

A ROBUST INDIVIDUAL RIGHT TO BEAR ARMS VERSUS THE PUBLIC'S HEALTH: THE COURT'S RELIANCE ON FIREARM RESTRICTIONS ON THE MENTALLY ILL

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I. INTRODUCTION

“None of us can know with any certainty what might have stopped these shots from being fired or what thoughts lurked in the inner recesses of a violent man’s mind,” said President Barack Obama while trying to console the nation in the wake of the January 2011 attempted assassination of Representative Gabrielle Giffords in Tucson, Arizona.¹ The shooting at a civic

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1. Remarks at a Memorial Service for Victims of the Shootings in Tucson, Arizona, 2011 DAILY COMP. PRES. DOC. 19 (Jan. 12, 2011), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=88893>.

gathering left six bystanders dead, renewing the politically divisive debate about the appropriate response to violence: ban dangerous weapons or prohibit dangerous individuals from possessing firearms?

The public overwhelmingly supports limiting access to firearms for children, violent criminals, and persons with mental illness, which is consistent with the National Rifle Association's insistence that "guns don't kill people, people kill people."² Children lack the competency and maturity to use firearms wisely, whereas most convicted felons have a history of violence. Singling out persons with mental illness, however, is far more complex because they represent a broad spectrum of individuals, some of whom already have been subjected to social ostracism, but the majority of whom are not violent.

The Supreme Court's recent decision that the Second Amendment confers an individual's right to bear arms renders it increasingly difficult to enact generally applicable laws regarding firearms, but the Court explicitly supports "longstanding prohibitions on the possession of firearms" by individuals with mental illness.³ In hindsight, Jared Lee Loughner—the youth accused of shooting Giffords—is easily labeled as mentally ill,⁴ but prospectively identifying such dangerous individuals is fraught with difficulties.

II. AN EXPANDED INTERPRETATION OF THE SECOND AMENDMENT

A constitutionally protected individual right to bear arms is not a foregone conclusion under U.S. law. In fact, the scope of the Second Amendment has expanded considerably over the past

2. See, e.g., Tom Foley, *Gun Nut*, NEW REP., Jan. 28, 1991, at 7.

3. *District of Columbia v. Heller*, 554 U.S. ___, ___, 128 S. Ct. 2783, 2816–17 (2008); see also Lawrence O. Gostin, *The Right to Bear Arms: A Uniquely American Entitlement*, 304 J. AM. MED. ASSOC. 1485, 1486 (2010).

4. His trial has been postponed while he undergoes court ordered pharmacologic treatment to regain competency. Jacques Billeaud, *Trial Not Likely for Jared Lee Loughner in 2012*, BOSTONGLOBE.COM (Jan. 6, 2012), http://www.boston.com/news/nation/articles/2012/01/06/trial_not_likely_for_jared_lee_loughner_in_2012/.

three years. In 2008, the Court held for the first time that the Second Amendment protects an individual's right to possess a loaded handgun—striking down the District of Columbia's ban on handguns, as well as its requirement that other arms be unloaded or protected by a safety lock.⁵ Just last year, the Court went further, finding that the Second Amendment not only limits the federal regulation of firearms, but state restrictions as well, rejecting the long-held premise that the Second Amendment serves not to arm the civilian public, but to protect the states from unfettered federal power.⁶

Legally speaking, the Court held that the right to bear arms was so fundamental that due process required that it constrain state as well as federal power.⁷ Practically speaking, the Court held that the right to bear arms was so fundamental that all regulations would be held to the same standard—from Camden, New Jersey to Recluse, Wyoming—regardless of legislators' interest in curbing violent crime. In other words, limitations on the right to bear arms can be placed only on certain groups (e.g., felons, the mentally ill), or in certain locations (e.g., government or school buildings). Universal bans that one might expect in a densely populated urban area—such as restrictions against concealed weapons or dangerous handguns—are prohibited. Other categorical restrictions such as limiting the number of arms an individual may possess, requiring gun owners to enroll in firearm training, or imposing licensing requirements on purchasers are all subject to litigation. In the wake of the Court's expansive reading of the Second Amendment, the National Rifle Association challenged numerous firearm regulations, including a ban on sales to children and teens,⁸ threatening fiscally constrained municipalities and states with expensive legal battles.

