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## Gun Control Is Not Enough: The Need to Address Mental Illness to Prevent Incidences of Mass Public Violence.

Morgan Stanley

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**GUN CONTROL IS NOT ENOUGH: THE NEED TO ADDRESS  
MENTAL ILLNESS TO PREVENT INCIDENCES OF MASS  
PUBLIC VIOLENCE**

**BY: MORGAN STANLEY\***

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*Since I’ve been President, this is the fourth time we have come together to comfort a grieving community torn apart by a mass shooting. The fourth time we’ve hugged survivors. The fourth time we’ve consoled the families of victims. And in between, there have been an endless series of deadly shootings across the country, almost daily reports of victims, many of them children, in small towns and big cities all across*

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\* Candidate for Juris Doctorate at St. Mary’s University School of Law, Class of 2014. I would like to thank the Volume 15 Staff Writers and Editorial Board of *The Scholar* for all their hard work and for helping me make this Comment a success. I would especially like to thank Afton Cavanaugh for his feedback and guidance during the drafting of this Comment. The biggest thank you goes to my husband, Shea Stanley, for simultaneously tolerating and supporting me every single day.

*America—victims whose—much of the time, their only fault was being in the wrong place at the wrong time.*

*We can't tolerate this anymore. These tragedies must end. And to end them, we must change. We will be told that the causes of such violence are complex, and that is true. No single law—no set of laws can eliminate evil from the world, or prevent every senseless act of violence in our society.*

*But that can't be an excuse for inaction. Surely, we can do better than this. If there is even one step we can take to save another child, or another parent, or another town, from the grief that has visited Tucson, and Aurora, and Oak Creek, and Newtown, and communities from Columbine to Blacksburg before that—then surely we have an obligation to try.<sup>1</sup>*

-President Barack Obama

## I. INTRODUCTION

Senseless violence and tragedy plagued our nation throughout 2012. As a nation we experienced a seemingly endless stream of heartbreaking events that claimed the lives of several innocent victims and left the survivors wondering why such terrible events occurred. The shooting at a movie theatre in Aurora, Colorado where twelve people were killed and fifty-eight were injured,<sup>2</sup> was soon followed by two more tragedies—a shooting at a Sikh temple in Oak Creek, Wisconsin where six people were killed;<sup>3</sup> and a shooting near the Empire State Building in New York City in which the gunman shot and killed his former co-worker, along with wounding nine bystanders in the altercation, before the police finally shot and killed him.<sup>4</sup> It was this string of events, so close together and so merciless in their robbery of human life, that prompted my research into how these individuals were able to arm themselves and execute not only their plans, but also the lives of innocent human beings.

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1. President Barack Obama, *Remarks by the President at Sandy Hook Interfaith Prayer Vigil*, THE WHITE HOUSE (Dec. 16, 2012, 8:37 PM), [http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil?utm\\_source=wh.gov&utm\\_medium=shorturl&utm\\_campaign=shorturl](http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl).

2. Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html?pagewanted=all&pagewanted=print>.

3. Steven Yaccino et al., *Gunman Kills 6 at Sikh Temple Near Milwaukee*, N.Y. TIMES (Aug. 5, 2012), <http://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html?pagewanted=all>.

4. Wendy Ruderman, *After Empire State Building Shooting, a Gunman's Mother Asks Why*, N.Y. TIMES (Aug. 27, 2012), <http://www.nytimes.com/2012/08/28/nyregion/after-empire-state-building-shooting-jeffrey-johnsons-mother-asks-why.html?pagewanted=all>.

While completing the final revisions of this Comment, our nation was subjected to yet another tragedy, this one somehow more horrific than its predecessors. On December 14, 2012 twenty-year-old Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut “wearing combat gear and armed with semi[-]automatic pistols and a semi[-]automatic rifle.”<sup>5</sup> Children dove under desks and brave teachers hid children in closets as Lanza chose his victims from two classrooms with what was described as “brutal efficiency.”<sup>6</sup> In the aftermath, twenty children between the ages of five and ten were dead along with eight adults, including the principal, the school psychologist, teachers, Adam Lanza’s mother, Nancy Lanza, and the gunman himself.<sup>7</sup> Lanza’s motivation for the horrific events that transpired that day remains unclear.

As President Obama mentioned above, no single law will prevent these types of rampages from occurring.<sup>8</sup> The recent events at Sandy Hook have reopened the wound that is the gun control debate in our nation. While it is uncertain whether more or less stringent gun control legislation would prevent these events from occurring, one thing can be certain—access to firearms is only one of many potential reasons these tragedies occur. The failure to take notice of warning signs, bullying, violent role models, drug use, societal encouragement of violence and extremism, and serious mental illness may all theoretically be part of a gunman’s motivation to commit such a heinous act.<sup>9</sup> Although the scope of why these tragedies occur is immensely broad, this Comment is narrowly focused on how perpetrators of mass violence were able to obtain access to firearms and what recommendations can be made to prevent access by those with a disqualifying mental illness in the future.

This Comment begins by providing a brief discussion of the role of mental illness in our society, followed by an overview of legislation regulating the use of firearms in our nation’s history. Next, the tragedies that occurred at Columbine High School, Aurora, Colorado, Virginia Tech,

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5. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all>.

6. *Id.*

7. *Id.*; see also Miguel Llanos, *Lives Saved by Teachers, Custodian and Even Children in Connecticut School Shooting*, NBC NEWS (Dec. 15, 2012, 11:41 AM) [http://usnews.nbcnews.com/\\_news/2012/12/15/15927932-lives-saved-by-teachers-custodian-and-even-children-in-connecticut-school-shooting?lite](http://usnews.nbcnews.com/_news/2012/12/15/15927932-lives-saved-by-teachers-custodian-and-even-children-in-connecticut-school-shooting?lite) (discussing the brave actions of school administrators, teachers, a custodian, and even children during the shooting).

8. President Barack Obama, *Remarks by the President at Sandy Hook Interfaith Prayer Vigil*, *supra* note 1.

9. Frank Ochberg, *Why Does America Lead the World in School Shootings*, FAREED ZAKARIA: GPS BLOG (Feb. 28, 2012, 7:00 AM), <http://globalpublicsquare.blogs.cnn.com/2012/02/28/why-does-america-lead-the-world-in-school-shootings/>.

and Tucson, Arizona are discussed. By examining each event—the warning signs exhibited by the gunmen, and how they were able to obtain firearms—it becomes apparent that our national system for collecting pertinent information and performing background checks is severely lacking. In light of this, the next section covers occurrences of underreporting by the states to the national background check databases, and explores how the recent cuts to mental health services budgets will only serve to compound the problem and put our nation at risk for continued tragedies. The last section consists of recommendations for improving the reporting of disqualifying mental health data to the national databases in order to prevent access to firearms by prohibited individuals.

## II. THE ROLE OF MENTAL ILLNESS IN AMERICAN SOCIETY

Reports from the National Institute of Mental Health (NIMH) estimate 26.2% of American adults suffer from a diagnosable mental disorder.<sup>10</sup> More specifically, one in seventeen Americans, who are eighteen years old or older, live with a serious mental illness, including schizophrenia, major depression, or bipolar disorder.<sup>11</sup> As a whole, those individuals coping with serious mental illnesses are no more violent than any other member of society and, in fact, are frequently the victims of violence, not the perpetrators.<sup>12</sup> The propensity for violence of those with serious mental illnesses increases when this population is denied access to

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10. *The Numbers Count: Mental Disorders in America*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml> (last visited Mar. 29, 2013); see also SAMHSA NEWS RELEASE, *National Report Finds One-in-Five Americans Experienced Mental Illness in the Past Year*, SAMHSA (Jan. 19, 2012, 12:05 AM), <http://www.samhsa.gov/newsroom/advories/1201185326.aspx> (“Mental illness among adults aged eighteen or older is defined as having had a diagnosable mental, behavioral, or emotional disorder (excluding developmental and substance abuse disorders) in the past year based on criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders*.”).

11. *The Numbers Count*, *supra* note 10; see also SUBSTANCE ABUSE & MENTAL HEALTH SERVS ADMIN., 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS (2010) (finding an estimated 11.4 million adults over the age of eighteen had a diagnosable severe mental illness of a “sufficient duration to meet diagnostic criteria specified within the DSM-IV that has resulted in serious functional impairment, which substantially interfered with or limits one or more major life activities.”).

12. RON HONBERG ET AL., NAT'L ALLIANCE ON MENTAL ILLNESS, STATE MENTAL HEALTH CUTS: A NATIONAL CRISIS 2 (2011), available at <http://www.nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=126233>; see also Lindsay Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 Hous. J. HEALTH L. & POL'Y 149, 150–51 (2010) (“The relationship between mental illness and violence is complex and somewhat murky, and studies have generated diverse findings. Still, a common central theme can be derived from these studies: the majority of violence in the general population is not perpetrated by individuals with mental illness.”).

appropriate treatment, support, and medication.<sup>13</sup> The extensively reported acts of violence discussed in this Comment, specifically Columbine, Aurora, Virginia Tech, and Tucson, have a dual affect—they bring to light the most extreme consequences of inadequate mental health services, but also serve to stigmatize those individuals diagnosed with the same mental health issues as the assailants as being prone to dangerous and unpredictable acts of violence.<sup>14</sup> While “society rallies around people experiencing the symptoms of a heart attack or diabetic crisis . . . we run away from people manifesting the symptoms of a serious psychiatric crisis.”<sup>15</sup>

Mental health legislation is historically a contested topic, often depending on societal and cultural opinions at the time.<sup>16</sup> The origin of this con-

13. HONBERG ET AL., *supra* note 12; see also Edward P. Mulvey & Jess Fardella, *Are the Mentally Ill Really Violent?*, PSYCHOL. TODAY (Nov. 1, 2000), <http://www.psychologytoday.com/print/22419> (listing prior history of violence, substance abuse, and location as additional contributing factors to the likelihood a person with mental illness will commit a violent act and also noting that violence is more likely to occur when the individual is experiencing symptoms of their disorder, such as the panic of an anxiety attack, as opposed to when symptoms are dormant).

14. See HONBERG ET AL., *supra* note 12 (revealing that there is a positive correlation between the notoriety of crime and the amount of public exposure given to mental health issues).

Thanks to the recent headlines highlighting shocking crimes committed by the mentally ill, the common public perception is that random violence is on the rise and that people with mental disorders are especially violence-prone. But most experts agree that such incidences are a statistical rarity. Many also believe that these infractions are not easily predicted or prevented; their relative infrequency makes it difficult to create a profile of individuals prone to such behavior. Individuals diagnosed with mental illness often engage in disturbing behavior without ever committing violent acts.

Edward P. Mulvey & Jess Fardella, *Are the Mentally Ill Really Violent?*, PSYCHOL. TODAY (Nov. 1, 2000), <http://www.psychologytoday.com/print/22419>.

15. See HONBERG ET AL., *supra* note 12 (noting that often the family, friends, and peers of a person exhibiting signs of mental illness are unaware of how to help); see also *The Facts About Stigma and Mental Illness in Diverse Communities*, NAT'L ALLIANCE ON MENTAL ILLNESS 1, <http://www.nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=5148> (last visited Apr. 4, 2013) (reporting that stigma towards mental illness can not only lead to prejudice and discrimination, but also to fear, mistrust, and violence against people living with mental illness and their families).

16. See generally Valerie L. Collins, *Camouflaged Legitimacy: Civil Commitment, Property Rights, and Legal Isolation*, 52 HOW. L.J. 407, 410–43 (2009) (providing a historical overview of mental health and civil commitment procedures in America). See also Katherine Cook, *Revising Assisted Outpatient Treatment Statutes in Indiana: Providing Mental Health Treatment for Those in Need*, 9 IND. HEALTH L. REV. 661, 667 (2012) (discussing the need to develop more effective treatment protocol for those with mental illness, specifically the lack of insight into the need for treatment in some individuals with mental illness, the inappropriateness and high cost of housing seriously mentally ill persons in jails, and the inadequacy of civil commitment statutes).

testation stems from the need to balance several interests—the individual liberty rights of the person with mental illness, the regulation of mental health care facilities, and the need to protect the public.<sup>17</sup> Reform of the debatably insufficient mental health system in the United States comes to the surface when someone slips through the cracks and innocent people are killed or injured, especially when procedures exist that could have prevented the tragedy.<sup>18</sup> While the scope of mental health law is vast and involves issues worthy of scholarly review, this Comment aims to focus on the narrower issue of enabling those with mental health issues with the ability to purchase firearms—something which should be prevented by state and federal law.<sup>19</sup>

### III. FROM THE SECOND AMENDMENT TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK IMPROVEMENT AMENDMENTS ACT: AN OVERVIEW OF APPLICABLE LEGISLATION

The debate over the right to own firearms and the right to regulate gun ownership in our nation began with the wording of the Second Amendment: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>20</sup> While one side of the debate claimed the Second Amendment was only applicable to the maintenance of a state “Militia,” the other side argued the drafters intended the right of individuals to own firearms was guaranteed by the Amendment.<sup>21</sup> The Supreme Court’s decision in *District of Columbia v. Heller*<sup>22</sup> in 2008 held the Second Amendment should

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17. See generally Collins, *supra* note 16, at 407–08 (discussing the various array of interests implicated as the understanding and development of mental health issues evolve).

18. Rachel A. Sherer, *Toward a Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventative Outpatient Treatment*, 4 IND. HEALTH L. REV. 361, 367 (2007).

19. See HONBERG ET AL., *supra* note 12 (listing suicides, homelessness, arrests, incarceration, and drop outs as alternative issues facing those with mental illness).

20. U.S. CONST. amend. II.

21. See generally *D.C. v. Heller*, 554 U.S. 570, 577 (2008) (summarizing the Petitioner’s argument that the Second Amendment protects only the right to possess a firearm when it is related to military service, while the Respondents argue the protection extends to all individuals who own guns through lawful means and use them for law-abiding purposes).

