
THE NEW YORK SAFE ACT: A THOUGHTFUL APPROACH TO GUN CONTROL, OR A POLITICALLY EXPEDIENT RESPONSE TO THE PUBLIC'S FEAR OF THE MENTALLY ILL?

MATTHEW GAMSIN*

Colorado movie theater massacre: A gas-mask-wearing gunman opens fire during a midnight showing of the "Dark Knight Rises" at a suburban Denver movie theater.

Worst U.S. shooting ever kills 33 on Va. Campus.

*Nation Reels After Gunman Massacres 20 Children at School in Connecticut.*¹

I. INTRODUCTION

Each shocking headline announcing the most recent mass shooting seems to be followed by a call for more effective gun-control laws.² Yet, despite these constant public outcries, proposals for stricter gun controls are fiercely contested by gun-rights advocates and often fail to receive

* J.D. Candidate, 2015, University of Southern California Gould School of Law.

1. James Baron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>; *Colorado Movie Theater Massacre*, CBS NEWS, <http://www.cbsnews.com/feature/colorado-movie-theater-massacre> (last visited Jan. 5, 2015); *Worst U.S. Shooting Ever Kills 33 on Va. Campus*, NBC NEWS (Apr. 17, 2007), <http://www.nbcnews.com/id/18134671>.

2. E.g., Josh Gerstein, *After Navy Yard Shooting, Talk Turns to Gun Control*, POLITICO (Sept. 17, 2013), <http://www.politico.com/story/2013/09/navy-yard-shooting-gun-control-96900.html>.

widespread public support.³ Recently, several Colorado lawmakers who pushed for expanded background checks and limits on ammunition magazines following a mass shooting in Denver were ousted by voters “in the state’s first ever legislative recall,” which was seen as “a warning to [others] . . . who might contemplate gun restrictions in the future.”⁴

However, even those who generally oppose gun control overwhelmingly support limits on gun ownership by individuals with mental illness, which is often cited as the cause of these horrific events.⁵ Gun rights groups, such as the National Rifle Association (“NRA”), assert that “gun violence stems from the deranged minds of individuals,” and that additional laws regulating possession by individuals who do not suffer from mental illness “won’t do anything to curb the killings.”⁶ If the NRA’s position on gun violence and mental illness is a tactic to turn the focus of the political debate away from stricter gun control and toward mental illness, it appears to be working. According to a 2013 poll, Americans believe that a “[f]ailure of the mental health system” is the most significant factor leading to mass shootings.⁷

In response to the public’s fear of gun violence by individuals with mental illness, the New York legislature adopted the New York Secure Ammunition and Firearms Enforcement Act of 2013 (“SAFE Act”).⁸ A portion of the SAFE Act provides that designated “mental health professionals” who believe that a patient is “likely to engage in conduct that would result in serious harm to self or others” must report the patient to the Director of Community Services (“Director”) who, if he or she agrees, must then report to the Division of Criminal Justice Services (“DCJS”).⁹ Under the SAFE Act, once a report is referred to the DCJS, the patient’s gun license, which is required to lawfully possess a firearm under

3. E.g., Susan Page, *USA Today Poll: Public Support for Gun Control Ebbs*, USA TODAY (Apr. 23, 2013), <http://usat.ly/17SpZNE>.

4. *Two Colo. Lawmakers Recalled over Gun Control Support*, CBS NEWS (Sept. 11, 2013), <http://www.cbsnews.com/news/two-colo-lawmakers-recalled-over-gun-control-support>.

5. E.g., *Guns and the Mentally Ill: Why the NRA Keeps Talking About Mental Illness, Rather Than Guns*, ECONOMIST (Mar. 13, 2013), <http://www.economist.com/blogs/lexington/2013/03/guns-and-mentally-ill>.

6. See Ashley Killough, *Reframing the Gun Control Debate: Is Mental Health the Next Focus?*, CNN (Sept. 20, 2013), <http://www.cnn.com/2013/09/19/politics/guns-mental-health>.

7. Lydia Saad, *Americans Fault Mental Health System Most for Gun Violence*, GALLUP (Sept. 20, 2013), <http://www.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx>.

8. 2013-1 N.Y. Consol. Laws Adv. Legis. Serv. 1 (LexisNexis).

9. N.Y. MENTAL HYG. LAW § 9.46 (McKinney 2013). See also *infra* note 50 and related text (quoting language of the relevant portion of the SAFE Act, section 9.46(b)).

New York law, will be revoked and his or her gun will be seized.¹⁰

Critics question the constitutionality of the SAFE Act and also argue that it is bad policy. Mental health professionals and organizations that support the rights of the mentally ill assert that mental illness plays a very small role in gun violence.¹¹ They believe that the reporting provisions of the SAFE Act interfere with the patient-therapist relationship, discourage those in need of therapy from seeking mental health treatment, and inappropriately focus the gun-control debate on possession by the mentally ill.¹²

This Note will first review the historical development of gun-control laws in the United States, including those referred to by the Supreme Court as “longstanding prohibitions on the possession of firearms by . . . the mentally ill.”¹³ It will then analyze the extent to which the SAFE Act differs from such longstanding prohibitions and whether the Act is constitutional. Finally, this Note will consider whether, regardless of its constitutionality, the SAFE Act is an appropriate legislative response to gun violence or whether a recent proposal by a group of national experts on mental illness and gun violence might be more effective and more likely to pass constitutional muster.¹⁴

II. HISTORICAL DEVELOPMENT OF GUN-CONTROL LAWS AND THEIR RELATION TO MENTAL ILLNESS

A. THE SECOND AMENDMENT

Although arguments regarding the scope of the right to bear arms have raged for decades, it was not until 2008 in *District of Columbia v. Heller* that the Supreme Court first held that the Second Amendment includes a

10. N.Y. PENAL LAW § 400.00(11)(b-c) (McKinney 2013).

11. E.g., Summer Berman & Michael Walther, *Mental Illness and Violence: The Advocate's Dilemma*, FOUNTAIN HOUSE (Feb. 27, 2013), <http://www.fountainhouse.org/blog/mental-illness-and-violence-advocates-dilemma>.

