

Shots Fired—A Rational Assessment of Mass Shootings, The Alleged Participation of the Mentally Ill, and an Impaired Right of Privacy

By: Tamela J. White



Tamela White is a Member of the law firm of Farrell, White & Legg, PLLC, Huntington, West Virginia. She is an honors graduate from both The Ohio State University College of Nursing and from the Salmon P. Chase College of Law, Northern Kentucky University. Ms. White earned a Masters in Public Health with an emphasis on law, policy and economics in May 2011 from the Johns Hopkins Bloomberg School of Public

Health. She has extensive health care clinical and administrative experience prior to practicing law.

The author wishes to express her appreciation to Hon. Dan O'Hanlon, Retired Circuit Court Judge, the State of West Virginia; McKenzie Cooley, Graduate Attorney, Farrell, White & Legg, PLLC; Michael J. Farrell, Partner, Former Interim President of Marshall University, Founder and Managing Member of Farrell, White & Legg, PLLC; Terry Fenger, PhD., Director of the Forensic Science Center, Marshall University; Samantha Thomas-Bush, Associate, Farrell, White & Legg, PLLC; Kevin Yingling, M.D., Dean, Marshall University School of Pharmacy, Faculty, Marshall University Joan C. Edwards School of Medicine; and Robert White (aka The Prince), Graduate Student, Political Science and International Policy Division, Virginia Polytechnic Institute.

"Only thing we have to fear is fear itself" ¹

¹ Franklin D. Roosevelt, Inaugural Address, March 4, 1933, as published in SAMUEL ROSENMAN, ED., THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT, VOLUME TWO: THE YEAR OF CRISIS, 1933, 11-16 (New York: Random House, 1938).

SOCIETAL shockwaves from mass violence have no borders. Sophisticated Paris, destination Orlando, rural Virginia Tech, a midnight movie theater in Colorado, the Newtown elementary school massacre of innocents, a psychiatrist in his Army uniform and too many more for too long of a time have been lead stories on the nightly news and headlines in *Le Monde*, The New York Times, Dallas Morning News, San Francisco Chronicle and every major news outlet. So much attention, so little change in access to automatic military-grade and other weaponry. Such sparsity of data, not opinion or speculation, from which to learn root contributors, causes and design implementation plans. So much carnage, so little understanding of root causes. And now, trains, planes and automobiles enter the equation.

Labeled insanity by some and terrorism by others, the result is the same. Human carnage of unspeakable proportion. Domestic, international, regional and local law enforcement are faulted for failing to foresee or mitigate these tragedies. Finger-pointing and cognitive dissonance invites labeling culprits as mentally ill. This article challenges those alternate propositions that place blame on Satan (possessed by demonry), gun manufacturers, Congress, state legislatures and the mentally ill. This article advocates

for removal of the barriers preventing data collection and analysis particularly in this perilous time with states abandoning conceal-carry permit requirements and terroristic murderous migrate to using cars and alternative means to accomplish their evil end.

The risk of marginalizing and dividing shooters and victims, and lawmakers from lawbreakers into stereotypical classification is too simplistic. No one should seriously conclude that any of those engaging in these heinous attacks upon vulnerable innocents are free from mental distress. Mental distress is not necessarily mental illness. Most if not all of the offenders were/are also vulnerable to the undue influence of the affected or disaffected. This article will provide both a domestic and international platform to review existing opinions, reconsider them and advocate for scientific-based conclusions in evaluating the actual relationship between mental illness, mass violence and the incredible tolerance for military grade weapons being accessible to a civilian population. Mental illness, standing alone, is not the sole or exclusive root cause of such violence.

Mass shootings
understandably create
 outpourings of public
 horror and outrage . . .
 These tragedies are

influenced by multiple complex factors, many of which are still poorly understood. However, the lay public and the media typically assume that the perpetrator has a mental illness and that the mental illness is the cause of these highly violent acts of horrific desperation. Although some mass shooters are found to have a history of psychiatric illness, no reliable research has suggested that a majority of perpetrators are primarily influenced by serious mental illness as opposed to, for example, psychological turmoil flowing from other sources. As a result, debate on how to prevent mass shootings has focused heavily on issues that are 1) highly politicized, 2) grossly oversimplified, and 3) unlikely to result in productive solutions . . . Laws intended to reduce gun violence that focus on a population representing less than 3% of all gun violence [the population of those with certain mental illness history and/or of mental-health related

hospitalization] will be extremely low yield, ineffective, and wasteful of scarce resources. Perpetrators of mass shootings are unlikely to have a history of involuntary psychiatric hospitalization. Thus, databases intended to restrict access to guns and established by guns laws that broadly target people with mental illness will not capture this group of individuals.²

The laws in the United States have been ineffective in addressing the balance between access to weapons and personal constitutional rights and privacy. There remains a void in understanding the convergence of forces that leads to such heinous events and a zealous propaganda campaign that the solution would deprive Americans of their guns.

Privacy is a valued commodity under challenge. The boundaries of privacy must be redefined in the modern era of satellites-circling-the-earth communicating with billions of computers at one time. This article approaches a unique subset issue: the tension in the health care provider-patient

² James L. Knoll and George D. Annas, "Mass Shootings and Mental Illness", in *GUN VIOLENCE AND MENTAL ILLNESS*, 81-82 (Liza H. Gold et al. eds. 2016).

relationship, privacy, access to weaponry and public health. This article advocates for a change in definition of the problem with preservation of respect for those on both sides of the gun debate, whether you are an advocate for near plenary Second Amendment application or a pacifist without any interest in owning a gun. This article advocates for research and analysis so that a data-driven redefinition of the issues, not the fear-driven reactionary response, may be developed.

Privacy is essential to any relationship grounded in trust so that free and unrestrained communication may occur. In the mental health and health care domain, privacy is a cherished value intended to promote positive health outcomes and minimize the risk of indiscriminate treatment by others like profiling, stereotyping and discrimination.³ The mental health care provider: patient relationship must be grounded in trust, and privacy protection is paramount to establishing trust. To this end, the American Psychiatric Association

("APA") opposes legislative action that would mandate any health care provider to breach this trust by forcing disclosure of confidences shared by an individual patient that use of a gun may be perceived as a means to an end.⁴ The APA calls for research, data analysis, least-intrusive data-base generation and data analysis, as well as restrictions on gun access, as means to address the real issue: the instrumentality of harm: the inherently unsafe product -- not the person.⁵

Congress has a long history of banning epidemiologic research by the Centers and Disease Control and Prevention ("CDC") concerning the subject of gun violence.⁶ Silently housed within the Patient Protection and Affordable Care Act ("ACA") of 2009 (otherwise referred to as "Obamacare") is a two-edged sword, gun lobby-backed provision. A portion of the law includes an implicit recognition of the substantial public health need and the obligation to avoid gun-access discrimination against individual patients based upon gun use and access. However, other

³ *Id.*

⁴ American Psychiatric Association, *Position Statement on Firearms Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Services*, 33 BEHAV. SCI. LAW 195 (June 2015).

⁵ *Id.*; see also and generally, Knoll and Annas, *supra* note 2.

⁶ Todd C. Frankel, *Why the CDC still isn't researching gun violence despite the ban being lifted two years ago: Fear and funding shortfalls remain at the agency ordered to*

resume firearm studies since the Newtown shooting, WASH. POST (Jan. 14, 2015), https://www.washingtonpost.com/news/storyline/wp/2015/01/14/why-the-cdc-still-isnt-researching-gun-violence-despite-the-ban-being-lifted-two-years-ago/?utm_term=.d21da39b1065 (last visited June 2, 2017) (noting that 20 years prior, the gun control lobby was successful in threatening the funding of the CDC if gun violence research was conducted).

provisions include express barriers to some forms and means of communication and analysis with respect to data collection and data assimilation necessary to study this public health crisis.⁷ These barriers prevent sound, evidenced-based analysis and recommendation development. The call-for-action by the American Medical Association (“AMA”) President Steven Sack, M.D. succinctly announces:

[w]ith approximately 30,000 men, women, and children

dying each year at the barrel of a gun in elementary schools, movie theaters, workplaces, houses of worship, and on live television, the United States faces a public health crisis of gun violence An epidemiological analysis of gun violence is vital so physicians and other health providers, law enforcement, and society at large may be able to prevent injury, death,

⁷ The ACA contains the following “Gun Rights” provisions:

(1) **Wellness and prevention programs:**

A wellness and health promotion activity . . . may not require the disclosure or collection of any information relating to the presence or storage of a lawfully-possessed firearm or ammunition in the residence or on the property of an individual; or the lawful use, possession, or storage of a firearm or ammunition by an individual.

