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2013

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#### Recommended Citation

Fredrick E. Vars & Amanda A. Young, *Do the Mentally Ill Have a Right to Bear Arms*, 48 Wake Forest L. Rev. 1 (2013).

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# DO THE MENTALLY ILL HAVE A RIGHT TO BEAR ARMS?

*Fredrick E. Vars\**  
*Amanda Adcock Young\*\**

## INTRODUCTION

At the midnight premiere of the latest Batman movie on Friday, July 20, 2012, in Aurora, Colorado, James Holmes “tossed two hissing gas canisters and calmly walked up the aisle firing at moviegoers, killing 12 and wounding 58.”<sup>1</sup> Some called almost immediately for reinstatement of the ban on assault weapons and high-capacity magazines.<sup>2</sup> President Obama hinted in that direction but called instead for better enforcement of existing gun laws and keeping guns out of the hands of the mentally ill.<sup>3</sup> Although all of Holmes’s guns were obtained legally,<sup>4</sup> he was apparently seeing a psychiatrist before the shooting.<sup>5</sup>

The politics of gun control are complicated. The Brady Campaign to Prevent Gun Violence and the National Rifle Association (“NRA”) are generally on opposite sides of gun policy debates.<sup>6</sup> After the Virginia Tech massacre,<sup>7</sup> however, the NRA

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1. Karen E. Crummy & Jordan Steffen, *A Calculated Plan: Apartment Rigged with Deadly Traps*, DENVER POST, July 22, 2012, at 1A; Op-Ed., *Restrict Access to Mass Killing Tools*, DENVER POST, July 24, 2012, at 21A.

2. *Restrict Access to Mass Killing Tools*, *supra* note 1.

3. Amy Gardner & Philip Rucker, *President Promises More Action on Guns*, WASH. POST, July 26, 2012, at A04.

4. *Restrict Access to Mass Killing Tools*, *supra* note 1.

5. Karen E. Crummy & Jeremy P. Meyer, *Suspect Saw Psychiatrist*, DENVER POST, July 28, 2012, at 1A.

6. Press Release, Dan Gross, President, Brady Campaign to Prevent Gun Violence, Brady Campaign Statement on the NRA’s Defense of Dangerous “Shoot First” Laws (May 2, 2012), available at <http://www.bradiycampaign.org/media/press/view/1495/>.

actually worked *with* the Brady Campaign on a bill encouraging states to submit records of the dangerously mentally ill for background checks.<sup>8</sup>

This temporary alignment of strange bedfellows and Obama's response to the movie massacre are undoubtedly derived from the strong public perception that the mentally ill are dangerous to others.<sup>9</sup> High-profile killings certainly fuel that perception: in addition to Virginia Tech and Aurora, consider Jared Loughner and John Hinckley, both of whom attempted to assassinate prominent politicians. Fear was also the motivation for the current federal law prohibiting firearm possession by certain mentally ill individuals.<sup>10</sup> And it would be hard to conclude that the perception of danger did not contribute to the United States Supreme Court's recent dictum to the effect that such laws do not violate the Second Amendment.<sup>11</sup>

In fact, the vast majority of mentally ill individuals will not be violent toward others, and large subsets do not even pose an increased risk. The risk of suicide, on the other hand, is substantially elevated for nearly every diagnosis. Mental illness likely played a role in the gun suicides of Junior Seau,<sup>12</sup> Kurt Cobain,<sup>13</sup> Ernest Hemingway,<sup>14</sup> and Vincent van Gogh.<sup>15</sup> Current restrictions on gun ownership by the mentally ill would rest on much stronger constitutional footing if based on preventing suicide

7. See *Virginia Polytechnic Institute and State University*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/organizations/v/virginia\\_polytechnic\\_institute\\_and\\_state\\_university/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/v/virginia_polytechnic_institute_and_state_university/index.html) (last updated Mar. 14, 2012).

8. Editorial, *One Gun Bill Too Many*, L.A. TIMES, Dec. 4, 2009, at A42. What happened to the fragile truce? "After the bill became law in 2008, the N.R.A. began lobbying state lawmakers to keep requirements for petitioners [seeking a restoration of gun rights after disqualification for mental illness] to a minimum." Michael Luo, *Mixing Guns and Mental Illness*, N.Y. TIMES, July 3, 2011, at A1.

9. Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1332 (1999).

10. Clare Priest, Note, *When a Stopgap Measure Triggers a Permanent Proscription: The Interpretation of "Committed to a Mental Institution" in the Gun Control Act of 1968*, 80 WASH. U. L.Q. 359, 369 (2002).

11. See *infra* notes 23–30 and accompanying text.

12. Sam Farmer, *Junior Seau Had Brain Disease When He Committed Suicide*, L.A. TIMES (Jan. 10, 2013), <http://www.latimes.com/sports/sportsnow/la-sp-sn-junior-seau-brain-20130110,0,5469494.story>.

13. Alan Berman, *An Idiographic Approach to Understanding Suicide in the Young*, in SUICIDE IN CHILDREN AND ADOLESCENTS 198, 200–01 (Robert A. King & Alan Apter eds., 2003).

14. NANCY J. OSGOOD, SUICIDE IN LATER LIFE: RECOGNIZING THE WARNING SIGNS 1–2 (1992).

15. Dietrich Blumer, *The Illness of Vincent van Gogh*, 159 AM. J. PSYCHIATRY 519, 520–22 (2002).

rather than violence toward others.<sup>16</sup> Of course, this assumes that the mentally ill have some right, however limited, to bear arms.

The Supreme Court's dictum is the starting point for answering the title question: Does the Second Amendment protect the mentally ill?<sup>17</sup> Part I considers several possible interpretations of the dictum. One reading is that the mentally ill simply fall outside the scope of the Second Amendment and have no right to bear arms. All but one federal circuit court of appeals have strongly suggested that they would take this approach.<sup>18</sup> This reading is unsatisfactory, as explained below. The Seventh Circuit would apparently apply intermediate scrutiny.<sup>19</sup> State courts interpreting their own constitutions have adopted a less exacting standard: reasonableness.<sup>20</sup> Finally, some commentators and courts have advocated hybrid or other unorthodox approaches.<sup>21</sup>

Rather than arguing for the adoption of one approach or another, the balance of this Article examines whether existing gun laws restricting the right of the mentally ill to possess firearms are constitutional under three possible approaches: (1) reasonableness; (2) intermediate scrutiny; and (3) hybrid or other.

The first goal of this Article is to assess what is at stake when selecting a level of scrutiny. The second, and perhaps more important, goal is to illuminate a hidden and flawed assumption of current gun policy. Even if we have the right laws, it may be for the wrong reasons. Subpart II.A begins by outlining current laws restricting gun possession by the mentally ill. There is a continuum from the federal law disallowing possession primarily by those who have been involuntarily committed to a few states' laws banning possession by anyone merely diagnosed as mentally ill.

All three standards require consideration of the government interest justifying regulation, as explained in Subpart II.B.

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16. Professor David Williams has suggested that suicide prevention is a stronger rationale for gun regulation than violence prevention. David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641, 657 (2008).

17. Note that the question is descriptive, not normative. This Article does not answer the question of how the Constitution *should* be interpreted or the question of whether restrictions on firearm possession by the mentally ill are good policy. On the latter, see, for example, Paul S. Appelbaum & Jeffrey Swanson, *Gun Laws and Mental Illness: How Sensible Are the Current Restrictions?*, 61 PSYCHIATRIC SERVICES 652, 652 (2010); Lawrence O. Gostin & Katherine L. Record, *Dangerous People or Dangerous Weapons: Access to Firearms for Persons with Mental Illness*, 305 J. AM. MED. ASS'N 2108, 2108 (2011). For purposes of this Article, individuals with substance abuse disorder and no other comorbid mental illness are not considered "mentally ill."