5. *Heller*, 554 U.S. at ___, 128 S. Ct. at 2821–22.

6. *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010).

7. *Id.* at ___, 130 S. Ct. at 3050.

8. The NRA supports a suit filed in 2010 challenging a ban on sales to individuals less than twenty-one years of age. See John Richardson, *NRA Files Suits Challenging Handgun Bans on 18-20 Year Olds*, NO LAWYERS—ONLY GUNS AND MONEY (Sept. 21, 2010, 5:48 PM), <http://onlygunsandmoney.blogspot.com/2010/09/nra-files-suits-challenging-handgun.html>.

III. GUN CONTROL LAWS

Gun advocates applauded the Court's recent interpretation of the Second Amendment, asserting that categorical restrictions (e.g., based on mental illness or a criminal record) are the only Constitutional limits that can be placed on the right to bear arms. Yet they fail to propose a workable solution for keeping arms out of the hands of the dangerous, demonstrating a blind reliance on a system of categorical restrictions that have failed to protect the public.⁹ To understand why this is, one need only review the patchwork of federal and state gun control laws; a system ubiquitous for its loopholes.

Widely publicized shootings directed at high-profile individuals (e.g., Giffords, former President Ronald Reagan, and John Lennon) or crowds of civilians (e.g., Virginia Tech, Columbine High School) fuel the public's perception that all persons with mental illness are dangerous. Legislators have responded with a patchwork of laws, excluding broad classes of individuals from purchasing firearms. However, predictions of dangerousness are highly inaccurate and categorical restrictions are rife with loopholes and inefficiencies.

The Gun Control Act of 1968¹⁰ restricts "prohibited persons" from purchasing firearms, including individuals addicted to controlled substances, those involuntarily committed to a mental institution or adjudicated as incompetent or dangerous,¹¹ or those

9. For example, in issuing the opinion in *Heller*, Justice Scalia dismissed the concern of dangerous use of firearms by assuring "[the Court's] opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." 554 U.S. at ___, 128 S. Ct. at 2816–17. In addition, subsequent to successfully challenging D.C.'s handgun ban before the Court, the advocate for *Heller* asserted those with mental illness should simply be "excluded from society" in order to protect the public from unsafe operation of arms. *The Diane Rehm Show: Renewed Calls for Gun Control*, THE DIANE REHM SHOW (Jan. 12, 2011), available at <http://thedianerehmshow.org/shows/2011-01-12/renewed-calls-gun-control/> transcript.

10. 18 U.S.C. § 922(g)–(h) (2006).

11. "Adjudicated as a mental defective" includes individuals: (1) who as a result of mental illness are a danger to themselves or others; (2) who lack the mental capacity to contract or manage their own affairs; or (3) who have been found incompetent to stand trial or not guilty for reason of insanity or lack of mental responsibility. 27 C.F.R. § 478.11 (2010).

who receive a verdict of not guilty by reason of insanity. In theory, the National Instant Criminal Background Check System (NICS)¹² contains the definitive list of individuals to whom licensed dealers cannot sell firearms.¹³ In practice, however, many prohibited persons are never entered into the NICS.

Reasoning that the NICS breaches the principles of federalism, the Supreme Court ruled in 1997 that Congress could not compel states to report prohibited persons who attempt to purchase firearms to the FBI.¹⁴ Consequently, reporting is inaccurate and incomplete; some states overreport (including patients who voluntarily seek outpatient treatment) and others underreport (including only those individuals who are involuntarily committed for ninety or more days or only those who are committed to public hospitals). Moreover, as of 2007, twenty-eight states did not report inpatients with mental illness at all.¹⁵ The Government Accountability Office estimates that the NICS mental illness data fall short by more than 2 million individuals.¹⁶

Even if listed in the NICS, prohibited persons can successfully avoid background checks. Unlicensed (second-hand) dealers (like the individual who sold guns to the Columbine

12. The NICS was formed by the Brady Handgun Violence Prevention Act (Brady Bill), Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-22 (2006)), *amended by* the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008).

