

LEGAL MEMORANDUM

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Part III: The Current State of Laws Regarding Mental Illness and Guns

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Abstract

This is Part III of a three-part series exploring the intersections of mental illness, violence, and firearms. As the nation sits in the midst of a serious debate about gun violence in general, and mass shootings in particular, we must ensure that policy decisions regarding Second Amendment rights reflect an accurate understanding of the role mental illness does and does not play in gun violence, as well as an accurate understanding of why the United States is suffering from a crisis of untreated serious mental illness.

Contrary to popular narratives espoused in the aftermath of tragic events involving both firearms and mentally ill persons,¹ many federal and state laws already exist that restrict access to firearms by mentally ill individuals. The relevant question is often not whether there are mechanisms in place to prevent people suffering from a serious mental illness who pose a danger to themselves or others from possessing firearms, but rather whether those mechanisms are being adequately utilized by the relevant authorities. Moreover, because mental illness is so transient in the lives of so many individuals—and because the vast majority of mentally ill individuals are not and will never become violent (especially when treated)—laws restricting fundamental constitutional rights must contain adequate due-process protections and refrain from using broad, over-inclusive prohibitions.

To be more effective, laws regulating access to firearms by the mentally ill should focus on intervention and prohibition for specific individuals whose actions evidence that they pose a heightened risk of danger to self or others. States should also do everything practicable to increase the number and timeliness of disqualifying mental health

KEY POINTS

- Numerous state and federal laws already exist that restrict the ability of mentally ill persons to legally purchase, possess, or otherwise have access to firearms.
- Federal law, in particular, properly bases these restrictions on whether the mentally ill person presents a heightened risk of danger to self or others, and not on the basis of mental illness alone.
- Some states have expanded firearm prohibitions in ways that raise serious constitutional concerns—and are likely to have the unintended effect of deterring those with mental health problems from voluntarily seeking treatment.
- Instead of enacting overly broad or general restrictions on the right to keep and bear arms, states should promptly and adequately share mental health records with the federal NICS database.
- Further, restrictions should focus on *identifiable* risks of future violence while respecting due process, as some states have done through comprehensive Gun Violence Restraining Order frameworks.

This paper, in its entirety, can be found at <http://report.heritage.org/lm241>

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histories reported to the National Instant Background Check System. These actions, however, should be taken with a view toward respecting due process and providing mechanisms for the restoration of an individual's Second Amendment rights after he or she no longer poses a heightened risk of danger.

Federal Law Provides a Minimum Level of Restrictions on Firearm Possession by Mentally Ill Individuals

The principal source of federal regulation of firearms in relation to mental illness is the Gun Control Act of 1968, which prohibits the possession of firearms by any individual “adjudicated as a mental defective” or who has been “committed to a mental institution.”² Federal law defines the term “adjudicated as a mental defective” to mean: “A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease (1) is a danger to himself or others; or (2) lacks the mental capacity to contract or manage his own affairs.”³ This includes a finding of insanity by a court in a criminal case, as well as equivalent findings under the Uniform Code of Military Justice.⁴

Meanwhile, the term “committed to a mental institution” necessitates a “formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority,”⁵ including an involuntary commitment to a mental institution for mental defectiveness, mental illness, or drug use.⁶ It does not, however, include voluntary admission to a mental institution or a temporary stay for observation.⁷

In 1986, Congress passed the Firearms Owners Protection Act, which established a “relief from disabilities” program for individuals prohibited from possessing firearms under the Gun Control Act.⁸ Applicants could petition the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to restore their firearms rights upon a showing that he or she “will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”⁹ Denials of relief would be subject to judicial review. This program, however, proved politically divisive, and in 1992, Congress stopped providing funding, causing the ATF to stop accepting restoration petitions.¹⁰

Since then, individuals who have lost their right to purchase or possess a firearm through a federal

criminal conviction or determination of a disqualifying mental defect have no way of getting those rights restored.¹¹ Many states—but not all of them—have enacted their own mechanisms for restoring the Second Amendment rights of individuals disqualified from possessing firearms due to criminal convictions, adjudications of mental defectiveness, or involuntary mental health commitments under state law.¹²

The NICS index is, in layman's terms, a database of criminal and mental health records that would disqualify an individual from purchasing or possessing a firearm.

Congress strengthened the enforcement mechanisms of the Gun Control Act with the Brady Handgun Violence Prevention Act of 1993.¹³ Although some provisions of this Act expired in 2003 and were not renewed, the provision establishing the National Instant Criminal Background Check System (NICS index) remains in force.¹⁴ The NICS index is, in layman's terms, a database of criminal and mental health records that would disqualify an individual from purchasing or possessing a firearm.¹⁵ The NICS index is run by the FBI as a means of facilitating background checks by Federal Firearms Licensees,¹⁶ who are required under the Brady Act to request federal background checks on all prospective firearm purchasers.¹⁷

Federal law mandates that federal agencies, upon request from the Attorney General, submit to the NICS index all records of individuals disqualified from purchasing firearms. In the 1996 case of *Printz v. United States*,¹⁸ however, the Supreme Court held that Congress's attempt, through the Brady Act, to “commandeer” state officials to perform background checks violated the Tenth Amendment.¹⁹ The FBI is, therefore, reliant on states to voluntarily submit relevant records for use in the NICS index, but most states have not been willing to disclose many pertinent records—particularly, relevant mental health records—because, they claim, the disclosure of such records violates individual privacy rights and protections afforded under the Health Insurance Portability and Privacy Act (HIPAA).²⁰ By 2007, over a decade after the Brady Act became law, 28 states had failed to submit a single record to the NICS database.²¹

In 2007, Congress passed the NICS Improvement Amendments Act, which attempted to further incentivize state reporting of disqualifying records to the NICS index.²² These incentives, as well as several high-profile mass public killings that might have been prevented through more active state disclosure of disqualifying records, appeared to substantially increase state reporting to NICS.²³ The NICS index, however, is likely still missing millions of disqualifying histories because of problems with record backlogs and because many states still fail to adequately and promptly report relevant records.²⁴

After a 2017 mass public shooting at a church in Sutherland Springs, Texas, it also became evident that even the military—which is required to submit disqualifying records—had failed to report a significant percentage of relevant histories to the NICS index.²⁵ In March of 2018, Congress passed and the President signed into law the Fix NICS Act in an effort to address some of these significant problems.²⁶ The Act increases oversight over federal agencies and renders ineligible for bonus pay the political appointees of those agencies that fail to show themselves in “substantial compliance” with plans for better reporting.²⁷ It also increases funding for assisting state reporting to the NICS index and directs the Attorney General to prioritize funding states that establish plans under the Act for increasing their NICS reporting.²⁸

On the whole, federal prohibitions on the possession of firearms by the mentally ill correctly place the focus on individualized determinations of dangerousness and not on the broader category of diagnosis alone.

In 2017, President Donald Trump rescinded an Obama-era regulation that, though never actually put into effect, would have required the Social Security Administration to report to the NICS index those individuals who successfully filed a disability claim for mental health reasons and requested that another person be given authority over those disability payments.²⁹ Part of the controversy surrounding the Obama-era regulation was that disability claims of this nature do not require any “adjudication” of mental defect by a judge or jury or an involuntary

commitment to a mental institution.³⁰ Any person checking a box on a form submitted to the Social Security Administration would have seen their Second Amendment rights automatically revoked. Even the American Civil Liberties Union, an organization not known for staunchly defending Second Amendment rights, fought against the implementation of the regulation,³¹ which would have revoked constitutional rights of individuals with such illnesses as anorexia and mild autism without any meaningful due process.³²

On the whole, federal prohibitions on the possession of firearms by the mentally ill correctly place the focus on *individualized determinations* of dangerousness and not on the broader category of diagnosis alone. This is consistent with both the Second Amendment’s protection of a fundamental right and with the recognition that mental illness in and of itself is not significantly related to an increased risk of future violence.