(2) **Limitation on data collection:**

None of the authorities provided to the Secretary . . . shall be construed to authorize or may be used for the collection of any information relating to the lawful ownership or possession of a firearm or ammunition; the lawful storage of a firearm or ammunition.

(3) **Limitation on databases or data banks:**

None of the authorities provided to the Secretary . . . shall be construed to authorize or may be used to maintain records of individual ownership or possession of a firearm or ammunition.

(4) **Limitation on determination of premium rates or eligibility for**

health insurance: A premium rate may not be increased, health insurance coverage may not be denied, and a discount, rebate, or reward offered for participation in a wellness program may not be reduced or withheld under any health benefit plan issued pursuant to or in accordance with the Patient Protection and Affordable Care Act or an amendment made by that Act on the basis of, or on reliance upon the lawful ownership or possession of a firearm or ammunition; or the lawful use or storage of a firearm or ammunition.

(5) **Limitation on data collection requirements for individuals:**

No individual shall be required to disclose any information under any data collection activity authorized under the Patient Protection and Affordable Care Act or an amendment made by that Act relating to the lawful ownership or possession of a firearm or ammunition; or the lawful use, possession, or storage of a firearm or ammunition.

42 U.S.C. § 300 gg-17(c) (2010).

and other harms to society resulting from firearms.⁸

By allowing permissive, gun-related disclosure from patients, but prohibiting collection and assimilation of that information (volunteered or otherwise) with scrutiny of that data by the scientific method, this legislation frustrates the efforts and the capacity to develop data-based public health gun violence recommendations. The outcome becomes a self-fulfilling perpetuation of impotency in gun violence understanding and intervention. The lack of CDC and research funding is shameful. ACA anti-discrimination provisions are essential, but the over-reaching data-related prohibitions are not.

Privacy interests, privacy rights, civil responsibility, self-responsibility and the gun debate intersect. Society has addressed other public health threats and health care providers have served integral roles. An interactive and interdisciplinary approach should be applied in the gun and violent crime domain with adequate funding and without over-reaching legislative prohibition.

Sensitive and politically charged issues have previously been addressed through legislative interventions that preserved

individual privacy and constitutional rights. A successful example are the HIV-AIDS laws, which preserve privacy of infected persons and potentially infected ones while maintaining respect for constitutional freedom of association. That vulnerable class has been protected against discrimination, harassment and mistreatment driven from the “I’ll catch it too” fear where the real instrumentality of harm was, and is, the live virus, not the person. The HIV-AIDS legal interventions evolved over time as the issue was studied through clinical trials and research grounded in the scientific method. The result is a legal framework designed to be narrowly tailored to address the risk to public health, like the risk of a contaminated blood supply, while balancing private health information disclosure. Some of those interventions have included anonymity in testing, establishment of public health data bank registries, offering free public health education and privacy-protected third-party notification of unanticipated or known exposure.

⁸ Mark Moran, *AMA Calls for End of CDC Ban on Research on Gun Violence*, PSYCHIATRIC NEWS, July 2, 2016-July 15, 2016, at 1.

Other examples include:

Chart A:

Instrumentality of Harm	Intervention/Mandate	Constitutional and Other Considerations
Child abuse and neglect	State law mandatory reporting obligations by health care providers and others with qualified immunity and declaration of exception to HIPAA and privacy laws and protections. ⁹	Life, liberty and pursuit of happiness of a vulnerable person.
Adult protection services against abuse and neglect	State law mandatory reporting of elder abuse and neglect with health care providers and others with qualified immunity and declaration of exception to HIPAA and privacy laws and protections. ¹⁰	Life, liberty and pursuit of happiness of a vulnerable person.
Motor vehicles	State mandates for physician reporting of certain health conditions which are considered to impair the capacity of a person to operate a vehicle safely. Those	Life, liberty and pursuit of happiness of third parties; Commerce;

⁹ United States Department of Health and Human Services, Child Welfare Information Gateway, *Immunity for Reporters of Child Abuse and Neglect*, available at <https://childwelfare.gov/pubPDFs/immunity.pdf> (last accessed June 3, 2017).

¹⁰ Lori Stiegel. and Ellen Klem, *Explanation of the "Immunity for Good Faith Reporting Provisions and Citations in Adult Protective Services Laws by State" and "Immunity for Good Faith Reporting; Criteria in Adult Protective Services laws by State" Charts*, American Bar Association Commission on Law and Aging and the National Center on Elder Abuse, 2007, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/Immunity_for_Good_Faith_Reporting_Provisions_and_Citations_Chart.authcheckdam.pdf (last accessed June 3, 2017).

	health conditions include, for instance, Alzheimer's, eye disorders and seizure activity. ¹¹	Freedom of movement and migration
Prescription Medications, Behind-the-Counter and, Over-the-Counter Medications	Federal law mandates, through the Controlled Substances Act ¹² and Food Drug and Cosmetics Act, includes a comprehensive scheme regulating banned substances, substances with medicinal value through over-the-counter medications. ¹³	Life, liberty and pursuit of happiness of third parties; Commerce; Federalism given

¹¹ Jeffrey T. Berger, Fred Rosner, Pieter Kark, and Alex J. Bennett, *Reporting by Physicians of Impaired Drivers and Potentially Impaired Drivers*, J. Gen. Med. 2000 Sep. 15(9)

¹² 21 U.S.C. 812, *et seq.*

¹³ 21 U.S.C Chapter 9.

As used in this article, high-capacity weaponry is the instrumentality of harm. According to recent Supreme Court precedent, high-capacity weapons *are not* the self-protection devices recognized by the United States Supreme Court as having Second Amendment protection.¹⁴ High-capacity weaponry is the category of products that are implements for mass murder and war. This article analyzes a niche issue relative to the unique private relationship between health care providers, their patients and the instrumentality of harm: high-capacity weaponry. This author does not attempt to develop or promote a definition of “high-capacity weaponry” because experts need to do that.

Mental illness does not equate to “crazy.” As used in this article, mental illness refers to the continuum of mental health and includes the 3% of the population referred to in the opening quote by psychiatric experts.¹⁵

Misclassification and miscategorization of mental illness as the defining causative cause of violence when high-capacity weapons or guns are used is unfair and unforgivable.¹⁶ For instance,

white males who ride Harley Davidson® motorcycles and are Hogs®¹⁷ are not gang members, and the women who ride with them are not bearers of scarlet letters. Yet, a reactionary fear-driven response to the 2015 Waco, Texas motorcycle gang member shootout between the Bandidos and Cossacks¹⁸ could invite such a conclusion in an uneducated and uninformed society.

Similarly, it is grossly unfair to label all persons with mental illness or a mental illness health history as the cause of mass terrorism. The ACA¹⁹ and other legal prohibitions toward discriminatory practices combined with HIPAA and other privacy protections should open and facilitate transparent communication between gun owners and health care providers, not chill it. With free and open communication, research should be permitted, funded and completed to better understand contributors to the ever-frequently occurring mass instrumentality of harm and related attacks on innocence and a peaceful discourse.

There exists an evolving recognition by the federal courts that high-capacity weaponry is the instrumentality of harm, not the

¹⁴ McDonald v. City of Chicago, 561 U.S. 747 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

¹⁵ Knoll and Annas, *supra* note 2, at 90.

¹⁶ *Id.*

¹⁷ “HOG” is the acronym for “Harley Davidson Owners Group”.

¹⁸ 2015 WACO Shootout, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/2015_Waco_shootout (last visited June 2, 2017).