13. The Gun Control Act requires anyone “engage[d] in the business” of selling firearms to be federally licensed, except for those making secondary sales. §§ 921(a)(21), 922(a)(1)(A). The Brady Bill requires federally licensed firearms dealers to conduct background checks before making a handgun sale, and to adhere to a five-day waiting period before finalizing the transaction. *Id.* § 922(s)(1), (t)(1).

14. *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that requiring reporting into NICS is equivalent to requiring states to enforce a federal regulatory program).

15. See Press Release, FBI, Response to Inquiries on the FBI’s National Instant Criminal Background Check System (Apr. 19, 2007), *available at* <http://www.fbi.gov/news/pressrel/press-releases/response-to-inquiries-on-the-fbis-national-instant-criminal-background-check-system>.

16. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-751, GUN CONTROL: OPTIONS FOR IMPROVING THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 59 (2000) [hereinafter GUN CONTROL], *available at* <http://www.gao.gov/archive/2000/gg00056.pdf>.

shooters) are excluded from conducting background checks and can sell at gun shows—a notorious loophole.¹⁷ Additionally, states can issue Brady permits that allow licensed sellers to waive background checks; nineteen states offer these permits, seven of which do not exclude persons with mental illness from purchasing firearms.¹⁸

The Gun Control Act incentivizes states to further regulate by making it a federal offense to sell firearms to individuals whose possession would violate state law.¹⁹ Yet not all states impose regulations based on mental illness, and those that do have variable laws;²⁰ some states restrict only access to concealed weapons or rely, in part, on buyer self-identification as having a mental illness.²¹ Thus, even where state law supplements federal regulations, determined purchasers often access firearms.

Categorically restricting access to firearms for persons with mental illness has proved difficult and ineffectual, reducing neither suicide rates nor homicide rates.²² Universally applicable restrictions appear more effective; states with the most stringent firearms laws have the lowest per capita homicide rates.²³ Yet, the Supreme Court's rulings push states to regulate dangerous persons rather than dangerous firearms. Thus, policy makers

17. In fact, Price and Norris recently documented several instances in which individuals who had been involuntarily committed for mental illness were able to purchase a firearm and used it fatally. Marilyn Price & Donna Marie Norris, *Firearm Laws: A Primer for Psychiatrists*, 18 HARV. REV. PSYCHIATRY 326, 328 (2010).

18. See OFFICE OF ENFORCEMENT PROGRAMS & SERVS., BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ATF PUBL'N. 5300.5, STATE LAWS AND PUBLISHED ORDINANCES-FIREARMS xv-xvi (2008) [hereinafter ATF PUBL'N], available at <http://www.atf.gov/publications/download/p/atf-p-5300-5/atf-p-5300-5.pdf>.

19. 18 U.S.C. § 922(b)(2) (2006).

20. For analysis of state arms restrictions, see the *Brady State Gun Law Scorecard*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/stategunlaws/scorecard> (last visited Dec. 20, 2011).

21. ATF PUBL'N, *supra* note 18, at 3.

22. Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 ANNALS EMERGENCY MED. 771 (2003); see also Michael Luo, *In Firearms Research, Cause Is Often the Missing Element*, N.Y. TIMES, Jan. 26, 2011, at A3, available at <http://www.nytimes.com/2011/01/26/us/26gunsresearch.html>.

23. Wiebe, *supra* note 22

must find narrow and accurate ways to identify individuals who are unlikely to use firearms safely.