12. See Michael Virtanen, *VA Says It Won't Follow New York Gun Law*, HUFFINGTON POST (Mar. 11, 2013), <http://www.huffingtonpost.com/huff-wires/20130311/us-gun-law-veterans> (noting that a veterans group believed that reporting under the new law “would definitely have had a chilling effect on [veterans] seeking or continuing treatment because of confidentiality and overcoming the stigma of getting treatment for mental injuries”).

13. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

14. See generally PAUL APPELBAUM ET AL., THE CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR STATE POLICY (2013) (discussing the laws of Connecticut, Indiana, and Texas) [hereinafter CONSORTIUM ON STATE POLICY].

“right to keep and bear arms.”¹⁵ After being denied a license to keep a handgun at his home, Dick Anthony Heller challenged the District of Columbia’s total ban on handgun possession and its requirement “that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.”¹⁶ The Court found these laws to violate the Second Amendment, but it never defined the constitutional limits on, or the standard of constitutional review applicable to, state gun-control laws that were not a complete ban. In oral argument, Heller conceded that the District of Columbia’s licensing requirement was permissible if it “[was] not enforced in an arbitrary and capricious manner.”¹⁷ As a result, the Court merely ordered the District of Columbia to “permit [Heller] to register his handgun and . . . issue him a license to carry it in the home.”¹⁸ Two years later, in *McDonald v. City of Chicago*, the Court held that the Second Amendment right to possess a firearm is “fundamental” and applies to the states through the Due Process Clause of the Fourteenth Amendment.¹⁹

While the Court in *Heller* and *McDonald* found that the Second Amendment creates a right to possess a firearm, it cautioned that the “right . . . is not unlimited . . . [and should not be construed as] a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”²⁰ In addition, the Court explicitly stated that “nothing in [its] opinion should be taken to cast doubt on *longstanding prohibitions on the possession of firearms by felons and the mentally ill*.”²¹ Therefore, in determining whether the SAFE Act is constitutional, it is first necessary to consider whether it is consistent with such “longstanding prohibitions.”

B. “LONGSTANDING PROHIBITIONS” ON FIREARM POSSESSION BY THE MENTALLY ILL

1. The Federal Gun Control Act of 1968 and the NICS Reporting System

The “longstanding prohibitions” on gun ownership by the mentally ill referred to by the Court in *Heller* began with the adoption of the Gun Control Act of 1968,²² the first federal legislation addressing mental illness

15. *Heller*, 554 U.S. at 595.

16. *Id.* at 628.

17. *Id.* at 631 (internal quotation marks omitted).

18. *Id.* at 635.

19. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

20. *Heller*, 554 U.S. at 626.

21. *Id.* (emphasis added).

22. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18

and gun violence, which was enacted in response to the assassinations of Martin Luther King, Jr. and Robert Kennedy that year. Mental illness was already a focus of the gun-control debate as the result of a mass shooting at the University of Texas two years earlier by an individual who had complained about his mental state and was later found to have a brain tumor.²³ In addition to various requirements for gun manufacturers and dealers, the Gun Control Act made it unlawful for certain classes of “high-risk” individuals, including those “adjudicated as a mental defective or who ha[ve] been committed to a mental institution[.] . . . to . . . possess in or affecting commerce . . . any firearm or ammunition.”²⁴ It also made it unlawful for a licensed dealer to sell a gun to a “mental defective.”²⁵

While the Gun Control Act contained prohibitions on the sale of guns to high-risk individuals, enforcement was limited by the lack of a system for gun dealers to determine if an individual was ineligible. Then, in 1981, John Hinckley, Jr. attempted to assassinate President Ronald Reagan, shooting both the President and his press secretary, James Brady. Hinckley was found not guilty by reason of insanity, reigniting the gun-control debate.²⁶ In 1993, the Brady Handgun Violence Prevention Act (“Brady Act”) introduced a new reporting system, the National Instant Criminal Background Check System (“NICS”), intended to create a comprehensive database of individuals who were ineligible to purchase a gun, including those who had been adjudicated mentally ill or involuntarily committed to a mental institution.²⁷ The Brady Act requires that licensed dealers consult the database in order to determine the eligibility of a purchaser. The NICS system, however, failed to become the comprehensive catalogue of ineligible purchasers originally envisioned because many relevant records

U.S.C. § 922 (2013)). See also Tom Wehl, *The Presumption of Dangerousness: How New York’s SAFE Act Reflects Our Irrational Fear of Mental Illness*, 38 SETON HALL LEGIS. J. 35, 40 (2014) (“Despite the rich history in this country of limiting the physical liberty of those who are deemed mentally unsound, the concept of prohibiting gun possession by the mentally ill is relatively new,” being first addressed by Congress in the Gun Control Act of 1968.).