¹⁹ 42 U.S.C. § 300 gg-17(c).

person. This article advocates for high-capacity weaponry to be treated the same as other instrumentalities of harm, where health care providers serve an essential role in promoting public health and safety. High-capacity weaponry should not be afforded discriminatory favored-product status under the ruse of a protected constitutional right; implements of warfare wrongly destroy the fabric of community and spirit-filled lives. In a moment's time, these high-capacity devices deprive individual persons, their families, communities and our nation of the undeniable right afforded to *every person*, the right to life, liberty and the pursuit of happiness.²⁰

I. Instrumentality of Harm: High-Capacity Weaponry--A Brief Contextual Overview

The homicide rate in the United States is seven times that of other high-income countries.²¹ Beginning with the 2007 Virginia Tech massacre to the present date, the loss of innocence and life has been

profound. This call for action is placed into a contextual framework by a brief chronological summary and the reader should be cognizant of the fact that the type of weaponry of harm used is not homogenous.

April 16, 2007: 32 killed, 17 injured: Blacksburg, Va. Seung-Hui Cho, a 23-year old student, opened fire on campus, taking his own life after a second attack on the same day;²² a Glock 9mm handgun and Walther .22-caliber pistol were used;²³

Dec. 5, 2007: 8 killed, 4 injured: Omaha, Nebraska Nineteen-year-old Robert Hawkins opened fire in a busy shopping mall during the holiday season, leaving behind suicide notes;²⁴ an AK-47 semi-automatic was used;²⁵

Feb. 14, 2008: 5 killed, 16 injured: Dekalb, Illinois Suicide-murderer, Steven Kazmierczak, dressed all in

²⁰ THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

²¹ Erin Grinshteyn and David Hemenway, *Violet Death Rates: The US Compared With Other High-Income OECD Countries, 2010*, THE AMERICAN JOURNAL OF MEDICINE, March 2016, at 266-273.

²² *Deadliest U.S. mass shootings, 1984-2016*, LOS ANGELES TIMES: June 12, 2016.

²³ Ned Potter, et al., *Killer's Note: x'You Caused Me to Do This'*, ABC NEWS (April 17,

2007), <http://www.abcnews.go.com/US/story?id=3048108&page=1> (last visited June 3, 2017).

²⁴ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

²⁵ Jeff Zeleny and Maria Newman., *Details of Omaha Shooting Emerge*, THE NEW YORK TIMES (Dec. 6, 2007), www.nytimes.com/2007/12/06/us/06cnd-shoot.html (last visited June 3, 2017).

black, killed and maimed students in a Northern Illinois University geology class;²⁶ a 129-9 mm Glock, 9 mm pistol and 0.38 caliber pistol were used;²⁷

Apr. 3, 2009: 13 killed, 4 injured: Binghamton, N.Y. Before committing suicide, a forty-one-year-old shooter killed 13 and injured 4. These events occurred at an immigration services center;²⁸ the guns used were Berettas;²⁹

Nov. 5, 2009: 13 killed, 32 injured: Ft. Hood, Tex. An army psychiatrist opened fire during a rampage at Ft. Hood, having exchanged hate-filled emails with extremists with anti-American sentiment;³⁰ using an FN Herstel semi-

automatic weapon;³¹

Feb. 12, 2010: 3 killed, 3 wounded: Huntsville, Ala. Amy Bishop, a neurobiologist and assistant professor shot and killed faculty members during a meeting;³² the gun was a Ruger semi-automatic weapon;³³

August 3, 2010: 8 killed, 2 injured: Manchester, Conn. A 34-year-old male walked out of a disciplinary hearing at work and began shooting, killing 8 and then himself;³⁴ the assailant used handguns;³⁵

January 8, 2011: 6 killed, 11 injured: Tucson, Ariz. Congresswoman Gabrielle Giffords was among the wounded when Jared Lee

²⁶ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

²⁷ Mike Nizza, *Gunman Was Once 'Revered' On Campus*, THE NEW YORK TIMES (Feb. 15, 2008), www.nytimes.com/2008/02/15/us/15cnd-shoot.html (last visited June 3, 2017).

²⁸ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

²⁹ Robert D. McFadden, *13 Shot Dead During a Class on Citizenship* THE NEW YORK TIMES (April 3, 2009), <http://www.nytimes.com/2009/04/04/nyregion/04hostage.html> (last visited June 3, 2017).

³⁰ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

³¹ McFadden, *supra* note 29.

³² *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

³³ Amy Wallace, *What Made This University Researcher Snap?* WIRED (Feb. 28, 2011, 12:00 PM), https://www.wired.com/2011/02/ff_bishop/ (last visited June 3, 2017).

³⁴ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

³⁵ Emily Friedman, *Chilling 911 Tapes from Connecticut Shooting Describe Gunman's Deadly Rampage*, ABC NEWS (Aug. 4, 2010), <http://abcnews.go.com/US/connecticut-shooter-omar-thornton-chased-victims-beer-distributor/story?id=11322281> (last visited June 3, 2017).

Loughner opened fire at a meet-and-greet social event at a supermarket³⁶ using a Glock 19 9 mm weapon;³⁷

October 12, 2011: 8 killed, 1 injured: Seal Beach, Calif. Enraged by a custody dispute, Scott Dekraai entered a hair salon and opened fire.³⁸ There is a dispute as to the weapons used versus those that were available on-site; those identified were a 9mm Springfield, a Smith & Wesson .44 Magnum, and a Heckler & Koch .45 (it was widely reported that only two of these weapons were used, but which two were unidentified in media reports);³⁹

April 2, 2012: 7 killed, 3 injured: Oakland, Calif. A

former student opened fire at a small Christian College. Although saying he was “deeply sorry” for his actions, the murderer killed seven innocent people;⁴⁰ a 45-caliber semiautomatic handgun was the weapon of choice;⁴¹

July 20, 2012: 12 killed, 58 injured: Aurora, Colo. At opening night of the highly-anticipated Batman® movie, “The Dark Night Rises”, James Holmes entered a packed movie theatre and began shooting;⁴² the involved weapons included an AR-15 assault rifle, Remington 12-gauge 870 shotgun and 40-caliber Glock handgun;⁴³

September 28, 2012: 6 killed, 2 injured: Minneapolis,

³⁶ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

³⁷ Susannah Kim, *Glock 19: How Did Unemployed Jared Loughner Buy Popular, Expensive Pistol?*, ABC News, Jan. 11, 2011, <http://abcnews.go.com/Business/question-s-remain-jared-loughner-paid-expensive-firearm/story?id=12585290> (last visited June 3, 2017).

³⁸ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

³⁹ Michael Martinez, *Prosecutor to Seek Death Penalty in Salon Shooting*, CNN (Oct. 14, 2011, 9:08 PM), <http://www.cnn.com/2011/10/14/justice/california-shooting/> (last visited June 3, 2017).

⁴⁰ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁴¹ Terry Collins, *Cops Find Gun Believed Used In College Shooting*, SAN DIEGO TRIBUNE (April 6, 2012, 10:34 AM), <http://www.sandiegouniontribune.com/sdut-cops-find-gun-believed-used-in-ca-college-shooting-2012apr06-story.html> (last visited June 3, 2017).

⁴² *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁴³ Nick Carbone, *Colorado Shooter Carried 4 Guns, All Obtained Legally*, TIME (July 21, 2012), <http://newsfeed.time.com/2012/07/21/colorado-theater-shooter-carried-4-guns-all-obtained-legally/> (last visited June 3, 2017).

Minnesota. A disgruntled former employee opened fire on his boss and co-workers and then killed himself. The company specialized in making interior signs that comply with the Americans with Disabilities Act.⁴⁴ A 9mm Glock semiautomatic pistol was used;⁴⁵

October 21, 2012: 3 dead, 4 injured: Brookfield, Wisconsin. A former Marine walked into a salon and spa in pursuit of his estranged wife, and shot her and others before killing himself;⁴⁶ the weapon was a .40-caliber semiautomatic handgun;⁴⁷

December 14, 2012: 27 killed, one injured: Newtown Connecticut. Adam Lanza, a twenty-year old mentally ill

gunman, shot his mother at the home they shared and then stormed into Sandy Hook Elementary School taking the lives of 20 first-graders, 6 adults and himself;⁴⁸ involved weapons were a Bushmaster AR-15 rifle, Glock 10mm handgun and Sig Sauer 9mm;⁴⁹

June 7, 2013: 5 killed: Santa Monica. A rampage that began at the home of the 23-year-old, unemployed John Zawahri and ended at a Santa Monica college;⁵⁰ two firearms, an AR-15 rifle and a .44 caliber handgun were used;⁵¹

September 16, 2013: 12 killed, 3 injured: Washington, D.C. Aaron Alexis, a Navy Contractor and former enlisted member of the Navy

⁴⁴ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁴⁵ Doug Stanglin, *6 Dead, Including Gunman in Minn. Workplace Shooting*, USA TODAY (Sept. 28, 2012), <http://content.usatoday.com/communities/ondeadline/post/2012/09/28/minneapolis-gunman-shooting-workplace-five-dead/70001320/1#>. WOIWKvnysnQ (last visited June 3, 2017).