22. See *id.* at 636 (holding that the District of Columbia’s ban on the possession of handguns in the home violated the Second Amendment). The Court also held that a “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense” was unconstitutional. *Id.* The Court noted in their holding that handgun violence is a problem in the United States, but affirmed that the parameters of the Second Amendment take certain courses of action in constructing public policy, such as the one attempted by the District of Columbia, off the table. *Id.* See also Michael Steven

be interpreted as protecting an individual's right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home.<sup>23</sup> While this decision established the right of individual citizens to lawfully own and use firearms, the Court still recognized that appropriate restrictions and regulations could be placed upon this right without infringing upon it.<sup>24</sup>

The Court stated its decision in *Heller* was not intended to invalidate the established prohibitions on the possession of firearms, for example, "the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."<sup>25</sup> A number of these longstanding regulations regarding who may purchase firearms were codified in the Gun Control Act of 1968.<sup>26</sup> The main purpose of this Act was to keep "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."<sup>27</sup> Among the lengthy list of restrictions placed on licensed retailers is a provision prohibiting the sale of

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Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 133, 136, 152, 167 (2008) (discussing in detail, the use of the self-defense justification for the right to bear arms outside of military service in the Supreme Court's decision in *Heller* and exploring the possible roots of this self-defense argument. The author identifies several possible reasons for the majority opinion's use of self-defense arguments, including necessity to preserve public safety, a desire to "reduce disparities in physical strength," and a desire to allow individuals to defend themselves should the government fail to provide necessary security).

23. See *Heller*, 554 U.S. at 576–626 (affirming generally that through the study of commonly used language at the time, compared with the language of the Second Amendment, evidence pointed to the purpose of the Second Amendment as extending beyond use of firearms by militias, but also allowing an individual the right to bear arms for purposes other than those that are military-related); see also Alex Altman, *The Future of Gun Control*, TIME (Jun. 26, 2008), <http://www.time.com/time/printout/0,8816,1818325,00.html> (summarizing that the landmark *Heller* case affirmed for the first time an individual's right to own firearms for purposes beyond military use, and also noting the majority of the Court arrived at the verdict by studying the meaning of the Second Amendment's language in the context of the time period in which it was written).

24. See generally *Heller*, 554 U.S. at 626–27 (admonishing those concerned with Second Amendment rights to refrain from taking the *Heller* opinion as an approval to repeal all prohibitions on firearms); see also Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY LAW 330, 331–32 (2007) (describing in general the most high profile federal laws prohibiting firearms possession by individuals with a history of mental illness that have been enacted within the last fifty years).

25. *Heller*, 554 U.S. at 626–27.

26. See 18 U.S.C. § 922(d) (2012) (prohibiting licensed retailers from selling firearms to felons, fugitives from justice, illegal aliens, or perpetrators of domestic violence crimes).

27. *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)).



firearms to those individuals who have been “adjudicated as a mental defective” or “committed to any mental institution.”<sup>28</sup>

The term “adjudicated as a mental defective” is defined as 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 is a danger to himself or others . . . or lacks the mental capacity to contract or manage his own affairs.”<sup>29</sup> The term “committed to a mental institution” is applicable to describe an individual a court, board, commission, or other lawful authority has formally committed to a mental institution.<sup>30</sup> While “commitment to a mental institution” includes an involuntary commitment of an individual, it does not include those persons voluntarily admitted to a mental facility or who are admitted for observation only.<sup>31</sup>

In addition to preventing licensed retailers from selling firearms to those with mental illness, there is a federal requirement under the Brady Handgun Violence Prevention Act (Brady Act) to perform a background check before selling a firearm to any individual.<sup>32</sup> The Brady Act established the National Instant Criminal Background Check System (NICS) to screen potential customers, but federal law does not mandate that states provide mental health information to state or federal agencies that are responsible for performing background checks.<sup>33</sup> Without a federal obligation to report, many states fail to contribute pertinent mental health information to the NICS database, thereby preventing individuals who are prohibited from purchasing firearms from being identified.<sup>34</sup>

28. 18 U.S.C. § 922(d)(4) (2012).

29. 27 C.F.R. § 478.11(a) (2012).

30. *Id.* § 478.11(b).

31. *Id.*; LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA 69 (2008), available at <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGuns.entire.report.pdf>.

32. See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (“[P]rovid[ing] for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.”).

33. See 28 C.F.R. § 25.4 (2012) (stating federal, state, local, and international law enforcement agencies may *voluntarily* contribute information to the records in the NICS database) (emphasis added).

34. LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA 115 (2008), available at <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGuns.entire.report.pdf>.

[A]s of April 30, 2007, the FBI identified only 23 states as having submitted mental health records to the FBI for the inclusion in NICS. Thirteen of the 23 had submitted less than 50 records. Some had submitted only one record. A few more states began reporting mental health records to NICS soon after the Virginia Tech shooting. Nev-

It became evident to Congress that access to the NICS was not so immediate and was subject to delays attributable to the lack of updates to state criminal records and the absence of automated access to data concerning individuals prohibited from possessing or purchasing firearms due to mental illness, restraining orders, or misdemeanor convictions for domestic violence.<sup>35</sup> In response to these concerns and as a reaction to the then-recent Virginia Tech shooting, Congress enacted the NICS Improvement Amendments Act of 2007, which President Bush quickly signed into law in January 2008.<sup>36</sup> This Amendment provides financial incentives to states for establishing a relief-from-disabilities-program in accordance with the NICS Act.<sup>37</sup> In return for creating such a relief program, a state became eligible for a grant to be used for the purpose of creating an electronic system to provide to the NICS database accurate, current, and relevant information regarding whether an individual was prohibited from possessing firearms.<sup>38</sup>

Although the Act purports to improve the referral system to the NICS, the establishment of a relief program—which is conditional for funding—modified the standard for determining when an individual has been adjudicated as a mental defective or committed to a mental institution.<sup>39</sup> Under previous law, once a person had been deemed to belong to a classification, the classification was permanent.<sup>40</sup> The new regulations re-

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ertheless, according to Attorney General Michael Mukasay, as of November 2007, only 32 states had submitted mental health records to the FBI for inclusion in NICS. *Id.* at 116–17; *see generally* NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTIONS, COMPENDIUM OF STATE LAWS GOVERNING FIREARMS (2010), *available at* <https://docs.google.com/gview?url=http://www.nrila.org/media/2441225/compendium.pdf> (listing main provisions of individual state laws, including exemptions to requirement to refer data to the NICS database).

35. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2 (2008).

36. *Id.*

37. *Id.* § 103(c); *see also id.* § 105 (providing statutory guidelines enabling a person who has been adjudicated as a mental defective or committed to a mental institution to obtain relief from such a classification).

38. *Id.* § 103(b); *see also id.* § 103(e) (authorizing “\$125,000,000 for fiscal year 2009, \$250,000,000 for fiscal year 2010, \$250,000,000 for fiscal year 2011, \$125,000,000 for fiscal year 2012, and \$125,000,000 for fiscal year 2013.”).

39. *See* LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34, at 120 (citing the differences under the Act from prior laws).

40. *Id.* at 120 n.38; *see* § 101(c)(1)–(2) of the NICS Improvement Amendments Act (amending the classifications for reporting to NICS). The Act amended the permanency of these classifications under the following circumstances: (a) “the adjudication or commitment has been “set aside or expunged[.]” (b) the individual was “fully released or discharged from all mandatory treatment, supervision, or monitoring[.]” (c) “a court, board, commission, or other lawful authority has found the person no longer suffers from the mental health condition that was the basis of the adjudication or commitment,” or the individual is deemed rehabilitated through “any procedure available under law[.]” (d) “the

sulted in fewer records being submitted to the NICS database.<sup>41</sup> Without these records in the system, individuals who would have been prevented from purchasing a firearm under the previous law are now able to pass the background check and obtain a firearm.<sup>42</sup> Currently, “seventeen states have less than ten mentally ill persons listed as prohibited gun purchasers” on the NICS database.<sup>43</sup> Additionally, the NICS amendments provide penalties for non-reporting by the states.<sup>44</sup> These penalties were deferred until 2011, but remain at the discretion of the Attorney General until 2017. The penalties become mandatory in 2018; however, the Attorney General can still waive mandatory penalties if there is substantial evidence a state is making reasonable efforts to comply.<sup>45</sup> The non-enforcement of penalties and the reluctance of the states to submit complete records will continue to allow individuals who should be prevented from purchasing firearms under federal law access to weapons.<sup>46</sup> The events discussed below are indicative of what we can expect without procedural improvements to the NICS reporting system.

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adjudication or commitment . . . was based solely on a medical finding of disability without a hearing before the court, board, commission, or other lawful authority, and the person has not otherwise been adjudicated as a mental defective . . . [;]” (e) or the person has been granted “relief” under a “relief from disabilities” program established by the federal agency or department in accordance with the Act’s requirements. *Id.*

41. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34, at 121 n.49.

42. *Id.*; see Knute Berger, *Washington’s Deadly Approach to Gun Control*, CROSSCUT (Sept. 5, 2012), <http://crosscut.com/2012/09/05/mossback/110281/seattle-shooting-ian-stawicki-gun-control/> (“It does little good to say the mentally ill can’t own firearms if you can’t identify who they are, if you can’t disarm them.”).

43. Donna Cooper, *Cuts to Mental Health Services Could Lead to More Spree Killings* (July 31, 2012), <http://www.americanprogress.org/issues/civil-liberties/news/2012/07/31/11871/cuts-to-mental-health-services-could-lead-to-more-spree-killings/>. Six states and the District of Columbia have merely 100 mentally ill persons listed as prohibited gun purchasers. *Id.*

44. NICS Improvement Act of 2007, Pub. L. No. 110-180, § 104, 122 Stat. 2559 (2008). After three years, 3% of grant funds can be withheld if less than 50% of records are complete; after five years, 4% can be withheld if less than 70% of records are complete; and after ten years, 5% can be withheld if less than 90% of records are complete. Lindsey Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL’Y 149, 167–68 (2011).

45. Lindsey Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL’Y 149, 167–68 (2011).

46. *Id.* at 168.

#### IV. FALLING THROUGH THE CRACKS: WHEN FIREARMS GET INTO THE WRONG HANDS

##### A. *Columbine to Aurora: Colorado's Response to Mass Public Violence*

The events that occurred at Columbine High School on April 20, 1999 were, until recently, considered to be the worst school shooting in American history.<sup>47</sup> Eric Harris and Dylan Klebold, both seniors at Columbine High School, stormed the campus with four guns and dozens of pipe bombs, killing twelve classmates, one teacher, and ultimately themselves.<sup>48</sup> Twenty-three others were also injured in the rampage.<sup>49</sup> In the wake of the shootings, the community and society as a whole were left with several questions: Could this shocking tragedy have been prevented? Were there warning signs that were missed? How did two high school seniors obtain firearms?

These questions unearthed the discovery of several pertinent events that eerily foreshadowed Harris and Klebold's massacre. Harris maintained a website where he wrote about the arsenal of weapons he and Klebold were accumulating—including knives, guns, cans of gunpowder, coils of bomb fuse, and over 100 bombs.<sup>50</sup> In addition to Harris's website, Klebold penned a story for class that described an assassination at a school by a man in a black trench coat,<sup>51</sup> and another student reported Harris and Klebold made videotapes of themselves shooting their guns and showed the videos at school.<sup>52</sup> Despite school officials and the Jef-

47. Regina Avila et al., *The Columbine High School Tragedy Timeline*, DENVER POST (2000), <http://extras.denverpost.com/news/timeline.htm>.

48. *Id.* See also Sarah Jane Foreman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 325 (2011) (discussing “[t]he influx of law enforcement into public school can be attributed in part to the national fervor over school violence . . . after Columbine.”).

49. Avila et al., *supra* note 47.

50. See David Kohn, *Columbine: Were There Warning Signs?*, CBS News (Apr. 29, 2009, 9:59 PM), [http://www.cbsnews.com/2100-500164\\_162-286163.html](http://www.cbsnews.com/2100-500164_162-286163.html) (quoting junior Brooks Brown as saying “[w]hen I first saw the Web pages, I was utterly blown away . . . he’s saying he wants to blow me up and he’s talking about how he’s making the pipe bombs to do it with.”); see also HON. WILLIAM H. ERICKSON, COLUMBINE REVIEW COMM’N, REPORT OF GOVERNOR BILL OWENS (2001), available at [http://www.state.co.us/columbine/Columbine\\_20Report\\_WEB.pdf](http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf) (indicating that Harris’s website included diary entries, documented his homicidal and suicidal thoughts, detailed his bomb makings, and named people he would like to kill).

51. See Kohn, *supra* note 50 (reporting Klebold wrote “[t]he man unloadeone (sic) of the pistols across the fronts of [the] four innocents. The streetlights caused a visible reflection off of the droplets of blood . . . I understood his actions.”).

52. *Id.*

erson County Sheriff's Office being aware of these events, Harris and Klebold still managed to slip through the cracks.<sup>53</sup>

In addition to the aforementioned overt acts, both Harris and Klebold exhibited signs of mental health issues prior to their massacre at Columbine.<sup>54</sup> Reports from police indicate Klebold's journal entries described his desire to obtain a gun, commit suicide, and to go on a killing spree.<sup>55</sup> Harris's autopsy indicated he was on the anti-depressant Luvox, typically prescribed for obsessive-compulsive disorders.<sup>56</sup> The specific details of Harris's psychiatric issues, however, remain unknown.

The two seniors were able to obtain firearms through a "straw purchase" by a friend, Robyn Anderson, who purchased the guns at the Tanner Gun Show in December of 1998 from unlicensed sellers.<sup>57</sup> Klebold and Harris also purchased an assault pistol from a pizza shop employee, Mark Manes, who sold it to them for \$500, knowing they were minors.<sup>58</sup> Nothing prevented Harris and Klebold from executing their assassination plan; they were armed with weapons and neither school officials, parents, nor law enforcement officers intervened.

Traditionally, Colorado broadly supported the Second Amendment right to bear arms; however, following the tragedy at Columbine, Colo-

53. *See id.* (reporting that authorities knew information related to Harris and Klebold's threat before the shooting).