The lack of federal mechanisms for the restoration of Second Amendment rights, however, is deeply problematic and effectively leaves some individuals permanently stripped of their Second Amendment rights, regardless of whether they currently pose a heightened risk of danger to themselves or others. Further, as detailed below, some states impose much broader and more severe restrictions than does federal law and similarly fail to provide a way of having Second Amendment rights restored.

Several States More Severely Restrict the Second Amendment Rights of a Broader Segment of the Population

Against the recommendation of the American Psychiatric Association (APA), several states have broadened the scope of their firearms prohibitions to include individuals who voluntarily commit themselves to mental institutions.³³ On the one hand, there is certainly an argument to be made that individuals who commit themselves and who meet the criteria for inpatient mental health care are more likely to pose a danger to themselves or others. On the other hand, there are very legitimate concerns that the potential loss of Second Amendment rights could dissuade individuals from cooperating in their own mental health care—and even increase the likelihood of a person committing violent acts by delaying treatment.

Moreover, these restrictions apply to individuals who were aware enough of their deteriorating mental

state to seek help and who may remain under inpatient care for a very short period of time before stabilizing—sometimes without ever again needing an intensive level of treatment. These individuals are not necessarily more prone to violent actions, and disarming them for lengthy periods of time—or in some cases, permanently—serves no real purpose.

Even more concerning than the expansion of restrictions to those who voluntarily seek inpatient mental health treatment is a 2013 New York law that puts at risk the Second Amendment rights of *any person* voluntarily seeking *any type* of mental health care. The Secure Ammunition and Firearms Enforcement (SAFE) Act,³⁴ which was pushed through the state legislature on the heels of the horrific school shooting in Newtown, Connecticut, requires most medical practitioners³⁵ to file reports on any person whom they believe is at risk of harming himself or others.³⁶ These reports are forwarded to the local director of community services to evaluate the concern, and, in practice, almost all concerns are deemed “credible.”³⁷ The reported person’s information is then sent to the state’s Department of Criminal Justice, which adds the person’s name to “no-buy” database for five years, reports the information to the national NICS background system as a disqualifying mental health record, and cross-checks with the state’s database of firearms licenses.³⁸

Several prominent mental health associations have argued that the SAFE Act’s mandatory reporting provisions also force doctors to violate the Health Insurance Portability and Protection Act.

If the person is a licensed firearm owner,³⁹ local police are then tasked with confiscating his or her guns. At no point in this process is the individual given notice of the report, entitled to an evidentiary hearing or legal representation, or otherwise provided with the slightest semblance of due process. There is not even a post-deprivation hearing, nor does the statute provide any mechanism by which a person may have his or her Second Amendment rights restored.⁴⁰ Within the first year of the SAFE Act, tens of thousands of New Yorkers had their Second

Amendment rights eliminated under the mandatory-reporting provisions, many of whom still may not be aware that they have lost their rights.⁴¹

Despite several challenges to the mental health-related portion of the law, as of the time of this writing no federal court has yet ruled directly on the law’s constitutionality as applied to an individual whose license was revoked solely on the basis of the reporting requirement.⁴² On its face, the SAFE Act appears inconsistent with the Supreme Court’s holdings in the pre-eminent Second Amendment cases of *District of Columbia v. Heller*⁴³ and *McDonald v. City of Chicago*.⁴⁴

Like the other restrictions applied to people who voluntarily commit themselves to psychiatric facilities for treatment, the SAFE Act’s provisions regarding mental health and firearm possession may deter individuals from voluntarily seeking mental health treatment that they may desperately need in the first place, which may result in New Yorkers being less safe.⁴⁵ The reporting mandate also raises serious concerns about a physician’s duty of confidentiality, which is both uniquely critical to the field of psychiatric treatment and imposes legal liability on physicians who breach that duty absent certain circumstances.⁴⁶ Several prominent mental health associations have argued that the SAFE Act’s mandatory reporting provisions also force doctors to violate the Health Insurance Portability and Protection Act.⁴⁷

The State of Hawaii similarly maintains broad but highly questionable restrictions on Second Amendment rights. The state’s firearms laws prohibit the possession of firearms by any person “diagnosed as having a significant behavioral, emotional, or mental disorder as defined by the most current diagnostic manual of the American Psychiatric Association” unless that person “has been medically documented to be no longer adversely affected by the...mental disease, disorder, or defect.”⁴⁸

This broad categorization focuses exclusively on a person’s diagnosis and not on dangerousness or an individualized risk assessment as the basis for eliminating a person’s Second Amendment rights. And, like the SAFE Act and the voluntary commitment statutes discussed above, a statute that imposes a Second Amendment prohibition on anyone diagnosed with a significant behavioral, emotional, or mental disorder, without any regard to dangerousness, may deter some in need of treatment from seeking it on their own. Ironically, Hawaii relies on the APA’s expertise in defining mental disorders but roundly ignores the

APA's position on policies prohibiting the possession of firearms by individuals with mental illness.⁴⁹

Intervention Policies Should Focus on Temporary Disarmament of Individuals Whose Actions Indicate a Significant Risk of Violence, Providing Treatment, and Respecting Due-Process Rights

States Should Promptly and Adequately Share Mental Health Records with the NICS Database. The federal government has taken steps to encourage states to report relevant criminal and mental health records to the FBI for use in the NICS database, yet many states still fail to adequately share them and to do so in a timely manner. While state reports have increased approximately 200 percent since 2013, millions of records are likely still missing from the database, and the statistical increase can be attributed to the improved efforts of only a handful of states.⁵⁰ As of December 31, 2017, there appeared to still be at least five states with fewer than 1,000 reported mental health histories.⁵¹

Although some states rely on their own internal databases of disqualified individuals, many do not make these records available to other states via the NICS database, thus creating a loophole for disqualified individuals to simply purchase firearms in another state.⁵² Finally, several states have not yet passed laws mandating that entities covered by HIPAA disclose otherwise protected mental health information for purposes of NICS reporting, thereby continuing to possibly hinder the disclosure of this important information on a national level.⁵³

Despite these gaps, the NICS database flagged and denied more than 1 million firearm transactions between 1998 and 2012,⁵⁴ with some estimates suggesting that the number could be more than 3 million as of 2018.⁵⁵ If more relevant records are submitted to the NICS, it is very likely that more disqualified individuals—including people with severe mental illness who pose a danger to themselves or others—will be prevented from legally purchasing a firearm.

The capacity to save lives through increased reporting is significant. 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.”⁵⁶ Spread across all 50 states, an estimated 840 to 900 suicides could be prevented every year if states would simply submit disqualifying

mental health histories to the NICS system, helping to ensure that people who have already been adjudicated as seriously mentally ill cannot legally purchase new firearms with which to harm themselves.