IV. REGULATING PEOPLE, NOT ARMS

Successfully reducing firearms-related violence requires effectively identifying dangerous individuals and keeping firearms out of their hands. However, both are difficult, if not impossible. Categorical restrictions, which are designed to protect the public with minimal infringement on Second Amendment rights, paradoxically threaten both public safety and individual rights. Indeed, arms proponents concede that predictions of dangerousness are at once inaccurate and insufficient as a means of protecting the public, going so far as to suggest that a safe public is a universally armed public.²⁴

Prospectively identifying dangerous individuals is fraught with error. Research is exceptionally limited but suggests that any increased risk in violence is extremely modest, if at all.²⁵ If there is an inflated risk of violence, it is associated with minor acts, not fatal shootings.²⁶ Even those recently discharged from mental institutions are no more likely to be violent than their peers, unless they suffer from a comorbid substance abuse problem or have a history of violence.²⁷ In fact, it is those who have not yet been diagnosed who may pose the most risk, as

24. The CEO of the NRA asserted “the best way to stop a bad guy with a gun is with a good guy with a gun.” Wayne LaPierre, CEO of the National Rifle Association, Address at the Conservative Political Action Conference (Feb. 10, 2011), available at http://home.nra.org/pdf/WAYNE_LAPIERRE_CPAC_2011.pdf.

25. Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from The Epidemiologic Catchment Area Surveys*, in *VIOLENT BEHAVIOR & MENTAL HEALTH* 20 (1997); Richard Van Dorn et al., *Mental Disorder and Violence: Is There a Relationship Beyond Substance Use?*, 47 *SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY* (forthcoming 2012), available at <http://www.springerlink.com/content/r067501433wx3411/fulltext.pdf>.

26. Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in *VIOLENT AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* 104–05, 132 (John Monahan & Henry J. Steadman eds., 1994).

27. Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 *ARCHIVES GEN. PSYCHIATRY* 393, 400 (1998).

certain untreated mental illnesses leave a person with less control over his thoughts and actions.²⁸ Nonetheless, restrictions on the sale of firearms are based on the defined thresholds of involuntary commitment, adjudicated dangerousness, and receipt of verdict of not guilty by reason of insanity. Because these proxies often follow rather than precede acts of violence, they have limited utility.

Not only can prohibited persons access firearms, but removing firearms post purchase is even more problematic. Only a minority of states require a license to purchase or possess a handgun, some of which remain valid for years or indefinitely. Even where states have the capacity to match adjudications with purchasing records, law enforcement lack the resources to track down and remove weapons from prohibited persons.²⁹ An estimated 200,000 individuals have legally purchased a gun and subsequently lost competence to safely operate it.³⁰

Categorical restrictions do not reliably keep firearms from violent persons. Nearly 3 million individuals meet the criteria for firearms restrictions relating to mental illness, but only a few hundred thousand are listed in the NICS.³¹ Regulating people and not firearms will always prove deficient in the wake of the next tragedy. Nevertheless, even imperfect legislation must

28. Indeed, Jared Loughner's teachers and classmates had noticed bizarre behavior in the months leading up to his homicidal actions. The school asked him to take a leave of absence until he sought mental health evaluation, but no one reported him to the authorities, or even to a mental health professional. Kirk Johnson et al., *Suspect's Odd Behavior Caused Growing Alarm*, N.Y. TIMES, Jan. 10, 2011, at A1, available at <http://www.nytimes.com/2011/01/10/us/10shooter.html>. In other notorious shootings, schools have done much less (e.g., Virginia Tech, Columbine).

29. California is the only state to have implemented a system to match purchasing records with subsequent loss of competency. There, authorities rely on the Armed Prohibited Persons System to track down at least those individuals who have purchased a handgun (rifles and shotgun purchases are not monitored). Yet with nearly 20,000 names in the system, police lack the manpower to track down and remove weapons from all of these persons' homes; some departments have not even accessed the database. Ed Connolly & Michael Luo, *States Struggle to Disarm People Who've Lost Right to Own Guns*, N.Y. TIMES, Feb. 6, 2011, at A1, available at <http://www.nytimes.com/2011/02/06/us/06guns.html>.

30. *Id.*

31. GUN CONTROL, *supra* note 16, at 8, 59.

protect patient privacy and dignity.