54. HON. WILLIAM H. ERICKSON, COLUMBINE REVIEW COMM'N, REPORT OF GOVERNOR BILL OWENS 18 (2001), available at [http://www.state.co.us/columbine/Columbine\\_20Report\\_WEB.pdf](http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf). Klebold wrote in his journal in 1997 about his depression and feelings of social isolation, saying, "I swear—like I'm an outcast, [and] everyone is conspiring against me." *Id.*

55. *Id.*; Greg Toppo, *10 Years Later, The Real Story Behind Columbine*, USA TODAY (Apr. 14, 2009), [http://usatoday30.usatoday.com/news/nation/2009-04-13-columbine-myths\\_N.htm](http://usatoday30.usatoday.com/news/nation/2009-04-13-columbine-myths_N.htm).

56. ERICKSON, *supra* note 54; *Columbine Shooter Was Prescribed Antidepressant*, CNN (Apr. 29, 1999), [http://articles.cnn.com/1999-04-29/health/9904\\_29\\_luvox.explainer\\_1\\_antidepressant-ssris-drugs?\\_s=PM:HEALTH](http://articles.cnn.com/1999-04-29/health/9904_29_luvox.explainer_1_antidepressant-ssris-drugs?_s=PM:HEALTH).

57. *Where'd They Get Their Guns? An Analysis of The Firearms Used in High Profile-Shooting, 1963 to 2001*, VIOLENCE POL'Y CENTER (2001), <http://www.vpc.org/studies/wgun990420.htm>. A straw purchase is defined as one where the actual buyer uses the straw purchaser to execute a form purporting to show the straw purchaser is the actual purchaser, typically because the actual buyer is prohibited from purchasing a firearm under federal law. OFFICE OF ENFORCEMENT PROGRAMS AND SERVS., BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, U.S. DEP'T OF JUSTICE, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2005), available at <http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf>.

58. *Where'd They Get Their Guns?*, *supra* note 57; *see also Gun Provider Pleads Guilty in Columbine Case*, CNN (Aug. 18, 1999), [http://articles.cnn.com/1999-08-18/us/9908\\_18\\_columbine.manes\\_1\\_mark-manes-tec-dc9-felony-charges?\\_s=PM:US](http://articles.cnn.com/1999-08-18/us/9908_18_columbine.manes_1_mark-manes-tec-dc9-felony-charges?_s=PM:US) (reporting that Mark Manes pled guilty to providing a handgun to a minor and possession of a sawed-off shotgun).

rado's legislature and voters began passing more stringent gun restrictions.<sup>59</sup> The legislation specifically addressed requirements governing the sale of firearms at gun shows and legislation banning "straw purchases" of firearms, the very methods Harris and Klebold used to obtain their weapons.<sup>60</sup> In addition to the legislative reaction to Columbine, society as a whole began to recognize the need for research into the minds of the perpetrators of these violent events in order to better educate themselves about behavioral warning signs and determine the steps necessary to prevent these tragedies in the future.<sup>61</sup> While targeted violence is not as common as other problems in the American school system, its impact among the students, parents, and educators is significant.<sup>62</sup> In response to the need for answers, the U.S. Secret Service and the U.S. Department

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59. John Schwartz, *Colorado Gun Laws Remain Lax, Despite Changes After Columbine*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/colorado-gun-laws-remain-lax-despite-changes-after-columbine.html>; see Jack Healy & Dan Frosch, *U.S. Debate on Gun Laws is Put to Test in Colorado*, N.Y. TIMES (Jan. 13, 2013), [http://www.nytimes.com/2013/01/14/us/colorado-may-pass-major-gun-control-legislation.html?\\_r=0&pagewanted=all](http://www.nytimes.com/2013/01/14/us/colorado-may-pass-major-gun-control-legislation.html?_r=0&pagewanted=all) (reviewing the debate in Colorado and other Western states between gun rights activists and those lobbying for stricter gun laws).

60. Schwartz, *supra* note 59 (noting that despite the changes in state law, the Aurora, Colorado shooter was still able to kill twelve people and wound fifty-nine others with weapons that he most likely obtained legally); see also 18 CO. STAT. ANN. 12, § 111 (West 2012) (categorizing the purchase of a firearm on behalf of a person they know to be ineligible to purchase a firearm as a class four felony); 12 CO. STAT. ANN. 26.1, § 101 (West 2012) (establishing procedures required for vendors who wish to sell firearms at gun shows, including the requirement to obtain a background check before all firearm transactions); *Where'd They Get Their Guns?*, *supra* note 57 (noting that the illegal "straw purchase" from a gun show several months prior to the shooting enabled Harris and Klebold to attack the school on April 20, 1999).

61. BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOLS INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 3 (2002), available at [http://www.secretservice.gov/ntac/ssi\\_final\\_report.pdf](http://www.secretservice.gov/ntac/ssi_final_report.pdf).

Littleton, Colorado; Springfield, Oregon; West Paducah, Kentucky; Jonesboro, Arkansas. These communities have become familiar to many Americans as the locations where school shootings have occurred in recent years . . . . In the aftermath of these tragic events, educators, law enforcement officials, mental health professionals, parents and others have asked: "Could we have known that these attacks were planned?" and, if so, "What could we have done to prevent these attacks from occurring?" *Id.* Thus the U.S. Secret Service and the U.S. Department of Education launched a collaborative effort to answer the aforementioned questions. *Id.* at 1.

62. See *id.* at 7 (acknowledging that while "[s]chool shootings are . . . rare," they are a "significant, component of school violence in America"); see also U.S. SECRET SERV. NAT'L THREAT ASSESSMENT CTR., SAFE SCHOOLS INITIATIVE: AN INTERIM REPORT ON THE PREVENTION OF TARGETED VIOLENCE IN SCHOOLS 1 (2000), available at [http://cecp.air.org/download/ntac\\_ssi\\_report.pdf](http://cecp.air.org/download/ntac_ssi_report.pdf) (noting that several recent highly publicized shootings in schools have led to an increase in fear among parents, students, and educators).

of Education collaborated to conduct an in-depth examination of thirty-seven incidents of targeted school violence that took place in our country between December 1974 and May 2000.<sup>63</sup> Two key points from the findings were “most attackers engaged in some behavior, prior to the incident, that caused others concern or indicated a need for help”<sup>64</sup> and “most attackers had access to and had used weapons prior to the attack.”<sup>65</sup> The study found there was no history among the attackers surveyed of having been diagnosed with a mental disorder, but most of the attackers showed some history of suicidal ideations or a history of extreme depression or desperation.<sup>66</sup> Despite gaining some insight into potential warning signs for targeted violence and proposing effective procedures for preventing and handling episodes of mass public violence,

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63. VOSSEKUIL ET AL., *supra* note 61 (defining “targeted violence” as “any incident of violence where a known or knowable attacker selects a particular target prior to their violent attack.”).

64. *Id.* at 11, 26 (explaining that “[t]he behaviors that led other individuals to be concerned about the attacker included both behaviors specifically related to the attack, such as efforts to get a gun, as well as other disturbing behaviors not related to the subsequent attack.”). The study also cited to ten key findings in support of the Initiative’s objectives:

- Incidents of targeted violence at school rarely were sudden, impulsive acts.
- Prior to most incidents, other people knew about the attacker’s idea and/or plan to attack.
- Most attackers did not threaten their targets directly prior to advancing the attack.
- There is no accurate or useful “profile” of students who engaged in targeted school violence.
- Most attackers engaged in some behavior prior to the incident that caused others concern or indicated a need for help.
- Most attackers had difficulty coping with significant losses or personal failures. Moreover, many had considered or attempted suicide.
- Many attackers felt bullied, persecuted or injured by others prior to the attack.
- Most attackers had access to and had used weapons prior to the attack.
- In many cases, other students were involved in some capacity.
- Despite prompt law enforcement responses, most shooting incidents were stopped by means other than law enforcement intervention.

*Id.* at 11–12.

65. *Id.* at 11, 17 (stating “nearly two-thirds of the attackers had a known history of weapons use, including knives, guns and bombs” and “over two-thirds of the attackers acquired the gun (or guns) used in their attacks from their own home or that of a relative”); see REDDY RANDAZZO ET AL., THREAT ASSESSMENT IN SCHOOLS: EMPIRICAL SUPPORT AND COMPARISON WITH OTHER APPROACHES 148 (2005), available at [ncjrs.gov/spotlight/school\\_safety/summary.html](http://ncjrs.gov/spotlight/school_safety/summary.html) (explaining that, in the context of school-based threat assessments, a profile of the typical “school shooter” is gathered from common characteristics between known perpetrators).

66. See VOSSEKUIL ET AL., *supra* note 61, at 21 (reporting that only one-third of those surveyed had ever received a mental health evaluation, and the only indication of prescription of psychiatric medications concerned information regarding the failure to take medication as prescribed).

Columbine would not be the last tragedy Colorado would experience in which the gunman should have been prevented from ever purchasing the weapons used to carry out his plan.

The midnight premiere of the film *The Dark Knight Rises* added a new tragedy of seemingly senseless public violence to our nation's history. Just after the lights dimmed at the start of the movie, James Holmes, wearing a long black coat and armed with an assault rifle, a shotgun, and two .40 caliber Glock handguns, said something to the effect of "I am the Joker" and opened fire as people began to stand up from their seats in fear and confusion.<sup>67</sup> In the end, Holmes was arrested in the movie theatre parking lot after killing twelve people and wounding fifty-eight others.<sup>68</sup>

Following the massacre, Holmes was indicted on 142 criminal charges, including 24 counts of murder, 116 counts of attempted murder, and illegally possessing explosives.<sup>69</sup> The illegal possession of explosives indictment was in regard to the litany of explosives Holmes used to booby-trap his apartment.<sup>70</sup> The trial is slow-moving, and while Holmes' public defenders describe him as mentally ill, there is no indication an insanity plea will be entered.<sup>71</sup> Holmes' indictment was the beginning of an extensive

67. Frosch & Johnson, *supra* note 2.

68. *Id.* For each of the twelve victims, Holmes was charged once for showing a deliberate intent to kill and once for showing extreme indifference to human life. Jack Healy & Dan Frosch, *Colorado Suspect Faces 142 Counts in Shootings*, N.Y. TIMES (July 30, 2012), [http://www.nytimes.com/2012/07/31/us/murder-charges-to-be-filed-in-colorado-shooting.html?\\_r=0](http://www.nytimes.com/2012/07/31/us/murder-charges-to-be-filed-in-colorado-shooting.html?_r=0).

69. Jack Healy & Dan Frosch, *Colorado Suspect Faces 142 Counts in Shootings*, N.Y. TIMES (July 30, 2012), [http://www.nytimes.com/2012/07/31/us/murder-charges-to-be-filed-in-colorado-shooting.html?\\_r=0.1](http://www.nytimes.com/2012/07/31/us/murder-charges-to-be-filed-in-colorado-shooting.html?_r=0.1).

70. *Id.*; see also James Holmes (*Batman Shootings, Aurora, Colo.*), N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/h/james\\_holmes/index.html](http://topics.nytimes.com/top/reference/timestopics/people/h/james_holmes/index.html) (last visited Apr. 1, 2013) (describing Holmes's booby-trapped apartment).

Holmes has also booby-trapped his Aurora apartment with explosives fashioned to tear through the body of anyone who opened the front door . . . which were powerful enough to bring down the entire building. He had left the door unlocked and music blaring, in an apparent effort to lure someone inside . . . . A law enforcement official speaking on the condition of anonymity said that the tripwire was about waist high and that among the hazards found in the roughly 800-square-foot apartment were bullets in jars that were rigged to detonate. Also, there were about thirty aerial shells, typically used in fireworks, which had been fashioned to be explosive devices.

*Id.*

71. See Healy & Frosch, *supra* note 69 ("Holmes spent much of the hearing gazing wide-eyed in front of him or staring at the floor, glancing once at the ceiling lights" with "his neon orange-pink hair combed flat to his head."); see also Jack Healy, *Death Penalty is Sought in Shooting at Colorado Theatre*, N.Y. TIMES (APR. 1, 2013), [http://www.nytimes.com/2013/04/02/us/prosecutors-seek-death-penalty-against-james-holmes.html?\\_r=0](http://www.nytimes.com/2013/04/02/us/prosecutors-seek-death-penalty-against-james-holmes.html?_r=0) (In deciding to pursue the death penalty, prosecutors rejected a plea offer floated last week by



investigation into how an intelligent student with a bright future became the mastermind behind the deadliest mass shooting in Colorado since Columbine.<sup>72</sup>

Reports from Holmes' former co-worker expressed surprise that he could commit such an atrocity.<sup>73</sup> The only blemish on Holmes' criminal history was a traffic citation for speeding and he had no history of involvement with campus police at the university in California where he received his bachelor's degree.<sup>74</sup> While Holmes was involved in the online social network Adult Friend Finder, there were no online messages or clues to offer insight into his motivation for the massacre.<sup>75</sup> Signs of Holmes' unraveling first began to show at the University of Colorado's Denver-Anschutz Medical Campus where Holmes was in the process of withdrawing because of academic problems.<sup>76</sup> Holmes also saw psychia-

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Mr. Holmes's lawyers, in which their client would have pleaded guilty to the shooting in exchange for life in prison with no chance of parole").

72. See Jack Healy & Serge Kovalski, *Before and After the Massacre, Puzzles Line Suspect's Path*, N.Y. TIMES (July 21, 2012), <http://www.nytimes.com/2012/07/22/us/pain-and-puzzles-in-wake-of-deadly-colorado-attack.html?pagewanted=all> (describing Holmes as a top science student who had won a prestigious scholarship from the National Institute of Health to finance his studies at the University of Colorado in pursuit of his PhD in neuroscience).

73. Frosch & Johnson, *supra* note 2 (quoting Billy Kromka, a pre-med student who worked with Holmes for three months as a research assistant); see also Healy & Kovalski, *supra* note 72 (interviewing neighbors and friends from Holmes' hometowns in California and Aurora, Colorado yielded descriptions of Holmes as "a young man as anonymous as a glass of water," and "really shy, really quiet, but really nice and sweet.").