23. Charles Whitman had a brain tumor that was thought to have contributed to his shooting rampage. See Cara Santa Maria, *The Mind of a Mass Murderer: Charles Whitman, Brain Damage, and Violence*, HUFFINGTON POST (Mar. 28, 2012), http://www.huffingtonpost.com/2012/03/27/mind-murderer_n_1384102.html. The discussion regarding gun control following his attack at the University of Texas included a focus on individuals referred to offensively as “mental defectives.”

24. 18 U.S.C. § 922(g)(4) (2012).

25. *Id.* § 922(d)(4).

26. Lucia Graves, *Gun Control Timeline: 7 Big Events in the Federal Gun Control Debate*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/01/09/gun-control-timeline_n_806516.html (last updated May 25, 2011).

27. See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)).

were not reported to the system.²⁸ Following the Virginia Tech shooting in 2007, public outrage was again triggered by the discovery that the shooter was “mentally ill . . . [and had been] directed to undergo outpatient treatment,” but records “of the outpatient commitment were not placed into the Virginia Mental Health Database that forwards information to the NICS.”²⁹ In response to the perceived failures of the NICS system, a “new centerpiece of federal legislation affecting the purchase of firearms by persons with a history of mental illness,” the National Instant Criminal Background Check System Improvement Act, was enacted in 2007.³⁰ The NICS Improvement Act “provides states with significant financial incentives to release all relevant records, including those contained in mental health databases, . . . [by providing] grants [that] will allow states to establish or upgrade . . . identification technologies.”³¹ However, the impact of the NICS Improvement Act has been disappointing, as many relevant records of convictions and commitments are still not reported to the system.³² The failure of the system to catalogue individuals who suffer from dangerous mental illness before they commit violent crimes has led to calls for laws like the SAFE Act.

2. State Gun Control and Reporting Laws

While there are many differences in state gun-control laws, most states “have laws that restrict access to firearms by persons who are mentally ill,” and such laws generally “use definitions of mental illness similar to the

28. Reporting to the NICS system has been incomplete in part because the law does not mandate reporting by the states. Doing so would likely unconstitutionally violate state sovereignty. *See* *Printz v. United States*, 521 U.S. 898, 932–33 (1997) (holding that provisions of the Brady Act that coerced state compliance with the federal regulatory scheme were an unconstitutional violation of dual sovereignty). In 2006, only 22 states voluntarily reported information. At that time, “[t]he system contained only 235,000 mental health records . . . although it was estimated that 2.7 million people had been involuntarily institutionalized for mental health disorders.” Donna M. Norris & Marilyn Price, *Firearms and Mental Illness*, *PSYCHIATRIC TIMES*, Nov. 2009, at 24, 24, available at <http://www.psychiatrictimes.com/articles/firearms-and-mental-illness> (internal citation omitted).

29. Norris & Price, *supra* note 28, at 24.

30. 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, 125 (2008), available at <http://www.jaapl.org/content/36/1/123.full>.

31. *Id.*

32. While upwards of forty states now authorize or require NICS reporting, a number of states have reported fewer than 100 records, and reporting is still incomplete. EVERYTOWN FOR GUN SAFETY, *CLOSING THE GAPS: STRENGTHENING THE BACKGROUND CHECK SYSTEM TO KEEP GUNS AWAY FROM THE DANGEROUSLY MENTALLY ILL*, 5–13 (2014), available at <http://everytown.org/documents/2014/10/closing-the-gaps.pdf> (discussing the effectiveness of state reporting laws as of May 2014 and potential improvements to the current system). *See also* *Mental Health Reporting Summary*, *LAW CTR. TO PREVENT GUN VIOLENCE* (Sept. 29, 2013), <http://smartgunlaws.org/mental-health-reporting-policy-summary/#state>.

federal [law] . . . and its implementing regulations.”³³ A majority of states have some prohibition on the purchase, possession, or carrying of a firearm by individuals who have been found not guilty of a crime by reason of mental illness, otherwise adjudicated mentally ill, or involuntarily committed to a mental hospital or institution.³⁴ Seven additional states and the District of Columbia apply their prohibitions not only to individuals who have been involuntarily committed, but also to individuals who have voluntarily committed themselves.³⁵ Most states also have laws regarding the reporting of information from courts, public hospitals, and other state institutions to NICS and, in some cases, state databases for use in identifying individuals who may be subject to restrictions.³⁶

In addition, forty-five states have laws detailing the duty of mental

33. *Categories of Prohibited People Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 29, 2013), <http://smartgunlaws.org/prohibited-people-gun-purchaser-policy-summary> (footnote omitted). See also *Possession of a Firearm by People with Mental Illness*, NAT’L CONF. STATE LEGISLATURES (Jan. 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/possession-of-a-firearm-by-the-mentally-ill.aspx>. State law tends to track the prohibitions of the federal law, which applies to firearms that are in, or affect, interstate commerce. This encompasses essentially all firearms, and it prohibits possession of a firearm by an individual “who has been adjudicated as a mental defective or who has been committed to a mental institution.” 18 U.S.C. § 922(g)(4) (2012).

34. See generally *Possession of a Firearm by People with Mental Illness*, *supra* note 33. Some unusual statutes only restrict individuals’ abilities to possess or carry a firearm due to commitment. *E.g.*, DEL. CODE ANN. tit. 11, § 1448(a)(2) (2007). Others have increased restrictions, and Hawaii has gone so far as to restrict possession by individuals who have simply been “diagnosed” with a “behavioral, emotional, or mental disorder” or an “organic brain disorder.” HAW. REV. STAT. § 137-4 (2013). As of late 2013, six states—Colorado, Kentucky, Alabama, Alaska, Vermont, and New Hampshire—did not have any state law regarding the purchase or possession of guns by individuals with mental illness, simply defaulting to federal law. Reid Wilson, *State Rules Vary on Guns for the Mentally Ill*, WASH. POST (Sept. 20, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/20/state-rules-vary-on-guns-for-the-mentally-ill>.