18. See *infra* notes 37–41 and accompanying text.

19. See *infra* notes 59–63 and accompanying text.

20. See *infra* notes 51–55 and accompanying text.

21. See *infra* notes 64–71 and accompanying text.

Preventing gun accidents, violence, and suicides are the relevant interests. There is little question that these interests are sufficiently important—rather, the issue is whether the fit between the interests and current gun laws is sufficiently tight to pass constitutional muster. There is a substantial amount of evidence regarding the relationship between mental illness and violence and suicide. Under the reasonableness approach, all current gun laws are very likely constitutional. Under intermediate scrutiny, only targeted restrictions are justified by the goal of preventing harm to others. On the other hand, preventing suicide is likely a sufficient constitutional justification for sweeping prohibitions. The most exacting, third approach considered here would invalidate all such laws. Almost everything turns on the level of scrutiny.

This examination of laws prohibiting gun possession by the mentally ill reveals hidden tensions beneath a “consensus” issue. Such laws pit civil liberties against civil rights—more specifically, the right to bear arms against the rights of the mentally ill not to be discriminated against. A second tension is fear versus reality. Contrary to popular misconceptions, the mentally ill are far more dangerous to themselves than to others.<sup>22</sup> If the government wants to robustly regulate their gun rights, it may have to embrace paternalism.

## I. DELINEATING THE RIGHT TO BEAR ARMS

### A. *What Heller Says*

The Second Amendment to the United States Constitution provides: “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>23</sup> The path-marking case is the United States Supreme Court’s 2008 decision in *District of Columbia v. Heller*.<sup>24</sup> After an extensive analysis of the history of the Second Amendment, the Court struck down a total ban on handgun possession in the home, as well as a requirement to maintain other firearms either disassembled or bound by a trigger lock.<sup>25</sup>

History was at the heart of the *Heller* opinion. In its historical exegesis, the Court stated and implied multiple times that *all* Americans have a right to bear arms:

What is more, in all six other provisions of the Constitution that mention “the people,” the term unambiguously refers to

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22. See *infra* notes 85–100 and accompanying text.

23. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting U.S. CONST. amend. II).

24. *Id.*

25. *Id.* at 628–30.

all members of the political community, not an unspecified subset.<sup>26</sup>

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.<sup>27</sup>

“Keep arms” was simply a common way of referring to possessing arms, for militiamen *and everyone else*.<sup>28</sup>

From this language it would seem clear that the mentally ill, like all other Americans, have a right to bear arms.

But the Court in dictum suggested otherwise: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”<sup>29</sup> A footnote described these prohibitions as examples of “presumptively lawful regulatory measures.”<sup>30</sup>

How should one reconcile these crosscurrents in *Heller*?<sup>31</sup>

### B. *What Heller Does Not Mean*

Start with the most expansive view of gun rights for the mentally ill. First, one could simply ignore the dictum and conclude that the mentally ill have precisely the same Second Amendment rights as other Americans. Dicta are dicta and not controlling.<sup>32</sup> But lower federal courts fear reversal and take the Supreme Court’s “considered dicta” quite seriously.<sup>33</sup> One commentator has gone so

26. *Id.* at 580.

27. *Id.* at 581.

28. *Id.* at 583; *see also id.* at 583 n.7 (referencing “[t]he right of every individual to keep arms for his defence . . .” (quoting WILLIAM ALEXANDER DUER, *OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* 31–32 (1833))); *id.* at 585 n.8 (“Every citizen has a right to bear arms . . .” (quoting ALA. CONST. of 1819, art. I, § 23; CONN. CONST. of 1818, art. I, § 17; MISS. CONST. of 1817, art. I, § 23)).

29. *Id.* at 626.

30. *Id.* at 627 n.26.

31. The Court had a chance to answer this question in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion) but chose instead merely to apply *Heller* against the states and to reiterate the enigmatic dicta.

32. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

33. *United States v. S. Union Co.*, 630 F.3d 17, 34 (1st Cir. 2010) (“We are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement.” (citation omitted) (internal quotation marks omitted)).

far as to describe these as “dicta of the strongest sort.”<sup>34</sup> Ignoring them does not seem a viable option.

A second approach would focus on the “presumptively lawful” language. A minimalist reading of this phrase is that restrictions on the gun rights of the mentally ill will be presumed constitutional in the same way practically all other legislation is.<sup>35</sup> Nothing in the *Heller* opinion casts doubt on such restrictions because they were not at issue, and the presumption of constitutionality survives. This argument is too clever by half. Recognizing an individual right to bear arms obviously casts doubt on—even if it does not automatically invalidate—restrictions on gun ownership. So when the Court says its opinion casts no doubt, it is sending a signal regarding the merits of mental illness gun restrictions.<sup>36</sup>

Skipping for a moment over more complicated middle ground, the third approach would be simply to rely upon the dictum to uphold existing restrictions on gun possession by the mentally ill.<sup>37</sup> All three lower courts to address the question squarely have, without analysis, done precisely this.<sup>38</sup> All but one court of appeals have similarly followed the *Heller* dicta in upholding felon-in-possession laws.<sup>39</sup>

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34. Carlton F. W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009).

35. *Kennedy v. Louisiana*, 554 U.S. 407, 465 (2008) (Alito, J., dissenting) (“Laws enacted by the state legislatures are presumptively constitutional . . .”); *United States v. Morrison*, 529 U.S. 598, 607 (2000) (applying a “presumption of constitutionality” to acts of Congress). *But cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969) (“Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a ‘rational basis’ for the distinctions made are not applicable.”).

36. Essentially the same could be said of another possible limiting construction: the Court was strongly suggesting that such restrictions are facially valid, but subject to as-applied challenges. The as-applied challenges are strengthened, indeed created, by the recognition of an individual right to bear arms. See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008).

37. Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review Under Heller*, 29 N. ILL. U. L. REV. 605, 621 (2009) (“The more plausible inference would be that the Court intended to assert that felons and the mentally ill are not protected under the Second Amendment.”).

38. *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at \*1 (4th Cir. Jan. 14, 2009) (per curiam); *United States v. Murphy*, 681 F. Supp. 2d 95, 103 (D. Me. 2010); *United States v. Roy*, 742 F. Supp. 2d 150, 152 (D. Me. 2010).

39. *United States v. Moore*, 666 F.3d 313, 316–19 (4th Cir. 2012); *United States v. Torres-Rosario*, 658 F.3d 110, 112–13 (1st Cir. 2011); *United States v. Barton*, 633 F.3d 168, 171–72 (3d Cir. 2011); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114–15 (9th Cir. 2010); *United States v. Rozier*,

One problem with this approach is that the ban on gun possession by the mentally ill is not “longstanding,” at least not in the constitutionally relevant sense of pre-dating adoption of the Second or Fourteenth Amendments.<sup>40</sup> It is true that justices of the peace traditionally had the greater power to confine individuals with dangerous mental impairments, but there is no historical basis for deprivation of gun rights after release.<sup>41</sup>

A second defect is that this reading of *Heller* arguably drops the word “presumptively” from the phrase “presumptively lawful.” If the mentally ill were categorically excluded from Second Amendment protection, then restrictions on their gun rights would be simply “lawful,” not “presumptively” so.