74. Healy & Kovalski, *supra* note 72; see also James Holmes, 24, *Identified as Suspect in Deadly Mass Shooting at Aurora, Colo., Movie Theater*, CBS NEWS (July 20, 2012), [http://www.cbsnews.com/8301-201\\_162-57476449/james-holmes-24-identified-as-suspect-in-deadly-mass-shooting-at-aurora-colo-movie-theater/](http://www.cbsnews.com/8301-201_162-57476449/james-holmes-24-identified-as-suspect-in-deadly-mass-shooting-at-aurora-colo-movie-theater/) (stating "Holmes doesn't appear to have a criminal record in Colorado or in San Diego, Calif., where he graduated from high school in 2006.").

75. See Healy & Kovalski, *supra* note 72 (claiming Holmes posted a picture of himself on the Adult Friend Finder website with orange hair saying he was interested in a fling); see also Christine NG & Olivia Katrandjian, *Colorado Movie Shooting: Who is James Holmes?*, ABC NEWS (July 21, 2012), <http://abcnews.go.com/US/colorado-movie-shooting-james-holmes/story?id=16829552> ("With no apparent Facebook or Twitter account, Holmes has essentially no online footprint, virtually unheard of for someone of his age.").

76. Frosch & Johnson, *supra* note 2 (quoting Jackie Brinkman, a spokeswoman for the University of Colorado Denver-Anschutz Medical School); see James Holmes (*Batman Shootings, Aurora, Colo.*), N.Y. TIMES, [http://topics.nytimes.com/top/reference/times-topics/people/h/james\\_holmes/index.html?8qa](http://topics.nytimes.com/top/reference/times-topics/people/h/james_holmes/index.html?8qa) (last visited Apr. 1, 2013) (reporting that Holmes had initiated the withdrawal process, but he never finished the required paperwork). Holmes's classmates reported that his behavior had begun to change in the spring of 2012 as he became more withdrawn and performed poorly on oral exams—a nod to the academic problems that prompted his withdrawal from school. *Id.*

trist Dr. Lynne Fenton, the medical director of student mental health services at the University of Colorado campus where Holmes was a student.<sup>77</sup> Dr. Fenton testified that she wrote a four-page note after her session with Holmes and contacted campus security to express her concerns and to seek more information on Holmes.<sup>78</sup> The campus official Dr. Fenton spoke to informed her: “nothing Mr. Holmes disclosed to Dr. Fenton rose to the threshold set by Colorado law to hospitalize someone involuntarily.”<sup>79</sup>

A few days after the shooting, the police discovered a notebook in the campus mailroom that Holmes mailed to Dr. Fenton hours before the shooting, but the public defenders working for Holmes argued the notebook is protected by doctor-patient privilege.<sup>80</sup> Holmes’ lawyers suggested he reached out to Dr. Fenton minutes before the shooting by making calls to the university hospital switchboard.<sup>81</sup> Two weeks prior to the shooting, Holmes sent a text message to a classmate asking if she had ever heard of “dysphoric mania,” which is a form of bipolar disorder characterized by a combination of the frantic energy of mania with the

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77. See Jack Healy, *Psychiatrist Questioned in Colorado Shootings*, N.Y. TIMES (Aug. 30, 2012), <http://www.nytimes.com/2012/08/31/us/psychiatrist-of-james-holmes-questioned-in-colorado-movie-theater-shootings.html> (claiming Holmes only met once with Dr. Fenton on June 11, 2012); see also *Defense: Colo. Shooting Suspect James Holmes Made Call 9 Minutes Before Attack*, CBS NEWS (Aug. 30, 2012), [http://www.cbsnews.com/8301-201\\_162-57503831/defense-colo-shooting-suspect-james-holmes-made-call-9-minutes-before-attack/](http://www.cbsnews.com/8301-201_162-57503831/defense-colo-shooting-suspect-james-holmes-made-call-9-minutes-before-attack/) (stating Dr. Fenton testified that she had met with Holmes on June 11, 2012 and believed there to be no doctor-patient privilege by July 19, 2012).

78. Healy, *Psychiatrist Questioned in Colorado Shootings*, *supra* note 77.

79. *James Holmes (Batman Shootings, Aurora, Colo.)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/h/james\\_holmes/index.html](http://topics.nytimes.com/top/reference/timestopics/people/h/james_holmes/index.html) (last visited Apr. 1, 2013). *But see* COLO. REV. STAT. ANN. § 27-65-105(1)(a)(I) (West 2012) (“When any person appears to have a mental illness and, as a result of such mental illness, appears to be an imminent danger to others or to himself or herself or appears to be gravely disabled, then a person specified in subparagraph (II) of this paragraph (a), each of whom is referred to in this section as the ‘intervening professional,’ upon probable cause and with such assistance as may be required, may take the person into custody, or cause the person to be taken into custody, and placed in a facility designated or approved by the executive director for a seventy-two-hour treatment and evaluation.”).

80. See *James Holmes (Batman Shootings, Aurora, Colo.)*, *supra* note 79 (“Prosecutors said they were giving up their fight to examine a notebook [by] Mr. Holmes . . . because they anticipated that it might ultimately be entered into evidence by Mr. Holmes’s lawyers as part of an insanity defense, and thus they would get to see it anyway.”); see also Healy, *Psychiatrist Questioned in Colorado Shootings*, *supra* note 77 (rejecting the public defender’s argument of privilege, prosecutors argued Holmes had not been a patient of Dr. Fenton’s for over a month and likely intended to be “dead or in custody or something else, on the run, when th[e] package was received[.]”).

81. Healy, *Psychiatrist Questioned in Colorado Shootings*, *supra* note 77. As it turned out, Dr. Fenton was not aware of Mr. Holmes’s attempt to talk to her that night. *Id.*

dark thoughts and paranoid delusions of major depression.<sup>82</sup> She responded by asking Holmes if dysphoric mania was manageable with treatment and he answered that it was, adding that she should avoid him “because I am bad news.”<sup>83</sup> Despite these warning signs and the referral by Dr. Fenton to campus authorities, Holmes was still able to obtain the firearms and ammunition used to end the lives of twelve people and injure many more.

In the two months prior to the massacre, Holmes legally purchased four guns at gun shops in the area and over six thousand rounds of ammunition over the Internet.<sup>84</sup> The lack of documented psychiatric issues meant Holmes would not have raised a red flag under current, or even more restrictive, screening procedures.<sup>85</sup> Despite the changes in firearm legislation that occurred after Columbine, Colorado remained an arguably gun-friendly state.<sup>86</sup> A permit is required to carry a concealed weapon, but Colorado is characterized as one of thirty-eight “shall issue” states, meaning if a person meets all the requirements to own a firearm,

82. *James Holmes (Batman Shootings, Aurora, Colo.)*, *supra* note 79 (last visited Apr. 1, 2013); see also González-Pinto et al., *Epidemiology, Diagnosis and Management of Mixed Mania*, 21 CNS DRUGS 611 (2007) (confirming that states of dysphoric or mixed mania have been recognized and described for centuries). Patients with dysphoric mania generally face a worse prognosis than those with pure manic forms. *Id.* at 614. They are also more likely to be suicidal. *Id.* at 616. Adequate treatment can significantly decrease mortality, but the recovery is longer. *Id.*

83. *James Holmes (Batman Shootings, Aurora, Colo.)*, *supra* note 79.

84. See Frosch & Johnson, *supra* note 2 (quoting Aurora’s police chief as saying that the drum magazine purchased by Holmes would have allowed him to shoot fifty or sixty rounds in one minute); see also Healy & Kovaleski, *supra* note 72 (“Over the last two months, he bought two handguns, a shotgun and an assault rifle from local gun dealers. He bought and stockpiled 6,000 rounds of ammunition online. The police said he began to receive large deliveries to his home and work.”).

85. Schwartz, *supra* note 59. But see *Rachel Marsden: Put Prospective Gun Ownership Under the Microscope*, CHI. TRIBUNE (Dec. 18, 2012), <http://www.chicagotribune.com/sns-201212181200—tms—amvoicesctnav-a20121218-20121218,0,6491111.column> (describing the guns laws in Canada, which require a safety screening to a determine whether an applicant has “threatened or attempted suicide, suffered from or been diagnosed or treated by a medical practitioner for: depression; alcohol; drug or substance abuse; behavioral problems; or emotional problems.”).

86. See COLO. REV. STAT. ANN. § 18-12-105(2) (West 2012) (recognizing many forms of gun ownership as legal, while only placing limitations or banning very few); David B. Kopel, *Colorado Consensus on Gun Laws*, CATO INST. (July, 26, 2012), <http://www.cato.org/publications/commentary/colorado-consensus-gun-laws> (describing Colorado’s plethora of favorable gun laws); Schwartz, *supra* note 59 (noting that Colorado has not tightened gun control laws). Gun rights organizations have successfully blocked a University of Colorado rule prohibiting concealed weapons on campus and residents of Colorado are permitted to carry firearms in a vehicle, provided their intended use is lawful, such as for protection of self or property. *Id.*

the state *must* issue a concealed weapon permit.<sup>87</sup> Much like the legislation that passed following the Columbine shootings, proposed legislation post-Aurora addresses the methods Holmes used to obtain firearms.<sup>88</sup>

Democratic Representatives Diana DeGette and Carolyn McCarthy introduced the Stop Online Ammunition Sales Act, which is intended to make the anonymous stockpiling of ammunition over the Internet more difficult.<sup>89</sup> In response, pro-gun advocates suggest that the Act is a “tired strategy of exploiting a tragedy to carve out gun rights.”<sup>90</sup> Although debate over firearms tends to flood the media following a tragedy like that in Aurora, research shows public opinion following these types of events remains constant in regard to gun laws and regulations.<sup>91</sup> Nonetheless, on both sides of the debate there is a general consensus that the decrease in mental health spending has had an impact on the recent prevalence of gun violence.<sup>92</sup>

Since 2009 Colorado has decreased their Mental Health Budget by 7.8%, or \$9.7 million dollars.<sup>93</sup> Furthermore, while the national average for per capita spending on mental health was \$122.90 per person, Colo-

87. COLO. REV. STAT. ANN. § 18-12-105(2) (West 2012); Schwartz, *supra* note 59. This is in contrast to other states, known as “may issue” states, which permits sellers to exercise discretion in deciding whether or not to issue a permit when an applicant meets all of the statutory requirements. *Id.*

88. Representatives DeGette and McCarthy put forth a house bill that called for stricter regulation of the sale of ammunition, licensing, and recordation of bulk ammunition purchases. H.R. 6241, 112th Cong. § 2 (2012).

89. H.R. 6241, 112th Cong. § 2 (2012); see Scot Kersgaard et al., *Democratic U.S. Reps., Lead the Way Toward Tighter Gun Control After Aurora Shooting*, HUFFINGTON POST (Aug. 7, 2012), [http://www.huffingtonpost.com/2012/08/07/aurora-shooting-prompts-c\\_n\\_1752390.html](http://www.huffingtonpost.com/2012/08/07/aurora-shooting-prompts-c_n_1752390.html) (quoting DeGette as saying “in the wake of another violent tragedy it’s impossible to understand why an ordinary citizen can get a hold of a high capacity magazine that can fire 100 rounds in 90 seconds.”).

90. Fawn Johnson, *Why Aurora Shooting Won’t Affect Gun Law*, THE ATLANTIC, <http://www.theatlantic.com/politics/archive/2012/07/why-the-aurora-shooting-wont-affect-gunlaws/260134/> (last visited Apr. 1, 2013).

91. See PEW RESEARCH CTR., VIEWS ON GUN LAWS UNCHANGED AFTER AURORA SHOOTINGS 1 (2012), available at <http://www.people-press.org/files/legacy-pdf/7-30-12%20Gun%20Control%20Release.pdf> (reflecting a roughly 50/50 split on the issue of gun rights and gun control in a poll of 1,000 adults).

92. See Scot Kersgaard et al., *Democratic U.S. Reps., Lead the Way Toward Tighter Gun Control After Aurora Shooting*, HUFFINGTON POST (Aug. 7, 2012), [http://www.huffingtonpost.com/2012/08/07/aurora-shooting-prompts-c\\_n\\_1752390.html](http://www.huffingtonpost.com/2012/08/07/aurora-shooting-prompts-c_n_1752390.html) (“If we want to make a difference in society, we need to get back to investing in mental health. We had mental institutions before Reagan, but we threw out the baby with the bathwater and today we have a lot of vulnerable people.”). Representatives from both sides of the debate agree more government spending should be allocated for mental health services if we as a society want to prevent the type of incident that occurred in Aurora. *Id.*

93. HONBERG ET AL., *supra* note 12.

rado was far below that at \$86.83 per person.<sup>94</sup> Two serious mental illnesses—schizophrenia and depression—begin manifesting in adolescence. A man like Holmes, who is intelligent enough to get into a good school, can become deluded, leading to rejection and isolation by his peers.<sup>95</sup> Unfortunately, in Holmes' case, and in the massacre at Virginia Tech, and the shooting of Congresswoman Gabrielle Giffords in Tucson, Arizona (both discussed below), those delusions became lethal.<sup>96</sup> Arguably these tragedies occurred because our society lacks an effective system of mental healthcare services and federal and state laws contain contrasting definitions as to what criteria warrants reporting to the NICS database.

### B. *The Tragedy at Virginia Tech*

Similar to James Holmes, Seung-Hui Cho was a highly intelligent young man who became plagued by increasingly erratic behavior, ending in a massacre comparable to events that occurred in Aurora five years later.<sup>97</sup> On April 16, 2007 Cho commenced a shooting rampage at Virginia Polytechnic Institute and State University (Virginia Tech), killing thirty-two students and faculty, and injuring seventeen others.<sup>98</sup>

Much like Holmes, Cho was described as being extremely shy and socially isolated.<sup>99</sup> In the seventh grade Cho was diagnosed with severe social anxiety disorder, and received counseling as part of his treatment; during that counseling he was diagnosed with major depression and prescribed an anti-depressant.<sup>100</sup> Isolation and a resistance to therapy characterized Cho's high school years.<sup>101</sup> By the time Cho enrolled at Virginia Tech, there was no affirmative obligation for Cho to disclose his prior mental health issues to the school, but there were also no laws preventing Virginia Tech from requesting the information from a student after they were admitted.<sup>102</sup>

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94. *Id.* at V.