35. The seven states are California, Connecticut, Illinois, Maryland, Mississippi, New York, and Texas. See *Possession of a Firearm by People with Mental Illness*, *supra* note 33. See also CAL. WELF. & INST. CODE § 8100(a) (West 2010) (prohibition on possession and purchase of a weapon applies to an individual “receiving inpatient treatment . . . even though the patient has consented to that treatment”); D.C. CODE § 7-2502.03(a)(6) (LexisNexis 2012) (prohibiting possession when an individual has been voluntarily or involuntarily committed within five years of application); TEX. GOV’T CODE ANN. § 411.172(e)(2) (West 2012) (considering any “psychiatric hospitalization” as evidence that a person has a disqualifying psychiatric condition).

36. While “the categories of individuals who are reported vary, as do the specific procedures and requirements” for the reporting of information, upwards of “forty[] states have laws that require or authorize the reporting of some mentally ill people to the federal NICS database or a state database for use in firearm purchaser background checks.” *Mental Health Reporting Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 29, 2013), <http://smartgunlaws.org/mental-health-reporting-policy-summary/#state>. See also EVERYTOWN FOR GUN SAFETY, *supra* note 32, at 5–13. Five states (Arkansas, California, Michigan, Ohio, and Utah) require or authorize the reporting of mental health information only to a state database. *Mental Health Reporting Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 16, 2013), <http://smartgunlaws.org/mental-health-reporting-policy-summary>.

health professionals to warn of, or take reasonable action to protect against, patient threats to the safety of a third party.³⁷ The widespread enactment of such laws was triggered in 1976 by the California Supreme Court ruling in *Tarasoff v. Regents of the University of California*, which, for the first time, imposed such a legal duty on psychiatrists.³⁸ Thirty-one states now have laws mandating reporting of such threats, while fourteen states and the District of Columbia have permissive reporting laws.³⁹ While the phraseology of these so-called “*Tarasoff* laws” is not uniform, the disclosure of otherwise confidential patient information under such laws has typically required some combination of: (1) explicitly communicated threats involving (2) an imminent risk of serious physical harm to (3) a clearly identifiable victim or group of victims.⁴⁰ While *Tarasoff* laws typically require mental health professionals to notify a potential victim, notify the police, or take other reasonable action when a patient makes a threat, the laws do not provide for the automatic confiscation of lawfully possessed firearms.

III. NEW YORK’S “SULLIVAN ACT” LICENSING SCHEME

The SAFE Act must be understood in the context of New York’s gun-licensing law, the Sullivan Act, which was first enacted in 1911 and requires a license to possess or carry a handgun.⁴¹ Under the Sullivan Act, “possession of a handgun license is [considered] a privilege, not a right, which is subject to the broad discretion of the New York City Police Commissioner.”⁴² In order to carry or possess a handgun, the law requires

37. See generally *Mental Health Professionals’ Duty to Protect/Warn*, NAT’L CONF. STATE LEGISLATURES (Jan. 2013), <http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx>.

38. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). The court recognized that mental health professionals ordinarily must maintain the confidentiality of information received from patients. However, the court weighed “the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy” against “the public interest in safety from violent assault.” *Id.* at 346. It determined that “once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.” *Id.* at 345.

39. See *Mental Health Professionals’ Duty to Protect/Warn*, *supra* note 37.

40. For a discussion of the three main factors, at least one of which is required by all state *Tarasoff* laws but not by New York’s SAFE Act, see Weihl, *supra* note 22, at 52–53. For example, California law imposes potential liability on a psychotherapist for failing to warn or take reasonable action to protect a “patient [who] has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.” CAL. CIV. CODE § 43.92(a) (West 2007).

41. See *Mental Health Professionals’ Duty to Protect/Warn*, *supra* note 37.

42. *Papaioannou v. Kelly*, 788 N.Y.S.2d 378, 378 (N.Y. App. Div. 2005). Even in response to the argument that the Supreme Court’s decisions in *Heller* and *McDonald* “change[d] an individual’s

that an individual obtain a license. In order to obtain a license, an applicant must be an individual:

(b) of good moral character; (c) who has not been convicted anywhere of a felony or a serious offense; (d) who has stated whether he or she has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; (e) who has not had a license revoked . . . ; [and] (g) concerning whom no good cause exists for the denial of the license.⁴³

Licenses to carry a firearm outside the home require an extra showing of “proper cause,”⁴⁴ which generally requires a demonstrated “need for self-protection distinguishable from that of the general community.”⁴⁵ A licensing official, the Police Commissioner in New York City or a local judge in most other jurisdictions, makes the decision to grant or deny a license.⁴⁶ In practice, these officials have great latitude, and the decision to deny or revoke a license will only be overturned if it is “arbitrary and capricious.”⁴⁷

IV. THE NEW YORK SAFE ACT

A. OVERVIEW

The SAFE Act, signed into law on January 15, 2013, has been described as the “toughest gun-control law” in the nation and was passed in response to the Sandy Hook shooting in Newtown, Connecticut.⁴⁸ While there has been a great deal of focus on the assault weapon ban and magazine size restrictions contained in the SAFE Act,⁴⁹ one of the most

possession of a gun from a ‘privilege’ to a ‘right’” the New York County Supreme Court in *Caputo v. Kelly*, No. 113232/10, WL 567978 (N.Y. Sup. Ct. 2011), refused “to accept this interpretation.” *Id.* at *7–8. See also, Matthew Bridge, Note, *Exit, Pursued by a “Bear”?* *New York City’s Handgun Laws in the Wake of Heller and McDonald*, 46 COLUM. J.L. & SOC. PROBS. 145, 164–65 (2012).