V. CONFIDENTIALITY

Mental health records contain sensitive information and fear of disclosure may dissuade individuals from being honest with physicians or even seeking treatment. Nonetheless, the Supreme Court has upheld restrictions on access to firearms based on involuntary commitment or adjudication as a “mental defective,”³² meaning that gun control laws circumvent medical privacy laws, subjecting mentally ill patients to unwanted and unauthorized disclosure of treatment and diagnosis details. Overinclusive reporting policies (e.g., of diagnosis or outpatient treatment) unnecessarily infringe on medical privacy and deter patients from seeking care.

Individuals waive the right to privacy when purchasing firearms from a licensed dealer. Buyers complete firearms transaction records that fully disclose—subject to federal prosecution—personal information including current addiction to controlled substances, past involuntary commitments, or adjudication as “mentally defective,” which the Department of Justice can both access and release freely.³³ In other words, the buyer retains no expectation of privacy in disclosed information; the form is inspected not only by the seller, but also by state or federal agents in connection with a criminal investigation or annual inspection of the dealer.³⁴ Although the NICS limits otherwise unauthorized access, the Department of Justice is free to release this information “without regard for privacy or confidentiality.”³⁵ Moreover, should a purchaser challenge a denial of a state permit or license, courts will allow disclosure of mental health records to determine whether the application for

32. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 116–17 (1983).

33. *See* 18 U.S.C. § 923(g)(1)(A)–(B) (2006). *But see* *United States v. Marchant*, 55 F.3d 509, 513–14 (10th Cir. 1995) (noting the 1986 amendments to the Gun Control Act were added to narrow the government’s ability to make warrantless searches of firearm dealers’ records).

34. § 923(g).

35. *Id.* § 923(g)(1)(D); *Marchant*, 55 F.3d at 513, 516.

licensure was properly denied.³⁶

Privacy intrusions occur at the state level as well. The Gun Control Act does not require states to safeguard privacy such as by prohibiting overreporting, disclosure to nonessential personnel, or release of diagnosis.³⁷ State law often requires mental health professionals to alert authorities if a patient is dangerous to himself or herself or to others. For example, Illinois inpatient facilities must report involuntary hospitalizations to the police for inclusion in the NICS.³⁸ Five states explicitly require arms purchasers to waive confidentiality of all mental health records.³⁹

Tracking individual mental health histories in federal and state databases contravenes the purpose of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), a federal law protecting against unauthorized disclosure of individual health information.⁴⁰ The Privacy Rule, created by regulations implementing HIPAA, prohibits health care providers, plans, or clearinghouses (i.e., billing agencies) from disclosing identifiable health information without a patient's written consent or in connection with payment or treatment.⁴¹ Nonetheless, the Privacy Rule expressly does not vitiate other laws requiring disclosure, such as the Brady Handgun Violence Prevention Act (creating the NICS) or state laws requiring gun purchasers to waive confidentiality to mental health records.⁴² In fact,

36. *See, e.g.*, *State v. Cordoma*, 859 A.2d 756, 764–65 (N.J. Super. Ct. App. Div. 2004).

37. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, §102(d), 122 Stat. 2559 (2008).

38. LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS 148 (2008) [hereinafter LEGAL CMTY. AGAINST VIOLENCE], available at http://www.lcav.org/publications-briefs/reports_analyses/RegGuns.entire.report.pdf.

39. *Id.*

40. 42 U.S.C. § 1320d-2(d)(2)(B)(ii) (2006 & Supp. 2010).

41. 45 C.F.R. § 164.502 (2010).