95. Ochberg, *supra* note 9.

96. *Id.*

97. See Richard Brusca & Colin Ram, *A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 141, 142 (2010) (describing the Virginia Tech incident).

98. *Id.*

99. *Id.* at 154.

100. *Id.* at 155–56.

101. *Id.* at 157.

102. *Id.* at 158; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2010) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”). Notably, once an admissions decision is made, the Rehabilitation Act of 1973

During Cho's junior and senior years at Virginia Tech, his mental health deteriorated, yet neither university personnel nor Cho's parents were informed of his increasingly erratic and disturbing behavior.<sup>103</sup> After several negative experiences with Cho, notice was given to various administrators including the Dean of Student Affairs, the Cook Counseling Center, the University Care Team,<sup>104</sup> and the Virginia Tech Police Department to inform all of them about Cho's violent writings and concern about his behavior.<sup>105</sup> Between late November and early December 2005, Cho was involved in three incidents with the Virginia Tech Police Department.<sup>106</sup> The final episode precipitated Cho's evaluation by a licensed clinical social worker who believed Cho was "an imminent danger to self or others," thereby leading her to obtain a temporary detaining order to involuntarily hospitalize Cho overnight.<sup>107</sup> A commitment hearing the morning after Cho's stay in the psychiatric hospital concluded he "present[ed] an imminent danger to himself as a result of mental illness" and ordered follow up treatment, which was scheduled at the Cook Counseling Center on the Virginia Tech Campus.<sup>108</sup> Cho received yet another triage, this time in person at the counseling center, but he refused

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does not prevent an educational institution from inquiring about an incoming student's disability status in order to make accommodations. *See* 34 C.F.R. § 104.42(b)(4) (2010) (allowing educational institutions to make confidential inquiries after a student has been admitted).

103. *See* Brusca & Ram, *supra* note 97, at 160 (referring to Cho's stabbing the carpet in a student's room during a party, his disruptive behavior in the classroom, and the violent nature of his writings).

104. *See id.* at 161 (describing the University Care Team as a "group of administrators charged with monitoring students with problems").

105. *Id.* at 160. Although the counselor who reviewed Cho's writings didn't find a specific threat, they did suggest that Cho receive counseling, and even though Cho scheduled an appointment, he never physically attended a counseling session. *Id.*

106. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2006: REPORT OF THE VA. TECH REVIEW PANEL 45-47 (2007), available at <http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/FullReport.pdf>. The first two complaints involved female students alleged they were receiving unwanted communications and attention from Cho and the third involved a concerned roommate who contacted the police to report Cho's suicidal ideations. *Id.* *See also* Brusca & Ram, *supra* note 97, at 161-62 (recounting the events of the Fall of 2005 regarding complaints against Cho and campus police's involvement).

107. VA. TECH REVIEW PANEL, *supra* note 106, at 47. The evaluation included interviews with Cho, the campus police officers, and Cho's roommate and suitemates. *Id.* *See also* Brusca & Ram, *supra* note 97, at 162 (noting the social workers findings regarding Cho's mental status).

108. VA. TECH REVIEW PANEL, *supra* note 106, at 48; Brusca & Ram, *supra* note 97, at 163.

to arrange a follow up appointment.<sup>109</sup> Cho's failure to return for treatment was never reported to the court, the University Care Team, or Cho's parents.<sup>110</sup> In fact, Cho's parents were never informed of any of the problems their son was having at school, nor told of his involuntary detainment or commitment hearing results.<sup>111</sup> And most tragically, the results of his commitment hearing were never transmitted to the NICS database.<sup>112</sup>

The failure to report Cho's mental health issues to the NICS database meant Cho was able to circumvent two separate background checks and purchase the two guns he used to assassinate thirty-two students and then end his own life.<sup>113</sup> Under federal law Cho should have been prevented from purchasing a gun after the commitment hearing following his overnight detention because he was an imminent danger to himself or others.<sup>114</sup> As previously mentioned, the Gun Control Act prohibits the

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109. VA. TECH REVIEW PANEL, *supra* note 106, at 49. "It was the policy of the Cook Counseling Center to allow patients to decide whether to make a followup [sic] appointment." *Id.* See also Brusca & Ram, *supra* note 97, at 163 (indicating Cho had three encounters with Cook Counseling Center in fifteen days, but that still did not prompt the center to arrange follow-up treatment).

110. VA. TECH REVIEW PANEL, *supra* note 106, at 49; see also Brusca & Ram, *supra* note 97, at 163 (noting that very little information sharing occurred).

111. VA. TECH REVIEW PANEL, *supra* note 106, at 63. See Michael Luo, *Cho's Mental Illness Should Have Blocked Gun Sale*, N.Y. TIMES (Apr. 20, 2007), <http://www.nytimes.com/2007/04/20/us/20cnd-guns.html> (arguing the failure in reporting Cho's mental illness to the NICS database was due to Virginia's lack of enforcement of the implicated federal laws); Jeff Brady, *States Aren't Submitting Records To Gun Database*, NPR (Aug. 16, 2012, 12:44 PM), <http://www.npr.org/2012/08/16/158932528/states-arent-submitting-records-to-gun-database> (citing Virginia's lack of full participation in the NICS as the reason for Cho's name not being reported).

112. Michael Luo, *Cho's Mental Illness Should Have Blocked Gun Sale*, N.Y. TIMES (Apr. 20, 2007), <http://www.nytimes.com/2007/04/20/us/20cnd-guns>; Jeff Brady, *States Aren't Submitting Records To Gun Database*, NPR (Aug. 16, 2012, 12:44 PM), <http://www.npr.org/2012/08/16/158932528/states-arent-submitting-records-to-gun-database> (citing Virginia's lack of full participation in the NICS as the reason for Cho's name was not reported).

113. Lindsay Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL'Y 149, 166 (2010). See *Campus Killer's Purchases Apparently Within Gun Laws*, CNN (Apr. 19, 2007), [http://articles.cnn.com/2007-04-19/us/gun.laws\\_1\\_gun-dealer-gun-laws-gun-buyers?\\_s=PM:US](http://articles.cnn.com/2007-04-19/us/gun.laws_1_gun-dealer-gun-laws-gun-buyers?_s=PM:US) (noting Cho purchased one .22 caliber handgun in February 2007 and one 9mm pistol in March 2007). See also Luo, *supra* note 112 (highlighting the difference between Virginia law and federal law regarding the ability of those with mental health issues to purchase firearms and underscoring the difficulty states have in actually enforcing the federal requirements).

114. See 18 U.S.C. § 922(d)(4) (2012) (making it illegal for a person to sell or give a firearm to another person who "has been adjudicated as a mental defective or has been committed to any mental institution."). See also Luo, *supra* note 112 (discussing how and why the federal law should have applied in Cho's case); Maura Reynolds & Josh Meyer,

sale of firearms to anyone who “has been adjudicated as a mental defective,” as Cho was.<sup>115</sup> Virginia law, however, is phrased differently than the federal statute.<sup>116</sup> The referral form used in Virginia to report a mental health disqualification for purchasing a firearm only lists involuntary commitment or a ruling someone is mentally incapacitated as reasons for notifying state police.<sup>117</sup> Because Cho’s psychiatric evaluation did not qualify as an involuntary commitment under Virginia law, it was not reported and he was legally able to purchase a firearm.<sup>118</sup> The events that occurred at Virginia Tech inspired the passage of the NICS Improvement Amendments Act in 2007, theoretically to improve information sharing which would enable gun sellers to conduct more complete background checks.<sup>119</sup> Unfortunately, it was not until the tragedy at Virginia

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*Cho Was Under The Gun Sales Radar*, L.A. TIMES (Apr. 20, 2007), <http://articles.latimes.com/2007/apr/20/nation/na-guns20> (quoting Paul Helmke, President of the Brady Campaign to Prevent Gun Violence in 2007, as saying, “there is clear evidence that since a Virginia judicial officer found that [Cho] presented ‘an imminent danger to himself as a result of mental illness’ that he . . . should have failed his background checks,” but also noting Virginia officials’ argument that they adhered to the law).

115. See 18 U.S.C. § 922(d)(4) (2012) (defining “adjudicated” as a mental defective to include a “determination by a court, board, commission or other lawful authority” that a person “is a danger to themselves or others.”). Refer to the discussion of the statute’s definitions and meaning in Part III of this comment. See also Luo, *supra* note 112 (examining the intricacies of the federal law and its application to Cho’s mental illness and firearm purchases).

116. Compare 18 U.S.C. § 922(d) (2012) (prohibiting licensed retailers from selling firearms to minors, felons, fugitives from justice, illegal aliens, or perpetrators of domestic violence crimes) with 18.2 VA. CODE ANN. 308.1 § 2 (West 2012) (stating it is unlawful for a person who has been involuntarily admitted to a facility, mandated to participate in outpatient treatment, or temporarily detained and subsequently agreed to voluntary admission to purchase, possess, or transport a firearm).

117. Luo, *supra* note 112; see VA CODE ANN. § 18.2-308.1:2 (2012) (declaring it unlawful for a person adjudicated legally incompetent or incapacitated to purchase, possess, or transport a firearm); 18.2 VA. CODE ANN. 308.1 § 2 (West 2012).

118. Luo, *supra* note 112. Arguably, the fact that Cho was ordered to participate in mandatory outpatient treatment should have prevented him from purchasing a gun under Virginia law. See VA. CODE ANN. § 18.2-308.1:3 (2012) (stating it is unlawful for a person who has been involuntarily admitted to a facility, mandated to participate in outpatient treatment, or temporarily detained and subsequently agreed to voluntary admission to purchase, possess, or transport a firearm).

119. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2259 (2008). According to the Act’s findings:

On April 16, 2007, a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded 17 more, and then took his own life. The shooting, the deadliest campus shooting in [U.S.] history, renewed the need to improve information-sharing that would enable Federal and State law enforcement agencies to conduct complete background checks on potential firearms purchasers. In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting. Im-



Tech occurred that the discrepancy between federal law and Virginia's law allowing Cho to purchase firearms received any attention.<sup>120</sup>

As evidenced above, Cho's increasingly erratic behavior caused concern among school administrators and illustrated his need for comprehensive mental health services, not just the triage over the phone he received from the counseling center.<sup>121</sup> One might assume the tragedy at Virginia Tech would inspire the expansion of mental health services; yet, Virginia has unfortunately made budget cuts to mental health services, resulting in the loss of services for the extremely vulnerable population of those with mental illnesses.<sup>122</sup> Those suffering from mental illness and bearing the brunt of the budget cuts were not the only ones to notice the inadequate services.

On February 10, 2011, the Department of Justice notified the state of Virginia that it "fails to provide services to individuals with intellectual and developmental disabilities in the most integrated setting appropriate to their needs in violation with the ADA (Americans with Disabilities Act)."<sup>123</sup> From 2009 to 2012 Virginia cut mental health spending from \$424.3 million to \$386.6 million.<sup>124</sup> This 8.9% decrease constituted the 11th largest cut in mental health spending in all fifty American states.<sup>125</sup> Furthermore, in 2009 Virginia spent \$93.81 per person on mental health services, far less than the national average of \$122.90.<sup>126</sup>

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proved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS.

*Id.*

120. See Luo, *supra* note 112 (suggesting the "oversight on the federal law in Virginia has probably been occurring for some time" and it is not until "something like [the Virginia Tech shooting]," that "people start to pay attention to this.").

121. Brusca & Ram, *supra* note 97, at 163.

122. HONBERG ET AL., *supra* note 12, at 4. This report by the National Alliance on Mental Illness breaks down the downturn in finances allocated by the several states to mental health care, stating:

In Virginia, the Inspector General for Behavioral Health and Developmental Services released a report estimating that about 200 individuals determined to pose a threat to themselves or others were turned away from mental health treatment facilities because there were no beds available, a practice known as "streeting."

*Id.*; G. DOUGLAS BEVELACQUA, OFFICE OF THE INSPECTOR GENERAL SEMI-ANNUAL REPORT IN-BRIEF 7 (2011), available at <http://www.oig.virginia.gov/documents/SAR-10-1-11-03-31-12.pdf>.

123. G. DOUGLAS BEVELACQUA, OFFICE OF THE INSPECTOR GENERAL SEMI-ANNUAL REPORT 26 (2011), available at <http://www.oig.virginia.gov/documents/SAR-10-1-11-03-31-12.pdf> (citing "inadequate community-based services, the misalignment of resources that privileges state institutions, and a flawed discharge planning process as systematic failures causing unnecessary institutionalization.").

124. HONBERG ET AL., *supra* note 12.

125. *Id.*

126. *Id.* at 5.

This negative assessment had a positive impact in the form of a wakeup call to Virginia political officials. The Office of the Inspector General was established in response to the Department of Justice's concerns and was intended to provide an "independent system of accountability to the Governor, the General Assembly, service recipients and other interested parties for the services provided by the . . . Department of Behavioral Health and Developmental Services."<sup>127</sup> Although negotiations between Virginia and the Department of Justice continue, "it is certain that services for Virginians with behavioral health and developmental disabilities will be changed going forward."<sup>128</sup>

### C. *Tucson, Arizona and the Shooting of Congresswoman Gabrielle Giffords*

The deficiencies in the laws regarding the purchase of firearms by those with mental illness was once again highlighted by the shooting on January 8, 2011 in Tucson, Arizona during which Jared Lee Loughner killed six people and injured thirteen others, including former U.S. Representative Gabrielle Giffords.<sup>129</sup> Loughner opened fire with a 9mm Glock 19 pistol in a supermarket parking lot where Giffords was making a public appearance.<sup>130</sup> Following the shooting, Loughner was diagnosed with schizophrenia and forced to take psychotropic medication.<sup>131</sup> Loughner's court-appointed psychologist, Christina Pietz "warned that he remained severely disturbed and might not be able to cope with" the stresses of the 'lengthy trial' process awaiting him."<sup>132</sup> Over time Pietz concluded that Loughner's mental health was improving and she believed he was compe-

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127. Letter from G. Douglas Bevelacqua, Inspector Gen. for Behavioral Health and Developmental Services, to Governor Robert F. McDonnell, The Gen. Assembly of Virginia, and The Joint Comm'n on Health Care (May 30, 2011).