While there is little evidence that more adequate reporting of disqualifying records is associated with a decrease in gun homicide rates,⁵⁷ it could well have prevented some of the worst acts of mass public shootings in the past two decades. For example, Devin Kelley was able to purchase several firearms—despite his lengthy history of disqualifying criminal and mental health records—solely because the U.S. Air Force neglected to forward these records to the NICS database.⁵⁸ Unlike states, federal agencies are required by law to report disqualifying records to the FBI for the NICS database. But for the past two decades, the Army, Navy, and Air Force have failed to report the vast majority of military court-martial convictions, despite several public reports from the inspector general detailing this failure.⁵⁹

Similar failures of submission by states helped shooters obtain firearms in the following high-profile cases:

- Russell Weston, who was able to purchase a firearm in Indiana despite having spent 54 days in a Montana mental institution for schizophrenia.⁶⁰
- Paul Merhige was also able to pass a federal background prior to murdering four individuals on Thanksgiving Day in 2008, even though he had been involuntarily committed to a mental institution three times.⁶¹
- Prior to killing four and injuring two at a Waffle House in Tennessee, Travis Reinking's firearm possession permit for the state of Indiana was revoked by state officials due to Reinking's deteriorating mental health.⁶²

Sometimes, states failed to report disqualifying mental health histories simply because their submission forms did not adequately account for verbiage discrepancies between state and federal law. Two years before committing the worst school shooting in U.S. history, Seung-Hui Cho was declared by a Virginia community services board to be “mentally ill and in need of hospitalization.”⁶³ A Virginia special justice certified that Cho “presented an imminent danger to himself as a result of mental illness”

before ordering him to undergo outpatient mental health treatment.⁶⁴ Under federal law, this disqualified Cho from purchasing or possessing a firearm.⁶⁵

At the time, however, Virginia did not submit Cho's mental health record to the NICS database, in part because the state's forms did not include a "check box" for involuntary outpatient orders, even if the individual was "adjudicated as a mental defective."⁶⁶ Because of this, when Cho purchased the two handguns used in the Virginia Tech shooting, he was able to pass a mandatory federal background check even though he had clearly been "adjudicated as a mental defective" for purposes of federal law.⁶⁷ States should therefore review how their submission forms may provide loopholes for otherwise disqualified individuals to pass background checks.

States Should Impose Narrowly Targeted Restrictions that Focus on Identifiable Risks of Future Violence but also Respect Due Process. Especially in the wake of the Parkland, Florida, shooting at Marjorie Stoneman Douglas High School, there has been a renewed interest by politicians and commentators in Gun Violence Restraining Orders (GVROs) and so-called "red flag laws."⁶⁸

GVROs and red flag laws are already used in some states to temporarily remove firearms from the possession of individuals exhibiting signs of a mental health crisis or otherwise indicating they are at a heightened risk of violence toward themselves or others. The specifics of the statutes vary, but the general idea is that law enforcement officers (and, in some states, family members) may petition courts to issue search warrants to seize the firearms of individuals presenting a likely risk of harm to self or others in the near future.⁶⁹ These search warrants must be based on the officers' sworn affidavit explaining why he or she believes the individual presents this likely risk of future harm, whether due to diagnosed mental illness, emotionally unstable conduct, personal crisis, or other behaviors that support a reasonable belief that the person is at risk for violent conduct.

If the search warrant is granted and the firearms are seized, the state has a limited time in which to conduct an evidentiary hearing at which it must prove beyond some heightened standard of proof that the individual does indeed pose a risk of future harm—and at which point the individual can challenge the allegations. Sometimes, under exigent circumstances, law enforcement officers may seize the firearms

without a warrant. These emergency seizures must, however, be subsequently determined by a judge to have been based on probable cause, often within 48 hours of the seizure.⁷⁰

There are many benefits to the use of GVROs as a supplement to mental health and civil commitment statutes, the most important of which is that they allow officials to focus on a broader range of factors than just the presence of a diagnosable mental illness when making determinations of dangerousness. Often, factors such as drug abuse, recent acts of violence, and threats of suicide are far better indicators of future violence than the simple presence of mental illness, and these factors are not always coupled with an underlying mental illness.⁷¹

States should impose narrowly targeted restrictions that focus on identifiable risks of future violence but also respect due process.

This means that, in states relying solely on lengthy and burdensome civil commitment procedures for disarmament,⁷² violent individuals are often free to access firearms for long periods of time *after* they begin exhibiting violent behaviors, simply because they do not yet have a disqualifying mental health or criminal record.⁷³ At the same time, GVROs are narrowly focused on only those individuals with mental illness who also display signs of violence, and do not—unlike Hawaii's law and New York's SAFE Act—broadly categorize all persons with mental illness as presenting a heightened risk of violence.

GVROs also have the added benefit of inducing otherwise uncooperative individuals to voluntarily seek mental health treatment or crisis counseling as a means of having their firearms returned. Further, the determination of dangerousness under GVRO statutes does not necessarily result in the types of life-long civil rights disabilities imposed by criminal convictions and civil commitments under mental health statutes.⁷⁴ In other words, these statutes provide a middle ground between civil commitment procedures with very intrusive government intervention and informal police suggestions that a person seek mental health treatment voluntarily. In this middle ground, individuals posing a heightened risk

of violence can be temporarily disarmed and induced to treatment without incorporating the fullest extent of mental health court oversight.

Finally, GVROs are one of the few means available by which states could significantly reduce certain subsets of gun violence without sacrificing either the civil rights of law-abiding citizens through wholesale restrictions on their right to keep and bear arms or the due-process rights of individuals allegedly posing a heightened risk of future violence. In terms of preventative value, the GVRO could have been used against such high-profile mass killers as Esteban Santiago-Ruiz,⁷⁵ Jared Loughner,⁷⁶ Jarrod W. Ramos,⁷⁷ Eliot Rodger,⁷⁸ and Nikolas Cruz.⁷⁹ But this preventative value does not appear to come at the cost to due process imposed by overly broad “solutions” like New York’s SAFE Act.

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Several researchers have studied how GVROs are utilized by states in practice and found that they can be fairly effective at temporarily disarming potentially dangerous individuals without unnecessarily sacrificing due-process protections. In a 2017 study, it was revealed that between 1999 and 2013, Connecticut used its gun removal law to seize firearms from 762 individuals.⁸⁰ The annual rate of gun seizures under the statute increased substantially in the years following the 2007 shooting at Virginia Tech University but remains at an average of about 100 removals per year in a state with an estimated 448,000 gun owners.⁸¹ Of the cases in which the outcome of the seizure hearing was known, 10 percent of individuals had their firearms returned.⁸² While this may seem low, it is actually surprisingly high given that the low total number of seizures suggests that officers are directing their attention to the most grievous instances of imminent danger.⁸³

Shockingly, 88 percent of individuals whose firearms were seized had no criminal history in the year

prior to the seizure, and only 12 percent had received mental health services in the year prior to the seizure.⁸⁴ By contrast, in 55 percent of cases, law enforcement officers were so concerned for the imminent well-being of the individual that they brought him or her to the hospital for an evaluation.⁸⁵ In other words, these were individuals who were flying under the radar of local law enforcement or mental health agencies and may have continued to spiral into a violent mental health crisis had it not been for the intervention of law enforcement during GRVO investigations.

A second study examined data from both Connecticut and Marion County, Indiana.⁸⁶ According to this study, in 2015, police officers in Connecticut removed firearms from individuals under the state’s GVRO law on 180 occasions, approximately 65 of which involved individuals with serious mental illness.⁸⁷ In 2012, police in Marion County, Indiana, utilized the state’s red flag law 30 times, with about 13 of those involving serious mental illness.⁸⁸ In both Connecticut and Indiana, most people were placed under temporary observation but were not involuntarily committed. In most cases, their firearms were shortly returned to them.⁸⁹

This suggests that the post-deprivation processes are providing legitimate due-process protections that are not simply rubber-stamping the decisions of law enforcement officers or mental health practitioners. Further, by combining the information in the studies cited above, it becomes apparent that these laws also target a class of individuals unreached by mental health commitment laws: Only 30 percent to 40 percent of gun seizures in both studies were from individuals suffering from a known mental illness, while the other 60 percent to 70 percent of seizures stemmed from intimate partner conflict, intoxication, and acute emotional distress unrelated to an underlying mental illness.