Finally, this approach would seem to jettison *Heller*’s soaring rhetoric about the rights of *all* citizens. This last objection is the weakest because the above-quoted passages from *Heller* appeared in the course of rejecting the argument that the right to bear arms was limited to militia members, not that it applied equally across all other divides. The other two objections, however, should be decisive. The mentally ill have a right to bear arms.

### C. *What Heller Might Mean*

A more attractive, fourth alternative would be to adopt a brand of scrutiny that would likely validate mental illness restrictions. This would arguably give meaning to both words in the phrase “presumptively lawful.”<sup>42</sup> The *Heller* majority did not adopt a specific level of scrutiny for evaluating gun restrictions but expressly rejected the rational-basis test.<sup>43</sup> In dissent, Justice Breyer argued that the majority also implicitly rejected strict scrutiny by listing as presumptively valid restrictions that would likely fail that high hurdle.<sup>44</sup> Notably, Justice Breyer omitted mental illness restrictions from his list, suggesting that some of these could survive strict scrutiny.<sup>45</sup> But because the felon

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598 F.3d 768, 770–71 (11th Cir. 2010) (per curiam); *United States v. Stuckey*, 317 F. App’x 48, 50 (2d Cir. 2009); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).

40. *Larson*, *supra* note 34, at 1376 (“One searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership. Such laws seem to have originated in the twentieth century.”).

41. *Id.* at 1376–78.

42. *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

43. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

44. *Id.* at 688 (Breyer, J., dissenting); *see also id.* (explaining that strict scrutiny would require that a restriction be “narrowly tailored to achieve a compelling governmental interest”).

45. *Accord Larson*, *supra* note 34, at 1383 (“[A]lthough this exception, if focused on a specific subset of the mentally ill, would probably be upheld under



exception, paired with mental illness by *Heller*, is almost certainly not narrowly tailored to a compelling state interest,<sup>46</sup> strict scrutiny cannot be the relevant test.<sup>47</sup> That leaves several other options. Professor Carlton Larson narrows the candidates to three: (1) reasonableness,<sup>48</sup> (2) intermediate scrutiny, and (3) some hybrid.<sup>49</sup>

### 1. Reasonableness

Is there support for “reasonableness” review? Professors Laurence Tribe and Akhil Amar have endorsed this view.<sup>50</sup> Professor Adam Winkler has shown that state courts interpreting their constitutions have uniformly adopted a reasonableness approach: “[A]ny law that is a ‘reasonable regulation’ of the arms right is constitutionally permissible.”<sup>51</sup> This standard may be more exacting than rational basis review,<sup>52</sup> but only slightly.<sup>53</sup> In effect,

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strict scrutiny, it is by no means a clear-cut case, and a broader law would almost certainly fail.”)

46. *Id.* at 1382 (“It is . . . implausible to claim that an across-the-board exclusion for all felons from this one particular constitutional right can be justified as narrowly tailored under strict scrutiny.”). Nor is it consistent with history, according to another commentator. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009).

47. Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1156–57, 1157 n.227 (2011).

48. One commentator has argued that *McDonald* rejected the reasonableness standard. Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL'Y 489, 502 (2012). It did not. It merely rejected the argument that state and local governments were the arbiter of reasonableness. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010) (plurality opinion) (“Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable . . .”). Indeed, the same opinion went on to cite favorably the amicus position that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.” *Id.* (citation omitted).

49. Larson, *supra* note 34, at 1380.

50. See Laurence H. Tribe & Akhil Reed Amar, Op-Ed., *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31 (“The right to bear arms is certainly subject to reasonable regulation in the interest of public safety.”).

51. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686–87 (2007).

52. *Id.* at 717; see also *Nordyke v. King*, 644 F.3d 776, 795 (9th Cir. 2011) (Gould, J., concurring); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 380–84 (2011).

53. Winkler, *supra* note 51, at 687 (“Since World War II, state courts have authored hundreds of opinions using this test to determine the constitutionality of all sorts of gun control laws. All but a tiny fraction of these decisions uphold the challenged gun control laws as reasonable measures to protect public safety.”). But see Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J.L. & PUB. POL'Y 203, 207 (2010) (suggesting that state court review has been less deferential than claimed).

courts ask, with a healthy dose of deference, whether the legislature has struck a reasonable “balance between safety and weapons.”<sup>54</sup>

Courts will hold unconstitutional a gun control law (or its application to a particular individual) only in extreme circumstances where (a) the law or its application is so profoundly unfair as to be arbitrary and irrational, or (b) the law or its application is so restrictive as to be effectively a destruction or nullification of the right.<sup>55</sup>

## 2. *Intermediate Scrutiny*

Intermediate scrutiny would require that a restriction upon the gun rights of the mentally ill would have to be substantially related to an important government objective.<sup>56</sup> At least one commentator has advocated,<sup>57</sup> and several district courts have adopted,<sup>58</sup> this approach.

The Seventh Circuit as well has adopted intermediate scrutiny. In *United States v. Skoien*,<sup>59</sup> an en banc panel upheld a statute prohibiting firearm possession by an individual with two convictions for “misdemeanor crime[s] of domestic violence.”<sup>60</sup> The court expressly applied intermediate scrutiny.<sup>61</sup> One might distinguish misdemeanants from felons and the mentally ill on the ground that *Heller* did not mention them, but the Seventh Circuit in *Skoien* rejected that distinction.<sup>62</sup> Any doubt as to that conclusion was

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54. Winkler, *supra* note 51, at 713; *accord id.* at 717–18.

55. *Id.* at 723.

56. Craig v. Boren, 429 U.S. 190, 197 (1976).

57. Kiehl, *supra* note 47, at 1133 (“This Comment will then argue that courts should apply intermediate scrutiny in evaluating gun regulations that are short of absolute bans on possession, and that prohibitions on carrying weapons do not implicate the core constitutional right identified in *Heller* and *McDonald* of possessing a gun in the home for self-defense.”). This approach is arguably “hybrid.” See *infra* Part I.C.3. Professor Brannon Denning agrees that *Heller* adopted “at least” intermediate scrutiny. Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. 789, 799 (2008).

58. The cases are in the felon-in-possession context. *United States v. Miller*, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (citing *United States v. Radencich*, No. 3:08-CR-00048(01)RM, 2009 WL 127648, at \*4 (N.D. Ind. Jan. 20, 2009); *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 WL 35225, at \*5 (N.D. Ind. Jan. 5, 2009); *United States v. Bledsoe*, No. SA-08-CR-13(2)-XR, 2008 WL 3538717, at \*4 (W.D. Tex. Aug. 8, 2008)).

59. 614 F.3d 638 (7th Cir. 2010) (en banc).

60. *Id.* at 639 (quoting 18 U.S.C. § 922(g)(9) (2006)).

61. *Id.* at 641–42.

62. *Id.* at 640 (“The language we have quoted warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the

removed just weeks later, when a Seventh Circuit panel applied intermediate scrutiny to a felon-in-possession ban.<sup>63</sup>

### 3. *Hybrid*

The universe of “hybrid” approaches is potentially limitless, so this Article summarizes just two with substantial scholarly support. First, in a relatively straightforward hybrid of intermediate and strict scrutiny, Professor Calvin Massey argues that material infringements on the right to bear arms should be upheld only if they are substantially related to a compelling government purpose.<sup>64</sup> Several lower federal courts have similarly adopted or suggested a threshold burden on gun rights before heightened scrutiny need be applied.<sup>65</sup> This approach may be attractive, but it can be set to one side for present purposes. It is indistinguishable from intermediate scrutiny in this context: an absolute prohibition on gun possession is plainly material and sufficiently burdensome to trigger heightened scrutiny, and the government objectives of preventing gun deaths and injuries are plainly compelling, not merely important.<sup>66</sup>

A second “hybrid” approach is more complicated. Professor Eugene Volokh has argued that courts should examine restrictions separately based on four different categories of justification: (1) scope, (2) burden, (3) danger reduction, and (4) government as proprietor.<sup>67</sup> Volokh suggests that prohibiting the mentally ill from possessing firearms may be a valid limitation on the scope of the right to bear arms<sup>68</sup> but is probably not justified for danger

Second Amendment creates, and what regulations legislatures may establish, were left open.”)