128. BEVELACQUA, OFFICE OF THE INSPECTOR GENERAL SEMI-ANNUAL REPORT IN-BRIEF, *supra* note 123, at 1.

129. Stephen Rex Brown, *Jared Loughner Sentenced to Life in Prison*, N.Y. DAILY NEWS (Nov. 9, 2012, 1:12 AM), [http://articles.nydailynews.com/2012-11-08/news/34999202\\_1\\_loughner-susan-hileman-gabrielle-giffords](http://articles.nydailynews.com/2012-11-08/news/34999202_1_loughner-susan-hileman-gabrielle-giffords).

130. Michael Kiefer & Sean Holstege, *Giffords, Others Confront Loughner at Tucson Sentencing*, ARIZ. REPUBLIC (Nov. 9, 2012, 2:35 PM), <http://www.usatoday.com/story/news/nation/2012/11/08/loughner-sentencing-tucson-shooting-giffords/1691239/>.

131. *Jared Lee Loughner Gets 7 Life Sentences for Tucson Shootings*, CBS NEWS (Nov. 8, 2012, 7:46 PM), [http://www.cbsnews.com/8301-201\\_162-57547195/jared-lee-loughner-gets-7-life-sentences-for-tucson-shooting-rampage/](http://www.cbsnews.com/8301-201_162-57547195/jared-lee-loughner-gets-7-life-sentences-for-tucson-shooting-rampage/).

132. Brown, *supra* note 129.

His mug shot was haunting: maniacal smile, shaved head, shaved eyebrows. He underwent forcible psychotropic drug treatments. But he also refused to believe Giffords had survived the point-blank shooting, even after being shown a video that showed her emotional recovery. He only accepted the truth after medicine he was administered took effect.

tent to stand trial and understand the charges against him, notwithstanding his mental illness.<sup>133</sup>

Consequently, on November 8, 2012 Loughner pleaded guilty to nineteen federal charges and was sentenced to seven consecutive life terms, followed by 140 years in prison without the option of parole.<sup>134</sup> Judge Larry Burns, the presiding judge, believed an insanity defense would likely be unsuccessful because the evidence suggested Loughner was aware of his actions and knew they were wrong.<sup>135</sup> Also, the sentencing hearing served as an opportunity for the victims of the Loughner's violence to confront the man who changed their lives forever.<sup>136</sup> Among the sentiments of sadness, disbelief, and struggle was a plea to government officials take more action concerning gun control and psychiatric treatment.<sup>137</sup>

The Virginia Tech events resulted in the implementation of resources to deal with students who pose a risk to the school.<sup>138</sup> Prior to the shooting at the supermarket, Loughner was a student at Pima Community Col-

*Id.* Two other medical experts who evaluated Loughner concluded he suffered from schizophrenia, disordered thinking, and delusions. Joseph Schuman, *Jared Lee Loughner Trial: Judge Grants Doctors More Time To Restore Accused's Mental Fitness*, REUTERS (Feb. 6, 2012, 5:30 PM), [http://www.huffingtonpost.com/2012/02/06/jared-lee-loughner-trial-mental-competency\\_n\\_1258397.html](http://www.huffingtonpost.com/2012/02/06/jared-lee-loughner-trial-mental-competency_n_1258397.html).

133. Kiefer & Holstege, *supra* note 130.

134. Brown, *supra* note 129; *see also* Kiefer & Holstege, *supra* note 130 (reporting that in addition to pleading guilty to attempted assassination of a member of Congress, various counts of attempted murder, and injuring a person at a federal event, Loughner pled guilty to two counts of murder of a federal employee and four counts of causing the death of a person at a federally sponsored event for killing presiding U.S. District Court Judge John Roll, Gifford's staffer Gabe Zimmerman, nine-year old Christina-Taylor Green, and three retirees at the event, Dorwan Stoddard, Dorothy Morris, and Phyllis Schneck).

135. *See Jared Lee Loughner Gets 7 Life Sentences for Tucson Shootings*, *supra* note 131 (citing as evidence of his lucidity an "examination of Loughner's computer showed the [twenty-four]-year-old had researched Giffords and the federal death penalty beforehand."); *see also* Fernanda Santos, *Life Term for Gunman After Guilty Plea in Tucson Killings*, NY TIMES (Aug. 7, 2012), [http://www.nytimes.com/2012/08/08/us/loughner-pleads-guilty-in-2011-tucson-shootings.html?\\_r=0](http://www.nytimes.com/2012/08/08/us/loughner-pleads-guilty-in-2011-tucson-shootings.html?_r=0) (examining Loughner's mental health leading up to the Arizona shooting).

136. *See Jared Lee Loughner Gets 7 Life Sentences for Tucson Shootings*, *supra* note 131 (noting that several victims were allowed to speak).

137. *See id.* (quoting former Giffords aide Rep. Ron Barber saying "I believe we have to renew and expand our efforts to increase awareness about system [sic] and prevention and treatment of mental illness.").

138. Larry Abramson, *All Things Considered: The Tucson Shootings and Mental Health Procedures*, NPR (Jan. 11, 2011, 3:00 PM), <http://www.npr.org/2011/01/11/132840720/Alleged-Shooters-Mental-Health-And-College-Career> (pointing to examples of "behavioral intervention and threat teams or teams that meet on almost every college campus, both community and residential schools weekly, to discuss at-risk students and to develop action plans to work with the student.").

lege (Pima), where he exhibited numerous warning signs of a mental illness, which included several classroom disruptions.<sup>139</sup> Classmates reported that Loughner laughed randomly and loudly without cause and “would clench his fists and regularly pose strange, nonsensical questions to teachers and fellow students.”<sup>140</sup> Loughner also exhibited signs of paranoia, mentioning to classmates his belief that the U.S. currency was worthless and the government was seeking to exert control over the public through grammar.<sup>141</sup>

There is little information on why Loughner singled out Giffords, but speculation centered on political motivations, coupled with his mental illness, as his inspiration to plan his assault.<sup>142</sup> One person reported “[h]e was a political radical & [sic] met Giffords once before in ‘07, asked her a

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139. See Timothy Noah, *Class Clown: Why Was It So Hard to Kick Loughner Out of Pima Community College?*, SLATE (Jan. 10, 2011, 7:49 PM), [http://www.slate.com/articles/business/the\\_customer/2011/01/class\\_clown.html](http://www.slate.com/articles/business/the_customer/2011/01/class_clown.html) (including outbursts during algebra class and grabbing his genitals while reading a poem in poetry class); see also Simone S. Hicks, *Behind Prison Walls: The Failing Treatment Choice for Mentally Ill Minority Youth*, 39 HOFSTRA L. REV. 979, 1009 (2011) (citing Loughner’s behavior as evidence of his mental instability and adequate cause for the someone to take notice); E. Fuller Torrey, *A Predictable Tragedy in Arizona: We Emptied State Mental Hospitals Starting in the 1960s Without Providing Adequate Treatment Alternatives*, WALL ST. J. (Jan. 12, 2011), <http://online.wsj.com/article/SB10001424052748703779704576073973345594508.html> (“Jared Lee Loughner, is reported to have had symptoms associated with schizophrenia—incoherent thought processes, delusional ideas, erratic behavior—and almost certainly was seriously mentally ill and untreated. The fact that he was barred from his college until he was evaluated by a psychiatrist would appear to confirm the nature of the problem.”).

140. See Kate Pickert & John Cloud, *If You Think Someone is Mentally Ill: Loughner’s Six Warning Signs*, TIME (Jan. 11, 2011), <http://www.time.com/time/nation/article/0,8599,2041733,00.html> (quoting a former classmate of Loughner’s saying “A lot of people didn’t feel safe around him”). Loughner’s thoughts and speech had become noticeably disorganized, as evidenced by answering “Eat+Sleep+Brush Teeth=Math” and “Mayhem Fest!!!” on two separate tests. *Id.*

141. See Kate Pickert & John Cloud, *Loughner’s Mental Illness: Six Warning Signs*, TIME (Jan. 11, 2011), <http://www.time.com/time/nation/article/0,8599,2041733,00.html> (including Loughner’s interest in “conscious dreaming,” which was the basis of the film *Inception*, in his increasingly irrational behavior).

142. Adam Klawonn, *What Motivated Giffords’ Shooter?*, TIME (Jan. 9, 2011), <http://www.time.com/time/printout/0,8816,2041427,00.html>.

What is not clear is what role politics – and, in particular, the red-hot rhetoric of the mid-term elections –played in the shooting. Descriptions [ ] Loughner’s high school classmates posted on Twitter only added to the mystery. ‘He had a lot of friends until he got alcohol poisoning in ‘06, & dropped out of school. Mainly loner very philosophical,’ @caitieparker tweeted. ‘As I knew him he was left wing, quite liberal & oddly obsessed with the 2012 prophecy.’

*Id.*

question & [sic] he told me she was 'stupid & unintelligent.'"<sup>143</sup> On September 29, 2010 school officials issued a letter of suspension after discovering a disturbing video posted to YouTube by Loughner.<sup>144</sup> In order to return to school Loughner was required to get mental health clearance confirming that he was not a threat to himself or others.<sup>145</sup> Instead of seeking mental health services, on October 4, 2010, Loughner withdrew from Pima.<sup>146</sup> According to Brian Van Brunt, President of the American College Counseling Association, the school's responsibility does not extend further than requiring a mental health evaluation, and, moreover, the school lacks the authority to do more than remove the disruptive student from school.<sup>147</sup> Pima refused to comment on the shooting, but disclosed that Loughner did have five interactions with campus police in response to his disruptive actions in the library and classroom.<sup>148</sup>

When Loughner went to a Sportsman's Warehouse outlet on November 30, 2010 to purchase a semiautomatic handgun his background check came up clear.<sup>149</sup> Like Colorado, Arizona has traditionally low barriers to the possession of a firearm, but does prohibit possession by an individual who "constitutes a danger to himself or others" and whose right to possess a firearm has not been restored under the procedures established by state law.<sup>150</sup> Hindsight makes Loughner's risk of danger to himself

143. *Id.*; see also Gertrude Block, *Language Tips*, 83 N.Y. St. B.J. 56 (2011) ("He asked Representative Giffords, 'What is government if words have no meaning?' He told a friend that he was outraged when Representative Giffords did not answer, merely passing on to the next question.").

144. Abramson, *supra* note 138; see also *Jared Lee Loughner Gets 7 Life Sentences for Tucson Shootings*, *supra* note 131 (mentioning his suspension); Noah, *supra* note 139 (describing Loughner's video as "incoherent broadside" in which he called Pima unconstitutional, fraudulent, and a scam and referred to Pima students and teachers as illiterate).

145. *Jared Lee Loughner Gets 7 Life Sentences for Tucson Shootings*, *supra* note 131; see also Abramson, *supra* note 138 (explaining the flexibility in Arizona gun laws).

146. *Jared Lee Loughner Gets 7 Life Sentences for Tucson Shootings*, *supra* note 131.

147. Abramson, *supra* note 138; see Noah, *supra* note 139 (describing the "due-process gauntlet" required by school officials to expel a student for non-violent disruptions).

There is an alternative path, "immediate suspension," but for that you either have to demonstrate that the student represents "an unreasonable risk of danger to himself/herself or others," or that the student's "presence on College property poses a significant risk of disruption of educational activities," which sounds more global than persistently interrupting one class at a time.

*Id.*

148. Abramson, *supra* note 138.

149. Linda Feldmann, *Why Jared Loughner was Allowed to Buy a Gun*, CHRISTIAN SCIENCE MONITOR (Jan. 10, 2011), <http://www.csmonitor.com/USA/Politics/2011/0110/Why-Jared-Loughner-was-allowed-to-buy-a-gun>.

150. ARIZ. REV. STAT. ANN. § 13-3101 7(a) (West 2012); see Patrick Jonsson, *Aftermath of Arizona Shooting: More Guns in More Hands?*, CHRISTIAN SCIENCE MONITOR (Jan. 13, 2011), <http://www.csmonitor.com/USA/Society/2011/0113/Aftermath-of-Arizona>.

and others abundantly clear, but, as mentioned above, prior to the shooting there were warning signs that Loughner may have had mental health issues.<sup>151</sup>

At the time of the shooting, Arizona law forcing individuals to seek treatment was arguably flexible; however, courts still had an opportunity to engage in early intervention and require an evaluation.<sup>152</sup> Although Loughner was required to receive mental health treatment to return to Pima, no court order was ever issued.<sup>153</sup> More troubling is the likelihood that even a court record of Loughner's mental unfitness would not have prevented him from purchasing a firearm because of the inadequacy of compliance with reporting requirements under the NICS Improvement Act, mentioned previously.<sup>154</sup> The Brady Campaign to Prevent Gun Violence reported the number of disqualifying mental illness records the states submitted to NICS had more than doubled, and when combined with federal records, totaled nearly 1.1 million.<sup>155</sup> While these numbers reflect an improvement in reporting, the Brady Campaign argues the NICS database should contain more than two million disqualifying mental illness records.<sup>156</sup>

Whereas the Colorado and Virginia legislatures responded to the shootings at Columbine and Virginia Tech, respectively, by passing laws directly related to the tragedies that occurred, Arizona took a different

shooting-More-guns-in-more-hands (finding that Arizona has "some 39,000 words in its statutes related to gun control" and adopting the Firearms Freedom Act, "which exempts any firearm made and used inside the state's borders from federal regulations."); *see also* Feldmann, *supra* note 149 (examining how Jared was able to purchase a gun despite mounting evidence of his mental instability).