43. N.Y. PENAL LAW § 400.00(1) (McKinney 2013) (emphasis added). Under the current scheme, possession of an unlicensed firearm in public is a felony, and unlicensed possession in the home is a misdemeanor.

44. *Id.* § 400.00(2)(f).

45. Bridge, *supra* note 42, at 184 & n.228.

46. See *id.* at 151.

47. *Id.* at 163 (detailing Article 78 proceedings).

48. Shushannah Walshe, *New York Passes Nation’s Toughest Gun-Control Law*, ABC NEWS (Jan. 15, 2013), <http://abcnews.go.com/Politics/york-state-passes-toughest-gun-control-law-nation/story?id=18224091>. The SAFE Act contains restrictions on magazine size and assault rifles, some of which have been ruled unconstitutional. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 990 F. Supp. 2d 349 (W.D.N.Y. 2013) (upholding the majority of the SAFE Act, but finding that certain prohibitions on ammunition and certain types of weapons or weapon parts were unconstitutionally vague). That decision did not address the mental health portion of the SAFE Act.

49. The mental health provisions of the SAFE Act have received little attention. In contrast, the

significant differences between the SAFE Act and typical gun-control laws is found in section 9.46 of the Mental Hygiene Law, titled “Reports of Substantial Risk or Threat of Harm by Mental Health Professionals.” This section of the SAFE Act *mandates* that:

Notwithstanding any law to the contrary, when a mental health professional currently providing treatment services to a person determines, in the exercise of reasonable professional judgment, that such person is likely to engage in conduct that would result in serious harm to self or others, he or she shall be required to report, as soon as practicable, to the director of community services, or the director’s designee, who shall report to the division of criminal justice services whenever he or she agrees that the person is likely to engage in such conduct.⁵⁰

In effect, the law requires mental health professionals, defined as any “physician, psychologist, registered nurse or licensed clinical social worker,” to report a reasonable suspicion that a patient is dangerous.⁵¹

B. PROCESS UPON FILING OF A REPORT BY A MENTAL HEALTH PROFESSIONAL

If a mental health professional determines that a patient “is likely to engage in conduct that would result in serious harm to self or others,” the SAFE Act initiates the following process, which may lead to the revocation of a firearms license: (a) the mental health professional reports to a Director of Community Services; (b) if the Director agrees that the patient is likely to cause harm the Director reports the patient to the Division of Criminal Justice Services, although the Director can only report “non-clinical identifying information”; (c) the DCJS makes an initial screening to determine if the patient has a state firearms license or has applied for one;⁵² (d) if the patient has a firearms license or has applied for one, the DCJS notifies the State Police, who confirm the existence of the license or application and notify the licensing authority; and (e) the licensing authority *must* then “issue an order suspending or revoking” the patient’s

assault weapon ban and magazine size restrictions of the SAFE Act have generated a great deal of debate, as evidenced by the amicus brief filed by twenty-three states supporting the plaintiffs’ constitutional challenge of the provisions. *See* Brief of Alabama et al. as Amici Curiae in Support of Plaintiffs-Appellants-Cross-Appellees, N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo, No. 14-0036-CV(L) (2d Cir. May 6, 2014), 2014 WL 2039060.

50. N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney 2013).

51. *Id.* § 9.46(a). However, the SAFE Act creates a narrow exception if reporting will endanger the mental health professional. *Id.* § 9.46(c).

52. *Id.* § 9.46(b)

license.⁵³

While the statute lays out the process to be followed after a report from a mental health professional, it gives no guidance regarding the manner in which the Director confirms concerns initially reported by the professional.⁵⁴ Despite the lack of clarity regarding a Director's decisionmaking process, the statute is clear that the licensing authority must revoke or suspend a license if the Director agrees with the report by the mental health professional. Upon revocation, an individual must hand over his or her license and all firearms, or such firearms will be removed by local law enforcement.⁵⁵ A hearing is not required prior to revocation of a license and removal of firearms. In New York City, after revocation an individual must be given notice of the charges and evidence and has the right to request a hearing to challenge the charges.⁵⁶ An individual may also challenge the revocation of a gun license in a proceeding under Article 78 of the New York State Civil Practice Law and Rules, although such "challenges . . . are limited to the question of 'whether a determination . . . was arbitrary and capricious or an abuse of discretion.'"⁵⁷

53. N.Y. PENAL LAW § 400.00(11)(b) (McKinney 2013) ("Whenever the director of community services or his or her designee makes a report pursuant to section 9.46 of the mental hygiene law, the division of criminal justice services *shall* convey such information, whenever it determines that the person named in the report possesses a license issued pursuant to this section, to the appropriate licensing official, who *shall* issue an order suspending or revoking such license.") (emphasis added). See also THE OFFICE OF DIV. COUNSEL, GUIDE TO THE NEW YORK SAFE ACT FOR MEMBERS OF THE DIVISION OF STATE POLICE 2 (2013), available at http://www.nypdcea.org/pdfs/NYSP_Safe_Act_Field_Guide.pdf.