A third study examined the data regarding firearm seizures under Indiana’s law in Marion County, Indiana, between 2006 and 2013, and concluded that the law resulted in the removal of firearms from only a small number of persons, most of whom did not seek to have their firearms returned.⁹⁰ The county is populated by 950,000 residents, yet prosecutors filed for weapons seizure under the law only 404 times during this seven-year period.⁹¹ More than two-thirds of the petitions were for individuals presenting a risk of suicide, while 21 percent were for general violence, and another 16 percent were for individuals presenting signs of psychosis. Intoxication was noted in 26

percent of petition incidents, and domestic dispute scenarios accounted for about 28 percent of petitions for seizure—supporting the conclusions drawn above that these laws help at least temporarily disarm individuals who could not have been disarmed under existing mental-health-commitment laws.

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In roughly one-third of the cases, the firearms were returned by the court following the initial hearing, and the cases were dismissed.⁹² This tends to show a measured approach by law enforcement that focuses on removing firearms only from those individuals showing acute signs of imminent danger to self or others, all of which is further tempered by hearings in front of a neutral court that did not simply rubber-stamp the decisions of officers or prosecutors. Finally, similar patterns were reported in Maryland during the first month after the state enacted its own “red flag” framework, further suggesting that the measured approach is not limited to a particular state or jurisdiction.⁹³

Conclusion

The federal laws regulating the purchase and possession of firearms by individuals with mental illness provide a starting point that is praiseworthy in intent

but significantly flawed. Both Congress and some state governments have attempted to address some of these flaws through different measures that have met with varying degrees of success. States seeking to reduce gun violence perpetrated by individuals with histories of mental illness should:

- Make serious efforts to increase the adequate and timely reporting of disqualifying mental health histories to the NICS database;
- Promulgate laws that focus on the timely and effective removal of gun access for specific individuals in the midst or on the verge of mental health crises, who by their actions show themselves to be a heightened risk of danger to themselves or others;
- Ensure that such individuals are afforded due-process protections prior to or, at the very least, immediately following the restriction of their Second Amendment rights; and
- Increase the likelihood that individuals with mental illness will participate in their own treatment by affording adequate mechanisms for the restoration of their Second Amendment rights when they no longer pose a heightened risk of danger.

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Endnotes

1. After a man suffering from psychiatric problems opened fire at the Ft. Lauderdale International Airport, Broward County Sheriff Scott Israel told reporters: “People who are suffering from mental illness should not be allowed, in my opinion, to purchase or have firearms at any time. Enough is enough.” See Vincent Crivelli, *Sheriff: People Suffering From Mental Illness Shouldn’t Be Allowed To Purchase Firearms*, CBS12-WPEC (Jan. 10, 2017). However, under both federal and state law, the Ft. Lauderdale Airport shooter could have and should have been prohibited from purchasing firearms. See *infra* at n. 74. The problem was not the lack of adequate laws but the lack of properly utilizing those laws. CBS News also ran an article implying it was easier for individuals in Florida to purchase a firearm than it was for them to purchase cold medicine, obtain a marriage license, and receive a medical marijuana card, none of which is true. See *5 Things That Are More Complicated Than Buying a Gun in Florida*, CBS News (Feb. 19, 2018), <https://www.cbsnews.com/news/florida-gun-laws-ease-of-buying/>. In Florida, in order to purchase a firearm, an individual must provide photo identification, submit his social security number, prove that he is over the legal minimum age of purchase, pass a background check verifying that he is not a convicted felon, drug addict, or mentally incompetent, and—if he does not already have a concealed carry permit and is purchasing a handgun—wait three days after clearing these hurdles to take possession of the weapon. See FLA. STAT. § 790.065–790.0655. Meanwhile, while individuals obtaining a marriage license, cold medicine, or a medical marijuana card must provide identification and be above the legal minimum age, they are not subjected to background checks, nor are felons or domestic violence misdemeanants prohibited from obtaining them. See FLA. STAT. §§ 741.04; 893.1495; 381.986.
2. Gun Control Act of 1968, codified as amended in 18 U.S.C. § 922 (2012).
3. 27 CFR § 478.11, <https://www.law.cornell.edu/cfr/text/27/478.11>.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* But see *infra* regarding state laws that expand Second Amendment restrictions to some classes of individuals who voluntarily commit themselves to an inpatient mental health facility.
8. Firearm Owners’ Protection Act, 100 Stat. 449 (May 19, 1986), <https://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg449.pdf>.
9. *Id.*
10. The only official reason given by Congress for this continued lack of funding appears in a House report from the 102nd Congress, which stated: “[T]he Committee believes that the \$3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by the ATF in fighting violent crime.” William J. Krouse, *Gun Control: FY2017 Appropriations for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and Other Initiatives*, CONGRESSIONAL RESEARCH SERVICE (Aug. 7, 2017), <https://fas.org/sgp/crs/misc/R44686.pdf>. This assertion is absurd on its face, and underscores the reality that this was a political decision led by anti-gun advocates intent on finding any means to reduce the number of individuals allowed to legally possess firearms. The ATF’s 1992 budget was over \$250 million, meaning that the restoration of a fundamental right for individuals who no longer posed a risk of danger to themselves or their communities and who had fully paid their debt to society accounted for only 1.4 percent of the agency’s annual budget. GOV’T ACCOUNTABILITY OFF., FIREARMS AND EXPLOSIVES: INFORMATION AND OBSERVATIONS ON ATF LAW ENFORCEMENT OPERATIONS 2 (June 1993), <https://www.gao.gov/assets/80/78671.pdf>. The ATF’s annual budget is now over \$1.2 billion and growing. *Fact Sheet: Staffing and Budget*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (May, 2018), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-staffing-and-budget>. The sheer lack of concern for even attempting to fund the sole mechanism for restoring an individual’s right to keep and bear arms is grossly counter to the Second Amendment.
11. Under federal law, only the jurisdiction which originally convicted the individual can restore that individual’s civil rights. Because the federal mechanism for restoration is not funded—and therefore effectively moot—the only available option for federal felons is to seek a presidential pardon, which is rarely granted. See *Is There a Way for a Prohibited Person to Restore His or Her Right to Receive or Possess Firearms and Ammunition?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (last reviewed Nov. 5, 2017), <https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-his-or-her-right-receive-or-possess-firearms-and>.
12. For a comprehensive overview of state laws and mechanisms regarding the restoration of firearm rights to convicted felons, see *State Law Relief from Federal Firearms Act Disabilities*, RESTORATION OF RIGHTS PROJECT (updated Aug. 2018), <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonstate-law-relief-from-federal-firearms-act-disabilities/>. While most states offer some form of relief mechanism for at least some types of offenders, others—like California, Colorado, Delaware, Kentucky, and Wisconsin—only allow for restoration after a gubernatorial pardon. *Id.*
13. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 103rd Congress, codified at 18 U.S.C. § 921-922 (2012), <https://www.congress.gov/bill/103rd-congress/house-bill/1025>.
14. For example, between February 28, 1994, and November 30, 1998, the law required that all Federal Firearms Licensees (FFLs) impose a five-day waiting period on all prospective handgun purchasers. *Brady Law*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (last revised Apr. 28, 2017), <https://www.atf.gov/rules-and-regulations/brady-law>. But the NICS system was officially launched in 1998 and the provisions of the Brady Act requiring its use by FFLs remains in force. *National Instant Criminal Background Check System (NICS)*, FED. BUR. INVESTIGATION (last visited June 19, 2018), <https://www.fbi.gov/services/cjis/nics>.
15. See *National Instant Criminal Background Check System (NICS)*, *supra* note 14.

