

LET US REASON TOGETHER: A MORE EFFECTIVE, LESS PARTISAN APPROACH TO GUN-RELATED VIOLENCE

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In a time when gun-related violence is becoming an increasingly contentious and unavoidable policy topic, it can often seem as though there is no middle ground—as one common refrain goes, there are those who love guns more than their children, and those who love their children more than guns.¹ It is a grotesque oversimplification, however, to reduce conversations on gun-related violence to conversations about gun control, much less to accusations of ill-intent on the part of those opposing it. There is, indeed, a path of least resistance for meaningfully combating gun-related violence, and it is to focus on the role of untreated serious mental illness. This approach creates a space for bipartisan collaboration that otherwise does not exist and allows the nation to address very real underlying problems that are too often ignored. Policymakers need not engage in unnecessary battles to significantly restrict the Second Amendment rights of law-abiding citizens when there exists another approach to gun-related violence that both avoids serious constitutional problems and better addresses the underlying factors associated with gun-related violence than will commonly proposed gun control laws.

I. MAKING SENSE OF THE COMPLEX REALITY OF GUN-RELATED VIOLENCE

Gun-related violence is a complex problem that does not lend itself to easy or simplistic solutions. Most gun-related deaths in the United States are suicides, with homicides accounting for only around 30 percent of annual

¹ See, e.g., Tess Taylor, *Do We Love Our Guns More Than Our Children?*, CNN (Updated Feb. 15, 2018), <https://www.cnn.com/2017/11/18/opinions/guns-children-taylor-opinion/index.html>; Brett Samuels, *Eminem: NRA Loves 'Their Guns More Than Our Children,'* THE HILL (March 12, 2018), <https://thehill.com/blogs/in-the-know/in-the-know/377906-eminem-nra-loves-their-guns-more-than-our-children>; Phil Davis, *Presidential Candidate Swalwell's Poll On Gun Buyback Program Backfires; 79% Say, 'No. We Love Guns > Kids,'*, BALTIMORE SUN (July 2, 2019), <https://www.baltimoresun.com/politics/bs-md-swallow-gun-buyback-poll-20190702-story.html>; Marian Wright Edelman, *Why Are Children Less Valuable Than Guns In America? It's Time to Protect Children Not Guns*, HUFFINGTON POST (Updated Dec. 6, 2017), https://www.huffpost.com/entry/why-are-children-less-val_b_8842926.

gun-related deaths.² These two major categories of gun-related deaths have their own unique and complex underlying causes, which are generally quite different from each other. Moreover, these subsets can rationally be broken down even further into more specific subsets of gun-related deaths. For example, homicides can be filtered into subcategories of gang-related shootings, domestic violence incidents, mass public shootings, interpersonal disputes, and justified self-defense actions. Each of these subsets, in turn, has its own complicated underlying factors. The unfortunate reality is that, despite attempts to reduce these subsets of violence to being a mere result of broad levels of lawful firearm access in the United States, the data show that gun-related violence is much more complicated.

Several counterintuitive statistical relationships help illustrate this point. First, consider the complicating factors related to firearms and the national suicide rate. It is true that the United States has a high rate of firearm-related suicides compared to other developed countries, and this is hardly surprising given that the United States has by far the highest rate of private firearms per capita.³ The overall suicide rate, however, is fairly unremarkable

² See Drew Desilver, *Suicides Account for Most Gun Deaths*, PEW RESEARCH CENTER (May 24, 2013), <http://www.pewresearch.org/fact-tank/2013/05/24/suicides-account-for-most-gun-deaths>; Sherry L. Murphy et al., *Deaths: Final Data for 2015*, 66 NATIONAL VITAL STATISTICS REPORT No. 6, 39, Table 8 (Nov. 27, 2017), https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_06.pdf. See also, *Web-based Injury Statistics Query and Reporting System (WISQARS)*, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, www.cdc.gov/injury/wisqars, (last visited July 1, 2019).

³ The most recent Small Arms Survey, which makes a comprehensive effort to track international firearm ownership data, estimated that as of 2018, American civilians collectively owned almost 400 million firearms. Aaron Karp, *Estimating Global Civilian-Held Firearms Numbers*, SMALL ARMS SURVEY BRIEFING PAPER (June 2018), <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf>. Many gun control advocacy groups argue that the comparatively high rate of firearm suicides in the United States is the result of the high rate of private firearm ownership, and that this in and of itself justifies much stricter regulations on civilian gun ownership. See, e.g., *Firearm Suicide in the United States*, EVERYTOWN FOR GUN SAFETY (Aug. 30, 2018), <https://everytownresearch.org/firearm-suicide/>. There are two serious problems with this argument. First, as noted below, the United States' overall suicide rate is unremarkable. If the focus is genuinely on reducing the overall number of suicide deaths every year, any effective approach must be concerned with all means of suicide, not just those suicides attributable to a particular means. See Jennifer M. Boggs et al., *The Association of Firearm Suicide with Mental Illness, Substance Use Conditions, and Previous Suicide Attempts*, 167 ANNALS OF INTERNAL MED. 287 (2017) <http://annals.org/aim/fullarticle/2636753/association-firearm-suicide-mental-illness-substance-use-conditions-previous-suicide> (“Our findings also highlight the importance of expanding attention beyond an exclusive focus on firearms—especially for persons with mental health or substance abuse conditions—to include other common means of suicide, such as instruments used for suffocation (for example, rope for hanging) and poison (for example, medications, alcohol, and recreational drugs)”). Second, the number of guns per capita is not as meaningful as the percentage of private citizens with access to firearms. The United States does not have the highest rate of private gun possession in the developed world when accounting for countries like Israel and Switzerland, where military service is compulsory for most able-bodied individuals and large percentages of the population possess in their own homes firearms that are technically owned by the government. That these firearms are not “privately owned” does not

when compared to the international average and to other developed countries with much stricter gun control laws and lower rates of private-owned firearms per capita.⁴ This is not to suggest that an “average” suicide rate is something to gloat over, but it does indicate that America’s suicide rate is likely influenced in large part by factors unrelated to broad measures of private firearm ownership.⁵ Moreover, even though the national suicide rate has remained relatively stable over time—albeit with a slight but steady

detract from the reality that they are nonetheless possessed and stored by private citizens, just as they are in the United States.

- ⁴ In 2016, the United States’ national crude suicide rate was 15.3 per 100,000 inhabitants, up slightly from its 2015 rate of 15.0 per 100,000 inhabitants. World Health Organization, *Suicide Rate Estimate, Crude: Estimates by Country*, GLOBAL HEALTH OBSERVATORY DATA REPOSITORY (last updated Apr. 5, 2018), <http://apps.who.int/gho/data/node.main.MHSUICIDE?lang=en>. This is below the European average of 15.8, as well as the rates experienced by Austria (15.6), Finland (15.9), Switzerland (17.2), France (17.7), Japan (18.5), Belgium (20.7), and South Korea (26.9). *Id.* It is also roughly comparable to the rates experienced by Sweden (14.8), Portugal (14.0), Germany (13.6), Iceland (14.0), and within a respectable distance from countries like New Zealand (12.1), Canada (12.5), the Netherlands (12.6), Denmark (12.8), and Luxembourg (14.3). *Id.* The same comparatively average standing persists when considering age-standardized suicide rates—the United States’ 2015 rate of 13.7 per 100,000 inhabitants remains on par with Finland (13.8), Iceland (13.3), lower than Belgium (15.7), Japan (14.3), South Korea (20.2) and only slightly higher than France (12.1), New Zealand (11.3), Sweden (11.7), Switzerland (11.3). See World Health Organization, *Suicide Rate Estimates, Age-Standardized: Estimates by Country*, GLOBAL HEALTH OBSERVATORY DATA REPOSITORY (last updated Apr. 4, 2017), <http://apps.who.int/gho/data/node.main.MHSUICIDEASDR?lang=en>.
- ⁵ In fact, numerous studies indicate that various socioeconomic factors such as divorce rates, unemployment, poverty, past trauma, family structure, the size of one’s social group, and other measures of social cohesion have very strong links to suicide rates. See, e.g., Betsy Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Law and Family Distress*, 121 *QUART. J. ECON.* 267 (2006); Eric Neumayer, *Are Socioeconomic Factors Valid Determinants of Suicide? Controlling for National Cultures of Suicide with Fixed-Effects Estimation*, 37 *CROSS-CULTURAL RESEARCH* 307 (2003); Steven Stack, *The Effect of Marital Dissolution on Suicide*, 42 *J. MARRIAGE & FAMILY* (82) (1980); Allison Milner et al., *Long-Term Unemployment and Suicide: A Systematic Review and Meta-Analysis*, 8 *PLOS ONE* (2013), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0051333>; Aaron Reeves et al., *Increase in State Suicide Rates in the USA During Economic Recession*, 380 *LANCET* 1813 (Nov. 24, 2012), <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2812%2961910-2/fulltext>; Konstantinos N. Fountoulakis et al., *Relationship of Suicide Rates to Economic Variables in Europe: 2000–2011*, 205 *BRIT. J. PSYCHIATRY* 486 (Dec. 2014), <https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/relationship-of-suicide-rates-to-economic-variables-in-europe-20002011/BED5FCDDA918CE73A5390249B83F0C57>; Carlos Nordt et al., *Modelling Suicide and Unemployment: A Longitudinal Analysis Covering 63 Countries*, 2 *LANCET* 239 (Mar. 2015); Justin T. Denney et al., *Adult Suicide Mortality in the United States: Marital Status, Family Size, Socioeconomic Status, and Differences by Sex*, 90 *SOC. SCI. Q.* 1167 (Dec. 1, 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2818047/>; Nathan Daniel et al., *State-Level Social Capital and Suicide Mortality in the 50 U.S. States*, 120 *SOC. SCI. & MED.* 269 (Nov. 2014), <https://www.sciencedirect.com/science/article/pii/S0277953614005747>; Daniel T. Rasic et al., *Spirituality, Religion and Suicidal Behavior in a Nationally Representative Sample*, 114 *J. AFFECTIVE DISORDERS* 32 (Apr. 2009), [https://www.jad-journal.com/article/S0165-0327\(08\)00344-3/abstract](https://www.jad-journal.com/article/S0165-0327(08)00344-3/abstract); Charis E. Kurbin & Tim Wadsworth, *Explaining Suicide Among Blacks and Whites: How Socioeconomic Factors and Gun Availability Affect Race-Specific Suicide Rates*, 90 *SOC. SCI. Q.* 1203, 1205 (Dec. 2009).

increase over the last 20 years—the percentage of suicides involving firearms has actually decreased.⁶ Even gun-related suicide is, quite simply, much more complicated than having a problem of “too many guns.”