54. Once the Director makes a determination, the information provided to the DCJS, the police, and the licensing authority is limited. See N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney 2013) ("Information transmitted to the division of criminal justice services shall be *limited to names and other non-clinical identifying information*, which may only be used for determining whether a license issued pursuant to section 400.00 of the penal law should be suspended or revoked, or for determining whether a person is ineligible for a license issued pursuant to section 400.00 of the penal law.") (emphasis added).

55. See *id.*

56. 38 RULES OF THE CITY OF N.Y. §§ 15-21 to 15-22 (2012), available at http://www.nyc.gov/html/nypd/downloads/pdf/permits/title38_rcny_rev2010_11.pdf.

57. Bridge, *supra* note 42, at 163 & n.114.

V. ARE THE MENTAL HYGIENE PROVISIONS OF THE SAFE ACT
CONSTITUTIONAL?⁵⁸

While the courts have not reached a consensus regarding the standard of scrutiny applicable to gun-control laws after *Heller* and *McDonald*, their opinions create a general roadmap to be followed when determining whether such a law is constitutional. The courts have essentially asked three questions: (1) whether the law burdens a right protected by the Second Amendment; (2) if so, what level of scrutiny is appropriate when analyzing the law; and (3) whether the law survives a review applying the appropriate level of scrutiny.⁵⁹

A. DOES THE SAFE ACT BURDEN RIGHTS PROTECTED BY THE SECOND
AMENDMENT?

A disqualification under the SAFE Act results in a revocation of a firearms license, which is tantamount to a complete prohibition on an individual's Second Amendment right to bear arms in New York. Furthermore, the citizens disqualified by the mental health provisions of the SAFE Act are only those who have complied with New York law. These individuals have sought or obtained a license, have no other legitimate basis in their past for the rejection or revocation of a license, and are responsibly seeking the assistance of mental health professionals with respect to issues they are confronting. As the law effects a complete prohibition on otherwise law-abiding citizens, it clearly burdens Second Amendment rights⁶⁰ unless it is consistent with the "longstanding

58. Following the Court's decisions in *Heller* and *McDonald*, questions have been raised about the constitutionality of New York's licensing scheme in general, as well as similar licensing schemes in other states. *See, e.g., infra* note 80 and text accompanying note 82. However, while the constitutionality of the Sullivan Act may be open to debate when applied to deny a license to an individual who is not suffering from mental illness, such issues are beyond the scope of this Note. Rather, this Note will focus its analysis solely on the mental hygiene provisions of the SAFE Act.

59. The majority of courts have essentially adopted a so-called "two-step" approach, which actually requires answering these three questions. *See, e.g.,* *United States v. Chovan*, 735 F.3d 1127, 1136–41 (9th Cir. 2013) (adopting a "two-step" inquiry when analyzing laws alleged to infringe Second Amendment rights, which asks (1) "whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny"); *Heller v. District of Columbia*, 670 F.3d 1244, 1252–55 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Marzarella*, 614 F.3d 85, 89 (3rd Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

60. *See infra* Part V.B. (discussing the Second Circuit's determination that the "proper cause" requirement in the Sullivan Act, necessary to obtain a concealed carry license, was a substantial burden on Second Amendment rights). If requiring "proper cause" to obtain a license is a burden on Second Amendment rights, then the revocation of a legally obtained license would likely be a burden as well.

prohibitions on the possession of firearms by . . . the mentally ill,”⁶¹ making it a presumptively lawful regulation of conduct not protected by the Second Amendment.⁶²

An analysis of the SAFE Act demonstrates that it is not “presumptively lawful” under *Heller* because there are significant differences between the SAFE Act and traditional, longstanding prohibitions on the ownership and possession of firearms by individuals suffering from mental illness. Unlike the vast majority of the mental health related prohibitions that have been in place since the adoption of the Gun Control Act of 1968, the denial of an individual’s Second Amendment rights under the SAFE Act does not require an adjudication of mental illness or a commitment to a mental hospital or institution.⁶³ Mental illness, absent such an adjudication or commitment, has never been the basis for

61. See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008) (identifying “longstanding prohibitions on the possession of firearms by felons and the mentally ill” as examples of “presumptively lawful regulatory measures,” the validity upon which the opinion should not “be taken to cast doubt”).

62. There is disagreement as to the impact of a law being deemed a “longstanding prohibition.” The prevailing view is that a “longstanding prohibition” is presumptively lawful because the conduct regulated “is not within the scope of the Second Amendment” and a challenge therefore fails the first step of a constitutional analysis because the prohibition does not burden rights protected by the Second Amendment. *Drake v. Filko*, 724 F.3d 426, 431–34 (3d Cir. 2013) (“[T]he ‘justifiable need’ standard . . . is a longstanding regulation . . . [and] [a]ccordingly, it regulates conduct falling outside the scope of the Second Amendment.”). See also *Peterson v. Martinez*, 707 F.3d 1197, 1210–11 (10th Cir. 2013); *Heller v. District of Columbia*, 670 F.3d 1244, 1253–55 (D.C. Cir. 2011). However, other courts have questioned whether a law that is a longstanding prohibition fails the first step of the analysis. See, e.g., *United States v. Chester*, 628 F.3d 673, 678–80 (4th Cir. 2010) (questioning “whether *Heller* was suggesting that ‘longstanding prohibitions’ . . . [were] valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason”); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (“[T]he phrase ‘presumptively lawful’ could have different meanings under . . . Second Amendment doctrine.”). While the meaning of the phrase “presumptively lawful” is unclear, this Note will adopt the prevailing view that conduct regulated by a law determined to be a “longstanding prohibition” is outside the scope of Second Amendment protection.