63. *United States v. Williams*, 616 F.3d 685, 692–93 (7th Cir. 2010); *see also Ezell v. City of Chic.*, 651 F.3d 684, 708 (7th Cir. 2011).

64. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1137 (2000); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (suggesting that heightened scrutiny applied only to restrictions that amount to a “substantial burden” on the right to bear arms).

65. *Nordyke v. King*, 644 F.3d 776, 782–86 (9th Cir. 2011) (citing *United States v. Masciandaro*, 638 F.3d 458, 469–70 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 188 (D.D.C. 2010)).

66. Winkler, *supra* note 51, at 731 (“[P]ublic safety is already a compelling government interest.”); *cf. United States v. Salerno*, 481 U.S. 739, 750 (1987) (“[T]he Government’s general interest in preventing crime is compelling . . .”).

67. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1443 (2009).

68. *Id.* at 1510 (“I suspect that those whose judgment is seen as compromised by mental illness . . . have historically been seen as less than full rightholders . . . . But again, some solid historical research would be more helpful than either scholars’ or judges’ speculation.”). Recall that gun

reduction.<sup>69</sup> His scope argument is based on the false historical assumption that limitations on the rights of the mentally ill to bear arms are “longstanding” (discussed above), so our focus will be danger reduction. Volokh frames the question as follows: “The real inquiry is into whether and when a right may be substantially burdened in order to materially reduce the danger flowing from the exercise of the right, and into what sort of proof must be given to show that the substantial restriction will indeed reduce the danger.”<sup>70</sup> Volokh suggests some form of exacting scrutiny for substantial burdens like the mental illness gun ban.<sup>71</sup>

In sum, there are no fewer than three potential levels of constitutional scrutiny, from least to most exacting: reasonableness, intermediate scrutiny, and Volokh’s theory. Part II will apply each of these three standards to current restrictions on gun possession by the mentally ill.

## II. ARE CURRENT RESTRICTIONS CONSTITUTIONAL?

### A. *Federal and State Bans on Gun Possession by the Mentally Ill*

The Federal Gun Control Act of 1968 provides: “It shall be unlawful for any person—who has been adjudicated as a mental defective or who has been committed to a mental institution” to purchase or possess a firearm.<sup>72</sup> A person has been adjudicated as a mental defective if a lawful authority finds that he, “as result of marked subnormal intelligence, or mental illness, incompetency, condition or disease: is a danger to himself or to others; or lacks the mental capacity to contract or manage his own affairs.”<sup>73</sup> The term also includes “a finding of insanity by a court in a criminal case; and those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility.”<sup>74</sup> A person has been committed to a mental institution if, through a formal hearing, a legal authority makes the decision to commit the individual.<sup>75</sup> This term includes commitment for mental illness, but it “does not include a person in a mental institution for observation or a voluntary admission to a mental institution.”<sup>76</sup>

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restrictions on the mentally ill are of recent vintage. *See supra* notes 40–41 and accompanying text.

69. Volokh, *supra* note 67, at 1513.

70. *Id.* at 1461.

71. *Id.* at 1471–73.

72. 18 U.S.C. § 922(g)(4) (2006).

73. 27 C.F.R. § 478.11 (2010).

74. *Id.*

75. *Id.*

76. *Id.*

The diverse approaches of states to gun possession by the mentally ill can be reduced to three. Several states have no statute directly on point.<sup>77</sup> Others basically follow the lead of the federal statute and restrict access to people who have been involuntarily committed or adjudicated mentally defective.<sup>78</sup> Where there is no state statute or the state statute tracks the federal one, the federal standard effectively controls. Other states are more restrictive and prohibit possession or ownership by those who have had any type of commitment, voluntary or involuntary.<sup>79</sup> A small minority of states are extremely restrictive and prohibit ownership or possession by people with mental illness who have no history of commitment.<sup>80</sup> For example, Hawaii prohibits gun possession by anyone who “[i]s or has been diagnosed as having a significant behavioral, emotional, or mental disorder . . . .”<sup>81</sup>

These restrictions can be justified, if at all, by the government’s interest in reducing gun injuries and deaths. The causes may include accidents, aggressive acts, and self-harm. What is the evidence that the mentally ill pose a higher risk in these areas? Is there evidence specific to the different categories of the mentally ill that trigger the firearm ban in different jurisdictions: (1) involuntarily committed or adjudicated mentally defective; (2) voluntarily committed; and (3) merely diagnosed as mentally ill?

### B. *Fit with the Government Interest in Safety*

The government obviously has a compelling interest in preventing firearm deaths. In 2009, there were 554 unintentional

77. For example: Alaska, Mississippi, Montana, New Hampshire, South Dakota, Texas, and Vermont. See 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 & L. 330, 334–35 tbl.1 (2007).

78. E.g., ARK. CODE ANN. § 5-73-103(a) (2005); FLA. STAT. ANN. § 790.065(4) (West 2007); IOWA CODE ANN. §§ 724.8(6), 724.31 (West 2003); OHIO REV. CODE ANN. § 2923.125(D)(1)(i) (LexisNexis 2010); 18 PA. CONS. STAT. ANN. § 6105(c)(4) (West 2007); UTAH CODE ANN. § 76-10-503(1)(b)(vi) (LexisNexis 2008).

79. E.g., DEL. CODE ANN. tit. 11, § 1448(a)(2) (2007); D.C. CODE § 7-2502.03(a)(6) (LexisNexis 2001); GA. CODE ANN. § 16-11-129(b)(2)(J) (2011); 720 ILL. COMP. STAT. ANN. 5/24-3.1(a)(4) (West 2010); MASS. ANN. LAWS ch. 140, § 131(d)(ii) (LexisNexis 2007); *State v. Dunham*, No. 9812012054, 1999 WL 1223767, at \*3 (Del. Super. Ct. Oct. 6, 1999) (“[T]he person’s voluntariness is irrelevant . . .”).

80. N.Y. PENAL LAW § 400.00(d) (McKinney 2008); R.I. GEN. LAWS § 11-47-6 (2002); *In re Mazzone v. Czajka*, 777 N.Y.S.2d 812 (3d Dept. 2004) (affirming revocation of license with diagnosis; no indication of hospitalization).

81. HAW. REV. STAT. § 134-7(c)(3) (2011). Although the facts are not clear, it appears that only a prohibition this broad would have barred gun sales to the Aurora, Colorado shooter, James Holmes.

firearm deaths in the United States.<sup>82</sup> By comparison, there were 18,735 gun suicides and 11,493 gun homicides.<sup>83</sup> Avoiding serious injuries is also a compelling government interest. The following table summarizes, for 2001, firearm-related deaths and injuries serious enough to require treatment in hospital emergency departments<sup>84</sup>:

TABLE 1: FATAL AND NONFATAL FIREARM INJURIES,  
UNITED STATES: 2001

Type	Fatal		Nonfatal	
	Number	Rate*	Number	Rate*
Unintentional	802	0.3	8741	3.1
Assault	11,671	4.1	35,496	12.4
Self-harm	16,869	5.9	2980	**
Undetermined	231	0.1	9480	3.3

\* Per 100,000 population.  
\*\*Rate not calculated because estimate may have been unstable.