Second, there is no clear or statistically meaningful causal relationship between broad measures of firearm access or possession within a given population and the rates of firearm-related violence. Consider, for example, the fact that the number of privately owned firearms in the United States increased by at least 50 percent between 1990 and 2017, while rates of household gun ownership remained fairly constant.⁷ During this same period, however, the national homicide and gun homicide rates dropped by roughly 50 percent, and the total number of nonfatal firearm crimes committed in 2011 was one-sixth the total number committed in 1993.⁸ This does not necessarily imply that the increase in privately owned firearms caused the decreases in crime, but it does certainly complicate the argument that the gun-related violence in the United States is largely the result of its comparative lack of strict gun control laws or high rates of private firearm ownership.

What, then, might better account for variances in gun-related violence? Out of all the various factors associated with firearm-related violence in the United States, one stands out both for the strength of its relationship to two very important subsets of gun violence and the availability of practical and immediately feasible policy measures—untreated serious mental illness. The vast majority of mentally ill individuals are not and will never become violent, especially when properly treated.⁹ Untreated serious mental illness

⁶ See Sally C. Curtin et al., *Increase in Suicide in the United States, 1999–2014*, NATIONAL CENTER FOR HEALTH STATISTICS DATA BRIEF NO. 241 (Apr. 2016), <https://www.cdc.gov/nchs/products/databriefs/db241.htm>; Robert E. McKeown et al., *US Suicide Rates by Age Group, 1970–2002: An Examination of Recent Trends*, 96 AM. J. PUB. HEALTH 1744 (2006), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2005.066951>.

⁷ Between 1994 and 2009, the total number of civilian-owned firearms in the United States increased from 242 million to 310 million, and by 2017, the Small Arms Survey estimated the number had increased to nearly 400 million. Compare William J. Krouse, *Gun Control Legislation*, CONGRESSIONAL RESEARCH SERVICE (Nov. 4, 2012), with Karp, *supra* note 3. Meanwhile, estimates of household gun ownership between 1990 and 2018 indicate fairly constant rates between 40 and 50 percent. See *March 2018—Social Trends Survey*, NBC NEWS/WALL STREET JOURNAL SURVEYS STUDY 18164, (March 2018), <https://crimeresearch.org/wp-content/uploads/2017/09/18164-NBCWSJ-March-2018-Social-Trends-Poll-Political-Data-Release.pdf>; Lydia Saad, *Self-Reported Gun Ownership in U.S. is Highest Since 1993*, GALLUP (Oct. 26, 2011), <https://news.gallup.com/poll/150353/Self-Reported-Gun-Ownership-Highest-1993.aspx>.

⁸ See D’Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak: Public Unaware*, PEW RESEARCH CENTER (May 7, 2013), <https://www.pewsocialtrends.org/2013/05/07/gun-homicide-rate-down-49-since-1993-peak-public-unaware/>; Jens Manuel Krogstad, *Gun Homicides Steady After Decline in ‘90s: Suicide Rate Edges Up*, PEW RESEARCH CENTER (October 21, 2015), <https://www.pewresearch.org/fact-tank/2015/10/21/gun-homicides-steady-after-decline-in-90s-suicide-rate-edges-up/>.

⁹ See J. W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK

does, however, play a substantial role in firearm-related suicides, which account for the majority of annual firearm-related deaths in the United States, and in the majority of mass public shootings, which drive public policy discussions even though they account for a statistically negligible percentage of annual firearm-related deaths.

In 2017, over 47,000 Americans took their own lives.¹⁰ Roughly half of these individuals chose a firearm as the means of committing suicide, with firearm suicides regularly accounting for almost two-thirds of all annual firearm fatalities in the United States.¹¹ Although it is not the case that every person who commits suicide suffers from a serious mental illness,¹² there is an undeniable link between the two—serious mental illness is strongly and independently associated with a substantially increased risk of suicide, regardless of the means used.¹³ Further, when individuals with serious mental illness have access to firearms, this appears to increase their individual risk of committing suicide.¹⁴

ASSESSMENT (John Monahan & Henry J. Steadman eds.) (1994); E. Fuller Torrey, *Stigma and Violence: Isn't It Time to Connect the Dots?*, 37 SCHIZOPHRENIA BULLETIN 892 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3160234/pdf/sbr057.pdf> (reviewing the scientific literature regarding the connection between untreated mental illness and violence); Compare R. A. Van Dorn et al., *Mental Disorder and Violence: Is There a Relationship Beyond Substance Abuse?*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 487 (2012), with Christian C. Joyal et al., *Major Mental Disorders and Violence: A Critical Update*, 3 CURRENT PSYCHIATRY REV. 33 (2007). The primary link between violence and serious mental illness is limited to specific symptoms, such as psychosis, that are related to particular types of serious mental illness, such as schizophrenia. For an analysis of dozens of studies examining the relationship between mental illness, specific symptoms, and violence, see *Risk Factors for Violence in Serious Mental Illness*, TREATMENT ADVOCACY CTR (June 2016), <http://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-and-risks-for-violence.pdf>.

¹⁰ *Web-based Injury Statistics Query and Reporting System (WISQARS)* NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, www.cdc.gov/injury/wisqars (last visited July 1, 2019).

¹¹ *Id.*

¹² See *Suicide Rates Rising Across the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/media/releases/2018/p0607-suicide-prevention.html> (last updated June 7, 2018) (reporting that more than half of individuals who committed suicide did not have a known diagnosed mental health condition at the time of their deaths).

¹³ See Edward Chesney et al., *Risks of All-Cause and Suicide Mortality in Mental Disorders: A Meta-Review*, 13 WORLD PSYCHIATRY 153 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4102288>; Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS OF EPIDEMIOLOGY 366 (2015), <https://www.sciencedirect.com/science/article/pii/S1047279714001471>; Zhuoyang Li et al., *Attributable Risk of Psychiatric and Socio-Economic Factors for Suicide from Individual-Level, Population-Based Studies: A Systematic Review*, 72 SOC. SCI. & MED. 608 (2011), <https://www.sciencedirect.com/science/article/pii/S0277953610007896>.

¹⁴ See Miranda Lynne Baumann & Brent Teasdale, *Severe Mental Illness and Firearm Access: Is Violence Really the Danger?*, 56 INT'L J. L. & PSYCHIATRY 44 (2018) (finding that firearm access was not associated with suicidal thoughts for individuals without mental health problems, but that firearm access almost doubled the likelihood of experiencing suicidal thoughts for individuals with mental illness).

Untreated serious mental illness also plays a significant role in mass public shootings, and as many as two-thirds of all mass public shooters had a diagnosed or diagnosable serious mental illness and were clearly exhibiting symptoms in the days, weeks, or months leading up to the shooting.¹⁵ Almost none of these individuals were receiving treatment at the time they committed their acts of violence and, shockingly, almost none were legally prohibited from purchasing or possessing firearms because they had not been formally adjudicated as mentally ill or committed to a mental health facility.¹⁶

Like all subsets of firearm-related violence, mass public shootings are complex phenomena. While firearm access for those with untreated serious mental illness certainly plays a role in these shooting, an approach focused exclusively on the interaction of untreated mental illness and firearms neither explains all mass public shootings nor necessarily protects the public from the consequences of violence related to untreated serious mental illness. There are, of course, mass public shooters whose actions were not likely related to an underlying serious mental illness, including shooters motivated by ideological convictions or anger toward their employers.¹⁷ There are also

¹⁵ Grant Duwe, *The Patterns and Prevalence of Mass Public Shootings in the United States, 1915–2013*, in WILEY HANDBOOK OF THE PSYCHOLOGY OF MASS SHOOTINGS, 28 (James C. Wilson ed., 2015) (reviewing mass public shootings between 1915 and 2013 and concluding that “a little more than 60% [of mass public shooters] had either been diagnosed with a mental disorder or demonstrated signs of serious mental illness prior to the attack.”). The Federal Bureau of Investigation also analyzed 63 cases of mass public shooters in which the records were most complete, and found that while only 25 percent of these shooters had a confirmed diagnosis of mental illness, 62 percent indicated the presence of “mental health stressors.” James Silver, et al., *A Study of Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, FEDERAL BUREAU OF INVESTIGATION (June 2018). This does not, of course, mean that every shooter experiencing mental health stressors necessarily suffered from a diagnosable mental illness. It is nonetheless important that nearly two-thirds of shooters in this smaller analysis “appeared to be struggling with (most commonly) depression, anxiety, paranoia, etc. in their daily life in the year before the attack,” particularly because the “FBI could not determine if a diagnosis had been given” in an additional 37 percent of cases. *Id.* at 17. These estimates for mental illness amongst mass public shooters are consistent with several studies finding similarly high estimates of mental illness amongst mass killers and rampage killers generally. See *Serious Mental Illness and Mass Homicide*, TREATMENT ADVOCACY CENTER (June 2018), <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-and-mass-homicide.pdf>.

¹⁶ See Duwe, *supra* note 15, at 30 (of these mentally ill mass public shooters, only about one-third sought or received mental health care prior to the attack).