⁴⁶ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁴⁷ Dinesh Ramde, *Suspect in Wis. salon attack had history of abuse*, THE SAN DIEGO UNION-TRIBUNE (Oct. 22, 2012, 5:10 AM), <http://www.sandiegouniontribune.com/sdut-suspect-in-wis-salon-attack-had-history-of-abuse-2012oct22-story.html> (last visited June 3, 2017).

⁴⁸ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁴⁹ Steve Almasy, *Newtown shooter's guns: What we know*, CNN, Dec. 19, 2012, <http://www.cnn.com/2012/12/18/us/connecticut-lanza-guns/> (last visited June 3, 2017).

⁵⁰ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁵¹ Andrew Blankstein and Matt Stevens, *Santa Monica shooter's rifle appears to have been pieced together*, LOS ANGELES TIMES (June 12, 2013), <http://articles.latimes.com/2013/jun/12/local/la-me-santa-monica-gun-20130613> (last visited June 3, 2017).

shot and killed helpless unarmed victims. Alexis had a history of unauthorized military duty absences, insubordination, disorderly conduct and failed inspections;⁵² a Remington 870 shotgun was the weapon;⁵³

April 2, 2014: 3 killed, 16 injured: Ft. Hood, Texas. A gunman victimized the innocent at this military facility in a repeat of the 2009 assault;⁵⁴ the assailant used a .45-caliber Smith & Wesson handgun;⁵⁵

May 23, 2014: 6 dead, 7 wounded, Isla Vista, California. After a year's preparation, Elliott Rodger went on a shooting rampage after posting a video

declaring "Humanity is a disgusting, wretched and depraved species;"⁵⁶ the weapons involved were Sig Sauer p226 mode handguns and Glock 34;⁵⁷

June 18, 2015: 9 Dead in a Historic Church in Charleston, South Carolina. A white supremacist, Dylann Roof, sat in on a Wednesday evening prayer service and fired on the innocent welcoming congregation in a heartless manner;⁵⁸ the victims died due to close range fire from a .45-caliber Glock handgun;⁵⁹

July 16, 2015: 5 dead, 3 wounded, Chattanooga, Tenn. A gunman opened fire killing 4 Marines, 1 Navy sailor and himself at two

⁵² *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁵³ Pete Hermann and Ann E. Marimow, *Navy Yard shooter Aaron Alexis Driven By Delusions*, THE WASHINGTON POST (Sept. 25, 2013), https://www.washingtonpost.com/local/crime/fbi-police-detail-shooting-navy-yard-shooting/2013/09/25/ee321abe-2600-11e3-b3e9-d97fb087acd6_story.html?utm_term=.37d965c5c766 (last visited June 3, 2017).

⁵⁴ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁵⁵ Dana Ford, *4 Dead, Including Shooter, At Fort Hood*, CNN (April 3, 2014, 2:23 PM), <http://www.cnn.com/2014/04/02/us/fort-hood-shooting/> (last visited June 3, 2017).

⁵⁶ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁵⁷ Rosanna Xia, Kate Mather, and Matt Stevens, *Guns used in Isla Vista rampage were legally purchased, registered*, LOS ANGELES TIMES (May 24, 2014, 7:21 PM), <http://www.latimes.com/local/lanow/la-me-ln-sla-me-ln-guns-recovered-at-shooting-20140524-story.html> (last visited June 3, 2017).

⁵⁸ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁵⁹ Pete Williams and Mark Potter, *Charleston church massacre: Dylann Roof's gun bought at local store*, MSNBC (June 23, 2015, 1:56 PM), <http://www.msnbc.com/charleston-church-massacre-dylann-roofs-gun-bought-local-store> (last visited June 3, 2017).

military centers situate more than seven miles apart;⁶⁰ multiple weapons were used including an AK-47 assault-type rifle, 12-gauge shotgun, and 9mm pistol;⁶¹

August 5, 2012: 6 killed, 3 injured: Oak Creek, Wisconsin. Six people were fatally wounded when Wade Michael Page, a member of a white supremacist band with a history of having been demoted and administratively discharged from the Army slaughtered members at a Sikh Temple;⁶² a 9mm semiautomatic handgun was used;⁶³

October 1, 2015: 9 dead, 9 injured: Roseburg, Oregon. A college student, reputed to be a “hate-filled” person with anti-religion, white

supremacist leanings and a long history of mental illness, killed himself, 8 fellow students and a teacher;⁶⁴ the weapons included a 9mm Glock pistol, .40-caliber Smith & Wesson, .40-caliber Taurus pistol, .556-caliber Del-Ton, and two additional firearms;⁶⁵

November 29, 2015: 3 dead, 9 injured: Colorado Springs, Colorado. An elderly man entered a Planned Parenthood Clinic and began shooting while uttering Christian faith affirmations;⁶⁶ the assailant used an AR-15 rifle, 9mm pistol and .357 revolver;⁶⁷

December 2, 2015: 14 dead, 22 wounded: San Bernardino, California. Two assailants, found to have

⁶⁰ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁶¹ Erin McClam and Pete Williams, *Chattanooga Shooting: Attacker Had Three Guns, Authorities Say*, NBC NEWS (July 17, 2015), <http://www.nbcnews.com/storyline/chattanooga-shooting/chattanooga-shooting-attacker-had-least-three-guns-authorities-say-n394046> (last visited June 3, 2017).

⁶² *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁶³ *Sikh temple shooting weapon obtained legally*, CBS NEWS (Aug. 6, 2012, 4:21 PM), <http://www.cbsnews.com/news/sikh-temple-shooting-weapon-obtained-legally/> (last visited June 3, 2017).

⁶⁴ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁶⁵ Cole Miller and Chris Woodard, *Sheriff: Umpqua shooter had 13 weapons*, KOIN6 (Oct. 1, 2015, 4:05 PM), <http://koin.com/2015/10/01/the-gunman-what-we-know-so-far/> (last visited June 3, 2017).

⁶⁶ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁶⁷ Stephen Hobbs, *Update: What gunman was armed with in Colorado Springs shooting spree*, THE GAZETTE (Nov. 4, 2015, 6:36 PM), <http://www.gazette.com/update-what-gunman-was-armed-with-in-colorado-springs-shooting-sprees/article/1562591> (last visited June 3, 2017).

stockpiled an arsenal of ammunition and pipe bombs in their home, killed at random;⁶⁸ and

June 12, 2016: 50 killed, 53 injured in Orlando nightclub shooting as a gunman stormed into a packed gay nightclub in the early morning hours;⁶⁹ a Sig Sauer MCX was used.⁷⁰

Other equally reprehensible happenings in other countries including the Paris Bataclan nightclub shooting,⁷¹ the Bastille Day Tragedy,⁷² the Suicide Plane Crash of a Germanwings Flight into the French Alps,⁷³ the Brussels Airport Massacre of 2016,⁷⁴ and the March 22, 2017, attack on the

British Parliament by a 52-year old man nicknamed “the Vampire”,⁷⁵ each and all involved an instrumentality of harm: a truck or car (for which licensure to drive is required); an airplane (for which licensure and specific advanced training is required for operation); high-capacity weaponry; and a military grade, machete-style knife.

Unfortunately, the stigma of discriminatory stereotyping of the mentally ill is prevalent, as the media and ordinary persons naturally seek an understanding that answers the fear that “it could be me?” Yet, all normal, rational and stable citizens have engaged in inappropriate, rash, impulsive and poorly-thought out actions that have gone unnoticed. In contrast, the APA and its experts/members

⁶⁸ *Deadliest U.S. mass shootings, 1984-2016*, *supra* note 22.