One way to frame the constitutional question is to ask whether the mentally ill, if their firearm possession were unrestricted, would disproportionately increase these numbers.

### 1. Accidents

There are no studies showing that the mentally ill pose an increased risk of unintentional gun injuries.<sup>85</sup> Particularly given the relatively low number of accidental firearm fatalities—802 in 2001,<sup>86</sup> 554 in 2009<sup>87</sup>—even the narrow federal restriction on gun possession by involuntary committees and adjudicated mentally defectives would likely fail the most lenient “reasonableness” standard if this were the only justification.

One researcher estimates that more than one million people in the United States annually are civilly committed for psychiatric

82. Kenneth D. Kochanek et al., *Deaths: Final Data for 2009*, 60 NAT'L VITAL STAT. REP. 3 tbl.10 (2011), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_03.pdf).

83. *Id.*

84. Sara B. Vyrostek et al., *Surveillance for Fatal and Nonfatal Injuries—United States, 2001*, 53 MMWR SURVEILLANCE SUMMARIES 1 tbls.6 & 7 (2004), available at <http://www.cdc.gov/mmwr/PDF/SS/SS5307.pdf>.

85. Cf. Donald W. Black et al., *The Iowa Record-Linkage Study—I. Suicides and Accidental Deaths Among Psychiatric Patients*, 42 ARCHIVES GEN. PSYCHIATRY 71, 73–74 (1985) (finding a significant increase in accidental deaths from undifferentiated causes only during the first year after psychiatric hospital admission).

86. Vyrostek et al., *supra* note 84, at 18 tbl.6.

87. Kochanek et al., *supra* note 82.

treatment, one-third of which are involuntary commitments.<sup>88</sup> Of course, the total number of individuals barred by federal law from possessing firearms is much greater than the roughly 333,000 detained each year.<sup>89</sup> To deny all Second Amendment rights to such a large class of individuals in the blind hope of preventing some fraction of unintentional gun fatalities and other injuries does not seem reasonable. Without any supporting data, the restriction seems, in Winkler's words, "so profoundly unfair as to be arbitrary and irrational."<sup>90</sup>

## 2. Violence

The mentally ill are widely perceived as dangerous. Whether this perception is grounded in reality has been disputed.<sup>91</sup> This Subpart will first summarize the key literature and then will consider whether the evidence supports current restrictions under the three possible levels of scrutiny.

### a. Literature

In one large study of community residents, Jeffrey Swanson and his colleagues concluded that 6.81% of people with a serious mental illness reported violent behavior in the past year as compared with only 2.05% of people without a major mental disorder.<sup>92</sup> The diagnoses considered were schizophrenia, major depression, mania or bipolar disorder, alcohol or drug abuse or dependence, obsessive-compulsive disorder, panic disorder, and phobia.<sup>93</sup> Of particular interest was the question about use of a weapon, which expressly included a gun. Weapon use was significantly higher for every

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88. Adam J. Falk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After Kansas v. Hendricks*, 25 AM. J.L. & MED. 117, 117 & n.3 (1999) (citing Mary L. Durham, *Civil Commitment of the Mentally Ill: Research, Policy and Practice*, in MENTAL HEALTH AND LAW 17, 17 (Bruce D. Sales & Saleem A. Shah eds., 1996)).

89. One researcher has more recently suggested that the actual figure may be double: "[A]s many as 660,000 patients per year may be subject to involuntary commitment." BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 3 (2005).

90. Winkler, *supra* note 51, at 723.

91. Eric Silver, *Understanding the Relationship Between Mental Disorder and Violence: The Need for a Criminological Perspective*, 30 L. & HUM. BEHAV. 685, 685-86 (2006).

92. Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMM. PSYCH. 761, 767 fig.1 (1990). An elaboration of this research appears in Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 101 (John Monahan & Henry J. Steadman eds., 1994).

93. See Swanson et al., *supra* note 92, at 763.

diagnosis except mania or bipolar disorder where the *N* was only 30 and none had wielded a weapon.<sup>94</sup> Of the non-substance abuse disorders, schizophrenia had the highest weapon use: 8.58% as compared with 0.40% of individuals without a disorder.<sup>95</sup>

A second study, by Bruce Link and his colleagues, of mental patients reported assaultive weapon use in the past five years for 2.7% of never-treated community residents, 2.1% for first-contact patients, 12.9% for repeat-contact patients ( $p < 0.01$ ), and 11.1% for former patients ( $p < 0.05$ ).<sup>96</sup> These effects remained statistically significant after controlling for age, sex, education, race, ethnicity, need-for-approval scale, and homicide rate in the community,<sup>97</sup> but lost significance after controlling for psychotic symptoms.<sup>98</sup> This strongly suggests that a subset of the mentally ill with psychotic symptoms may account for the higher-observed overall levels of violence, including weapon use.

Supporting the role of psychosis is a recent meta-analysis by Seena Fazel and his colleagues of violence studies involving schizophrenia and other psychoses.<sup>99</sup> The researchers found that such patients were roughly twice as likely to engage in violent behavior as control groups.<sup>100</sup> Summarizing five studies, the meta-analysis found that schizophrenics were almost twenty times more likely to commit homicide.<sup>101</sup>

State firearm bans are not limited to the acutely, or even potentially, psychotic. Again, the key trigger for a firearm ban in most places is commitment to an inpatient facility. That is why a

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94. *Id.* at 768 tbl.6.

95. *Id.*

96. Bruce G. Link et al., *The Violent and Illegal Behavior of Mental Patients Reconsidered*, 57 AM. SOC. REV. 275, 283 tbl.1 (1992). The link between use of mental health services, presumably in part a proxy for severity of illness, was confirmed by Jeffrey W. Swanson et al., *Psychotic Symptoms and Disorders and the Risk of Violent Behavior in the Community*, 6 CRIM. BEHAV. & MENTAL HEALTH 309, 314, 319 tbl.1 (1996) (finding significantly elevated levels of violence among individuals ever hospitalized or otherwise using mental health services in the past six months).

97. Link et al., *supra* note 96, at 287 tbl.4.

98. *Id.* at 288 tbl.5; accord Bruce G. Link & Ann Stueve, *Psychotic Symptoms and the Violent/Illegal Behavior of Mental Patients Compared to Community Controls*, in *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* 137, 154 tbl.7 (John Monahan & Henry J. Steadman eds., 1994); see also Swanson et al., *supra* note 96, at 320 tbl.2 (finding significantly increased violence among those with psychotic symptoms).

99. See generally Seena Fazel et al., *Schizophrenia and Violence: Systematic Review and Meta-Analysis*, 6 PLOS MED. 1 (2009), available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000120>.

100. *Id.* at 4 fig.2 (2.1 odds ratio, eleven studies). With substance abuse comorbidity, the odds ratio jumps to 8.9. *Id.* at 5 fig.3.