¹⁷ Using the Mother Jones mass public shooting database as a guide, there are clearly some mass public shootings where the perpetrator was indisputably “sane” in a clinical sense. These include shootings motivated by extremist ideologies, such as white nationalism or Islamic fundamentalism. See Mark Berman, *Prosecutors Say Dylann Roof ‘Self-Radicalized’ Online, Wrote Another Manifesto in Jail*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-charleston-church-gunman-self-radicalized-online/?utm_term=.e63d502bc050 (detailing the radicalization and underlying motivations of Dylann Roof, who shot and killed nine African American parishioners in a Charleston, South Carolina church in 2015, specifically targeting them because of their race); Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>

acts of mass public violence committed by seriously mentally ill individuals who do not use firearms.¹⁸ As with gun-related suicides, however, a focus on serious untreated mental illness provides a framework that can meaningfully address the problem of mass public shootings, even if it cannot account for all mass public shootings.

II. THE MENTAL ILLNESS-CENTERED APPROACH AS A MORE EFFECTIVE AND CONSTITUTIONALLY-SOUND ALTERNATIVE

Currently, policy debates over how to address the issue of gun-related violence are largely drawn along partisan lines, with Democrats generally focusing on the imposition of broad-scale restrictions on firearm ownership and Republicans generally opposing these restrictions on the grounds of Second Amendment concerns. The gun control-centered approach raises serious constitutional problems and fosters an inherently contentious atmosphere that minimizes areas for bipartisan collaboration. A mental illness-centered approach, on the other hand, avoids many of the contentious constitutional problems of a gun control-centered approach, thereby creating a space for bipartisan support. More importantly, this latter approach is much more likely to meaningfully affect rates of gun-related violence because it focuses on underlying problems instead of on a particular means of violence.

(exploring the anti-Semitic motivations of Robert Bowers, who shot and killed 11 Jewish worshippers in a Pittsburgh synagogue in 2018); Mark Berman & Sari Horwitz, *San Bernardino Shooter Spent Years Steeped In Extremism Before Attack*, WASH. POST (Dec. 18, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/18/san-bernardino-shooter-spent-years-steeped-in-extremism-before-attack/> (describing the years of radicalization in Islamic extremism for Syed Rizwan Farook and Tashfeen Malik, prior to their 2015 shooting attack that killed 14 at a holiday party in San Bernardino, California).

¹⁸ For example, in 2001, David Attias intentionally drove his car down a crowded sidewalk near University of California, Santa Barbara, killing four and wounding nine before exiting his car and shouting, “I am the Angel of Death.” See Joel Arak, *Driver Who Killed 4 Ruled Insane*, CBS NEWS (June 20, 2002), <https://www.cbsnews.com/news/driver-who-killed-4-ruled-insane/>. During the subsequent trial, Attias’ father testified to his son’s long battles with his mental health and several mental health professionals testified that Attias likely suffered from some sort of psychosis. John Johnson, *TV Director Testifies in Son’s Murder Trial*, L.A. TIMES (May 29, 2002), <http://articles.latimes.com/2002/may/29/local/me-attias29>. Also in 2001, Damir Igric—a mentally disturbed man showing clear signs of psychotic behavior—attempted to slit the throat of a Greyhound bus driver, ultimately causing the bus to collide with oncoming traffic. See *Bus Slasher a Troubled Croatian*, CBS NEWS (Oct. 6, 2001), <https://www.cbsnews.com/news/bus-slasher-a-troubled-croatian/>. Seven people were killed, including Igric, and another thirty-five passengers were wounded. *Id.* In 2015, a woman thought to be suffering from severe psychosis brought about by undiagnosed bipolar disorder plowed her car through a crowd at Oklahoma State University’s homecoming parade, killing four and injuring forty-eight. *Adacia Chambers Charged in Oklahoma State University Parade Crash that Killed 4*, NBC NEWS <https://www.nbcnews.com/news/us-news/adacia-chambers-charged-oklahoma-state-university-parade-crash-killed-4-n457226> (updated Nov. 4, 2015, 10:57 AM ET); Silas Allen, *Psychologist: Driver in OSU Crash is Bipolar, Not Competent to Stand Trial*, THE OKLAHOMAN, <http://newsok.com/article/5458221> (updated Nov. 4, 2015, 5:08 PM CDT).

A. The Second Amendment As A Barrier To Gun Control-Centered Approaches to Gun-Related Violence

For nearly two centuries after the states ratified the Constitution, the Supreme Court effectively declined to wade into the waters of Second Amendment jurisprudence.¹⁹ This is not particularly surprising given the relative dearth of pre-Fourteenth Amendment federal regulations on private firearm ownership and the rather slow development of the Incorporation Doctrine over the course of the 20th century.²⁰ It was not until 2008 in the landmark case *District of Columbia v. Heller*²¹ that the Court first settled foundational questions about the scope and nature of the Second Amendment right, followed by the equally momentous decision in *McDonald v. City of Chicago*.²² Between these two cases, the Court made clear that the Second Amendment protects an individual right to keep and bear all arms commonly owned by law-abiding citizens for lawful purposes, and this right is incorporated against the States via the Fourteenth Amendment.²³ Although

¹⁹ As Second Amendment scholar, David Kopel, recognized in 1999, prior to *Heller* and *McDonald*, “the Supreme Court has said almost nothing about the Second Amendment.” David B. Kopel, *The Supreme Court’s Thirty-Five Other Gun Cases*, 18 ST. LOUIS PUB. L. REV. 99, 99 (1999) (examining thirty-five Supreme Court cases in the twentieth century that only tangentially touched on the Second Amendment without examining its scope or fundamental meaning). See also Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 B.Y.U. L. REV. 127, 127–28 (1998) (writing prior to *Heller* and noting: “For most practicing lawyers, the Second Amendment is similarly absent from their professional radar screens, not least because the Supreme Court has basically ignored, at least since its 1939 decision in *United States v. Miller*, the fact that it exists as part of the text of the Constitution that is presumably authoritative for the Court. As I have written elsewhere, ‘[t]he Supreme Court has almost shamelessly [and shamefully] refused to discuss’ the meaning of the Second Amendment.”).

²⁰ The process of selective incorporation has spanned almost a century, beginning in the 1920s with *Gitlow v. New York*, 268 U.S. 652 (1925), where the Court in dicta implied that the First Amendment’s freedom of speech clause was applied to the states through the Fourteenth Amendment’s Due Process Clause. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (incorporating the First Amendment’s protection of the freedom of the press against the states); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the First Amendment’s protection of the free exercise of religion against the states); *In re Oliver*, 333 U.S. 257 (1948) (incorporating the Fifth Amendment’s right to a public trial against the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment’s right to assistance of counsel against the states for purposes of felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (expanding *Gideon* to include the incorporation of the right to assistance of counsel in cases of imprisonable misdemeanors). The process is still ongoing, with the incorporation of the Eighth Amendment’s Excessive Fines Clause occurring in 2019. See *Timbs v. Indiana*, 139 S. Ct. 682 (2019). The Court has also recently granted certiorari in *Ramos v. Louisiana*, a case where the Court is expected to address the question of whether a unanimous verdict is part of the incorporated rights under the Fifth Amendment.

²¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²² *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²³ See *Heller*, 554 U.S. at 624–25 (“The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”); *McDonald*, 561 U.S.

many gun control advocates have insisted the *Heller* majority simply “made up” or “created” an individual right, such sentiment would have shocked not only the framers and ratifiers of the Amendment but the preeminent constitutional law scholars of the next two centuries.²⁴

Beyond this barebones outlining of the Second Amendment right, however, the Court largely failed to give meaningful guidance to lower courts in terms of a more complex analysis of questions arising under the right. The Court in *Heller* declined to address which level of scrutiny, if any, claims of Second Amendment infringement would be subjected to, instead simply rejecting any “freestanding ‘interest-balancing’ approach.”²⁵ It declared the right to be fundamental, but, at the same time, the Courts in both *Heller* and *McDonald* declared that certain “longstanding” prohibitions—such as those barring possession by felons and the mentally ill—were “presumptively lawful,” without elaborating on how or why such presumptions should exist.²⁶ In both *Heller* and *McDonald*, the majority appeared to indicate an approach bound by the Amendment’s “text, history, and tradition” rather than by any level-of-scrutiny analysis traditionally applied to cases involving fundamental rights.²⁷ Additionally, both the Supreme Court and several lower courts have indicated the use of a First Amendment framework in the Second Amendment context, presumably because “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”²⁸ This rather well-developed

at 780 (“Municipal respondents’ remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes...”); *Id.* at 791 (“Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

²⁴ See generally STEPHEN P. HALBROOK, *THE FOUNDER’S SECOND AMENDMENT: ORIGINS OF THE RIGHT TO KEEP AND BEAR ARMS* (2d ed. 2019); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998).

²⁵ *Heller*, 554 U.S. at 634–35; *McDonald*, 561 U.S. at 790–91.

²⁶ *Heller*, 554 U.S. at n.2; *McDonald*, 561 U.S. at 786.

²⁷ See *Heller v. District of Columbia*, 670 F.3d 1244, 1271–1272 (D.C. Cir. 2011) (Kavanaugh, J. dissenting) (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny. To be sure, the Court never said something as succinct as ‘Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations.’ But that is the clear message I take away from the Court’s holdings and reasoning in the two cases.”).

²⁸ *Heller*, 554 U.S. at 591. See also, *id.* at 581–82 (observing that the First Amendment protects modern forms of communication, and rejecting the premise that the Second Amendment only protects those arms in existence at the time of its ratification); *Ezell v. City of Chicago*, 651 F.3d 684, 702–04 (7th Cir. 2011) (noting *Heller*’s parallels between First and Second Amendment jurisprudence and borrowing from First Amendment doctrine regarding judicial review as applied to Chicago’s strict firearm registration and licensing regime); *Tyler v. Hillsdale County Sheriff’s Dep’t*, 837 F.3d 678, 711 (6th Cir. 2016) (Sutton, J. concurring) (“The First Amendment offers a useful analogy [to the Second Amendment]... What is true for the First Amendment is true for the

framework supplies several supplemental “formulas” for analysis, including, among others, the ideas that laws must not “burden substantially more [of the exercise of the right] than is necessary to further the government’s legitimate interests”²⁹ and that the government may not “suppress lawful speech as the means to suppress unlawful speech.”³⁰

The reality is that, regardless of the precise formula the Supreme Court ultimately chooses for determinations of infringement on the Second Amendment right, most commonly proposed gun control measures will fail to pass constitutional muster. This is the case, in large part, because these measures are unlikely to substantially further any government interest in reducing gun-related violence. In other words, they are not likely to be effective, especially compared to more narrowly-tailored and less-restrictive measures utilized by the mental illness-centered approach outlined below. In order to more fully understand this, it is important to analyze some of these commonly proposed gun control measures.