⁶⁹ *Id.*

⁷⁰ Thomas Gibbons-Neff, *The gun the Orlando shooter used was a Sig Sauer MCX, not an AR-15. That doesn't change much*, THE WASHINGTON POST (June 14, 2016), https://www.washingtonpost.com/news/heckpoint/wp/2016/06/14/the-gun-the-orlando-shooter-used-was-not-an-ar-15-that-doesnt-change-much/?utm_term=.3730c286347d (last visited June 3, 2017).

⁷¹ Emily Kent Smith, Hannah Roberts, Flora Drury, and Fidelma Cook, *Is this the ISIS killer stalking the Bataclan venue before his murderous rampage begins?* THE DAILY MAIL, U.K. (November 13, 2015, 8:54 PM), <http://www.dailymail.co.uk/news/article-3317960/They-cutting-one-one-Terrifying-Facebook-posts-man-trapped-INSIDE-theatre-Paris-terrorists-taken-100-hostages.html> (last visited June 3, 2017).

⁷² *Bastille Day Tragedy: Attack on Nice: Who was Mohamed Lahouaiej-Bouhlel?* BBC NEWS (Aug. 19, 2016), <http://www.bbc.com/news/world-europe-36801763> (last visited June 3, 2017).

⁷³ Nicola Clark and Dan Bilefsky, *Germanwings Crash in French Alps Kills 150: Cockpit Voice Recorder is Found*, THE NEW YORK TIMES (March 24, 2015), <https://www.nytimes.com/2015/03/25/world/europe/germanwings-crash.html> (last visited June 3, 2017).

⁷⁴ *Brussels explosion: What we know about airport and metro attacks* BBC NEWS (April 9, 2016), <http://www.bbc.com/news/world-europe-35869985> (last visited June 3, 2107).

⁷⁵ *London attack – latest updates*. BBC NEWS (March 23, 2017), <http://www.bbc.com/news/live/uk-39355505> (last visited June 3, 2017).

warn that it is highly unlikely for a person with schizophrenia, multiple personalities and similar major psychiatric illnesses to possess and/or use weapons of mass destruction.⁷⁶ The issue and discussion should not be driven by fear and insecurity, blaming persons with mental illness as being the “cause” of mass catastrophe. The justice system is the place for criminals to be tried, not in the media or by barriers to access to healthcare. It is society’s obligation to protect those with mental illness and mental sensitivities. The issue and discussion should concentrate upon the real instrumentalities of harm.

II. A Brief Overview of the Second Amendment, U.S. Gun Control Measures And HIPAA

The Second Amendment to the United States Constitution states: “[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.”⁷⁷ Reactionary legislative intervention has been palpably ineffective in addressing this constitutional guarantee and

the various competing social interests:

The history of American firearms legislation is one of tragedy and [reactionary] response. The Gun Control Act of 1968 . . . was prompted by political violence. The Brady Handgun Violence Prevention Act of 1993, requiring background checks on prospective buyers via the National Instant Criminal Background Check System (“NICS”), arose from and memorialized an attempted presidential assassination. The NICS Improvement Act of 2007, designed to strengthen the background check system, followed the mass shooting at Virginia Tech University.⁷⁸

With the exception of the ACA, Congressional acts have generally been reactive and not prospective. Examples include the Gun Control Act or Safe Streets Law of 1968,⁷⁹ the Firearms’ Owners Protection

⁷⁶ *Id.*; see also *supra* notes 4-5.

⁷⁷ U.S. CONST. Amend. II.

⁷⁸ Charles G. Kels, Jennifer A. Bernstein, and Y. Tony Yang, *Criminal Background Checks – Combating Violence Without Inhibiting Care*, JAMA PSYCHIATRY (August 2016), doi:10.1001/jamapsychiatry.2016.1485 (last visited June 3, 2017).

⁷⁹ 42 U.S.C. § 3711 (1968) (Congress passed this legislation and it was signed into law by President Lyndon Johnson. The long title of the statute is “An Act to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness and coordination of law enforcement and criminal justice systems at all levels of

Act of 1986,⁸⁰ the Brady Handgun Violence Prevention Act of 1993,⁸¹ the Protection of Lawful Commerce in Arms Act of 2005,⁸² The NICS Improvement Amendments Act of 2007 (“NICS”).⁸³ Compare the foregoing with the ACA’s Gun Rights provisions and ask whether a

privacy interest or a political agenda incepted this provision?

A. HIPAA, NICS, the ACA and Florida’s “Docs versus Glocks” Law

government and for other purposes.” The statute addressed interstate sale of handguns and other issues such as *Miranda* warnings.).

⁸⁰ 18 U.S.C. § 921 *et seq.* (1986) (The Firearms’ Owners Protection Act (“FOPA”) was enacted to address abuses by law enforcement that had been charged as evolving under the Gun Control Act of 1968. This Act included reforms that loosened restrictions on gun sales across interstate commerce, allowing ammunition to be shipped through the U.S. Postal service and changing provisions concerning non-armor piercing ammunition, among other things.).

⁸¹ Following the assassination attempt upon President Ronald Reagan during which John Hinkley Jr. shot James Brady, Public Law 103-159 was enacted and titled, The Brady Handgun Violence Prevention Act. 18 U.S.C. §§ 921-922. This bill requires background checks to be performed on persons before a firearm may be bought lawfully from a federally licensed dealer, manufacturer or importer, subject to certain specific exceptions. The prohibitions apply to a person convicted in a Court of a crime; a fugitive; someone who is an unlawful user of or addicted to any controlled substance; a person that has been committed to a mental institution; a person unlawfully in the United States or who is an illegal alien; a person dishonorably discharged from the United States Armed Forces; a person who renounces his/her United States citizenship; a person subject to a domestic violence restraining order or petition; a person convicted of certain domestic violence crimes. 18 U.S.C. § 922(g) (2015).

⁸² Referred to as PLCAA, the Protection of Lawful Commerce in Arms Act, provides civil liability protection for manufacturers, distributors, dealers or importers of firearms or ammunition for civil damages, injunctive or other relief resulting from misuse of products by others. 15 U.S.C. §§ 7901-7903 (2005).

⁸³ P.L. 110-180 amended the Brady Bill with respect to the National Instant Criminal Background Check System (NICS) and the reporting of mental health orders, rulings and other information relating to Federal Firearm Licensure. If a person comes within a specific category, the FBI issues a notice that the Federal Firearms Licensee (FLL) is denied. *See* <https://www.bjs.gov/index.cfm?ty=tp&tid=49> (last visited June 3, 2017). The Improvements Amendments were passed after the Virginia Polytechnic Institute and State University (Virginia Tech) mass shooting by Seung Hui Cho who had been adjudicated previously by a Virginia Court as suffering from a mental health issue which created a risk of danger to himself. By that adjudication, it was unlawful for Cho to lawfully purchase a gun pursuant to the Gun Control Act of 1968. On February 28, 2017, Congress nullified the rule finalized by the Social Security Administration that sought to disclose to NICS identifying information concerning person(s) determined to be mentally incapable of managing firearms). *See* <https://www.congress.gov/bill/115th-congress/house-joint-resolution/40> (last visited June 3, 2017).

The HIPAA privacy rule is a reflection of the valued public policy protection from publication of confidences outside of the physician:patient privileged relationship. It restricts access to private health information (“PHI”) with noted limited public-policy based exceptions. Intended to promote free exchange of information between healthcare provider and patient, HIPAA embraces the fundamental value referenced at the beginning of this article: unfettered disclosure and frank communication between those in that special relationship.

Health care providers have a duty to warn a patient when his or her illness constitutes harm to the person, mentally and/or physically. Health care providers have a duty to work to act in their patient’s best interests, even if the patient disagrees and objects. Tension of this nature may arise more frequently in a mental health relationship. This distress in the relationship may have therapeutic value or it may not. Regardless, these duties are situationally-driven.

There are also situationally-driven duties to third parties. Some states have laws that impose tort liability upon a health care provider for foreseeable accidents caused by the conduct of a patient.⁸⁴ Communication to third party law enforcement or regulators may also come within this obligation. Specific to the mental health domain, *Tarasoff v. Board of Regents of the University of California*⁸⁵ and its progeny require disclosure and warnings to third parties even if it causes the provider to disclose patient confidences.⁸⁶ There are state and federal laws mandating health care provider publication of confidential information when the risk of harm to the patient or third parties is a real or substantial risk.