101. *Id.* at 12 fig.9.



study funded by the MacArthur Foundation and published in 1998 is so important: it compared “civil admission” patients discharged from acute psychiatric facilities with a control group living in the same neighborhood.<sup>102</sup> It concluded that, among non-substance abusers, the prevalence of violence by patients was no higher than by neighbors.<sup>103</sup> The study also showed that, among acts of violence, actual or threatened weapon use was significantly *less* likely among patients.<sup>104</sup>

The exclusion of substance abusers was important. When they were included, there was a significantly higher prevalence of violence among patients (11.5% in first follow-up period) than among the control group (4.6%;  $p < 0.05$ ).<sup>105</sup> As the authors of the MacArthur study later conceded: “Mental disorder has a significant effect on violence by increasing people’s susceptibility to substance abuse.”<sup>106</sup>

#### b. Applying the Standards

The three standards are (1) reasonableness, (2) intermediate scrutiny, and (3) the Volokh approach. Even the most restrictive state statute would almost certainly survive reasonableness review. Hawaii proscribes gun possession by anyone ever diagnosed with a mental illness.<sup>107</sup> One need look no further than the first study above, by Swanson and his colleagues, for a sufficient basis for this proscription.<sup>108</sup> Nearly 7% of people with a serious mental illness reported violent behavior as compared with 2% of those without.<sup>109</sup>

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102. 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, 394 (1998).

103. *Id.* at 393, 399 tbl.5; see also Virginia Aldigé Hiday, *Dangerousness of Civil Commitment Candidates: A Six-Month Follow-Up*, 14 L. & HUMAN BEHAV. 551, 562 (1990) (“Following a large sample in one state through arrest records, patient ward charts, hospital admission evaluations, civil commitment affidavits, and mental health center patient records, and using objective behavioral indicators, we found that civil commitment candidates do not tend to be dangerous, much less violent, within the 6 months following their court hearings.”). *But see* Swanson, *supra* note 92, at 111 (“Major mental disorder without alcohol or drug abuse complications emerged as a quite rare condition in the community, yet one that was significantly more common among persons who reported that they had committed assaultive acts.”).

104. See Steadman et al., *supra* note 102, at 400 tbl.6 (revealing 22.3% for patients; 42.3% for community).

105. *Id.* at 399 tbl.5.

106. John Monahan et al., *The MacArthur Violence Risk Assessment Study Revisited: Two Views Ten Years After Its Initial Publication*, 59 PSYCHIATRIC SERVICES 147, 149 (2008).

107. HAW. REV. STAT. § 134-7 (2011).

108. See *supra* notes 92–95 and accompanying text.

109. Swanson et al., *supra* note 92.

One slippage here is the word “serious.” Many common diagnoses were omitted from the Swanson study but are nonetheless disqualifying.<sup>110</sup> A second missing link is harmful use of a firearm, as opposed to violence of any kind. Nevertheless, it is exceedingly unlikely that a court would conclude that the Hawaii legislature acted “arbitrarily” or “irrationally” in lumping all mental illness together or in assuming that gun violence is positively correlated with overall violence.

State courts applying the reasonableness standard have upheld similar laws. The Court of Appeals of Oregon held as reasonable a statute providing for an individualized determination that a mentally ill person was too dangerous to possess firearms.<sup>111</sup> And the Colorado Supreme Court upheld a much broader restriction, explaining that “[i]t is clearly reasonable for the legislature to regulate the possession of firearms by those who are under the influence of alcohol or drugs.”<sup>112</sup>

In contrast, applying intermediate scrutiny to existing law would generate uncertainty. Commentators are split on this issue.<sup>113</sup> The narrowest restriction is the federal one barring gun possession by involuntary committees and those adjudicated mentally defective.<sup>114</sup> The MacArthur study found a significant, double risk of violence for released inpatients. In combination with the higher rates of violence associated with mental illness in the other studies, most courts would likely conclude that the federal restriction is substantially related to the important government interest in curbing gun violence.<sup>115</sup>

But there is a serious problem of overbreadth. Excluding substance abusers eliminated the effect observed in the MacArthur study. The other studies suggest that only the *seriously* mentally ill or those with psychosis are more violent. There is no clear answer as to the degree of overinclusiveness that will be tolerated under

110. See, e.g., Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 593, 596 tbl.2 (2005) (reporting lifetime prevalence rates of 9.5%, 8.1%, and 6.8%, respectively, for conduct disorder, attention-deficit/hyperactivity disorder, and posttraumatic stress disorder, none of which were included in the Swanson study).

111. *State v. Owenby*, 826 P.2d 51, 53 (Or. Ct. App. 1992).

112. *People v. Garcia*, 595 P.2d 228, 230 (Colo. 1979).

113. Compare Kiehl, *supra* note 47, at 1160, and Winkler, *supra* note 51, at 688–89, 722, with Volokh, *supra* note 67, at 1463–64.

114. 18 U.S.C. § 922(g)(4) (2006).

115. It could go without saying, but the federal law would no doubt be held “reasonable.” One probably would need to look no further than the usual trigger for civil commitment: danger to self or others. WINICK, *supra* note 89, at 42.

intermediate scrutiny.<sup>116</sup> Even if facial challenges to the federal restriction fail, there may be winning as-applied challenges by mentally ill individuals without comorbid substance abuse or only mild or moderate symptoms, not including psychosis.<sup>117</sup>

Even if known low-risk groups were excluded from the ban, there would still be massive overbreadth. Schizophrenia is a serious mental illness typically accompanied by hallucinations and delusions.<sup>118</sup> Suppose the firearm ban were targeted at just schizophrenics. Fazel reported a nearly twenty-fold increased risk of homicide by schizophrenics.<sup>119</sup> Of course, not every homicide involves a firearm. Still, the number is quite close to Swanson's finding of a roughly twenty-one times higher rate of weapon use by schizophrenics.<sup>120</sup>

Prohibiting firearm possession by schizophrenics would certainly seem to be substantially related to reducing firearm homicide. But the base rates for homicide and homicide with a firearm are very low. As a result, even a well-substantiated policy sweeps quite broadly.<sup>121</sup> Based on the United States population,<sup>122</sup> lifetime prevalence of schizophrenia,<sup>123</sup> and rate of assaultive firearm deaths,<sup>124</sup> I estimate that, each year, roughly 1500 schizophrenics who would commit no deadly firearm assault would

116. See Volokh, *supra* note 67, at 1470–71 n.109 (suggesting the felon-in-possession ban fails intermediate scrutiny because it covers nonviolent felons).

117. *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010); see also Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 L. & CONTEMP. PROBS. 35, 42 (1986) (“[V]iolence potential above the minimal level characterizing the general public is limited to a small, identifiable minority of mentally ill persons.”).

118. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 312 (4th ed. text rev. 2000) (listing delusions and hallucinations among schizophrenia's characteristic symptoms). Furthermore, nearly fifty percent of schizophrenics have lifetime substance abuse comorbidity. Peter F. Buckley et al., *Psychiatric Comorbidities and Schizophrenia*, 35 SCHIZOPHRENIA BULL. 383, 394 (2009).

119. Fazel et al., *supra* note 99, at 12 fig.9.

120. Swanson et al., *supra* note 92, at 768 tbl.6.

121. See Marilyn Price & Donna M. Norris, *National Instant Criminal Background Check Improvement Act: Implications for Persons with Mental Illness*, 36 J. AM. ACAD. PSYCHIATRY & L. 123, 128 (2008) (“Even if the persons with mental illness who are part of the prohibited class are truly at increased risk, can the legislation actually decrease the suicide and homicide rates, and at what cost?”).

122. U.S. Dep't of Commerce, *State & Country QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Jan. 27, 2013) (estimating a national population of 308,745,538 people as of April 2010).

123. Samuel J. Keith et al., *Schizophrenic Disorders*, in PSYCHIATRIC DISORDERS IN AMERICA: THE EPIDEMIOLOGIC CATCHMENT AREA STUDY 33, 37 tbl.3-2 (Lee N. Robins & Darrel A. Regier eds., 1991) (noting a 1.4% prevalence of schizophrenia among the household population).