16. *Id.*
17. See 18 U.S.C. § 922(t) (2014).
18. 521 U.S. 898 (1997).
19. *Id.* at 898–99 (“The Brady Act’s interim provision commanding [chief law enforcement officers] to conduct background checks...is unconstitutional. Extinguished with it is the duty implicit in the background-check requirement that the [chief law enforcement officer] accept completed handgun-applicant statements (Brady Forms) from firearm dealers.... The Framers rejected the concept of a central government that would act upon and through the States.... The Federal Government’s power would be augmented immeasurably and impermissibly if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”).
20. For a discussion on how HIPAA’s prohibition on certain disclosures of personal medical information interacts with state laws regarding the disclosure of these records to NICS, see Edward C. Liu et al., *Submission of Mental Health Records to NICS and the HIPAA Privacy Rule*, CONGRESSIONAL RESEARCH SERVICE (Apr. 15, 2013), <https://fas.org/sgp/crs/misc/R43040.pdf>.
21. Sarah Ferris, *Lack of Data Makes It Hard for Background Checks System to Work Properly*, WASH. POST (Aug. 28, 2014), https://www.washingtonpost.com/world/national-security/lack-of-data-makes-it-hard-for-background-checks-system-to-work-properly/2014/08/28/d166c1b4-2ed8-11e4-be9e-60cc44c01e7f_story.html?utm_term=.6604713347bd.
22. See The NICS Improvement Amendments Act of 2007, Bureau of Justice Statistics (last visited Aug. 15, 2018), <https://www.bjs.gov/index.cfm?ty=tp&tid=49>.
23. For example, the number of mental health records in the NICS system rose from an estimated 235,000 in 2005 to more than 5.2 million in 2018. Benjamin Mueller, *Limiting Access to Guns for Mentally Ill Is Complicated*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/us/gun-access-mentally-ill.html>.
24. See Devlin Barrett, Sandhya Somashekhar & Alex Horton, *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/dd87ff8c-c4c4-11e7-aae0-cb18a8c29c65_story.html?utm_term=.55f5ce544cac; *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/>.
25. 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>.
26. Consolidated Appropriations Act, Pub. L. 115-141, amending 34 U.S.C. 40901, <https://www.gpo.gov/fdsys/pkg/BILLS-115hr1625enr/html/BILLS-115hr1625enr.htm>. The Fix NICS Act comprises Title VI of the Appropriations Act.
27. *Id.* at § 602(1)(H)–(I).
28. *Id.* at § 603(b)(2).
29. See Alan Zarembo, *Obama Pushes to Extend Gun Background Checks to Social Security*, L.A. TIMES (July 18, 2015), <http://www.latimes.com/nation/politics/la-na-gun-law-20150718-story.html>.
30. See *id.*
31. See Vania Leveille & Susan Mizner, *Gun Control Laws Should Be Fair*, ACLU (Feb. 20, 2017), <https://www.aclu.org/blog/disability-rights/gun-control-laws-should-be-fair>.
32. See Charles C. W. Cooke, *No, the GOP Did Not Just Repeal the Background Check System or Give Guns to the Mentally Ill*, NATIONAL REVIEW (Feb. 3, 2017), <https://www.nationalreview.com/corner/no-gop-did-not-just-repeal-background-check-system-or-give-guns-mentally-ill/>. For purposes of Social Security Disability Income, a “medically determinable impairment” is “an impairment that results from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques.” Social Security Administration, *Disability Evaluation Under Social Security: Part I—General Information* (last visited Jan. 7, 2019), <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm>.
33. See Debra A. Pinals et al., *American Psychiatric Association: Position Statement on Firearm Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Services*, 33 BEHAVIORAL SCIENCES & THE LAW 1 (June 11, 2015).
34. The bill was, in fact, rushed through the legislative process during a special emergency session in which Governor Andrew Cuomo waived the constitutionally required three-day waiting period between the legislation’s introduction and its vote. It passed through both houses of the state legislature in under 24 hours and was signed into law less than an hour later, with its provisions effective immediately. See Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES (Jan. 15, 2013), <https://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html>.
35. The SAFE Act defines “mental health professional” to include physicians, psychologists, registered nurses, and licensed clinical social workers. In other words, it covers almost all licensed medical personnel, regardless of their background in mental health training. See N.Y. MENT HYG § 9.46(a) (McKinney 2018).
36. “[W]hen a mental health professional currently providing treatment services to a person determines, in the exercise of reasonable professional judgment, that such a person is likely to engage in conduct that would result in serious harm to self or others, he or she shall be required to report, as soon as practicable, to the director of community services, or the director’s designee, who shall report to the division of criminal justice services whenever he or she agrees that the person is likely to engage in such conduct.” *Id.* at § 9.46(b).

37. The New York Times reported that in the first seven months after the law's mandatory reporting provisions took effect, all but a few hundred of the more than 42,000 cases in which a physician flagged an individual as "potentially dangerous" were ultimately recorded into the state's "no-buy" list. Anemona Hartocollis, *Mental Health Issues Put 34,500 on New York's No-Guns List*, N.Y. TIMES (Oct. 19, 2014), <https://www.nytimes.com/2014/10/19/nyregion/mental-reports-put-34500-on-new-yorks-no-guns-list.html>. At least one psychologist in charge of "evaluating" the reports received from physicians has admitted to rarely reading them before forwarding them to the state's Division of Criminal Justice Services. *Id.*
38. *Id.*
39. In New York City, all prospective firearm owners must first apply for a firearms license, meaning that all lawful gun owners are, by definition, on this list of licensed gun owners. See *New York Gun Laws: Laws on Purchase, Possession and Carrying of Firearms*, NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION (Apr. 11, 2017), <https://www.nraila.org/gun-laws/state-gun-laws/new-york/>. Outside New York City, New York residents must only obtain a license prior to the purchase or possession of handguns. *Id.* Because handguns are by far the most popular type of firearm among American gun owners, however, the reality is that the vast majority of lawful gun owners in New York are effectively in a state database of firearm owners. See Kim Parker et al., *The Demographics of Gun Ownership*, PEW RESEARCH CENTER (June 22, 2017) (finding that seven in 10 gun owners who possess more than one firearm own a handgun and that 62 percent of gun owners who possess only one firearm chose a handgun, compared to 22 percent who own a rifle and 16 percent who own a shotgun), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/>.
40. For an in-depth critique of the SAFE Act's many concerning aspects, see Carolyn Reinach Wolf & Jamie Rosen, *Missing the Mark: Gun Control Is Not The Cure for What Ails the U.S. Mental Health System*, 104 J. CRIMINAL L. & CRIMINOLOGY 851, 863-68 (2015), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7540&context=jcl>. In effect, the SAFE Act establishes a procedure for a complete five-year suspension of a person's Second Amendment rights based solely on the judgment of a single health care professional—who need not even specialize in mental health—after what might be nothing more than a cursory interview. There is no requirement that the person receive notice of the health care provider's report under the Act, much less that he or she be provided an opportunity to dispute the determination that he or she suffers from a mental illness and is dangerous. *Id.*
41. Governor Cuomo and other New York agencies have effectively refused to provide data, including public records, on the total number of citizens reported under the law, the number of firearms licenses revoked, or the number of individuals who later attempted to purchase a firearm without prior knowledge they were prohibited from doing so because of the law. See Hartocollis, *supra* note 37.
42. In March 2018, the United States District Court for the Western District of New York granted the state's motion to dismiss a lawsuit by a man whose firearms license was already suspended due to an involuntary commitment to a mental health institution. See *Montgomery v. Cuomo*, 291 F.Supp.3d 303 (W.D. N.Y. 2018). The court did not decide the case on the merits but determined that the plaintiffs' complaint was deficient and that they lacked standing to assert a Section 1983 claim challenging the law. *Id.* A challenge was also dismissed by the Northern District of New York in 2017, and the court did not address the constitutionality of this specific provision. *Phelps v. Bosco*, No. 1:13-CV-1510 (N.D. N.Y. Mar. 26, 2017). In February 2018, the Western District of New York dismissed a Section 1983 claim against the state by an individual whose pistol license and firearms were erroneously confiscated after she was declared to have been "involuntarily committed" to a mental institution for voluntarily seeking mental health treatment. *McKay v. New York*, #16-CV-6834-FPG (W.D. N.Y. Feb. 26, 2018). Once again, the court dismissed the case for lack of standing and did not reach a conclusion on the merits of the SAFE Act's constitutionality in light of the Second Amendment. *Id.* Certain provisions of Pennsylvania's mental health statutes similarly result in the loss of Second Amendment rights for persons who never received evidentiary hearings or were never otherwise "adjudicated as a mental defective" by a court. Unlike in New York, these Pennsylvania provisions have been successfully challenged in federal court and may no longer pose serious threats to due-process rights. Under Section 302 of the state's Mental Health Procedures Act, individuals can be temporarily confined for emergency involuntary mental health examinations. Mental Health Procedure Act, P.L. 817, § 302 (1976) codified as PENN. REV. CODE § 5100.86 (2016). <http://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1976/0/0143..PDF>. For years, relevant state and federal agencies interpreted emergency holds under this statute as triggering 18 U.S.C. 922(g)(4)'s prohibition on the purchase and possession of firearms. However, in December 2017, the U.S. District Court for the Western District of Pennsylvania held that a Section 302 temporary emergency hold did not qualify as an "adjudication" of mental defect under federal law because the procedures for subjecting a person to these holds do not involve "any judicial or quasi-judicial decision-maker or any semblance of adversarial proceeding." Nor are persons subject to these holds "committed to a mental institution" under the federal statute, because the terms of Section 302 "describe mandated medical care of a temporary and observational nature," and the statute itself does not refer to a "commitment" but to an "emergency examination." See *Franklin v. Sessions*, No. 3:16-CV-36 (W.D. Penn. Dec. 21, 2017), <http://images.law.com/contrib/content/uploads/documents/402/9447/Franklin-v-Sessions.pdf>.
43. 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual right to keep and bear arms unconnected to active participation in militia service).
44. 561 U.S. 742 (2010) (reaffirming *Heller* and holding that the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment against the states). For an in-depth analysis of how the Act likely violates the Second Amendment, see James B. Jacobs & Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York's SAFE Act*, 14 GEO. J. L. & PUB. POL'Y 77 (2016).
45. N.Y. STATE PSYCHIATRIC ASS'N, *NYSIPA Issues Press Release on SAFE Act Reporting Requirements* (last visited June 14, 2018), http://www.nyspsych.org/index.php?option=com_content&view=article&id=53:safe-act-press-release&catid=20:site-content.