1. Bans on “Assault Weapons”

Perhaps the most commonly advocated proposal from the gun control-centered approach, bans on so-called “assault weapons” suffer from serious constitutional and practical limitations. Congress implemented a prohibition on new purchases of these firearms for a ten-year period stretching from 1994 to 2004, and several states currently implement similar bans. While some lower courts have upheld challenges to these laws, they have not been reviewed by the Supreme Court either before or after *Heller*, and it is difficult to see how a post-*Heller* Court could uphold these laws while also remaining faithful to *Heller* and *McDonald*. Millions of law-abiding Americans own

Second”); *United States v. Marzzarella*, 614 F.3d 85, 96–97 (3d Cir. 2010) (determining that, like First Amendment claims, Second Amendment claims are subject to a sliding scale where less stringent standards may apply depending on the degree to which the statute burdens the right); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 419 (2014) (describing how the Supreme Court has “strongly indicated that First Amendment tools should be employed to help resolve Second Amendment issues”); Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings,”* 92 NEB. L. REV. 537, 542 (2014) (concluding that “lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller*’s schools and government buildings”); Kenneth A. Kuklowski, *Making Second Amendment Law With First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine In Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 441 (2014) (reasoning that “the fact that both Amendments guarantee interests that share common characteristics reinforces the theory that they can likewise share a doctrinal framework for judicial review” and attempting to ascertain what that framework should look like in a Second Amendment context).

²⁹ See *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486, (2014), 134 S.Ct. 2518, 2534 (2014)).

³⁰ See *Packingham v. North Carolina*, 137 S.Ct. 1730, 1738 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

AR-15s and similar semi-automatic rifles, with some estimates reaching 16 million of these rifles in circulation.³¹ They are, by all meaningful standards, “commonly owned”³² and, like all semi-automatic firearms, “traditionally have been widely accepted as lawful possessions.”³³ Moreover, they are statistically the type of commonly owned firearm least likely to be used for unlawful purposes, particularly compared to the handguns explicitly protected by *Heller* and *McDonald* which account for the vast majority of all gun-related homicides.³⁴ It is little surprise that the official analysis of the federal assault weapons ban found that its renewal was likely to have little impact on firearm-related crime rates.³⁵

³¹ National Shooting Sports Foundation, *1990–2016 Estimated US Firearm Production of Semi-Automatic Rifles*, GUNS.COM, <https://news.guns.com/wp-content/uploads/2018/09/NSSF-MSR-Production-Estimates-2017.pdf>.

³² Some gun control advocates—and at least one federal court—appear to claim that because these types of firearms constitute a relatively small percentage of total firearms owned by Americans, they are therefore not “commonly owned.” See, e.g., *Kolby v. Hogan*, 849 F.3d 114, 141 (4th Cir. 2017) (rejecting a “popularity test” for determining which types of firearms are “commonly owned” and determining [erroneously] that the inquiry is not relevant because the firearm is “like” the fully automatic M-16 which *Heller* presumed could be prohibited for civilian possession, but also reasoning that such rifles constituted only 1 percent of the national gun stock in 2013); Kate Irby, *Nobody Knows Exactly How Many Assault Rifles Exist in the U.S.—By Design*, MCCLATCHY D.C. BUREAU (Feb. 23, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article/201882739.html> (quoting Dave Chipman, senior policy analyst at the Giffords Law Center to Prevent Gun Violence, as stating the “gun lobby” misrepresents the number of semiautomatic rifles in circulation so that “it can argue the guns are commonly used,” and implying that a difference between 5 million and 20 million firearms in circulation is the difference between common usage and uncommon usage). But this confuses the term “common” with an item being a “household product.” As a matter of sheer numbers, it is hard to understand how an item owned by millions of Americans is “uncommon.” For example, few would doubt that motorcycles are a vehicle “commonly used” by law-abiding drivers in the United States, even though motorcycles account for only about 3 percent of the total number of registered vehicles in the United States. See *Traffic Safety Facts: Motorcycles*, at 2, NATIONAL CENTER FOR STATISTICS AND ANALYSIS, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812353> (updated March 2017).

³³ *Staples v. United States*, 511 U.S. 600, 612 (1994).

³⁴ See Federal Bureau of Investigation, *2016 Crime in the United States, Expanded Homicide Data Table 4*, FEDERAL BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTS (July 25, 2019), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-4.xls>; Federal Bureau of Investigation, *Crime in the United States 2013, Expanded Homicide Data Table 8*, FEDERAL BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTS (July 25, 2019), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls; Marianne W. Zawitz, *Guns Used in Crime*, BUREAU OF JUSTICE STATISTICS NCJ-148201 (July, 1995), <https://www.bjs.gov/content/pub/pdf/GUIC.PDF>; *Firearms Trace Data: Firearm Types Recovered and Traced in the United States and Territories*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES <https://www.atf.gov/resource-center/firearms-trace-data> (Last Reviewed June 19, 2019).

³⁵ Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003* (June, 2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> (“Should it be renewed, the ban’s effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. [Assault weapons] were rarely used in gun crimes even before the ban.”).

Although prominent politicians and gun control advocates often refer to semi-automatic rifles like the AR-15 as the “weapon of choice” for a would-be mass public shooter, this is statistically erroneous. Indeed, analyses of mass public shootings show that roughly six in ten mass public shooters used a handgun alone, while only one in ten used a rifle alone.³⁶ As shown in the case of the 2007 Virginia Tech shooting, would-be mass public shooters can easily substitute other firearms and cause equally significant amounts of carnage.³⁷ All of this must be factored in light of the statistical insignificance of mass public shootings to the overall number of firearm-related deaths every year.³⁸ These incidents certainly strike at important public perceptions of overall safety from gun-related violence, but it is difficult to see how, under any test, broad prohibitions on the right to possess firearms commonly owned for lawful purposes could be justified by the government’s interest in possibly mitigating a fraction of a percent of all gun-related deaths.

This reality is compounded by the fact that, whatever disadvantage would be imposed on would-be criminals by forcing them to use other firearms, that same disadvantage would similarly be imposed on law-abiding citizens forced to use alternative firearms for lawful purposes, including self-defense. Many of the features characterizing “assault weapons” exist for the purpose of making the firearm safer to operate and easier to fire in a more accurate manner.³⁹ The features of firearm platforms like the AR-15 make it

³⁶ See John R. Lott, Jr., & Rebekah C. Riley, *The Myths about Mass Public Shootings: Analysis*, CRIME RESEARCH PREVENTION CENTER (Sept. 30, 2014), <https://crimeresearch.org/wp-content/uploads/2014/10/CPRC-Mass-Shooting-Analysis-Bloomberg1.pdf>. See also Advanced Law Enforcement Rapid Response Training Center, *Characteristics of Active Shootings*, ALERRT <http://activeshooterdata.org/the-event.html> (last visited June 26, 2019) (analyzing school shootings and finding that a rifle was the most powerful weapon used in only 27 percent of cases, while in 56 percent of cases the most powerful weapon was a handgun). More recent data compiled by the Mother Jones mass public shooting database for the 47 mass shootings between January 1, 2014 and August 10, 2019 shows that handguns continue to be the firearm of choice for mass public shooters, with the data showing 22 cases where the shooter used handguns alone but only 10 where the shooter used rifles alone. MOTHER JONES MASS PUBLIC SHOOTING DATABASE, 1982–2019, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>. The other 16 shooters used some combination of handguns, shotguns, and rifles.

³⁷ Armed with a .22 caliber Walther P22 handgun and a 9mm Glock 10 handgun—both extremely common and relatively low-caliber firearms—the Virginia Tech shooter fired 174 rounds in roughly 11 minutes, killing 30 people and wounding 17 others. TriData Division, MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL, at 30-A (Nov. 2009), <https://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf>

³⁸ See Appendix A (detailing the annual number of deaths in mass public shootings and total numbers of firearm-related deaths over the last decade and factoring in the percentage of firearm-related deaths attributable to mass public shootings during those years).

³⁹ Consider features commonly included on lists of what constitutes an “assault weapon,” like barrel shrouds, collapsible stocks, pistol grips, and forward grips. None of these features change the functional mechanics of the firearm, make rounds fired from it more lethal, nor increase the rate of fire. See David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381, 395–401 (1994); E. Gregory Wallace, *“Assault Weapons” Myths*, 43 S. Ill. U. L.J. 193 (2018); H.R. REP. NO. 103-489, at 75 (1994), as reprinted in 1994 U.S.C.A.N. 1820.

easier to fire accurately, especially for less experienced shooters or for all individuals in a life-or-death scenario.⁴⁰ It is not only the case, then, that bans on these commonly owned firearms would fail to substantially further the government's interest in reducing rates of gun-related violence by making it more difficult for would-be criminals to commit acts of gun-violence—they fail to advance the interest by reducing the relative safety of lawful exercises of the Second Amendment right.