151. Noah, *supra* note 139.

152. Abramson, *supra* note 138 ("You don't have to be to the point where you just cannot take care of yourself, but you also don't have to be imminently dangerous to yourself or to others."). Loughner was not receiving any form of mental health treatment, yet had someone reported his dangerous behavior to law enforcement authorities, Loughner would have been prevented under federal law from purchasing the firearm he used to kill and wound so many individuals. *Id.*

153. Pickert & Cloud, *Loughner's Mental Illness: Six Warning Signs*, *supra* note 141. This meant Loughner would only receive treatment through self-referral, something few schizophrenics who are unable to distinguish fantasy from reality are likely to do. *Id.* For more information on schizophrenia, *see* ANGELO BARBATO, SCHIZOPHRENIA AND PUBLIC HEALTH, WORLD HEALTH ORG. (1996), *available at* [http://www.who.int/mental\\_health/media/en/55.pdf](http://www.who.int/mental_health/media/en/55.pdf) (discussing the challenges schizophrenics face).

154. Feldmann, *supra* note 149.

155. *See id.* (reporting records of individuals with a disqualifying mental illness going from 402,047 in January 2008 to 929, 254 at the end of August 2010).

156. *Id.* For more information about the Brady Campaign, *see Brady Campaign to Prevent Gun Violence*, BRADY CAMPAIGN <http://www.bradycampaign.org/> (last visited Apr. 3, 2013) (describing the campaign's mission to rid America of gun violence).

approach—namely putting more guns in more hands.<sup>157</sup> The Arizona Senate Judiciary Committee passed Senate Bill 1474, giving individuals the right to carry a concealed firearm on the grounds of higher education campuses and prohibiting a public university or college from adopting or enforcing any policy prohibiting a licensed gun owner from carrying a concealed weapon on the institution's premises.<sup>158</sup> The Arizona House of Representatives passed Bill 2563 seeking to raise Arizona's standard for persons diagnosed with mental illness, who petitioned to regain their rights to possess a firearm to the federal level.<sup>159</sup> The language of the bill did not reflect the purported intent, and in fact, included language that would have lowered the standard for recovering gun rights for those diagnosed with mental illness.<sup>160</sup> The bill lowered the burden of proof required of a person with mental illness seeking to restore their gun rights from a clear and convincing standard to a preponderance of evidence standard.<sup>161</sup>

Though the legislative response in terms of firearm ownership following Loughner's shooting in Arizona was distinctly different from the responses in Colorado and Virginia, the state of funding for mental health

157. The Arizona State Legislature chose to place their focus on promoting gun rights and consequently putting more guns in more hands. Patrik Jonsson, *Aftermath of Arizona Shooting: More Guns in More Hands*, CHRISTIAN SCIENCE MONITOR (Jan. 13, 2011), <http://www.csmonitor.com/USA/Society/2011/0113/Aftermath-of-Arizona-shooting-More-guns-in-more-hands> (explaining the effect the Arizona shooting on state laws); see generally S. 1610, 50th Leg. Reg. Sess. (Az. 2011) (making the Colt single action Army revolver the official state firearm); S. 1201, 50th Leg. Reg. Sess. (Az. 2011) (allowing guns in government buildings and public events and giving gun owners the right to seek recovery if they are unlawfully kept from carrying guns inside public venues).

158. S. 1474, 50th Leg. Reg. Sess. (Az. 2012); see also *Arizona Senate Judiciary Committee Passes Personal Protection Bill!*, NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTIONS (Feb. 7, 2012), <http://www.nra.org/legislation/state-legislation/2012/2/arizona-senate-judiciary-committee-passes-campus-personal-protection-bill!.aspx> (conceding public universities would be able to restrict concealed weapons in certain buildings if notice is posted and storage for the firearm is provided). See generally S. 1610, 50th Leg. Reg. Sess. (Az. 2011) (making the Colt single action Army revolver the official state firearm); S. 1201, 50th Leg. Reg. Sess. (Az. 2011) (allowing guns in government buildings and public events and giving gun owners the right to seek recovery if they are unlawfully kept from carrying guns inside public venues).

159. Lourdes Medrano, *Guns in Government Buildings? Four Controversial Gun Rights Bills in Arizona*, CHRISTIAN SCIENCE MONITOR, <http://www.csmonitor.com/USA/Politics/2011/0323/Guns-in-government-buildings-Four-controversial-gun-rights-bills-in-Arizona/Back-and-forth-on-gun-rights-for-the-metally-ill> (last visited Apr. 3, 2013).

160. *Id.*

161. *Id.* This lower standard resulted in the withdrawal of support of the bill from the Arizona Criminal Justice Commission, and after negotiations, the bill was withdrawn and replaced with the House Bill 2645, which maintained the higher clear and convincing evidence standard. *Id.*

services in Arizona is just as ineffectual as those in Colorado and Virginia.<sup>162</sup> Whereas Colorado and Virginia experienced budget cuts from 2009 to 2012, Arizona actually increased its budget from \$492.8 million to \$520.5 million, a 5.6% increase.<sup>163</sup> Additionally, Arizona's per capita spending on mental health was \$196.13, while the national average was \$122.90.<sup>164</sup> What these numbers fail to reflect is the \$353 million decrease in federal Medicaid matching funds allocated to Arizona in 2012.<sup>165</sup> In response to the decrease in matching funds, Arizona—as a forced decision—shifted money from the state general mental health fund to Medicaid recipients.<sup>166</sup> The mild increase in spending does little to cover the overall loss in Arizona caused by the decreases in federal funding.<sup>167</sup> Many non-Medicaid recipients with serious mental illness were left without services.<sup>168</sup> This loss of services has caused harm to several individuals via incarceration, hospitalization resulting from psychotic breakdowns, or simply falling through cracks in the system.<sup>169</sup> Clearly, the numbers do not tell the whole story about the extensive impact of decreased mental health services across the nation.

#### V. NATIONWIDE TRENDS OF UNDERREPORTING TO THE NICS DATABASES AND THE NEED FOR MAINTAINING AND EXPANDING MENTAL HEALTH FUNDING

It is unreasonable and impracticable to separate the issue of gun rights from the mental health issues as evidenced by tragedies such as Colum-

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162. See generally HONBERG ET AL., *supra* note 12 (comparing the status of mental health assistance in various states).

163. *Id.* at 11.

164. *Id.* at 14.

165. *Id.* at 15.

166. *Id.* at 1–2.

167. See *id.* at 1 (“Modest increases in state general fund mental health spending fails to compensate for the loss in federal Medicaid revenues.”).

168. See *id.* at 1–2 (reporting that in Arizona, “non-Medicaid recipients with serious mental illnesses have been virtually cut off from access to services as a result of this shift.”).

169. Mary K. Reinhart, *State, Critics Disagreeing on Impact of Mental-Health Cuts*, ARIZ. REPUBLIC (Sept. 21, 2011), <http://www.azcentral.com/news/articles/20110921mental-health-cuts-toll-debated.html>. Commentators note:

In July 2010, Arizona, a state with already serious gaps in its mental health safety net, eliminated virtually all services for 12,000 individuals diagnosed with serious mental illness who do not qualify for Medicaid. Advocates in Arizona say that the ‘loss of services has caused harm to people, including hundreds who have become incarcerated, hospitalized due to psychotic breakdowns or fallen through the tattered safety net and disappeared.’ For example, St. Joseph’s Hospital and Medical Center in Phoenix saw a [forty] percent spike in emergency room psychiatric episodes after services were eliminated for those who do not have Medicaid.

HONBERG ET AL., *supra* note 12, at 5.



bine, Aurora, Virginia Tech, and Tucson. The two are so inextricably intertwined that it would be impossible to address one without the other, and neither standing on its own is the answer. The result from analyzing these events is a better understanding of specific recommendations to ideally prevent such tragedies from occurring again in the future. Both, gun control and mental health are crucial to the discussion of the above-mentioned tragedies because they cannot be divided in addressing the problems associated with episodes of targeted public violence.

The past few years have been characterized by the worst recession in the United States since the Great Depression.<sup>170</sup> A recession means smaller budgets and cuts to the already inadequate mental health system.<sup>171</sup> Traditionally, general state revenues fund mental health services.<sup>172</sup> This means the recession has a greater impact on these services than other “safety net” services for general healthcare, such as community health centers funded by federal stimulus money.<sup>173</sup> Paradoxically, the same recession causing cuts to mental health budgets is also creating an increased demand for mental health services.<sup>174</sup> This increase is attributed to the spike in unemployment because individuals are four times more likely to report symptoms consistent with severe mental illness than those who are employed.<sup>175</sup> Similar symptoms are twice as likely for those who are employed but experienced involuntary changes in their employment status, such as reduced hours or pay cuts.<sup>176</sup> The cuts to mental health spending across the nation put our society at risk, especially when the cuts impact services to young adults.<sup>177</sup> Decreasing the budget and services available, means the 57.7 million adults who experi-

170. HONBERG ET AL., *supra* note 12, at 1.

171. *See id.* (estimating that from 2009 to 2011, \$1.6 billion dollars were cut from non-Medicaid state mental health spending and that deeper cuts were planned for the future).

172. *See* Jenny Gold, *Recession Hits States' Mental Health Budgets*, NPR: SHOTS (March 9, 2011, 2:16 PM), <http://www.npr.org/blogs/health/2011/03/09/134394190/recession-hits-states-mental-health-budgets?ps=rs> (explaining the sources for mental health service funding).

173. *Id.*

174. *Economic Downturn Taking Toll on Americans' Mental Health*, NAT'L ALLIANCE ON MENTAL ILLNESS (Oct. 6, 2009), [http://www.nami.org/Template.cfm?Section=press\\_release\\_archive&template](http://www.nami.org/Template.cfm?Section=press_release_archive&template) (follow “Economic Downturn Taking Toll on Americans' Mental Health” hyperlink).

175. *Id.*

176. *Id.*

177. Cooper, *supra* note 43; *see* HONBERG ET AL., *supra* note 12, at 1 (arguing that cutting mental health budgets saves little money for a state in the end because, in effect, the cost is just shifted to “emergency rooms, community hospitals, law enforcement agencies, correctional facilities and homeless shelters.”).

ence a mental health disorder in a given year will be forced to cope with their illness and seek professional help on their own.<sup>178</sup>

There are two recommended solutions for resolving the mental health crisis. First, if our nation wants to avoid events similar to existing tragedies, mental health services cannot be sacrificed—they must be adequately funded. It is unwise to wait for these events to occur before making mental health a priority. In these times of tight budgets across the board, those in positions of influence must acknowledge that saving money now does little good if that cost comes back many times over in terms of emergency treatment, law enforcement, and correctional expenses.<sup>179</sup> Adequate funding does not have to be given without consequence. Accountability of public funds for mental health services is vital to ensure their effectiveness and the legislature and society as a whole is entitled to accurate reporting of procedures and outcomes of these services.

Secondly, more effective screening and reporting procedures are necessary. Each of the perpetrators discussed in this comment gave adequate warning through their behavior and actions that a more serious mental health issue was looming beneath the surface. Cho and Lougher's behavior came to the attention of school administrators at both of their universities, yet their cases were not handled with urgency nor were their treatments with mental health services ensured by the school. Also worth noting, is the relative similarity in age of all the shooters, ranging from seventeen to twenty-four. Routine screening for mental health or behavioral issues as part of a patient's primary care, and in educational settings, would help to identify warning signs during adolescence, where symptoms often begin to manifest.<sup>180</sup> Early detection can prevent expensive treatment in late adolescence and help to prevent tragedies that occur when mental illness goes undetected and untreated.

#### VI. IMPROVING BARRIERS TO THE PURCHASE OF FIREARMS BY THE MENTALLY ILL

Improved screening procedures lead to recommendations focused on access to firearms by those with mental illness. If the cuts to mental health services continue, it will become even more difficult to ensure mental health information is being properly reported to the NICS database.<sup>181</sup> Reporting mental health information to NICS databases is essential to preventing those with mental illness from purchasing firearms

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178. Cooper, *supra* note 43.

179. HONBERG ET AL., *supra* note 12, at 11.

180. *Id.* at 12.

181. Cooper, *supra* note 43.

and potentially harming themselves and others.<sup>182</sup> As discussed previously, under current federal law, the reporting of mental health data by the states is strictly voluntary and penalties for incomplete records do not begin until the year 2017.<sup>183</sup> Even states authorized or required to submit disqualifying mental health information may fail to report all relevant information due to loopholes in state laws.<sup>184</sup> States failing to report information to the NICS Index may keep their own in-state databases of disqualifying information, however, this information does not prevent a person disqualified in one state from purchasing a firearm in a state with no record of their mental illness.<sup>185</sup>

To ensure the capture and reporting of accurate and relevant mental health information required under the federal law, changes must be made to state law. Mandating reporting and exacting penalties earlier than the 2017 deadline are vital to preventing tragedies such as the previous ones discussed. Without this pertinent information, background checks are rendered completely ineffective. Protecting innocent persons from violent attacks by an individual who should be barred from purchasing a firearm requires an expansion of state law to require a report to NICS in six circumstances: (1) when a court, board, or other lawful authority determines a person is a danger to themselves or others as a result of marked subnormal intelligence, mental illness, incompetency, condition, or disease, even if the danger doesn't result in involuntary commitment;

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182. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34; *see also* Jeff Brady, *States Aren't Submitting Records to Gun Database*, NPR (Aug. 16, 2012, 12:44 PM), <http://www.npr.org/2012/08/16/158932528/states-arent-submitting-records-to-gun-database> (describing the lack of records of mentally ill people in the NICS database because states do not submit all required records).

183. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34.

184. *Id.*

Some States that do not currently submit mental health information to the NICS Index have State statutes that require a court order to allow the sharing of mental health information. In some States, a change in law would be required to allow the sharing of such information with the NICS. Other States simply do not have the funding to support the gathering and submission of mental health information. BJS is currently developing and expects to send out soon a survey to identify States whose barriers to sharing this information are simply resource limitations, rather than issues of law or policy.

Rachel L. Brand, Assistant Dist. Attorney General for Legal Policy, U.S. Dep't of Justice, *Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws*, Statement before the House Committee on Oversight and Government Reform, Subcomm. on Domestic Policy, U.S. House of Representatives 12 (May 10, 2007), *available at* <http://www.justice.gov/olp/pdf/guns07a.pdf>.

185. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34, at 117; *see also* Donna M. Norris et al., *Firearms Laws, Patients, and the Roles of Psychiatrists*, 163 AM. J. PSYCHIATRY 1392, 1393 (2006) (finding databases for recording people with mental illness in twenty states and the District of Columbia and that the firearm statutes vary from state to state).

(2) when a court, board, or other lawful authority determines a person is unable to manage their own affairs, including findings under state law that the person is incapacitated, disabled by mental illness, or is appointed a guardian or conservator; (3) when a person is found not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility in a criminal case; (4) when a person is found guilty, but insane, in a criminal case; (5) when a person is deemed incompetent to stand trial; and (6) when a person is involuntarily committed to a mental institution or asylum for mental defectiveness, mental illness, or other reason.<sup>186</sup>

The protection of privacy of mental health records is an often-cited argument for not disclosing relevant information to NICS.<sup>187</sup> However, procedures and policies are in place to protect this information and the Federal Privacy Act shields all records submitted to NICS.<sup>188</sup> These policies and procedures ensure that mental health records submitted to NICS are kept private, access to these records is closely monitored, and protections are in place to prevent unauthorized disclosures of information recorded in the report.<sup>189</sup> Moreover, reports to NICS from the states regarding disqualifying mental health history are put into one of two files, the Mental Defective File or the Denied Persons File.<sup>190</sup> Only biographical information, such as a birthdate or social security number, is entered into the Mental Defective file.<sup>191</sup> The Denied Persons File contains the names and biological information of persons who are prohibited from purchasing a firearm, but their record is not entered into another system or file checked by NICS.<sup>192</sup> Neither file contains medical or mental health records and the Denied Persons File contains only the name of the person disqualified.<sup>193</sup> By entering a prohibited individual's information

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186. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34, at 118–19.

187. *Id.* at 119; *see also* Lewis, *supra* note 113, at 170 (“People may worry that their mental health records may become public knowledge or otherwise compromised in some way if entered into NICS.”); Michael Lou, *Mental Health and Guns: Do Background Checks Do Enough?*, N.Y. TIMES, April 19, 2007, [www.nytimes.com/2007/04/19/us/19weapons.html?\\_r=0](http://www.nytimes.com/2007/04/19/us/19weapons.html?_r=0) (noting that some find privacy concerns an issue when contemplating efforts to tighten background check laws).

188. Lewis, *supra* note 113, at 169.

189. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 34, at 119; *see* 28 C.F.R. § 25.1 (2012) (“The purpose of this subpart is to establish policies and procedures implementing the Brady Handgun Violence Prevention Act.”).

190. Rachel L. Brand, Assistant Dist. Attorney General for Legal Policy, U.S. Dep’t of Justice, *Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws*, Statement before the House Committee on Oversight and Government Reform, Subcomm. on Domestic Policy, U.S. House of Representatives 10 (May 10, 2007), *available at* <http://www.justice.gov/olp/pdf/guns07a.pdf>.

191. *Id.*

192. *Id.*

193. *Id.*

into the Denied Persons File, a state may submit the information for NICS background check purposes without identifying the individual as being disqualified for mental health reasons.<sup>194</sup> Furthermore, when a Federal Firearm Licensee requests a background check through the NICS Index the responses are limited to either “proceed,” “denied,” or “delayed.”<sup>195</sup> A response of “denied” means nothing more than that. No reason or disqualifying quality under federal law is given for the denial.<sup>196</sup>

In addition to mandating reporting, enacting penalties, and expanding the reporting criteria, the loophole for unlicensed dealers must be closed.<sup>197</sup> As evidenced by Columbine, purchases at gun shows by unlicensed dealers can result in guns getting into the wrong hands.<sup>198</sup> To solve this issue, *all* gun sales should require a background check through a federally licensed gun retailer. Background checks must be required for all gun transactions, including private sales at gun shows and sales online, to avoid mentally ill persons from purchasing guns “legally” through these venues.<sup>199</sup> This puts no additional burden on the state, only on the unlicensed seller, and would prevent someone with a disqualifying mental illness from circumventing the law and obtaining a firearm.<sup>200</sup>

## VII. INTERNATIONAL RESPONSE TO MASS PUBLIC VIOLENCE

The United States is not alone in experiencing the aftermath of a violent rampage and the international community provides an additional resource for potential recommendations.<sup>201</sup> In 1996 a gunman killed thirty-five people and injured an additional twenty-one in Port Arthur, Tasmania in Australia using an illegally obtained semi-automatic rifle and mili-

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194. *Id.*

195. Overview of National Instant Criminal Background Check System Checks, FED. BUREAU OF INVESTIGATION (2010), <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet>.

196. Lewis, *supra* note 113, at 169. Specific reasons for denials are only revealed if the potential purchaser personally requests the reason from the FBI through an appeal. *Id.*

197. *Id.* at 173.

198. *Where'd They Get Their Guns?*, *supra* note 57.

199. Cooper, *supra* note 43.

200. Lewis, *supra* note 113, at 173; *see also* Cal. Penal Code § 12072(d) (West 2009) *repealed by* 2010 Cal. S.B. 1080 (“Where neither party to the transaction holds a dealer’s license issued pursuant to Section 12071, the parties to the transaction shall complete the sale, loan or transfer of that firearms through a licensed firearms dealer pursuant to Section 12082.”).

201. *See Some of the Deadliest Mass Shootings Around the World*, YAHOO! NEWS (Dec. 14, 2012), <http://news.yahoo.com/deadliest-mass-shootings-around-world-114808608.html> (providing a list of mass shootings and their victim counts from around the world).

tary-grade weapon.<sup>202</sup> In response, the government enacted stringent gun control laws and employed a mandatory gun buy-back policy resulting in a current gun homicide rate thirty times lower than that of the United States and no more massacres have occurred.<sup>203</sup>

Following a similar massacre in Scotland the same year as the shootings in Australia, a private handgun ownership ban was instituted in the United Kingdom and while the effect was not immediately apparent, the United Kingdom currently has a gun homicide rate forty times lower than the United States.<sup>204</sup> While gun bans have proven effective in Europe, there is not necessarily a correlation between private gun ownership and the prevalence of mass murders in a nation. The Small Arms Survey of 2011 estimates civilian gun ownership in the United States to be the highest in the world with eighty-nine guns per every one hundred people.<sup>205</sup> The next highest is Yemen with fifty-five guns per one hundred people and third is Switzerland with forty-six guns per one hundred people.<sup>206</sup>

Although other nations do not rank as high as the United States in terms of gun ownership, they still experience events of mass murders, but at a rate lower than that of the United States.<sup>207</sup> A nation's relationship with firearms also affects the number of mass murders that occur there. In the United States gun ownership is viewed as a basic right and gun control is seen as an infringement on that right.<sup>208</sup> In contrast, Switzerland allows men who complete mandatory service in the military to keep assault rifles in their home with sealed ammunition that is only to be

202. Josh Marks, *How Other Countries Respond to Mass Shootings*, THE NAT'L MEMO (Dec. 18, 2012, 5:17 PM), <http://www.nationalmemo.com/how-other-countries-respond-to-mass-shootings/>.

203. *Id.*

204. *See id.* (documenting similar mass shootings in Finland, Germany, and Canada which were followed by changes in gun control legislation).

205. Aaron Karp, *Estimating Civilian Owned Firearms*, SMALL ARMS SURVEY RES. NOTES 1, 2 (Sept. 2011), available at [http://www.smallarmssurvey.org/fileadmin/docs/H-Research\\_Notes/SAS-Research-Note-9.pdf](http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-9.pdf).

206. *Id.* ("In Israel, which ranks 79th out of 178 in terms of civilian gun ownership, it's typical for citizens to carry firearms while conducting everyday activities, but non-political mass murders are virtually unheard of."); *see also* Oren Dorell, *In Europe, Fewer Mass Killing Due to Culture Not Guns*, USA TODAY (Dec. 18, 2012), <http://www.usatoday.com/story/news/world/2012/12/17/guns-mass-killings-worldwide/1776191/> (asserting that culture plays an important part in European countries where mass killings are less frequent but gun ownership is still high).

207. Oren Dorell, *In Europe, Fewer Mass Killing Due to Culture Not Guns*, USA TODAY (Dec. 18, 2012), <http://www.usatoday.com/story/news/world/2012/12/17/guns-mass-killings-worldwide/1776191/>.

208. Joe Van Brussel, *U.S. Guns: Statistics Show America an Outlier Among Developed Nations*, HUFFINGTON POST (Dec. 26, 2012), [http://www.huffingtonpost.com/2012/12/20/us-guns-statistics-outlier\\_n\\_2331892.html](http://www.huffingtonpost.com/2012/12/20/us-guns-statistics-outlier_n_2331892.html).

opened under orders.<sup>209</sup> Similar to the differences in the societal relationship with firearms, the international community takes a different approach to incarceration than that of the United States—whereas the United States' criminal justice system focuses on punishment, other countries focus on rehabilitation and re-acclimatization of the individual to society.<sup>210</sup> Moreover, some experts speculate the individualist culture in America contributes to the prevalence of mass murders that occur here.<sup>211</sup> British criminologist Peter Squires argues that the typical profile of a mass murderer in any nation is a loner who lacks social support and strikes out against the communities they feel isolated from.<sup>212</sup> Squires reasons the close-knit and supportive societies in Europe play a pivotal role in the lower numbers of mass murders there because they act as informal social controls.<sup>213</sup> No nation stands as a model for a violence-free culture and societal ideologies and mores are not easy to modify, but in light of the tragedy-stricken year America has experienced it is imperative to seek methods of prevention from every available source, including the international community.

### VIII. CONCLUSION

The weeks following the tragedy at Sandy Hook have been filled with grief and sorrow as stories about the victims' bravery emerge, and parents begin to bury the children who lost their lives. An outpouring of sympathy makes its way toward Connecticut as eulogies are read remembering the lively, precocious nature of the children who were needlessly robbed of their futures. While our nation mourns the loss of these lives, it is important to not let this become just another news story or a memory of a sad day. We as a country must take notice of the prevalence of these

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209. See Dorell, *supra* note 207 (“It’s part of a highly disciplined military training program . . . . It’s not going to the corner pawn shop and picking up what’s there like one can do in the [United States].”).

210. See Stephen Theil, *Norway Shooter Gets Off Easy*, THE DAILY BEAST (July 26, 2011), <http://www.thedailybeast.com/articles/2011/07/26/norway-shooter-breivik-gets-off-easy-maximum-sentence-is-21-years.html> (noting other countries consider the death penalty and life-long prison sentences barbaric). Recently Norwegian mass murderer of seventy-seven people, Anders Breivik, received a sentence of thirty years under a never used law allowing this punishment for crimes against humanity. *Id.* The maximum sentence for murders in Norway is traditionally twenty-one years, with most murders being allowed to apply for parole after only a few years in prison. *Id.*

211. Dorell, *supra* note 207.

212. *Id.*

213. See *id.* (“Close-knit societies where people are supported, where their mood swings are appreciated, where if someone starts to go off the rails it’s noted, where you tend to intervene, where there’s more support.”).

types of events in our hometowns and take action to prevent them from occurring.

During times of economic uncertainty it is easy to dismiss mental health services as having less importance, but these services are vital to the safety of our nation. Action must be taken to ensure the availability of services for those who need them, and information sharing must be improved to prevent those with disqualifying mental illnesses from obtaining access to firearms. It would be unrealistic to propose that the types of tragedies we have seen in 2012 are completely preventable and predictable, but it is irresponsible to ignore the steps we as a nation could take to at least decrease the likelihood of such heart wrenching events from occurring in the future.

The first attempt at federal legislation regarding gun control was met with swift defeat. On April 17, 2013 the Senate blocked several measures which would have expanded gun control, including expanded background checks for all gun buyers, an assault weapons ban, and a ban on high capacity magazines.<sup>214</sup> The bi-partisan bill drafted by Joe Manchin and Pat Toomey featured what President Obama referred to as a “common-sense compromise on background checks,” something that ninety percent of Americans support.<sup>215</sup> Despite the bi-partisan approach to drafting the bill, the vote predictably fell according to party lines, with Senate Democrats voting for increased gun control measures and Senate Republicans voting by expanded gun rights, with a minority from each party brave enough to cross party lines.<sup>216</sup> Although the failure of these preventative measures is disappointing, it is by no means the end. The following quote from President Obama after the Senate vote highlights the fact that this debate is not over as long as the passion for change remains in the American people.

*The point is those who care deeply about preventing more and more gun violence will have to be as passionate, and as organized, and as vocal as those who blocked these common-sense steps to help keep our kids safe. Ultimately, you outnumber those who argued the other*

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214. Jonathon Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), [http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&src=ISMR\\_AP\\_LO\\_MST\\_FB](http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&src=ISMR_AP_LO_MST_FB). The bills failed to acquire the sixty vote minimum necessary to pass each of the measures. Two Republican favored bills regarding the expansion of concealed-carry rights and increased focus on prosecution of gun crimes by law enforcement also failed to meet the sixty vote requirement. *Id.*

215. President Barack Obama, *Statement by the President*, THE WHITE HOUSE (Apr. 17, 2013, 5:35 PM), <http://www.whitehouse.gov/the-press-office/2013/04/17/statement-president>.

216. *See* Weisman, *supra* note 214 (“The successive defeats left senators on both sides of the issue dazed and disappointed.”).



*way. But they're better organized. They're better financed. They've been at it longer. And they make sure to stay focused on this one issue during election time. And that's the reason why you can have something that 90 percent of Americans support and you can't get it through the Senate or the House of Representatives.*

*So to change Washington, you, the American people, are going to have to sustain some passion about this. And when necessary, you've got to send the right people to Washington. And that requires strength, and it requires persistence.*

*And that's the one thing that these families should have inspired in all of us. . . . I believe we're going to be able to get this done. Sooner or later, we are going to get this right. The memories of these children demand it. And so do the American people.<sup>217</sup>*

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217. President Barack Obama, *Statement by the President*, *supra* note 215.