In *Tarasoff*, the Court recognized that clinicians have the duty to warn foreseeable victims about credible dangers imposed by seriously mentally ill persons as well as, possibly, a duty beyond warning, to protect those third parties.⁸⁷ *Tarasoff* third party warning and action obligations have had a significant and enduring impact on day-to-day mental health practice.⁸⁸

⁸⁴ See, e.g., Marshall B. Kapp, *The Physician’s Responsibility Concerning Firearms and Older Patients*, 25 KAN. J. L. & PUB. POL’Y 159 (2015); Rebecca Therkelson Raines, *Evaluating the Inebriated: An Analysis of the HIPAA Privacy Rule and Its Implications for Intoxicated Patients in the Hospital Emergency Department*, 40 UNIV. DAYTON L. REV. 479 (2016); Mark A. Rothstein,

Tarasoff Duties After Newtown, 42 J.L. MED & ETHICS 104 (2014).

⁸⁵ 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).

⁸⁶ See Chart A, *infra*.

⁸⁷ *Tarasoff*, 17 Cal.3d at 425.

⁸⁸ Ryan Chaloner Winton Hall and Susan Hatters Friedman, *Guns, Schools, and Mental Illness: Potential Concerns for Physicians and*

The 2016 amendment to the Privacy Rule and NICS mandating certain disclosures for federal data collection (but not scientific research analysis) purposes differs from compelled common law or statutory public health threat disclosures that I have just discussed.⁸⁹ On February 5, 2016, the Department of Health and Human Services (“DHHS”) amended HIPAA⁹⁰ and NICS⁹¹ to authorize (and mandate) certain limited covered entity and health care provider disclosures. These disclosures include information NICS deemed necessary to populate the national gun access data base.⁹² Understanding that the national gun access data lacked integrity, the NICS/HIPAA change imposes a mandatory reporting obligation upon providers (covered entities). It obligates them to identify and disclose categories of persons: (1) those who have been involuntarily committed to a mental institution for reasons such as mental illness or drug use; (2) those who have been found to be incompetent to stand trial; (3) those who have gone to trial and a verdict of not guilty by

reason of insanity was rendered; or (4) persons “otherwise determined by a Court, board, commission or other lawful authority to be a danger to themselves or others or unable to manage their own affairs, as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease”⁹³. This Privacy Rule modification mandates disclosure to NICS identifying demographic information, although DSM and diagnostic information is *not* to be published.⁹⁴

Some of this disclosed information would otherwise be available in the public domain or clearinghouses. Regardless, there exists a legitimate concern that the information could be used for individual profiling of those persons who come within the less than 3 percent of gun violence offenders where such “[l]aws intended to reduce gun violence that focus on a population representing less than 3% of all gun violence will be extremely low yield, ineffective, and wasteful of scarce resources.”⁹⁵

On a risk/benefit analysis, this means of limited data-sharing has

Mental Health Professionals, 88 MAYO CLINIC PROC. 1272, 1273-1274 (2013).

⁸⁹ See Knoll and Annas, *supra* note 2.

⁹⁰ See Pub. L. 104-191, 110 (1996).

⁹¹ See Brady Law (P.L. 103-159, Title I; 107 Stat. 1536); 1968 Gun Control Act as amended by the Brady Law, 18 U.S.C. Chapter 44, 18 U.S.C. § 922(g)(1)-(9) and (n) and Lautenberg Amendment, 18 U.S.C. § 922 (g)(9).

⁹² 45 C.F.R § 164 (2016) Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and National Instant Criminal Background Check System (NICS), Department of Health and Human Services, Office of Secretary

⁹³ *Id.*

⁹⁴ 45 C.F.R § 164.318 (2016).

⁹⁵ Knoll and Annas, *supra* note 2, 90.

been considered to be a minimally intrusive step to accomplish and address the gun violence crisis. Time may tell whether or not this targeted results/outcome defined disclosure meets its goal. The amendment likely will have ultimately no impact because it misses the target: access to weapons of war in high-energy/high-stress situations and the consequences from that cocktail.⁹⁶

In contrast, the 2011 Florida Firearms' Owners Protection Act ("FOPA") adopted a dramatically different change to the health care provider/patient relationship by establishing a barrier between certain communications concerning guns, gun access, gun use and use intent.⁹⁷ FOPA conflicts with, frustrates and undermines the HIPAA privacy rule, the NICS reporting amendment, *Tarasoff* and other fundamental aspects of the

health care provider/patient relationship. FOPA deemed certain communications between health care providers and patients about guns and weapons to be completely impermissible. Referred to as "Docs versus Glocks" law, it obligated health care providers to omit patient firearm ownership/access data from medical record documentation and to refrain from "harassing" patients about firearm ownership.⁹⁸ Harassment being in the eye of the beholder, it is readily apparent how this law undermined basic privacy principles, free speech, competing legal obligations such as those imposed by *Tarasoff* and mandatory child and adult protective agency disclosures and other basic duties of care.

Following an intense legal challenge in the United States District Court that had first granted a preliminary injunction in 2017,⁹⁹ the Court of Appeals for the

⁹⁶ *Id.*

⁹⁷ FLA. STAT. § 790.338 (2011).

⁹⁸ FLA. STAT. § 790.338 (2011).

⁹⁹ *Wollschlaeger v. Farmer*, 880 F.Supp.2d 1251, 1261, 1267 (S.D. Fla. 2012) ("The Firearm Owners' Privacy Act imposes content-based restrictions on practitioners' speech. It purports to regulate practitioners' inquiries, record-keeping, discrimination, and harassment with respect to one subject matter only—firearm ownership and possession. Under this law, for example, physicians may ask a new patient complaining of a stomachache to fill out an initial intake questionnaire that includes questions regarding household chemicals, risky recreational activities, sexual conduct, or drugs and alcohol kept in

the home, but not whether the patient owns a firearm.") ("This law chills practitioners' speech in a way that impairs the provision of medical care and may ultimately harm the patient. *Cf. Velazquez*, 531 U.S. at 546, 121 S.Ct. 1043. A physician may ask in an initial questionnaire about lifestyle choices or high-risk activities even though the physician does not, at that time, have a good faith belief that the information is relevant to that patient's medical care. The purpose of the inquiry is so that the practitioner can determine what subject matters require further follow-up in the practice of preventive medicine. The restrictions at issue here are especially problematic because, as Plaintiffs note, there may be cases where, unless the practitioner makes

Eleventh Circuit made its final decision very recently concerning FOPA and the constitutional issues it raised. In *Wollschlaeger v. Governor*,¹⁰⁰ the Eleventh Circuit concluded that FOPA's anti-harassment, anti-documentation and anti-discussion provisions were unconstitutional, content-based speech restrictions and hence, unlawful.¹⁰¹ Recognizing the intrusive and chilling nature such restrictions would have upon medical decision-making, the Court stated:

We do not think it is appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review. If rationality were the standard, the government could — based on its disagreement with the message being conveyed — easily tell architects that they cannot propose buildings in the style of I.M.

an initial inquiry about firearms (albeit with no good faith basis, at the time of the questioning, that it is relevant), the patient may not know to raise the issue herself and may not receive appropriate, possibly life-saving, information about firearm safety. These considerations persuade me that the balance of interests tip significantly in favor of safeguarding practitioners' ability to speak freely to their patients. As the Supreme Court recently stated: "The mere

Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on."¹⁰²

The APA's gun access restrictions/prohibitions may ultimately have a similar chilling impact as it may interfere with basic information exchange and documentation. It does interfere, like FOPA, with data and information collection for analysis, study and empiric research. Without data, there is no knowledge; there is only speculation and a fear-driven, reactionary, impotent and often, irrational response.

B. High-Capacity Weaponry: Instrumentalities of Harm Warranting Public Policy Intervention

The United States' Supreme Court's decisions in *McDonald v.*

potential for the exercise of [governmental censorial power] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez*, 132 S.Ct. at 2548 (Kennedy, J., opinion)").

¹⁰⁰ 848 F.3d 1293, 1300-1302 (11th Cir. 2017).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1311.

*City of Chicago*¹⁰³ and *Heller*¹⁰⁴ assist both originalists and non-originalist pragmatists to advocate for a least restrictive, non-discriminatory framework for the public health and safety intervention advocated for in this note.