42. U.S. DEPT OF HEALTH & HUMAN SERVS., PROTECTING PERSONAL HEALTH INFORMATION IN RESEARCH: UNDERSTANDING THE HIPAA PRIVACY RULE 3–4 (2004), available at http://privacyruleandresearch.nih.gov/pdf/HIPAA_Booklet_4-14-2003.pdf.

identifiable health information may be released broadly as required by law—for public health activities, in response to an order of a court, for law enforcement purposes, or to avert a serious threat to health or safety.⁴³

A system of gun control that relies on easily accessible mental health records creates a fundamental threat to basic privacy principles. The medical privacy of mental health records is of paramount importance due to the stigma associated with mental illness, and the deeply personal information contained in them; disclosure can result in personal embarrassment or even discrimination. Fear of disclosure can dissuade individuals from being honest with their providers, or even seeking treatment. Thus, special protections of medical privacy have been enacted, but are often trumped by concerns for public safety. For example, a therapist cannot reveal confidential patient information in state or federal court, but must alert authorities if the patient presents a danger to himself or third parties.⁴⁴ Privacy protections are built into all federal and state laws that relate to mental health restrictions, but are at inherent tension to the purpose of the restrictions—to easily identify prohibited persons. Balancing confidentiality of health records with the accessibility of a NICS will create perpetual tension.

VI. CREATING CONSTRUCTIVE AND CONSTITUTIONAL ARMS RESTRICTIONS?

Given the ineffectiveness of current restrictions on access to firearms for “dangerous” individuals with mental illness, the government must improve safeguards against firearm-related violence. The NRA’s approach—to arm the public—is an untenable solution, given the well-established relationship between gun ownership and fatalities, both intentional and accidental. While the current interpretation of the Second Amendment leaves us all at heightened risk for gun violence, Congress could enact sensible reforms to the Gun Control Act

43. 45 C.F.R. §§ 164.512(a), (b), (e), (f), (j) (2010).

44. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345–46 (Cal. 1976).

that would reduce the frequency with which the inevitable occurs—that widely available arms are placed in the wrong hands.

The NRA's suggestion that public safety from murderous intent requires a universally armed public flies in the face of all available evidence. Currently, there is one death per day for every civilian gun owned.⁴⁵ The presence of a firearm in a home makes residents more likely to be fatally shot—whether by accident or intentional action.⁴⁶ Moreover, the attempt to filter arms out of the hands of the dangerous has failed; use of the NICS has not lowered firearm related homicide and suicides,⁴⁷ even though the number of mentally ill persons listed has increased significantly since 2007.⁴⁸ This is not surprising, given that most violent acts are not committed by the mentally ill.⁴⁹ Fatalities have only declined in states with universally strict firearms control (e.g., Massachusetts, New York, and New Jersey).⁵⁰ These effectual laws are of the very type at risk of Constitutional scrutiny, given the Court's recent interpretation of

45. In 2007, there were approximately 85 deaths caused by guns per day. Gun Violence Statistics, LEGAL COMMUNITY AGAINST VIOLENCE, http://www.lcav.org/statistics-polling/gun_violence_statistics.asp#f37 (last visited Feb. 6, 2012). There are approximately 90 guns for every 100 people. *Id.*

46. David Hemenway, *Risks and Benefits of a Gun in the Home*, 5 AM. J. LIFESTYLE MED. 502, 508 (2011), available at <http://ajl.sagepub.com/content/5/6/502.full.pdf>.

47. Price & Norris, *supra* note 17, at 328.

48. The NICS Improvement Amendments Act of 2007, passed in the wake of the Virginia Tech shootings, created incentives to encourage state reporting into NICS (e.g., awarding grants to fund creation and maintenance of state databases and imposing financial penalties for failure to do so). In response, states have expanded the scope of reporting (including patients committed for fourteen days instead of only ninety and patients admitted to private as well as public hospitals). See, e.g., WASH. REV. CODE § 71.05.240 (2009) (expanding the definition of mentally ill triggering reporting to include those committed for fourteen days); 740 ILL. COMP. STAT. 110/12 (2009) (requiring reporting of patients in private as well as public hospitals). Reporting of mentally ill increased by thirty seven percent in 2009. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231679, BACKGROUND CHECKS FOR FIREARMS TRANSFERS 2009—STATISTICAL TABLES (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/html/bcft/2009/bcft09st.pdf>.