2. *Increasing the Age of Firearm Purchase to 21*

A second commonly proposed policy from the gun control-centered approach is prohibiting firearm purchases for all individuals under 21 years of age. As with bans on “assault weapons,” this proposal suffers from serious constitutional and practical limitations.⁴¹ Any form of heightened scrutiny analysis would appear to preclude states from stripping an entire class of law-abiding citizens of a fundamental right as a means of limiting the ability of a small minority to commit crimes. Under an analysis informed by “text, history, and tradition,” young adults are inarguably a part of “the people” to whom the right to keep and bear arms belong.⁴² These individuals are in all

Barrel shrouds protect the firearm operator from injury by partially or completely covering the firearm's barrel, which can easily become hot enough to cause serious burns after firing through as little as a single standard magazine. See Dennis P. Chapman, *Features and Lawful Common Uses of Semi-Automatic Rifles*, Working Paper, 63–68 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436512 (last revised Aug. 29, 2019). This protective function is so inherent to the purpose of a barrel shroud that the statutory definition in recently proposed legislation regarding assault weapons is: “a shroud that is attached to, or partially or completely encircles, the barrel of a firearm so that the shroud protects the user of the firearm from heat generated by the barrel.” Assault Weapons Ban of 2013, S. 150, 113th Cong. § 2(b)(38) (2013). Proponents of their prohibition insist that the barrel shroud therefore works to protect the non-trigger hand of would-be mass public shooters who fire in rapid succession, enabling them to “fire from the hip.” See Chapman, *supra* at 37–38; Wallace, *supra* at 211–212. However, not only is the prohibition of barrel shrouds unlikely to provide a meaningful barrier to mass shooters, but barrel shrouds are often used by law-abiding citizens to prevent injuries during lawful endeavors, like target shooting or in the event of using the firearm in self-defense. See Chapman, *supra* at 59–68, 173; Wallace, *supra* at 231–32. Collapsible stocks allow for the length of the firearm to be adjusted to better suit the particular arm length or firing mechanics of the operator, much like the seat adjustment settings of a car allow different drivers to adapt according to different leg lengths or levels of comfort. See Kopel, *supra* at 398–99; Chapman, *supra* at 80–87. Whatever advantage in accuracy is derived for the individual using the firearm in illegal ways is also derived by the millions law-abiding citizens operating them in lawful way, for whom a decrease in accuracy increases the relative dangers of their operation. Similarly, pistol grips and forward grips allow firearm operators to more comfortably hold and direct the movement of the firearm. Wallace, *supra* at 230–31; Kopel, *supra* at 396–97.

⁴⁰ See sources cited *supra* note 39.

⁴¹ See David B. Kopel & Joseph G.S. Greenlee, *History and Tradition in Modern Circuit Cases on the Second Amendment Rights of Young People*, 43 S. Ill. U. L.J. 119 (2018); David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495 (2018).

⁴² For example, the “militia” itself has historically been regarded as including teenagers as young as sixteen, while modern state and federal militia provisions almost unanimously reserve the right to call upon all able-bodied residents of at least 17 to 18 years of age or older, as they are considered

other respects full-fledged members of the American public, with all the corresponding rights and responsibilities—they can vote, marry and have children, sign legally binding contracts, and be drafted in the armed forces or called upon for state militia service. They may be held fully accountable before the law from criminal actions, to the point of being executed by the state.⁴³ There is, quite simply, little legal basis for divesting all law-abiding young adults of a fundamental constitutional right. Moreover, from a practical perspective, while young adults are statistically more likely than older adults to engage in criminal behaviors, they are also more likely to be victims of violent crime. To the extent that such laws limit the ability of young adults to engage in criminal behavior, they also limit the ability of the most vulnerable population of adults to engage in the core exercise of the Second Amendment—self-defense.⁴⁴

3. *Banning factory standard magazines with capacities over ten rounds*

A third commonly proposed gun control measure is the implementation of bans on so-called “high capacity magazines,” or magazines capable of holding more than ten rounds.⁴⁵ Recall that roughly two-thirds of all gun-

part of the “unorganized militia.” See 10 U.S.C. § 246 (2012); ALA. CODE § 31-2-5 (2015); ALASKA STAT. § 26.05.010 (2017); ARIZ. CONST. ART. 16, § 1; ARK. CODE ANN. § 12-61-101 (2017); CA MIL. & VET. CODE § 122 (2017); COLO. CONST. ART. 17; CONN. GEN. STAT. § 27-2 (2018); FLA. STAT. § 250.02 (2011); GA CODE ANN. § 38-2-3 (2010); HAW. REV. STAT. § 121-1 (2013); IDAHO CODE § 46-103 (2019); IND. CONST. ART. XII, § 1; IA. CONST. ART. VI, § 1; K.S. CONST. ART. VIII, § 1; KY. REV. STAT. ANN. § 37.170 (West 2019); LA. STAT. ANN. § 29:3 (2013); ME. REV. STAT. TIT. 37-B, § 222 (1983); MASS. GEN. LAWS ch. 33 § 22 (1985); MICH. COMP. LAWS § 32.509 (1967); MINN. STAT. § 190.06 (2018); MISS. CODE ANN. § 33-5-1 (2013); MO. REV. STAT. § 41.050 (2018); MONT. CONST. ART. VI, § 13; NEB. REV. STAT. ANN. §§ 55-105, 55-106 (2018); N.H. REV. STAT. ANN. § 110-B:1 (2015); N.J. REV. STAT. § 38:1-2 (2014); N.M. STAT. ANN. § 20-2-2 (2013); N.Y. MIL. LAW §§ 2–3 (McKinney 2018); N.C. GEN. STAT. ANN. §§ 127A-1, A-7 (2011); N.D. CENT. CODE § 37-02-01 (2018); OHIO REV. CODE ANN. § 5923.01 (1997); OKLA. STAT. tit. 44, § 41 (2016); OR. REV. STAT. § 396.105 (2017); 51 PA. CONS. STAT. § 301 (2014); R.I. GEN. LAWS § 30-1-5 (2014); S.C. CODE ANN. § 25-1-60 (2011); S.D. CODIFIED LAWS § 33-2-2 (2007); TENN. CODE ANN. § 58-1-104 (2014); TEX. GOV’T CODE ANN. § 431.061 (Vernon 2011); UTAH CODE ANN. §§ 39-1-1, 39-1-2 (West 2018); VA. CODE ANN. §§ 44-1, 44-4 (2015); WASH. REV. CODE § 38.04.030 (1989); WYO. STAT. ANN. § 19-8-101 (2010).

⁴³ 18 U.S.C. § 3591 (2012) (Ironically, 18-to-20-year-olds may be prosecuted for the criminal possession of firearms and are thereby considered mature enough to be held fully accountable for their criminal actions, yet these laws nonetheless presume that even the most law-abiding 18-to-20 year-olds are categorically too immature and irresponsible to be trusted with lawfully possessing firearms).

⁴⁴ See Craig A. Perkins, *Age Patterns of Victims in Serious Violent Crime*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ-162031 (July 1997), <https://www.bjs.gov/content/pub/pdf/apvsvc.pdf>; Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ 248471 (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

⁴⁵ The term “high capacity magazine” is a highly relative term—most of the commonly used handguns possessed in the United States are manufactured and sold with factory-standard magazines capable of holding between 10 and 20 rounds, while most semi-automatic rifles are manufactured and sold

related deaths are suicides, where a firearm's magazine capacity is effectively a moot point—one round is all that is necessary. Indeed, the primary concern with these factory standard magazines is that they may increase the ability of would-be mass public shooters to inflict high numbers of casualties by decreasing the number of times they need to reload. Even assuming that it is practical as a matter of policy to confiscate the millions of these magazines already owned by law-abiding citizens, without any means of replacement for would-be criminals, limiting magazine capacity is not likely to meaningfully lower casualty rates for mass public shootings. First, shooters can side-step these laws by bringing several firearms and extra magazines, easily replacing empty magazines within a matter a seconds. Second, at least one study has shown that mass public shooters typically do not fire at a fast enough rate for casualty counts to be attributed to magazine capacity.⁴⁶ This conclusion is also supported by the findings of various panels analyzing the effect of magazine capacity for individual mass shootings, as well as by the reality of high casualty counts resulting from shootings where only limited-capacity magazines were used.⁴⁷

In sum, as with prohibitions on “assault weapons” generally, it is difficult to see how a policy restricting a fundamental right could pass constitutional scrutiny when its justification is premised on the unlikely possibility of slightly reducing fatality rates for one of the least common types of firearm-related crimes. Further, again as with prohibitions on “assault weapons,” the extent to which limiting magazine capacity meaningfully hinders would-be mass public shooters must be measured against the degree to which it hinders law-abiding citizens using firearms for lawful purposes.⁴⁸

with factory-standard magazines capable of holding between 20 and 30 rounds. Indeed, if anything, magazines limited to a 10-round capacity are “low capacity magazines” compared to “standard capacity magazines.” See Matthew Laroseire, *Losing Count: The Empty Case for “High-Capacity” Magazine Restrictions*, CATO INSTITUTE: CENTER FOR CONSTITUTIONAL STUDIES LEGAL POLICY BULLETIN (July 17, 2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/legal-policy-bulletin-3-updated.pdf>.

⁴⁶ Gary Kleck, *Large-Capacity Magazines and the Casualty County in Mass Shootings: The Plausibility of Linkages*, 17 JUSTICE RESEARCH & POL’Y 28 (June 1, 2016).

⁴⁷ See, e.g., VIRGINIA TECH SHOOTING REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL 74 (Nov. 2009), <https://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf> (detailing the extra numbers of loaded magazines utilized by the Virginia Tech shooter and reporting that “the panel concluded that 10-round magazines that were legal [under the federal Assault Weapons Act of 1994] would not have made much difference in the incident.”); Nicholas Nehamas & David Smiley, *Florida School Shooter’s AR-15 May Have Jammed, Saving Lives, Report Says*, MIAMI HERALD https://www.miamiherald.com/news/local/community/broward/article_202486304.html (updated Feb. 27, 2018) (reporting that Nikolas Cruz used only 10-round magazines during his mass shooting at a Parkland, Florida high school in 2018, yet still managed to kill 17 people before his gun jammed and he simply tossed it aside).