*McDonald v. City of Chicago*¹⁰⁵ is the decision in which the United States Supreme Court addressed an Illinois state-law concerning handguns. Its analysis, in contrast with the previous *Heller* decision, concentrated upon whether the Federal Constitution applies to states in the gun/Second Amendment debate. In confirming that *Heller's* handgun rights protection applies to individual states,¹⁰⁶ Justice Samuel Alito, writing for the plurality majority, stated:

Self-defense is a basic right, recognized by many legal systems from ancient times to the present day . . . individual self-defense is 'the *central component*' of the Second Amendment right . . . Explaining that 'the need for defense of self, family, and property is most acute' in the home . . . this right applies to handguns because they are

'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' . . . this right is "deeply rooted in this Nation's history and tradition." . . . it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms [and specifically handguns] among those fundamental rights necessary to our system of ordered liberty.¹⁰⁷

Heller clearly distinguished handguns from high-capacity weaponry as weaponry and associated handguns as those inherently unsafe products that are Constitutionally-protected armory for the protection of the home, the family and self-defense.¹⁰⁸ Writing for the majority, originalist Justice Antonin Scalia announced:

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course, the right was not unlimited, just as

¹⁰³ 561 U.S. 747, 130 S.Ct. 3020 (2010).

¹⁰⁴ 554 U.S. at 595, 626-628 (emphasis added).

¹⁰⁵ 561 U.S. 747.

¹⁰⁶ *Id.* at 749.

¹⁰⁷ *Id.* at 767-768, 778 (internal citations and quotations omitted).

¹⁰⁸ 554 U.S. at 628.

the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose* . . .

From Blackstone through the 19th-century cases, commentators and courts routinely explained that *the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose*. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on*

longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, *that the sorts of weapons protected were those 'in common use at the time.'* We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'¹⁰⁹

Since *Heller* and *McDonald*, two (2) state-based military-grade weaponry statutory bans have been enacted, signed into law and survived constitutional scrutiny. Those decisions are discussed next: *Friedman v. City of Highland Park*¹¹⁰ (2016), *certiorari denied*, and the 2017 case of *Kolbe v. Hogan*.¹¹¹

¹⁰⁹ *Id.* at 570, 595, 626-628 (emphasis added, internal citations omitted).

¹¹⁰ *Friedman v. City of Highland Park*, 784 F.3d 406 (7th. Cir. 2015), *cert. denied sub*

nom. *Friedman v. City of Highland Park*, 136 S.Ct. 447, 193 L.Ed.2d 483 (2015).

¹¹¹ 849 F.3d 114 (4th Cir. 2017).

C. *Friedman v. City of Highland Park*¹¹²

The City of Highland Park, Illinois adopted ordinance Sec. 136.005 which prohibits possession of assault weapons or large-capacity magazines within its city limits.¹¹³ The law includes a ban applicable to certain semi-automatic guns that accept a large-capacity magazine with one of five other features or components: a pistol grip without a stock; a folding, telescoping, or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator.¹¹⁴ The law prohibits certain automatic weapons by name (AR-15s and AK-47s).¹¹⁵

The legal constitutionality challenge was on Second and Fourteenth Amendment grounds. In finding that the law survives constitutional scrutiny, the Seventh Circuit concluded, in reliance upon *Heller*, that an individual's Second Amendment rights are not violated by laws regulating military-grade weaponry and implements of mass destruction,¹¹⁶ even if a person purportedly desires to possess the product for self-defense. The Court defined the issue as not what "level" of [due process] scrutiny applies,

and how it works . . . [W]e think it better to ask whether a regulation bans weapons that were common at the time of ratification [of the Constitution] or those that have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia' . . . and whether law-abiding citizens retain adequate means of self-defense."¹¹⁷ Thus, with an originalist's eye, the Court upheld the law, acknowledging:

[t]rue enough, assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers. Householders too frightened or infirm to aim carefully may be able to wield them more effectively than the pistols James Bond preferred. But assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in aggregate. Why else are they the weapons of choice in mass shootings? A ban on

¹¹² 784 F.3d 406.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 409-410 (citing and quoting *Heller*, 554 U.S. at 626-627, n. 26, 128 S.Ct. 2783; *McDonald*, 561 U.S. at 786).

¹¹⁷ *Id.* at 410 (citing *Heller*, at 622-625, 128 S.Ct. 2783; *Miller* 307 U.S. 178-179, 59 S.Ct. 816).

assault weapons and large-capacity magazines might not prevent shootings in Highland Park (where they are already rare), but it may reduce the carnage if a mass shooting occurs.¹¹⁸

To honor states' rights, the panel went further and said:

The Constitution establish[ing] a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity. *McDonald* circumscribes the scope of permissible experimentation by state and local governments, but it does not foreclose *all* possibility of experimentation. Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim. Whether those limits should be extended is in

the end a question for the[se] Justices.¹¹⁹

D. *Kolbe v. Hogan*¹²⁰

In February 2017, the Fourth Circuit Court of Appeals upheld a statewide Maryland legislative ban on military-grade weaponry. The plaintiffs, as in *Friedman*, sought to own banned military-grade weaponry for purposes of self-defense. The Maryland statute, known as the "Firearms Safety Act" ("FSA"), prohibits a person from "transport[ing]¹²¹ an assault weapon into the State" or "possess[ing], sell[ing], offer[ing] to sell, transfer, purchase, or receive an assault weapon."¹²² It also provides that "[a] person may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm."¹²³ Similar to the *Highland Park* statute, certain named-products are restricted by name, examples being the "Colt AR-15", "Bushmaster semi-auto rifle" and "AK-47".¹²⁴

Framing its analysis by *Heller*,¹²⁵ the traditionally con-

¹¹⁸ *Id.* at 411.

¹¹⁹ *Id.*

¹²⁰ 849 F.3d 114 (4th Cir. 2017).

¹²¹ Discussion of Commerce Clause and/or other potential Constitutional Challenges to the FSA or any state law discussed is beyond the scope of this article.

¹²² MD. CODE ANN., CRIM. LAW § 4-303(a) (2013); Banned weapons include assault

long guns and copycat weapons. *Id.* at § 4-301(d); *see also* MD. CODE ANN., CRIM. LAW § 4-301(e)(1)(2).

¹²³ MD. CODE ANN., CRIM. LAW § 4-303(b).

¹²⁴ MD. CODE ANN., CRIM. LAW § 4-301(b); MD. CODE ANN., PUB. SAFETY § 5-101(r)(2).

¹²⁵ *Heller*, 554 U.S. at 577.

servative Fourth Circuit noted that the Second Amendment has both a prefatory clause (“A well-regulated Militia, being necessary to the security of a free State . . .”) and an operative clause (“... the right of the people to keep and bear Arms, shall not be infringed.”).¹²⁶ Appreciating that individual rights to possess handguns are to be zealously protected, these rights are not without limitation, with examples including bans on firearm possession by felons and the mentally ill, and forbidding guns in sensitive places like schools and government buildings.¹²⁷ The court stated:

The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “[w]eapons of offence, or armor of defense.” Timothy Cunningham’s important 1771 legal dictionary defined “arms” as “anything that a man wears for his defense, or takes into his hands, or useth in wrath to cast at or strike another.” *The term*

was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.¹²⁸

As with *Heller*, the court recognized that military-grade weaponry (high-capacity weaponry) has one purpose: mass killing and mass casualties in war, a fact inherent in the design of these products.¹²⁹ The *Kolbe* Court concluded that the defense of “hearth and home” is not boundariless and does not translate to a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”.¹³⁰ Acknowledging that the *Heller*’s Scalia majority stated affirmatively, “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,” including “short-barreled shotguns” and “machine guns,” those being protected are those “in common use at that time” with such limitation being “fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.”¹³¹ To contend that today’s military-grade

¹²⁶ *Kolbe*, 849 F.3d at 130 (quoting U.S. CONST. Amend. II); see also *Heller*, 554 U.S. 570.

¹²⁷ *Heller*, 554 U.S. at 595, 626-28.

¹²⁸ *Heller*, 554 U.S. at 582 (emphasis added; internal citations omitted).