46. *Id.* There are situations in which a mental health practitioner may—and in some cases, must—violate the general prohibition on disclosing confidential information. In *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976), the Supreme Court of California held that “when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.... It may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.” *Id.* at 431. Called the *Tarasoff* principle, this “duty to protect” has become the norm for mental health practitioners under state law. Most states maintain permissive statutes in which a mental health practitioner will not be punished for disclosing information under the *Tarasoff* principle—that is, when they determine that the patient has communicated a serious threat of violence toward a reasonably identifiable person or group. In other states, like New York, the statutes impose a mandatory duty to disclose when a patient “presents a serious and imminent danger to himself or others.” See National Conference of State Legislatures, *Mental Health Professionals’ Duty to Warn* (July 6, 2018), <http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx>.
47. For example, the New York State Psychiatric Association still notes its concerns with the SAFE Act in its Guidelines for Compliance with the law, including the lack of an “imminence” component to the future harm, which is required prior for disclosure under HIPAA. *The SAFE Act: Guidelines for Complying with the New Mental Health Reporting Requirement*, N.Y. STATE PSYCHIATRIC ASS’N (last visited Aug. 13, 2018), http://www.nyspsych.org/index.php?option=com_content&view=article&id=73:the-safe-act%E2%80%9393guidelines-for-complying&catid=41:safe-act&Itemid=140. The Healthcare Association of New York State expressed similar concerns in its collective testimony before the New York State Senate. See Testimony of the Healthcare Association of New York State for the Senator David Carlucci Hearing on the Implementation and Impact of Provisions Related to the New York SAFE Act (May 31, 2013), https://www.hanys.org/communications/testimony/docs/2013-05-31_hanys_ny_safe_act.pdf.
48. HAW. REV. STAT. § 134-7(c)(3) (2016).
49. The APA is generally supportive of what it calls “reasonable restrictions on gun access,” but opposes “restrictions based solely on the diagnosis of a mental disorder.” See Pinals et al., *supra* note 33.
50. See generally, National Shooting Sports Foundation, *Fix NICS—Facts & Info* (last visited Sept. 12, 2018), <http://fixnics.org/factinfo.cfm>. While this may sound impressive, the rate of improvement has decreased over time. Between 2004 and 2011, the total number of mental health records made available by the states to NICS increased by almost 800 percent, from about 126,000 to 1.2 million records. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS*, GAO-12-684 (July 2012), <https://www.gao.gov/products/GAO-12-684>.
51. See *State Rankings: Number of Mental Health Records Provided to NICS*, *Fix NICS CAMPAIGN* (last updated Dec. 31, 2017), <http://fixnics.org/staterankings.cfm>.
52. See Brad Heath, *Gun Checks Miss Millions of Fugitives*, USA TODAY (Updated Apr. 23, 2014), <https://www.usatoday.com/story/news/nation/2014/04/22/fugitives-gun-background-checks/7959529/>.
53. According to the Giffords Law Center, a gun-control advocacy group that keeps up-to-date information on various state gun laws, there are six states that authorize—but do not mandate—the disclosure of disqualifying mental health information to NICS. Such disclosure is authorized, but not required, in Colorado, Florida, Missouri, Nebraska, Pennsylvania, and West Virginia. Giffords Law Center to Prevent Gun Violence, *Mental Health Reporting* (last visited Jan. 3, 2019), <http://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/#state>. Arkansas, Michigan, Ohio, and Utah also have statutes that address the collection of mental health records but not their disclosure to NICS. Most of these states require the reporting of mental health information to a state agency for in-state use, and their statutes do not necessarily reflect an active impediment to the disclosure of this information to NICS. *Id.* The lack of mandated reporting to NICS, however, does make it less likely that all relevant records are disclosed and therefore accessible to other states via NICS. *Id.* This analysis is consistent with our own.
54. Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS) Operations 2013* (2013), <https://archives.fbi.gov/archives/about-us/cjis/nics/reports/2013-operations-report>. It is important to note that it is unlikely that this means over 1 million prohibited individuals were prevented from obtaining firearms. First, as Dr. John R. Lott explains, an unknown—but likely significant—percentage of these denials are actually “false positives.” See, e.g., John R. Lott, *Background Checks Are Not the Answer to Gun Violence*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/opinion/politics/background-checks-gun-violence.html>; John R. Lott, *CPRC in the Associated Press on Background Checks*, Crime Prevention Research Center (Dec. 9, 2014), <https://crimeresearch.org/2014/12/cprc-in-the-associated-press-on-background-checks/>. See also Ronald J. Frandsen, *Enforcement of the Brady Act, 2010: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2010*, NCJRS (Aug. 2012), <https://www.ncjrs.gov/pdffiles1/bjs/grants/239272.pdf>. Second, because so few of these denied individuals are actually prosecuted under federal law, they remain capable of procuring firearms through illicit means or through private sellers in states that do not require universal background checks.
55. See Richard Pérez-Peña, *Problems Plague System to Check Gun Buyers*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/28/us/problems-riddle-system-to-check-buyers-of-guns.html>.
56. 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 Alabama Legal Studies Research Paper No. 3127786 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127786.
57. *Id.*