⁴⁸ It is likely that magazine capacity limits most often impact competitive target shooters, whose competitions often require the use of magazines with capacities greater than 10 rounds, but these

B. A Conservative Reading of *Heller* Supports A Mental Illness-Centered Approach to Gun-Related Violence

Despite the commonality of rhetoric that “shall not be infringed” means an unlimited Second Amendment right, very few—if any—advocates of a strong Second Amendment right would argue that the scope of the right covers those who present a clear and substantial risk of danger to the public. No one, for example, truly believes that prisoners serving out their punishments for crimes have a right to keep and bear arms while in prison, or that seriously mentally ill individuals involuntarily committed to mental health treatment may not be disarmed. Although the *Heller* court did not elaborate on why such prohibitions on firearm possession are presumptively lawful, it would seem that these individuals either fall outside the scope of the right, or that their risk of danger to self or others presumptively satisfies a heightened standard of scrutiny. Importantly, a mental illness-centered approach to gun violence necessarily relies on a much more narrowly tailored restriction on Second Amendment rights, as it limits disarmament efforts only to those individuals who are most clearly a danger to themselves or others. Moreover, the Court has long recognized the continued applicability of the English common law doctrine of *parens patriae*, which presumes that the state maintains a responsibility to intervene and act on behalf of citizens who, whether due to minority or infirmity, cannot act in their own best

limitations are most acutely felt by individuals engaged in lawful self-defense. According to a 2013 CDC report, “almost all national survey estimates” indicate that firearms are used defensively between 500,000 and 3 million times a year in the United States. INST. OF MEDICINE & NAT’L RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner, Bruce M. Altevogt, Arlene F. Lee, Margaret A. McCoy, and Patrick W. Kelley, eds., 2013), <https://www.nap.edu/read/18319/chapter/3>. It is unclear how many of these incidents necessitate the firing of more than 10 rounds, but the need arises for civilians presumably as often as it does for the law enforcement officers who are inevitably called to respond to the same criminal threats facing civilians. Although studies show that the average and median number of shots fired per officer in shootouts is well below 10, laws limiting magazine capacity universally exclude law enforcement officers from these limitations and the vast majority of departments supply officers with firearms using standard capacity magazines. DOUGLAS C. GILLESPIE, LAS VEGAS METROPOLITAN POLICE DEP’T, DEADLY FORCE STATISTICAL ANALYSIS 2010-2011, 15 (2012), <https://cops.usdoj.gov/pdf/deadly-force-statistical-analysis.pdf>; THOMAS J. AVENI, THE POLICE POLICY STUDIES COUNCIL, OFFICER-INVOLVED SHOOTINGS: WHAT WE DIDN’T KNOW HAS HURT US 4 (2003), http://www.theppsc.org/Staff_Views/Aveni/OIS.pdf. Although the need for 10 rounds may be statistically rare, in those situations where more than 10 rounds are needed—especially those where an individual is outnumbered—the extra ammunition may mean the difference between life and death. *Police: Tallahassee Homeowner Shot 2 out of 4 Home Invasion Suspects, all 4 Charged*, WTXL TALLAHASSEE <https://www.wtxl.com/news/local-news/tpd-investigating-home-invasion-robbery> (Updated May 24, 2019); *Texas Homeowner Shoots, Kills 3 Men and Injures 2 During Home Invasion, Officials Say*, FOX NEWS (Jan. 21, 2019), <https://www.foxnews.com/us/texas-homeowner-shoots-kills-3-men-and-injures-2-during-home-invasion-officials-say>; WRIC, *Family Fends off Naked Intruder Who Claimed to be the Devil: ‘She Was In to Kill Us,’* WISHTV <https://www.wishtv.com/news/family-fends-off-naked-intruder-who-claimed-to-be-the-devil-she-was-in-to-kill-us/> (Updated July 9, 2019).

interests. The state has a “legitimate interest . . . in providing care to its citizens who are unable because of emotional disorders to care for themselves,”⁴⁹ presumably including an interest in disarming individuals who are a danger to themselves.⁵⁰ Taken together, these factors weigh heavily in favor of a Second Amendment that, even viewed in the most conservative of lights, allows for significant regulation of the right to keep and bear arms as-applied to individuals with serious untreated mental illness.

III. THE PRACTICAL IMPLEMENTATION OF MENTAL HEALTH-CENTERED APPROACH

On the whole, an adequate legal framework for tackling gun-related violence from a mental health perspective already exists at the federal and state level. Despite oft-repeated assertions to the contrary by advocates of broad gun control regimens, prohibitions on firearm possession already exist for individuals who have been adjudicated mentally ill or involuntarily committed to mental institutions.⁵¹ Background checks are already mandated for all purchases and transfers conducted by Federal Firearms Licensees, regardless of whether the purchase or transfer is facilitated via the internet or at a gun show.⁵² Moreover, all states have laws regulating the possession of firearms by individuals with histories of mental illness or who are currently suffering from mental health crises.⁵³ The primary problem is not a lack of adequate legal frameworks, but a failure to use already existing frameworks in an effective manner. As a matter of practicality, then, a mental illness-centered approach to gun-related violence does not necessarily entail a complete overhaul of the nation’s existing legal framework—and certainly not on the level necessary for measures such as the confiscation of tens of millions of firearms.

⁴⁹ *Addington v. Texas*, 441 U.S. 418, 426 (1979).

⁵⁰ *See, e.g., Heller*, 554 U.S. 570, 626 (stating that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill. . .”); *McDonald*, 561 U.S. 742, 786 (referring to the “presumptively lawful” nature of statutes prohibiting the possession of firearms for the mentally ill).

⁵¹ 18 U.S.C. § 922(g) (2012).

⁵² *See* Gun Control Act of 1968 (codified as amended at 18 U.S.C. § 922 (2012)); Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–922 (2012)).

⁵³ *See Possession of Firearms by People with Mental Illness*, NAT’L CONF. OF ST. LEGISLATURES, (Jan. 5, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/possession-of-a-firearm-by-the-mentally-ill.aspx>.

A. Better NICS Reporting

In 1993, Congress passed the Brady Handgun Violence Prevention Act, strengthening the enforcement mechanisms of the Gun Control Act of 1968, which prohibits the possession of firearms by categories of presumptively dangerous individuals, including those “adjudicated as a mental defective” or who have been “committed to a mental institution.”⁵⁴ Among other things, the Brady Act established the National Instant Criminal Background Check System (NICS) and required that all Federal Firearms Licensees use this system to request federal background checks on all prospective firearm purchasers.⁵⁵ The NICS index is maintained by the FBI, but the federal government is prohibited from “commandeering” state officials to perform background checks or submit disqualifying records.⁵⁶ Rather, the FBI must rely on states to voluntarily submit relevant records of individuals disqualified from firearm ownership. One major problem has been the unwillingness of many states to disclose pertinent mental health records.⁵⁷ Despite several attempts by Congress to incentivize increased reporting and a substantial increase in overall state reporting in recent years, the NICS index is likely still missing untold numbers of disqualifying records due to state reporting backlogs and inadequacies.⁵⁸ Meanwhile, federal agencies are required by law to report all disqualifying mental health histories to NICS, but several public reports by the Inspector General for the Department of Defense have highlighted the failures of many agencies—in particular, those

⁵⁴ See sources cited *supra* note 52.

⁵⁵ See sources cited *supra* note 52. See also *Brady Law*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (July 2, 2019), <https://www.atf.gov/rules-and-regulations/brady-law>; *About NICS*, FEDERAL BUREAU OF INVESTIGATION <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited July 22, 2019).

⁵⁶ See *Printz v. United States*, 521 U.S. 898 (1997) (affirming *New York v. United States*, 505 U.S. 144 (1992) in that “Congress cannot compel the States to enact or enforce a federal regulatory program,” and holding that “Congress cannot circumvent that prohibition by conscripting the States’ officers directly”—in this case, by compelling them to administer background checks under the Brady Act).

⁵⁷ See Devlin Barrett, et al., *FBI Database for Gun Buyers Missing Millions of Records*, WASH. POST (Nov. 10, 2017), <https://www.washingtonpost.com/national/fbi-database-for-gun-buyers-missing-millions-of-records/2017/11/10/>; *Gun Background Check System Riddled with Flaws*, ASSOCIATED PRESS (Mar. 10, 2018), <https://fox8.com/2018/03/10/gun-background-check-system-riddled-with-flaws/>.

⁵⁸ It does appear that states are, on the whole, increasing reporting of disqualifying mental health records, with roughly 300,000 active disqualifying mental health histories reported between December 31, 2017 and December 31, 2018. Compare FEDERAL BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS at 27 (2017), <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf> with FEDERAL BUREAU OF INVESTIGATION, ACTIVE RECORDS IN THE NICS INDICES AS OF DECEMBER 31, 2018, 2 <https://www.fbi.gov/file-repository/active-records-in-the-nics-indices-by-state.pdf/view> (last visited June 21, 2019).

associated with the military—to do so.⁵⁹ This is highly problematic, given that federally mandated background checks are only as effective as the adequacy of the records submitted to it.

Increasing state and federal agency reporting to the NICS index is a relatively easy and noncontroversial way of saving lives without broadly restricting the rights of all gun owners. One study found that “when states report mental health records to the federal system, they experience a 3.3–4.3% reduction in firearm-related suicides with no evidence of substitution to non-firearm methods.”⁶⁰ Importantly, this reduction in suicides does not come at the expense of further restricting the Second Amendment rights of those law-abiding citizens who have not been adjudicated as a danger to themselves or others. Moreover, while increased reporting of disqualifying records is not associated with a decrease in gun homicide rates, better reporting could have prevented several high-profile mass public shooters from obtaining firearms through lawful channels, including the shooters at Sutherland Springs, Texas, in 2017, and at Virginia Tech University in 2006.⁶¹

⁵⁹ See Shaila Dewan & Richard A. Oppel, Jr., *For the Military, a Long History of Failure to Report Crimes*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/us/texas-shooting-background-checks.html>; U.S. DEP’T OF DEF., EVALUATION OF DEPARTMENT OF DEFENSE COMPLIANCE WITH CRIMINAL HISTORY DATA REPORTING REQUIREMENTS (1997), <https://media.defense.gov/1997/Feb/10/2001715391/-1/-1/1/crimhist.pdf>; U.S. DEP’T OF DEF., EVALUATION OF THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS’ DEFENSE INCIDENT-BASED REPORTING SYSTEM REPORTING AND REPORTING ACCURACY (2014), <https://media.defense.gov/2014/Oct/29/2001713419/-1/-1/1/DODIG-2015-011.pdf>; U.S. DEP’T OF DEF., EVALUATION OF DEPARTMENT OF DEFENSE COMPLIANCE WITH CRIMINAL HISTORY DATA REPORTING REQUIREMENTS (2015), <https://media.defense.gov/2015/Feb/12/2001713470/-1/-1/1/DODIG-2015-081.pdf>.