124. See *supra* Part II.B.

be denied their constitutional right to bear arms for every one life saved.<sup>125</sup> Adding serious gun injuries avoided, the number would drop to around 400. Deciding whether that relationship is substantial enough necessarily requires an uncertain balancing of interests.<sup>126</sup>

The Volokh approach suffers on its face from much the same indeterminacy as intermediate scrutiny. In some sense, it is heightened scrutiny along a sliding scale. As to mental illness restrictions, however, Volokh is clear: "I don't think that any class of mentally competent adults should be denied constitutional rights based on their demographic characteristics, as opposed to things they have personally done."<sup>127</sup> No quantum of statistical evidence, even the strong schizophrenia findings (or suicide numbers below), would seem sufficient under Volokh's approach to justify a ban on firearm possession.

### 3. Suicide

A majority of suicides are committed with a firearm.<sup>128</sup> People without access to a gun are less likely to kill themselves, or others, with a gun.<sup>129</sup> Importantly, not having a gun appears to deter a substantial number of suicide attempts altogether, rather than simply steering the victim to alternative means<sup>130</sup>:

125. If the increased risk were two instead of twenty times—as the broader studies suggest—the 1500 figure would jump to 12,000. See Bruce G. Link & Ann Stueve, *New Evidence on the Violence Risk Posed by People With Mental Illness*, 55 ARCHIVES GEN. PSYCHIATRY 403, 403 (1998) ("Furthermore, because serious mental illness is relatively rare and the excess risk modest, the contribution of mental illness to overall levels of violence in our society is minuscule."); cf. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 345 (1991) ("If only a few percent of gun owners will ever use their guns to commit an unlawful violent act, broad-based controls are highly inefficient. A hundred people must be disarmed in the hopes of preventing two or three from doing violence with a gun.")

126. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 853 (2011). Underinclusiveness is generally not viewed as constitutionally problematic.

127. Volokh, *supra* note 67, at 1513.

128. WISQARS *Fatal Injury Reports, National and Regional, 1999-2010*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) (last visited Jan. 27, 2013) (choose "Suicide" and "Firearm"; then choose "Suicide" and "Non-Firearm").

129. Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 934 tbl.4 (2004); Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA 1029, 1031, 1033 (2007).

130. Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 NEW ENG. J. MED. 989, 990 tbl. (2008); see also Miller et al., *supra* note 129, at 1031 tbl.1.

TABLE 2: SUICIDES BY STATE GUN OWNERSHIP, 2001–2005

Variable	High Gun Ownership States	Low Gun Ownership States
Person-years	195 million	200 million
Households with guns	47%	15%
Number of firearm suicides	16,577	4257
Number of nonfirearm suicides	9172	9259
Total number of suicides	25,749	13,516

The dramatically lower number of total suicides in low gun ownership states makes more sense in light of two additional facts: (1) “one third to four fifths of all suicide attempts . . . are impulsive,”<sup>131</sup> and (2) “more than 90% of people who survive a suicide attempt . . . do not go on to die by suicide.”<sup>132</sup> Whether firearm restrictions effectively curb access and reduce total suicides is disputed,<sup>133</sup> but the federal background check system prevented 87,474 gun sales in 2007 alone.<sup>134</sup> The ultimate policy question, however, is beyond the scope of this Article, which is only concerned with the constitutionality of the current gun laws.

131. Miller & Hemenway, *supra* note 130, at 989.

132. *Id.*

133. Compare Deborah Azrael, Cook and Ludwig's Principles for Effective Gun Policy: An Extension to Suicide Prevention, 73 *FORDHAM L. REV.* 615, 618 (2004) (“[P]olicies that reduce access to guns are likely to be associated with reduced [suicide] mortality . . .”), and J. John Mann et al., *Suicide Prevention Strategies: A Systematic Review*, 294 *J. AM. MED. ASS'N* 2064, 2070 (2005) (“Suicides by [firearms among U.S. men] have decreased after firearm control legislation.”), with KLECK, *supra* note 125, at 255 (“On the whole, previous studies failed to make a solid case for the ability of gun controls to reduce the total suicide rate.”), and Price & Norris, *supra* note 121 (“There are few data showing that limiting legal firearm access to persons with mental illness as defined by the Brady Act will in fact have an effect on suicide and homicide rates using firearms.”). However, even a skeptic concedes that “gun controls might still reduce suicide by reducing gun ownership levels among depressed and other suicide-prone segments of the population,” KLECK, *supra* note 125, at 256; accord Joseph R. Simpson, *Issues Related to Possession of Firearms by Individuals with Mental Illness: An Overview Using California as an Example*, 13 *J. PSYCHIATRIC PRAC.* 109, 114 (2007), a possibility supported by the relatively low gun ownership rates observed among psychiatric inpatients. Dale E. McNeil et al., *Base Rates of Firearm Possession by Hospitalized Psychiatric Patients*, 58 *PSYCHIATRIC SERVICES* 551, 552 (2007) (noting that only 9 out of 100 acknowledged either owning or having access to a gun).

134. Letter from Thomas E. Bush, III, Assistant Dir. CJIS Div., Dep't of Justice, to Hon. Michael R. Bloomberg, N.Y.C. Mayor 19 tbls. (Oct. 21, 2008), available at [http://www.mayorsagainstillegalguns.org/downloads/pdf/FBI\\_NICS\\_Data\\_response.pdf](http://www.mayorsagainstillegalguns.org/downloads/pdf/FBI_NICS_Data_response.pdf).

Ninety percent (or more) of suicide victims in the United States suffered from mental illness<sup>135</sup> (estimates from England are consistent with this figure,<sup>136</sup> and globally the level may be even higher<sup>137</sup>). In contrast, lifetime prevalence in the United States of any mental disorder has been estimated at 46%.<sup>138</sup> These figures imply that the mentally ill are over ten times more likely to commit suicide.

Another way to estimate the increased risk is to directly compare the suicide rates for the mentally ill with the overall rate. One review article estimated the lifetime risk for suicide at 6% for affective or mood disorder, 7% for alcohol dependence, and 4% for schizophrenia.<sup>139</sup> A more recent reexamination put the schizophrenia number at 4.9%.<sup>140</sup> By way of comparison, the overall yearly suicide rate was 1.2 per 10,000 people in 2009.<sup>141</sup>

A thorough meta-analysis of published papers found a suicide risk for individuals with any psychiatric diagnosis in any treatment setting eleven times that of individuals without any diagnosis.<sup>142</sup> The meta-analysis also examined diagnoses separately and concluded that “[i]f these results can be generalized, then virtually all mental disorders have an increased risk of suicide excepting mental retardation and possibly dementia and agoraphobia.”<sup>143</sup> Data on suicide *attempts* generally confirm this result.<sup>144</sup>

135. Yeats Conwell et al., *Relationships of Age and Axis I Diagnoses in Victims of Completed Suicide: A Psychological Autopsy Study*, 153 AM. J. PSYCHIATRY 1001, 1003 (1996) (finding an exact rate of 90.1%); Charles L. Rich et al., *San Diego Suicide Study: I. Young vs Old Subjects*, 43 ARCHIVES GEN. PSYCHIATRY 577, 579 tbl.5 (1986) (finding an exact rate of 93.1%).

136. Elizabeth King, *Suicide in the Mentally Ill: An Epidemiological Sample and Implications for Clinicians*, 165 BRIT. J. PSYCHIATRY 658, 659 (1994).

137. José Manoel Bertolote et al., *Psychiatric Diagnoses and Suicide: Revisiting the Evidence*, 25 CRISIS 147, 147 (2004) (finding an exact rate of 98%).