¹²⁹ *Kolbe*, 849 F.3d at 127; see also *Heller*, 554 U.S. at 628.

¹³⁰ *Kolbe*, 849 F.3d at 131 (quoting *Heller*, 554 U.S. at 626).

¹³¹ *Id.* (quoting *Heller*, 554 U.S. at 624-625, 627 (internal quotation marks omitted)).

weaponry is or was embodied at the time of the ratification of the Second Amendment distorts reality as those weapons did not exist prior to World War I.¹³² Any debate to this conclusion may be easily put to rest, particularly in today's high-spirited economic and jobs debate with mechanization having displaced workers with the Industrial Revolution that began about a century ago.

Kolbe further analyzed the level of due process scrutiny applicable if the alternative conclusion were reached that FSA infringes upon Second Amendment's guarantees. FSA, under a Fourteenth Amendment challenge then, was determined to be subject to intermediate scrutiny because the law "is reasonably adapted to a substantial governmental interest"¹³³ and "the least intrusive means of achieving the relevant government objective" even if it would not be a perfect solution or fit.¹³⁴ The Court's questions and answers were direct and to the point:

- "Are the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' *i.e.*, 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" Answer: Yes.¹³⁵
- Does *Heller* create a "bright line" between automatic and semiautomatic firearms? Answer: No. The issue is not automatic versus semiautomatic firearms; the issue is those whether the regulated items constitute "weapons that are most useful in military service."¹³⁶
- In the alternative, *if* a ban upon assault weapons and large-capacity magazines is entitled to Second Amendment protection, intermediate scrutiny applies and as such, because its prohibitions are reasonably adapted to

(citing, *inter alia*, 4 Blackstone 148-49 (1769)).

¹³² *Id.* at 124.

¹³³ *Id.* at 133 (quoting *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011)); *see also* *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("[T]he government must demonstrate under the intermediate scrutiny standard that there is a reasonable fit between the challenged regulation and a substantial governmental

objective." (internal quotation marks omitted).

¹³⁴ *Kolbe*, 849 F.3d at 133 (quoting *Masciandaro*, 638 F.3d at 474); *see also* *Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013) (quoting *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012).

¹³⁵ *Kolbe*, 849 F.3d at 122 (citing *Heller*, 554 U.S. at 627, 128 S.Ct. 2783).

¹³⁶ *Id.* at 136 (citing *Heller*, 554 U.S. 570, 128 S.Ct. 2783).

a substantial governmental interest in promoting public safety, the ban is not unconstitutional,¹³⁷ the Court stated:

We are confident that our approach here is entirely faithful to the *Heller* decision and appropriately protective of the core Second Amendment right. In contrast, our dissenting colleagues would expand that then decree that strict scrutiny is applicable to any prohibition against the possession of those or other protected weapons in the home. At bottom, the dissent concludes that the so-called popularity of the banned assault weapons—which were owned by less than 1% of Americans as recently as 2013—inhibits any efforts by the other 99% to

stop those weapons from being used again and again to perpetrate mass slaughters. We simply cannot agree.¹³⁸

III. An Opportunity for Intervention: HIPAA and Non-Discriminatory Patient Care and High-Capacity Weaponry Versus Other Constitutionally Protected Firearms Classification and Regulation

Instrumentalities of harm threatening the fabric of society and public health are the framework for data-based legislative and social intervention. The examples of public-health crisis for which minimally intrusive and yet comprehensive, data-based interventions have occurred include the HIV-AIDS crisis intervention and some of those in Chart A. A model for consideration with the gun violence epidemic pronounced by leading experts, including AMA President Slack¹³⁹, may be taken from the Prescription Medication Model to which this discussion now turns.

Since 1902 with the enactment of the Biologics Control Act and 1906's Pure Food and Drug Act,¹⁴⁰ the United States Congress has,

¹³⁷ *Id.* at 121.

¹³⁸ *Id.* at 139–141.

¹³⁹ Mark Moran, *supra* note 8, at 1.

¹⁴⁰ United States Food and Drug Administration, *Milestones and Significant Dates in U.S. Food and Drug Administration*

addressed prescription drug abuse and misuse with the intended purpose of protection of the public, rather than a single individual person. The Controlled Substances Act (“CSA”) categorizes and classifies medications and chemicals according to recognized medicinal use, benefit and risk¹⁴¹.

The well-accepted five (5) schedules of prescription medications, Class I-V, is intended to serve as a closed system for distribution, use and consumption of chemical substances along this continuum. C-I (Class I) drugs have no medicinal or therapeutic benefit and are banned. Examples include heroin, LSD, amphetamines and cocaine. C-II (Class II) have substantial addictive potential but, a medicinal benefit for which under the right clinical circumstances, access may be appropriate. Examples include OxyContin and hydrocodone. The continuum advances through C-V (Class V) medications in a sliding scale fashion as the risk for addiction and adverse consequences reduce while the products continue to have a *bona fide* therapeutic benefit. The fluidity and metamorphic quality of this model is demonstrated by the public

health action taken with methadone, the *Breaking Bad*¹⁴² phenomenon and the bath salts crisis.¹⁴³ As a result of those social drug-culture events, there are now behind-the-counter and over-the-counter medication controls for the base chemicals that lead to the development of those products, and there are also distribution quantity restrictions.

A real opportunity exists for meaningful, non-discriminatory and least-intrusive evaluation and intervention by differentiating, classifying, and addressing the difference between Constitutionally-protected self-protection weapons versus implements of war such as high-capacity weaponry. Just as Schedule C-I drugs are banned completely, high-capacity weaponry, with an expert and data-based legislative definition, should become be treated similarly in our civilized democracy.

As stated at the outset, this article does not advocate to infringe upon Second Amendment rights, nor does it advocate for health care providers to somehow become involved in a person’s election to own a firearm or not. Rather, it is to call attention to other successful

History, <https://www.fda.gov/AboutFDA/WhatWeDo/History/Milestones/ucm128305.htm> (last visited June 3, 2017).

¹⁴¹ 21 U.S.C. § 801 *et seq.* (1970).

¹⁴² *Breaking Bad*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Breaking_Bad (last visited June 3, 2017).

¹⁴³ See e.g., Diane Wieland, *Psychoactive Bath Salts, An Emerging Crisis*, 10 NURSING CRITICAL CARE 22 (May 2015), http://journals.lww.com/nursingcriticalcare/Fulltext/2015/05000/Psychoactive_bath_salts_An_emerging_crisis.6.aspx last visited April 4, 2017).

models and examples of governmental and social intervention that, when confronted with a public health crisis, are minimally intrusive upon individual rights, yet targeted to promote a stable and healthy society. The time to act is now. The wheel does not need to be recreated. Originalists use history to support a broad berth of gun rights, and they should be and are entitled to that advocacy and preservation of First and Second Amendment Rights. Non-Originalists use pragmatism to apply the Constitution. Pragmatism mandates uniformity in control for C-I weaponry and a framework for any additional classifications and classification controls based upon science and data and a clearer understanding of why these instrumentalities of harm are being used in the manner they are.

Social scientists may develop, modify and adapt similar modeling and assessment based upon *data*, provided that the ACA's ban on data collection, the CDC's ban on research and other misinformed barriers are eliminated. An essential component of this research must include mental illness, emotional and situational triggers for mass violence, cultural influences as triggers for mass violence, the privacy rights of persons with mental stress, mental distress, mental illness as well as psychiatric disorders. Mental health should be not defined in a

stigmatized manner. Mental health must be respected and treated the same as physical disruptions in health and wellness.

In conclusion, this article is not intended to be a comprehensive survey of gun rights and gun control debate issues. Its purpose is to advocate for a rational approach to obtaining the information necessary to understand the gun and violent crime crisis. Another purpose is to advocate for the support of the *Kolbe* and *Hogan* decisions and to encourage rationality in this debate, an originalist's perspective, and not an inflammatory, fear-driven response.

The last, and most significant purpose of this article as it applies to the International Association of Defense Counsel's Privacy Project, is to remind all that privacy is invaluable and stereotypical assignment of blame to the stigma of mental health as the "problem" is wrong, misplaced and demands correction and attention.

A man of courage is also full of faith
~~ Marcus Tullius Cicero

Let us all have courage and live our faith by respecting others and protecting them and their privacy.