⁶⁰ Fredrick E. Vars & Griffin Sims Edwards, *Slipping Through the Cracks? The Impact of Reporting Mental Health Records to the National Firearm Background Check System* (U. of Ala. Legal Studies, ed., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127786.

⁶¹ The Sutherland Springs shooter was able to legally purchase the firearm used to shoot and kill 26 people because the military failed to report his domestic violence convictions and disqualifying mental health records to NICS. Alex Horton, *The Air Force Says It Failed to Follow Procedures, Allowing Texas Church Shooter to Obtain Firearms*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/06/the-air-force-says-it-failed-to-follow-procedures-allowing-texas-church-shooter-to-obtain-firearms/?utm_term=.fbbefc309fac. The Virginia Tech shooter, meanwhile, certified by a Virginia special justice to be “an imminent danger to himself as a result of mental illness” and was ordered to undergo outpatient mental health treatment, but due to discrepancies with the wording on the state’s judicial forms, this disqualification was never forwarded to NICS and the shooter was able to legally purchase the two handguns later used to kill 30 people. See Michael Luo, *U.S. Rules Made Killer Ineligible to Purchase Gun*, N.Y. TIMES (Apr. 21, 2007), <https://www.nytimes.com/2007/04/21/us/21guns.html>. It is less clear whether the court order rendered the Virginia Tech shooter a “prohibited person” under state law. VIRGINIA TECH SHOOTING REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL 71–73 (Nov. 2009), <https://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf>.

B. More Effective Use of Existing Civil Commitment Procedures

The unfortunate reality is that states and localities often fail to effectively utilize their existing civil commitment procedures to treat and monitor individuals who are both mentally ill and a clear danger to themselves or others. This is particularly the case with respect to prominent mass public shooters with untreated serious mental illness. Too often, these individuals come into contact with the mental health or criminal justice systems exhibiting very serious indicators of a need for psychiatric care, but no official steps are taken to intervene.⁶² While there are many examples of this type of failure, perhaps the most stunning is the case of Nikolas Cruz, who in February 2018 shot and killed seventeen students and teachers at Marjorie Stoneman Douglas High School in Parkland, Florida. Cruz managed to avoid court-ordered mental health treatment and a disqualifying criminal or mental health history, despite nearly two years of concerning behaviors showing both a troubled mental state and a tendency to engage in violent behaviors directed both toward himself and others.⁶³ Under existing

⁶² The more effective use of civil commitment procedures to treat potentially dangerous and seriously mentally ill individuals would likely have prevented some of the worst mass public shooters in U.S. history from legally obtaining—or continuing to legally possess—the firearms they used in the shootings. For example, prior to murdering 24 individuals in an Aurora, Colorado movie theater in 2012, James Holmes was referred to his university’s mental health service due to concerns over his deteriorating mental state. See Ann O’Neill & Sara Weisfeldt, *Psychiatrist: Holmes Thought 3–4 Times a Day about Killing*, CNN <https://www.cnn.com/2015/06/16/us/james-holmes-theater-shooting-fenton/index.html> (updated Jun. 17, 2015). One of his psychiatrists was so concerned that she contacted a campus threat assessment team to discuss placing Holmes under an emergency psychiatric hold for further evaluation, but ultimately decided against it. *Id.* Given that Holmes’ defense at trial rested on his alleged insanity, it is likely that had an evaluation been ordered, doctors would have seen significant evidence that Holmes qualified for and was in need of court-ordered mental health treatment. Similarly, Jared Loughner was almost certainly suffering from untreated schizophrenia in the year before he killed six people, including Chief U.S. District Judge John Roll, and wounded 13, including Rep. Gabrielle Giffords (D-AZ), in Tucson, Arizona. See Kate Pickert & John Cloud, *If You Think Someone is Mentally Ill: Loughner’s Six Warning Signs*, TIME (Jan. 11, 2011), <http://content.time.com/time/nation/article/0,8599,2041733,00.html>; Peter Langman, *Jared Loughner: What Kind of Psychosis?*, PSYCHOL. TODAY (Jan. 16, 2011), https://www.psychologytoday.com/us/blog/keeping-kids-safe/201101/jared-loughner-what-kind-schizophrenia?quicktabs_5=1. His bizarre and concerning behaviors resulted in his suspension from Pima Community College, under directions that he could not return until he received a mental health evaluation indicating he was not a danger to himself or others. *Jared Loughner Had 5 Run-Ins with College Police*, CBS NEWS (Jan. 10, 2011), <https://www.cbsnews.com/news/jared-loughner-had-5-run-ins-with-college-police/>. Loughner’s parents tried to get him mental health treatment, and worried about his wellbeing to the point of trying to hide his firearms and disabling his car, but no official state action was ever taken to ensure he received treatment. Michael Martinez & Chelsea J. Carter, *New Details: Loughner’s Parents Took Gun, Disabled Car to Keep Him Home*, CNN <https://www.cnn.com/2013/03/27/justice/arizona-loughner-details/index.html> (updated Mar. 28, 2013).

⁶³ Among other incidents, school and county officials opened an investigation in 2016 after a five-day period in which Cruz posted social media threats directed at himself and others, and found him to be cutting himself, and that he drank gasoline in a possible suicide attempt. Patricia Mazzei, *School Officials Wanted Florida Gunman Committed Long Before a Massacre*, N.Y. TIMES (Mar. 18,

state law, Cruz could have and should have been adjudicated as a danger to himself or others, and either prevented from legally purchasing the firearm used to commit the atrocity, or disarmed after any one of the many incidents for which law enforcement were called as a result a Cruz's erratic and dangerous actions.⁶⁴

Compounding the problem of state underutilization of existing mental health adjudication procedures is the fact that most states lack an adequate number of public psychiatric beds of last resort.⁶⁵ Beginning in the 1970s, several catalysts combined to shift national policy toward the mass-scale deinstitutionalization of the mentally ill—a well-intentioned but poorly planned strategy that has had disastrous consequences, including playing a substantial role in violent crime increases over the next several decades.⁶⁶ Due to these societal and legal forces, the United States experienced a 95 percent decrease in the number of available public psychiatric beds between 1995 and 2016.⁶⁷ States now maintain an average of only 11.7 beds per 100,000 people, woefully inadequate by most standards and well below the recommended ratio of 40 to 60 beds per 100,000 people.⁶⁸ This causes a perpetual shortage of psychiatric beds, leading to a serious inability to promptly initiate treatment and increasing the average duration of untreated

2018), <https://www.nytimes.com/2018/03/18/us/nikolas-cruz-baker-act.html>; Audra D. S. Barch, Frances Robles & Patricia Mazzei, *Florida Agency Investigated Nikolas Cruz After Violent Social Media Posts*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/us/nikolas-cruz-florida-shooting.html>. The investigators ultimately recommended against seeking a civil commitment despite initial conclusions by two guidance counselors and one sheriff's deputy that Cruz should be referred for an involuntary psychiatric hold and his home searched for weapons. Patricia Mazzei, *School Officials Wanted Florida Gunman Committed Long Before a Massacre*, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/us/nikolas-cruz-baker-act.html>. In the months prior to the shooting, the Broward County Sheriff's Department received five service calls expressing concerns about Cruz's access to weapons given his deteriorating mental state. Brett Murphy & Maria Perez, *Florida School Shooting: Sheriff Got 18 Calls about Nikolas Cruz's Violence, Threats, Guns*, USA TODAY, <https://www.usatoday.com/story/news/nation-now/2018/02/23/florida-school-shooting-sheriff-got-18-calls-cruzs-violence-threats-guns/366165002/> (updated Feb. 23, 2018).

⁶⁴ See FLA. STAT. §§ 394.451-394.47891 (2018).

⁶⁵ See JOHN G. MALCOLM & AMY SWEARER, HERITAGE FOUND., PART II: THE CONSEQUENCES OF DEINSTITUTIONALIZING THE SEVERELY MENTALLY ILL (2019), <https://www.heritage.org/firearms/report/part-ii-the-consequences-deinstitutionalizing-the-severely-mentally-ill>.

⁶⁶ See Barnard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006); E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., NO ROOM AT THE INN: TRENDS AND CONSEQUENCES OF CLOSING PUBLIC PSYCHIATRIC HOSPITALS 17-18 (2012), http://www.treatmentadvocacycenter.org/storage/documents/no_room_at_the_inn2012.pdf; Clayton E. Cramer, *Mental Illness and the Second Amendment*, 46 CONN. L. REV. 1301 (May 2014); MALCOLM & SWEARER, *supra* note 65.

⁶⁷ DORIS A. FULLER ET AL., TREATMENT ADVOCACY CTR., GOING, GOING, GONE: TRENDS AND CONSEQUENCES OF ELIMINATING STATE PSYCHIATRIC BEDS (2016), <http://www.treatmentadvocacycenter.org/storage/documents/going-going-gone.pdf>.

⁶⁸ See MALCOLM & SWEARER, *supra* note 65.

serious mental illness, thereby exacerbating risks of dangerousness.⁶⁹ A mental illness-centered approach to gun-related violence therefore involves a reversal of deinstitutionalization trends and increases in the ratio of available public psychiatric beds to ensure that individuals who are dangerously mentally ill are receiving prompt and adequate treatment.