63. While the standards have varied, laws regulating firearm possession by the mentally ill are generally based on a determination that an individual is not guilty of a crime by reason of mental illness; an adjudication of mental illness in some other context; or a commitment to a mental hospital or institution. See *supra* text accompanying notes 24 and 33. However, there is a long history of prohibitions on possession by categories of individuals assumed to be dangerous, such as felons. Therefore, it is arguable that firearm prohibitions on the mentally ill are presumptively lawful, regardless of the manner in which the illness is identified, because they regulate such a category of individuals. See Lawrence E. Rosenthal & Adam Winkler, *The Scope of Regulatory Authority Under the Second Amendment*, in *REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS* 225, 228 (Daniel W. Webster & Jon S. Vernick eds., 2013) (“One approach to assessing the permissibility of regulation is to inquire whether the challenged law comports with historical traditions broadly defined. For example, the ban on possession by felons and the mentally ill reflects a longstanding tradition of restricting access to firearms by people deemed dangerous to public safety.”).

the denial of Second Amendment rights.⁶⁴ On its face, the statute only requires an assertion by a mental health professional and the agreement of the Director that a patient receiving “treatment services” is “likely to engage in conduct that would result in serious harm to self or others.”⁶⁵ While the statute seems to equate treatment with mental illness, it does not define “treatment services,” and the “mental health professional” making the determination includes any physician, psychologist, registered nurse, or clinical social worker.⁶⁶ However, “[p]hysicians and other health care providers generally do not fall within th[e] list of authorized decision-makers” under “longstanding” prohibitions related to mental illness, unless they are involuntarily committing a patient.⁶⁷ With no express requirement that a patient be determined to be dangerous due to a mental illness through the process of an adjudication or commitment proceeding, the SAFE Act lacks an element that served as the cornerstone of “longstanding prohibitions on the possession of firearms by . . . the mentally ill.”⁶⁸

While there is no requirement in the SAFE Act for an adjudication of mental illness or a commitment to a mental hospital or institution, the New York State Office of Mental Health (“OMH”) has issued a “Guidance Document” for practitioners describing the law, which arguably may bring the SAFE Act more in line with “longstanding prohibitions.”⁶⁹ The OMH asserts that the phrase “likely to engage in conduct that would result in serious harm to self or others” in the Act is consistent with the “likely to result in serious harm to self or others” standard used for emergency removals, or short-term commitments, to a psychiatric hospital.⁷⁰ The latter standard is defined as:

- (a) a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or
- (b) a substantial risk of physical harm to other persons

64. EDWARD C. LIU ET AL., CONG. RESEARCH SERV., R43040, SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 2 (2013), *available at* <http://www.fas.org/sgp/crs/misc/R43040.pdf>. (“[N]either a diagnosis of a mental illness nor treatment for a mental illness appears, by itself, to qualify a person as ‘adjudicated as a mental defective.’”).

65. N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney 2013).

66. *Id.* § 9.46(a).

67. LIU ET AL., *supra* note 64, at 2.

68. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

69. NYS OFFICE OF MENTAL HEALTH & NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, NY SAFE ACT: GUIDANCE DOCUMENT, *available at* https://www.omh.ny.gov/omhweb/safe_act/guidance.pdf (last accessed Feb. 25, 2015) [hereinafter SAFE ACT GUIDANCE DOCUMENT].

70. *Id.* at 2.

as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.⁷¹

In addition, the OMH has developed an online form that requires the mental health professional filing a report under the SAFE Act to provide certain information, including a DSM-IV-TR diagnosis code along with a description of the reasons for his or her concerns.⁷²

However, the OMH Guidance Document and reporting form are not law and they do not actually require that reported patients have a diagnosed mental illness or be committed to a mental hospital or institution. A report may include the diagnostic code 799.91, “Diagnosis Deferred,”⁷³ which means that the mental health professional filing the report “has inadequate information to make any judgment about a diagnosis.”⁷⁴ In addition, while the OMH may assert that the test for dangerousness under the SAFE Act is the same as the test for an involuntary commitment, there is in fact no requirement that a patient be committed. Furthermore, a mere diagnosis of some form of mental illness or an assertion that a patient is dangerous enough to be committed has never been the basis for denying Second Amendment rights under the “longstanding prohibitions on the possession of firearms by . . . the mentally ill”⁷⁵ referred to in *Heller*. The traditional requirement of an adjudication of mental illness or a commitment to a mental hospital is nowhere to be found in the SAFE Act.

Finally, the SAFE Act is the first statute directly tying a report by a mental health professional to an automatic process that results in revocation of a patient’s right to bear arms.⁷⁶ So-called *Tarasoff* laws generally require or permit reporting by mental health professionals if “the patient has

71. N.Y. MENTAL HYG. LAW § 9.01 (McKinney 2011).

72. *New York SAFE Act Reporting*, N.Y. STATE OFFICE OF MENTAL HEALTH, <https://nysafe.omh.ny.gov> (last visited Feb. 25, 2015).

73. *Id.*

74. SUSAN W. GRAY, COMPETENCY-BASED ASSESSMENTS IN MENTAL HEALTH PRACTICE: CASES AND PRACTICAL APPLICATIONS 16 (2011).

75. *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 661 n.26 (2008).