49. Swanson, *supra* note 25.

50. Luo, *supra* note 22.

the Second Amendment.

Thus, Congress should adopt five sensible reforms, which the Supreme Court would likely uphold: (1) ban large-sized ammunition magazines,⁵¹ (2) withhold state funding for inadequate privacy protections, (3) ensure more rapid and reliable background checks, (4) require longer waiting periods,⁵² and (5) close the gun show loophole.⁵³ Progress has begun: President Obama called for change in the wake of the attack on Representative Giffords, citing the need for a “faster and nimbler” background check system,⁵⁴ and two bills recently introduced to the House and Senate would ban oversized ammunition magazines, penalize states for incomplete reporting to NICS, and close the loophole that allows unregulated sellers to use gun shows as a sales floor.⁵⁵ Legislators must take seriously the epidemic of firearms-related violence in the United States.

51. Several states already limit the number of rounds one can purchase in a single magazine. *E.g.*, CAL. PENAL CODE § 12020(a)(2), (c)(25) (West 2002) (setting a magazine round restriction of no more than ten); HAW. REV. STAT. § 134-8(c) (West 2006) (no more than ten); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 131M (West 2006) (no more than ten); MD. CODE ANN., CRIM. LAW § 4-305(b) (West 2006) (no more than twenty); N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (West 2006) (no more than fifteen); N.Y. PENAL LAW §§ 265.00(23), 265.02(8) (McKinney 2006) (no more than ten); *see also* Violent Crime Control and Gun Prevention Act, H.R. 3131, 103rd Cong. (1993) (banning large capacity ammunition feeding devices and setting the limit at ten rounds; this Bill was enacted in 1994, but expired in 2010).

52. The risk of suicide by firearm is fifty-seven times higher in the first week of purchasing handgun than in normal population. Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 *NEW ENG. J. MED.* 1583, 1585 (1999).

53. There are two bills currently before the House and Senate to amend the Brady Act—the first of which requires gun show operators to register with the Attorney General and submit to random inspection. Gun Show Loophole Closing Act of 2011, H.R. 591, 112th Cong. (2011). The second proposal requires a licensed dealer selling to an unlicensed buyer to report the transaction to the Attorney General within thirty days. Gun Show Background Check Act of 2011, S. 35, 112th Cong. (2011).

54. President Barack Obama, Op-Ed., *We Must Seek Agreement on Gun Reforms*, *ARIZ. DAILY STAR*, Mar. 13, 2011, http://azstarnet.com/article_011e7118-8951-5206-a878-39bfb9dc89d.html.

55. Fix Gun Checks Act of 2011, S. 436, 112th Cong. (2011); H.R. 591.

VI. CONCLUSION

*“Violence in American politics tends to bubble up from . . . a murky landscape where worldviews get cobbled together from a host of baroque conspiracy theories, and where the line between ideological extremism and mental illness gets blurry fast.”*⁵⁶

Ross Douthat, *United in Horror*

It is clear that a majority of the Supreme Court believes that the Second Amendment protects an individual right to bear arms, leaving governments to regulate dangerous persons, rather than dangerous weapons. Yet the longstanding prohibitions against arms possession by the mentally ill have proved ineffective at keeping arms out of the hands of the violent. Short of universal regulations, reliably keeping dangerous arms out of the hands of the violent is impossible, yet the struggle to protect the public's health cannot be defeated by the recent expansive interpretation of the Second Amendment. To the extent that restrictions within this scope will keep arms away from violent individuals, they offer reason for hope. Yet to the extent that restrictions further infringe on the mentally ill's right to privacy without providing comprehensive arms control, they likely will do more harm than good. In the wake of the most recent carnage and the newly robust right to bear arms, we must be very careful to maintain the dignity and human rights of the mentally ill as we push forward with our longstanding prohibitions against the right to bear arms.

56. Ross Douthat, Op-Ed., *United in Horror*, N.Y. TIMES, Jan. 10, 2011, at A21, available at <http://www.nytimes.com/2011/01/10/opinion/10douthat.html>.