This trend toward deinstitutionalization was facilitated in part by a series of Supreme Court opinions in the 1970s that made it substantially more difficult for the government to impose mental health treatment on mentally ill individuals.⁷⁰ While Supreme Court precedent now requires that the state prove by clear and convincing evidence that a person is both mentally ill and dangerous, states have significant leeway in determining the breadth of their civil commitment statutes. This is particularly important given that one recent study concluded that differences in state civil commitment laws account for approximately 17 percent of the state-to-state variations in murder rates.⁷¹ In other words, states that give officials the least amount of power to involuntarily commit and treat mentally ill citizens, such as by requiring showings of imminent danger, tend to have higher murder rates.⁷² Meanwhile, states that remove durational language related to dangerousness or provide additional grounds for civil commitment unrelated to dangerousness, such as grave disability or the risk of future deterioration, tend to have much lower murder rates.⁷³ Importantly, broader grounds for civil commitment or involuntary mental health holds could have played a role in preventing several high profile mass public shootings.⁷⁴

One clear example of inadequate civil commitment language leading to unnecessary deaths is the case of Aaron Alexis, who in 2009 shot twelve people to death and wounded another three in Washington, D.C.'s, Navy Yard. Alexis began exhibiting troubling signs of mental deterioration in the months leading up to the tragedy, becoming noticeably withdrawn and failing

⁶⁹ See MALCOLM & SWEARER, *supra* note 65.

⁷⁰ See, e.g., O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding that in order to involuntarily commit a person to a mental health treatment facility, the state must prove not only that the person suffers from a mental illness and is in need of treatment, but that the individual poses a risk of danger to himself or others and is incapable of surviving safely in the community); Addington v. Texas, 441 U.S. 418 (1979) (holding that the State must prove the element of dangerous by clear and convincing evidence); Washington v. Harper 494, U.S. 210, 227 (1990) (holding that States may forcibly treat prison inmates for mental illness when they are dangerous and the treatment is "in the inmate's medical interest," but indicating that in-depth and independent "procedures for determining whether forcible medication was necessary" were needed to provide sufficient due process).

⁷¹ Steven P. Segal, *Civil Commitment Law, Mental Health Services, and US Homicide Rates*, 47 SOCIAL PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1449, 1449 (2011).

⁷² *Id.* at 1455.

⁷³ *Id.*

⁷⁴ See David B. Kopel & Clayton E. Cramer, *Reforming Mental Health Law to Protect Public Safety and Help the Mentally Ill*, 58 HOW. L. J. 716, 762-772 (2015).

to sleep for days at a time.⁷⁵ Just forty days prior to his rampage, he called police to his hotel room in Newport, Rhode Island, convinced that others in the hotel wanted to harm him and were trying to control him by using a machine to send vibrations through his body.⁷⁶ It is unclear whether the responding officers were aware of Alexis's long history of mental instability and violent behavior, including the potentially criminal use of firearms.⁷⁷ The officers were concerned enough about his mental health, however, to ask him to discuss his mental health history and that of his family members. Ultimately, the officers determined there was little they could do under Rhode Island's emergency mental health commitment statute, which limited such temporary involuntary holds to situations when a person "is in need of immediate care and treatment" because leaving him or her in the community "would create an imminent likelihood of serious harm by reason of mental instability."⁷⁸ They left Alexis at the hotel. While the incident report was forwarded to Navy officials, it appears no meaningful steps were taken to follow up with Alexis.⁷⁹ The use of more permissive language, such as removing the necessity of "imminent" likelihood of harm and providing for civil commitment on the basis of "grave disability" or deterioration without hospitalization, could have more clearly permitted officers to temporarily detain Alexis for a mental health evaluation. This, in turn, would likely have resulted in a civil commitment proceeding and the corresponding legal prohibition on purchasing firearms, both preventing Alexis from subsequently purchasing the shotgun used in the shooting and greatly benefitting the life of a seriously ill young man in need of help.

C. Stop Gap Measures – Red Flag Laws

Besides efforts to strengthen and more effectively use existing mental health frameworks, a bipartisan mental illness-focused strategy could include measures to gap-fill and expand the frameworks themselves, particularly through the use of Gun Violence Restraining Orders or "Red Flag" laws, which focus on the temporary disarmament of individuals who, though

⁷⁵ Sari Horwitz, et al., *Before Navy Yard Shooting, Alleged Gunman Heard Voices and Sought Help*, WASH. POST (Sept. 17, 2018), https://www.washingtonpost.com/local/before-navy-yard-shooting-alleged-gunman-heard-voices-and-sought-help/2013/09/17/874970d8-1fd2-11e3-94a2-6c66b668ea55_story.html?utm_term=.73a8e6d02610.

⁷⁶ *Id.*

⁷⁷ *Navy Was Told of Aaron Alexis "Hearing Voices" Incident Last Month*, CBS NEWS (Sept. 18, 2013), <https://www.cbsnews.com/news/navy-was-told-of-aaron-alexis-hearing-voices-incident-last-month/>.

⁷⁸ R.I. Gen. Laws § 40.1-5-7 (2010). For more in-depth analysis of other instances where the language of civil commitment statutes could have played a role in possibly preventing mass public shootings, see Kopel & Cramer, *supra* note 74.

⁷⁹ CBS NEWS, *supra* note 77.

dangerous, may not fit neatly into existing structures like civil commitment laws. These types of measures have become increasingly popular on the heels of the shooting in Parkland, Florida, but the concept itself is not particularly new.⁸⁰ In short, they provide an intermediate measure between civil commitments and purely voluntary actions that can temporarily disarm individuals who are a risk of danger to themselves or others, without imposing the serious and often lifelong legal consequences of involuntary civil commitments.

What are these gaps where existing mental health legal frameworks are insufficient? First, there are many individuals who are a danger to themselves or others but are not discernably suffering from a diagnosable mental illness. As noted above, a significant percentage of individuals who commit suicide do not have a history of serious mental illness, and therefore could not be disqualified from firearm possession under existing civil commitment laws.⁸¹ Second, there are individuals who are nearing a mental health crisis but who may not yet have reached the standards for involuntary commitment or official action that would disqualify them from firearm possession, despite clear indications of being a heightened risk of danger. On a related level, because civil commitment procedures and mandated treatment are incredibly resource intensive and carry serious legal consequences, they are—rightly—used primarily as a means of last resort. As evidenced by cases like that of Nikolas Cruz, Aaron Alexis, Jared Loughner, and James Holmes,⁸² mass public shooters in particular often exhibit very clear “red flags,” yet remain capable of possessing firearms primarily because of a reluctance by state officials to pursue the most severe type of civil sanction available. Finally, because most states require that only state officials—whether district attorneys, law enforcement officers, or mental health professionals—may initiate civil commitment procedures, individuals may fly under the radar of these officials but nevertheless be known by family members or other members of the community to be a danger to self or others. Red Flag laws typically allow a broader range of individuals, including family members, roommates, or teachers, to petition courts to hold hearings for the temporary disarmament of individuals meeting objective standards of dangerousness. Importantly, any deprivation of a constitutional right—even a temporary deprivation—is a serious matter necessitating strict adherence to meaningful

⁸⁰ Connecticut became the first state to implement this type of law in 1999, and prior to the mass shooting at Marjorie Stoneman Douglass High School in 2018, four other states had passed similar statutes. Since the 2018 shooting, the number has grown to 17 states. Timothy Williams, *What Are 'Red Flag' Gun Laws and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html>; Sean Campbell & Alex Yablon, *Red Flag Laws: Where the Bills Stand in Each State*, THE TRACE <https://www.thetrace.org/2018/03/red-flag-laws-pending-bills-tracker-nra/> (updated June 27, 2019).

⁸¹ See *Suicide Rates Rising Across the U.S.*, *supra* note 12; Kopel & Cramer, *supra* note 74.

⁸² See *supra* note 62.

standards of due process. States choosing to implement these types of laws should use safeguards ensuring fair procedures that limit disarmament only to the time in which a person continues to be a danger to self or others.⁸³

IV. CONCLUSION

The reality is, despite common rhetoric denouncing opposing sides of Second Amendment policy debates, Americans ultimately want the same things—a safer nation, safer communities, safer families. Across the board, advocates of both stricter gun control laws and advocates for a strong, meaningful Second Amendment right are in favor of transforming broken human beings at risk of danger to themselves or others into healthy, functioning citizens. There is no one in favor of death and suffering, nor are disagreements over firearms disagreements over the relative value of human life.

That is precisely why a mental illness-centered approach to gun-related violence can be so important. It provides a space for many people who do not normally agree on much of anything related to firearms to work together in a way that meaningfully addresses gun-related violence. Even if the complex underlying realities of gun-related violence make any approach a less than perfect one, this ought not to prevent the implementation of policies that are likely to have a significant life-saving effect without broadly infringing on the rights of all law-abiding citizens. Respecting the constitutional rights of individuals who are not, and never will be, a danger to themselves or others does not mean settling for simply doing nothing to address gun-related violence.

⁸³ For a review of important guidelines, see *Red Flag Laws: Examining Guidelines for State Action Before the U.S. S. Judiciary Comm.*, 116th Cong. (2019) (written testimony of David B. Kopel, Research Director, Independence Institute), <https://object.cato.org/sites/cato.org/files/pubs/pdf/kopel-sen-judiciary-gun-confiscation-orders.pdf>.

APPENDIX A

Year	Total Gun Deaths⁺	Total Mass Public Shooting Deaths⁺⁺	MPS Deaths as Percentage of Total Gun Deaths
2017	39,773	117*	0.294
2016	38,658	71	0.184
2015	36,247	46	0.127
2014	33,594	18	0.057
2013	33,635	35	0.104
2012	33,563	71	0.212
2011	32,351	19	0.059
2010	31,672	9	0.028

* The 2017 death toll for mass public shootings was significantly above average due to one statistical outlier incident—the October 1, 2017 shooting in Las Vegas, Nevada, which claimed 58 lives. This single outlier accounted for nearly one-half all mass public shooting deaths that year.

+ Data from National Center for Injury Prevention and Control. Web-based Injury Statistics Query and Reporting System (WISQARS) www.cdc.gov/injury/wisqars (last visited July 1, 2019).

++ Data from Mother Jones Mass Public Shooting Database, 1982–2019 <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.