58. 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.
59. See Dewan & Oppel, Jr., *supra* note 25.
60. Montana did not disclose mental health records to the NICS system due to state privacy laws barring their disclosure. See Michael Luo, *Privacy Laws Slow Efforts on Gun-Buyer Data*, N.Y. TIMES (May 2, 2007), <https://www.nytimes.com/2007/05/02/us/02guns.html>; David Kohn, *Armed and Dangerous: Should the Mentally Ill Buy Guns?*, CBS NEWS (Oct. 10, 2002), <https://www.cbsnews.com/news/armed-and-dangerous-10-10-2002/>.
61. See Andrew Marra, *Paul Merhige's Gun Purchase Shows Gap in System*, PALM BEACH POST (Oct. 3, 2010), http://articles.sun-sentinel.com/2010-10-03/news/fl-merhige-gun-purchase-20101003_1_mental-health-gun-purchase-paul-merhige.
62. See Emanuella Grinberg, *The Waffle House Shooting Suspect Thought Taylor Swift Was Stalking Him and Showed Other Signs of Delusion*, CNN (updated Apr. 24, 2018), <https://www.cnn.com/2018/04/22/us/travis-reinking-waffle-house-shooting/index.html?sr=twCNN042318travis-reinking-waffle-house-shooting0819AMVODtop>.
63. See Ned Potter & David Schoetz, *Va. Tech Killer Ruled Mentally Ill by Court; Let Go After Hospital Visit*, ABC NEWS (Apr. 18, 2007), <https://abcnews.go.com/US/story?id=3052278&page=1>; Brigid Schulte & Chris L. Jenkins, *Cho Didn't Get Court-Ordered Treatment*, WASH. POST (May 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/06/AR2007050601403.html>; Brigid Schulte & Tom Jackman, *Va. Gunman's Records Reveal Disorganized Mental Health System*, WASH. POST (Aug. 20, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/19/AR2009081902380.html>.
64. See Potter & Schoetz, *supra* note 62; Schulte & Jackman, *supra* note 62.
65. It is less clear whether, at the time Cho purchased the firearms, he was prohibited as a disqualified person under state law. See MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL, VIRGINIA TECH SHOOTING REVIEW PANEL 71-73 (Nov. 2009), <https://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf>.
66. 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>.
67. *Id.*
68. See, e.g., David French, *A Gun-Control Measure Conservatives Should Consider*, NATIONAL REVIEW (Feb. 16, 2018), <https://www.nationalreview.com/2018/02/gun-control-republicans-consider-grvo/>; Press Release, *Rubio, Nelson, Reed Introduce "Red Flag" Bill*, Office of Senator Marco Rubio (Mar. 22, 2018), <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=A1C5B7D3-D60C-42E0-BEE9-AAA74B1416D4>; Nicole Gaudiano, *"Red Flag" Laws that Allow for Temporary Restrictions on Access to Guns Gain Momentum Across Nation*, USA TODAY (Mar. 25, 2018), <https://www.usatoday.com/story/news/politics/2018/03/25/red-flag-laws-allow-temporary-restrictions-access-guns-gain-momentum-across-nation/454395002/>.
69. See Lenny Bernstein, *Five States Allow Guns to Be Seized Before Someone Can Commit Violence*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/national/health-science/five-states-allow-guns-to-be-seized-before-someone-can-commit-violence/2018/02/16/78ee4cc8-128c-11e8-9570-29c9830535e5_story.html?utm_term=.2e0b2b91346b. The particular aspects of state laws can be found in their respective statutes. See Cal. Penal Code §§ 18150 and 422.4(b)(3); Rev. Code Wash. §§ 7.94.030(1) and 7.94.020(2); Fla. Stat. § 790.401(1)(a), (2)(a); Vt. Stat. Ann. tit. 13, § 4054(c)(1); Md. Code Ann., Pub. Safety § 5-601(E)(2)—effective October 1, 2018.
70. Indiana provides one of the best examples of this type of law in practice. Under the state's "Jake Laird Law," law enforcement officers may remove firearms from an individual's possession if there is probable cause to believe the person poses an imminent risk of harm to himself or others, or may pose such a threat in the future because he either: (1) has a mental illness controlled by medication but does not demonstrate a pattern of voluntarily and consistently taking that medication while unsupervised; or (2) "is the subject of documented evidence that would give rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct." IND. CODE § 35-47-14-1 et. seq. Officers are required to petition the court for a search warrant unless exigent circumstances or other standard warrant exceptions apply: The law does not create additional authority for officers to search for or seize firearms. If the officer seizes firearms without first obtaining a search warrant, he or she must submit to the court a written statement describing why the individual is considered dangerous, and the court must determine that there was indeed probable cause for the seizure. IND. CODE § 35-47-14-3. Should the court determine there was not probable cause for the seizure, the firearms must be returned to the individual. *Id.* In every case where probable cause is found to exist, law enforcement officers must, within 48 hours of the judge issuing a warrant, serve the warrant and file a report recording the firearms seized. IND. CODE § 35-47-14-4. The individual whose firearms were seized is entitled to an evidentiary hearing within no more than 14 days after the seizure, at which the state must prove by clear and convincing evidence that the person is "dangerous" as defined by the statute. IND. CODE § 35-47-14-5. As with the probable cause hearing, if the state fails to meet this burden, the firearms must be returned to the individual without undue delay. IND. CODE § 35-47-14-6. If the state does meet its burden, the individual who is determined to be dangerous must wait 180 days before petitioning the court for the return of his or her firearms. IND. CODE § 35-47-14-8. At this point, the individual bears the burden of showing by a preponderance of the evidence that the person is no longer dangerous under the statute. *Id.* Another state GVRO framework worthy of recognition is that of Connecticut. See CONN. GEN. STAT. § 29-38(c). Like Indiana's law, Connecticut's risk-based gun removal framework does not require a finding of mental illness *per se*, but rather focuses on imminent risk regardless of the presence of a diagnosed mental illness. *Id.* In making a determination as to whether imminent risk of harm exists, the judge is directed to consider such things as

recent violent acts or threats, recent acts of cruelty to animals, history of reckless gun use or display, history of attempted use or threats of physical force against others, prior involuntary psychiatric hospitalization, and illegal use of drugs or alcohol abuse. *Id.* Finally, Illinois' recently enacted gun-violence restraining order framework also has some important features worthy of note. An Act Concerning Orders of Protection, HB 2354, Pub. Act 100-0607 (2018), <http://www.ilga.gov/legislation/publicacts/100/PDF/100-0607.pdf>. The state allows for family members to file emergency petitions and protects against the possibility of family members wrongfully filing baseless retaliatory petitions by ensuring that all records of the proceeding are expunged if the court does not find enough evidence to seize the respondent's firearms. *Id.* at § 80. Even if the court does order an emergency firearm seizure, the order must be renewed every six months with the petitioner—not the respondent—continuing to carry the burden of proof by clear and convincing evidence. *Id.* at § 45. Finally, all records are sealed after three years—helping ensure that temporary, non-criminal court orders do not carry lifelong, irreversible consequences. *Id.* at § 80.

71. Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 ARCH. GEN. PSYCHIATRY 251 (2009), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/210191>.
72. As previously noted, states must prove more than a “need for treatment” in order to civilly commit an individual to mental health treatment. They are instead required to prove an element of dangerousness, often “imminent” dangerousness, sometimes coupled with a showing of “gravely disabled,” as opposed to simply suffering from mental illness. For an overview of state civil-commitment laws, see Brian Stettin et al., *Mental Health Commitment Laws: A Survey of the States*, TREATMENT ADVOCACY CTR. (Feb. 2014), <http://www.treatmentadvocacycenter.org/storage/documents/2014-state-survey-abridged.pdf>.
73. See Jeffrey W. Swanson et al., *Guns, Impulsive Angry Behavior, and Mental Disorders: Results from the National Comorbidity Survey Replication*, 33 BEHAVIORAL SCIENCES & THE LAW 199 (2015) (concluding that “[b]ecause only a small proportion of persons with this risky combination [of mental illness and impulsive behavior] have ever been involuntarily hospitalized for a mental health problem, most will not be subject to existing mental health-related legal restrictions on firearms resulting from a history of involuntary commitment”).
74. Civil commitments for mental health treatment and adjudications of mental defect or incompetence often entail the loss of certain civil rights for a significant period of time. As noted, these commitments disqualify a person from purchasing or possessing firearms, but they also affect a person's parental rights. In some states, it is as difficult for those with disqualifying mental health histories to have their civil rights fully restored as it is for felons.
75. Santiago-Ruiz opened fire at Fort Lauderdale International Airport in 2017, killing five and wounding eight. A year earlier, he had walked into an FBI office in Anchorage, Alaska, claiming a U.S. intelligence agency was controlling his mind and forcing him to watch videos for ISIS. Police sent him to a psychiatric hospital and seized a firearm from his car, but he was released shortly thereafter and his gun—the same gun used in the shooting—was returned. This was the second time law enforcement officers had seized this handgun from Santiago-Ruiz and taken him to a psychiatric facility for a mental health evaluation, only to later return it to his possession after a short stay in the facility. See Phil McCausland, *Gun Used by Airport Shooting Suspect Was Once Taken Away from Him—Then Returned*, NBC NEWS (Jan. 8, 2017), <https://www.nbcnews.com/news/us-news/gun-used-airport-shooting-suspect-was-once-taken-away-him-n704501>.
76. Loughner was clearly suffering from serious mental illness in the years leading up to his attack, and his nonsensical behaviors increasingly frightened those around him. One of his classmates at Pima Community College told investigators that she was “scared for her life” during his in-class outbursts. John Cloud, *The Troubled Life of Jared Loughner*, TIME (Jan. 15, 2011), <http://content.time.com/time/magazine/article/0,9171,2042358-1,00.html>. The woman sent several e-mails to friends throughout the course of the semester, detailing his behavior, and at multiple points indicating her concerns that Loughner might come to class with a firearm. David A. Fahrenthold, *Jared Loughner's Behavior Recorded by College Classmate in E-Mails*, WASH. POST (Jan. 9, 2011), <http://voices.washingtonpost.com/44/2011/01/jared-loughners-behavior-recor.html?hpid=topnews>. Loughner's parents considered his risk of danger to others so high that they took his shotgun away from him and disabled his car to keep him in the house. See Martinez & Carter, *supra* note 67.
77. Jarrod W. Ramos stormed into the office of the *Capital Gazette* newspaper in 2018, killing five with a shotgun. He would likely have been prohibited from legally purchasing a firearm under Connecticut and Indiana law given his long history of exhibiting threatening behaviors, including a misdemeanor conviction for criminal harassment that belies the serious nature of his obsessive stalking. *Ramos v. Hartley*, No. 2281 (Md. Ct. Spec. App. Sept. 17, 2015), <https://casetext.com/case/ramos-v-hartley>. He had made direct threats on social media against the newspaper and its employees—threats that made employees report Ramos to two different law enforcement agencies. He had a tendency to become so unhinged that a former executive editor and publisher for the paper once told his attorneys that “this was a guy that was going to come and shoot us.” Ian Duncan & Nicholas Bogel-Burroughs, *Alleged Annapolis Capital Shooter Jarrod Ramos Had Long-Running Feud with Paper*, BALTIMORE SUN (June 29, 2018), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ramos-search-20180628-story.html>.
78. Rodger had been prescribed the anti-psychotic medication risperidone but often refused to take it. His history of assaultive and threatening behaviors included splashing his coffee on two girls for not smiling back at him and spraying orange juice out of a Super Soaker on a group playing kickball. See Dan Good, Clayton Sandell & Cecilia Vega, *Elliot Rodger's Previous Attacks on Women, Couples*, ABC NEWS (May 27, 2014), <https://www.yahoo.com/gma/elliott-rodgers-previous-attacks-women-couples-135909744--abc-news-topstories.html>. Law enforcement officers determined that Rodger may have been the original aggressor in an altercation at a party that had ended with Rodger calling the police. Rodger would go on to write in his diary that he tried but failed to “shove girls at a party over a ten-foot ledge.” *Id.*; Joe Mozingo et al., *Isla Vista Shooting Suspect's Videos Reflect Cold Rage*, L.A. TIMES (May 25, 2014), <http://www.latimes.com/local/la-me-ista-vista-suspect-20140525-story.html#page=1>. One of Rodger's neighbors stumbled upon him crying, saying that he [Rodger] was going to kill some people who had bullied him and then kill himself. *Id.*

79. Nikolas Cruz would likely have been prohibited from legally purchasing a firearm under Connecticut and Indiana law given his history of animal abuse, suspension for assaultive behaviors, and history of reckless gun use against others. For details on Cruz's concerning behaviors, see Matthew Haag & Serge F. Kovalski, *Nikolas Cruz, Florida Shooting Suspect, Described as a 'Troubled Kid'*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/us/nikolas-cruz-florida-shooting.html>.
80. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicide?*, 80 LAW & CONTEMPORARY PROBLEMS 179, 189 (2017).
81. *Id.* The number of gun owners in Connecticut is a rough calculation based on estimates of a 16.6 percent gun ownership in the state. Connecticut has approximately 2.8 million residents of legal age to possess a firearm, meaning a 16.6 percent gun ownership rate would mean about this many gun owners.
82. *Id.* at 193.
83. See *id.* at 192 (listing as reasons for seizure such significant interactions as "extremely paranoid and delusional, set up wooden device to barricade door to house," and "emotionally sick and not eaten for past four days, mother in hospital, despondent and intoxicated").
84. *Id.* at 193.
85. *Id.*
86. See NATIONAL ACADEMIES OF SCIENCES, ENGINEERING & MEDICINE, *VIOLENCE AND MENTAL HEALTH: OPPORTUNITIES FOR PREVENTION AND EARLY DETECTION* 39–41 (2018), <https://www.nap.edu/download/24916>.
87. *Id.* at 40.
88. *Id.*
89. *Id.*
90. See George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013*, 33 BEHAVIORAL SCIENCES & THE LAW 308 (June 2015), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/bsl.2175>; <https://www.ncbi.nlm.nih.gov/pubmed/20439368>.
91. *Id.*
92. *Id.*
93. In the first month of its enactment, Maryland's judiciary received 114 petitions for the removal of firearms. See Catherine Rentz, *Maryland's New "Red Flag" Gun Safety Law Drew 114 Requests to Remove Firearms During Its First Month*, BALTIMORE SUN (Nov. 10, 2018), <https://www.baltimoresun.com/news/maryland/bs-md-red-flag-law-requests-20181114-story.html>. While this is certainly a far higher rate than seen in some other jurisdictions, the increase can be explained by the provision of the law allowing petitions to be filed by family members: Only 44 of the requests came from law enforcement. *Id.* Further, the rate at which the courts granted those petitions does not evidence mere rubber-stamping. Of the 114 petitions, only 70 were found to have met probable cause standards for even a temporary seizure, while only 36 of those resulted in a final disposition approving a longer-term seizure on the basis of clear and convincing evidence of dangerousness. *Id.* And because the court records are sealed, there is no way of knowing how many—if any—of those final orders were for the maximum length of one year. *Id.*