138. Kessler et al., *supra* note 110 (reporting 46.4% lifetime prevalence of any mental disorder, the overwhelming majority of which were axis-I under DSM-IV-TR). See generally AM. PSYCHIATRIC ASS'N, *supra* note 118, at 28 (providing examples of the major groups of clinical disorders included in axis-I).

139. Hazel M. Inskip et al., *Lifetime Risk of Suicide for Affective Disorder, Alcoholism and Schizophrenia*, 172 BRIT. J. PSYCHIATRY 35, 35 (1998).

140. Brian A. Palmer et al., *The Lifetime Risk of Suicide in Schizophrenia: A Reexamination*, 62 ARCHIVES GEN. PSYCHIATRY 247, 247 (2005).

141. Kenneth D. Kochanek et al., *Deaths: Final Data for 2009*, 60 NAT'L VITAL STAT. REP., no. 3, 2011, at 1, 5 tbl.B, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_03.pdf).

142. E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Illness: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 221 tbl.14h (1997).

143. *Id.* at 222.

144. Kessler et al., *supra* note 110, at 623 tbl.2; cf. Guilherme Borges et al., *Twelve-Month Prevalence of and Risk Factors for Suicide Attempts in the World Health Organization World Mental Health Surveys*, 71 J. CLINICAL PSYCHIATRY 1617, 1625 (2010) (“[A]lthough the presence of a DSM-IV mental disorder was

How do current laws fare under the three standards if preventing suicide is the goal? Given the much higher rate of suicide among virtually all mental illnesses, it is difficult to imagine any court striking down as “unreasonable” even the broadest restriction on gun possession by the mentally ill.<sup>145</sup> But what about intermediate scrutiny? Courts would probably reach the same result, but, as with harm to others, the connection to suicide prevention may not qualify as a sufficiently substantial relationship in some judges’ eyes.

To see this more clearly, focus again on the narrow, federal restriction. Here, the evidence of a higher suicide risk gets even stronger. The meta-analysis described above also examined released involuntary committees and found a suicide risk thirty-nine times greater than expected.<sup>146</sup> Taking the high *yearly* estimate above of 660,000 involuntary committees as an approximation for the number of people who have *ever* been civilly committed,<sup>147</sup> the federal restriction denies gun rights to about 450 former patients who would not use a firearm to commit suicide for every gun suicide it prevents. Assuming instead for illustration that three million people have ever been involuntarily committed, the ratio increases to about 575. The case for constitutionality of current laws is certainly stronger when the rationale is suicide prevention, but, as with violence, it ultimately comes down to balancing.<sup>148</sup>

### CONCLUSION

The Supreme Court in *Heller* stated that *all* Americans have a right to keep and bear arms but suggested in dicta that current restrictions on the mentally ill exercising that right are “presumptively lawful.” All but the Seventh Circuit have apparently reconciled these statements simply by dropping the word

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associated with significantly higher odds of experiencing suicide ideation in virtually every instance, few mental disorders predicted suicide attempts among those with ideation.”). Although these correlations are compelling, the suicide studies generally lack a control group, so causation is uncertain. But strong correlation even without causation is almost certainly sufficient for reasonableness and probably for intermediate scrutiny.

145. Jeffrey Swanson & Allison R. Gilbert, *Mental Illness and Firearm Violence, Letter to the Editor*, 306 J. AM. MED. ASS’N 930, 930 (2011) (“Suicide prevention may be an area of convergence between laws focused on guns and laws focused on individuals who should not have them.”).

146. Harris & Barraclough, *supra* note 142, at 219 tbl.14b, 220; *see also* Donald W. Black et al., *supra* note 85, at 72 (providing data demonstrating that women display almost three times the risk of death by suicide than men).

147. And assuming that involuntary commitment does not affect the percentage of suicides by firearm as opposed to by other means.

148. Again, Volokh’s hybrid approach would apparently strike down such status restrictions in all cases.

“presumptively.” That reading of *Heller* is unsatisfactory. The Second Amendment protects the mentally ill. The interesting question is the extent of that protection. This Article finds support for three possible constitutional standards for restrictions on the gun rights of the mentally ill: (1) reasonableness, (2) intermediate scrutiny, and (3) a hybrid.

Current restrictions are tested against these three standards. Federal law prohibits firearm possession by, principally, individuals who have been involuntarily committed. Some state laws are more restrictive, and a few ban gun possession by anyone with a mental illness. All of the restrictions would likely be deemed reasonable. Intermediate scrutiny poses a closer question. The broadest restrictions would likely have to be justified on grounds of suicide, not violence, prevention. Notwithstanding high-profile events like the Aurora, Colorado shooting, the statistical relationship to preventing violence is arguably not substantial. On the other hand, suicide risk is substantially increased for basically all diagnoses. The particular hybrid approach considered here would strike down all status-based restrictions.

Several core findings emerge. First, despite *Heller*’s dictum, it is an open question as to which standard applies to restrictions on gun possession by the mentally ill. Second, the choice of standard may very well be dispositive with respect to current firearm regulations. Third, particularly if intermediate scrutiny controls, a reexamination of the rationale for our gun laws is required. An undifferentiated and unsubstantiated fear that all persons with mental illness pose a grave threat to others will not suffice. This lowest common denominator of stigma may ultimately explain the common cause of politicians, the Brady Campaign, and the NRA to disarm the mentally ill. But the stronger, and probably constitutionally adequate, rationale is suicide prevention.

Preventing suicide may seem a less powerful goal than preventing violence against others. It is not. First, most courts have held that preventing suicide is a “compelling” government interest.<sup>149</sup> The United States Supreme Court has suggested that, even in the context of the terminally ill, it is “unquestionably important.”<sup>150</sup> Second, preventing suicide by the mentally ill falls

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149. *E.g.*, Grand Jury Subpoena, *John Doe v. United States*, 150 F.3d 170, 172 (2d Cir. 1998); *Krischer v. McIver*, 697 So. 2d 97, 103 (Fla. 1997); *Final Exit Network, Inc. v. State*, 722 S.E.2d 722, 724 (Ga. 2012); *McNabb v. Dep’t of Corr.*, 180 P.3d 1257, 1266 (Wash. 2008).

150. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997). Even critics of *Glucksberg* agree. *See id.* at 747 (Stevens, J., concurring in the judgment) (“I agree that the State has a compelling interest in preventing persons from committing suicide because of depression or coercion by third parties.”); Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L.



within the government's traditional *parens patriae* power, a "well-established exception[] to a broad general presumption of individual liberty in the liberal society."<sup>151</sup> If the prospect of self-harm is a sufficient basis for involuntary civil commitment (and it is<sup>152</sup>), it should equally suffice to justify a loss of gun possession rights. Finally, the public already recognizes that schizophrenics, individuals suffering from major depression, and alcohol dependents pose greater risks to themselves than to others.<sup>153</sup> To be sure, violence creates fear whereas suicide does not, but saving lives should be more important than calming nerves.

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REV. 1501, 1510 (2008) (conceding that the state "obviously . . . has an interest in preventing suicide").

151. Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323, 333 (1998).

152. *Addington v. Texas*, 441 U.S. 418, 426 (1979). For an argument that it should not be, see Bruce J. Winick, *The MacArthur Treatment Competence Study: Legal and Therapeutic Implications*, 2 PSYCHOL. PUB. POL'Y & L. 137, 144-45 (1996).

153. Bernice A. Pescosolido et al., "A Disease Like Any Other"? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence, 167 AM. J. PSYCHIATRY 1321, 1324 tbl.1 (2010).