76. Connecticut, Indiana, Texas, and California have laws, albeit relatively new ones, establishing a process for the removal of guns from individuals perceived to be dangerous. *See* CONSORTIUM ON STATE POLICY, *supra* note 14, at 25–28. However, the removal of a firearm is not tied to a report from a mental health professional that is merely reviewed by a government health officer. Each of these states instead requires a determination of dangerousness be made by a judge or by the police prior to removal of a weapon, as well as a prompt hearing following any such removal at which the state has the burden of proving that the individual is dangerous. For example, of the three current seizure laws, the Connecticut law requires a judge to issue a warrant prior to seizure, but only after the police have conducted an investigation “to establish that probable cause exists and determin[e] that [there is] no reasonable alternative to avert the risk of harm.” *Id.* at 25 (internal quotation marks omitted) (quoting CONN. GEN. STAT. § 29-38c).

communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.”⁷⁷ The SAFE Act on its face does not require an explicit threat, imminent harm, or an identifiable victim, instead mandating reports of a mental health professional’s generalized concern regarding dangerousness. In addition, the typical *Tarasoff* law only provides for disclosure of a threat to the potential victim or the police, which does not automatically trigger restrictions on the possession of firearms by the patient. In the past, restrictions on gun ownership only flowed from a determination of mental illness so severe that it resulted in an adjudication or commitment, and *Tarasoff* disclosure laws only related to the protection of identifiable victims who were the subject of explicit threats. The SAFE Act, on the other hand, has adopted a novel approach, creating an obligation for mental health professionals to report generalized concerns of potential dangerousness and tying such reports to restrictions that ultimately allow the state to confiscate guns lawfully in an individual’s possession.⁷⁸

In light of the foregoing, the SAFE Act is not consistent with “longstanding prohibitions” and is not presumptively lawful. Its constitutionality therefore must be analyzed by applying common constitutional principles.

B. APPLICABLE STANDARD OF CONSTITUTIONAL SCRUTINY

While holding that Second Amendment rights are “fundamental,” the Supreme Court in *Heller* and *McDonald* failed to give clear guidance as to the constitutional analysis applicable to a law burdening Second Amendment rights. The prevailing view is that a law substantially burdening the “core” of the Second Amendment right, the right of “law-abiding, responsible citizens to use arms in defense of hearth and home,”⁷⁹ would receive a level of scrutiny above intermediate, likely strict.⁸⁰

77. CAL. CIV. CODE § 43.92(a) (West 2013). Although the language varied, the early *Tarasoff* laws generally required some combination of a specific threat, imminent harm, and an identifiable victim, based on the belief that without such factors, disclosure would likely be a breach of doctor-patient confidentiality. See generally Wehl, *supra* note 22; *Mental Health Professionals’ Duty to Protect/Warn*, *supra* note 37. *Tarasoff* laws were only adopted after 1976. In recent years some states have modified the requirements of their *Tarasoff* laws.

78. See *supra* text accompanying notes 46–50.

79. *Heller*, 554 U.S. 570, 635.

80. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011) (holding that although “the application of strict scrutiny [is] important to protect the core right of the self-defense of a law-abiding citizen in his home . . . a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home”); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (“[A] regulation that imposes a substantial burden upon the core right of self-defense

However, no circuit of the U.S. Court of Appeals has yet applied strict scrutiny, and federal courts have taken “widely divergent approaches to determining the constitutionality of gun control.”⁸¹ As the SAFE Act is a New York law, it will initially be analyzed under Second Circuit precedent.

In *Kachalsky v. County of Westchester*, the Second Circuit upheld the constitutionality of the Sullivan Act’s requirement that an individual show “proper cause” in order to obtain a carry license.⁸² The court first

protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) (agreeing with the “prevailing view” that “[a] regulation that threatens a right at the core of the Second Amendment . . . triggers strict scrutiny”); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2nd Cir. 2012) (determining, without deciding what level of scrutiny would apply to the “core” of the Second Amendment right, that intermediate scrutiny applied to issues outside of the “core” right); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (determining, and reaffirming the statement in a previous case, that intermediate scrutiny “applies ‘to laws that burden [any] right to keep and bear arms outside of the home . . . [and assuming] that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.’” (citing *Masciandaro*, 638 F.3d at 470–71)). *Cf.* *Moore v. Madigan*, 702 F.3d 933, 941–42 (7th Cir. 2012) (“Our principal reservation about the Second Circuit’s analysis [in *Kachalsky*] . . . is its suggestion that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction . . . [T]he interest in self-protection is as great outside as inside the home . . . [and] [t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”).

81. TINA MEHR & ADAM WINKLER, *THE STANDARDLESS SECOND AMENDMENT 2* (2010), available at http://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf. Some courts have concluded that means-end testing is unnecessary because a statute constitutes a complete ban on a traditionally lawful activity, such as in *Heller*, or because it contains a presumptively lawful ban on a category of user or activity, such as “possession by substance abusers, illegal aliens, and people convicted of domestic violence misdemeanors,” or at sensitive locations including “airports, National Parks and post office parking lots.” *Id.* at 3. Other courts have applied (a) strict scrutiny, arguing that Second Amendment rights are “fundamental” and “that fundamental rights automatically trigger strict scrutiny”; (b) intermediate scrutiny, arguing that “by calling the public safety exceptions ‘presumptively constitutional,’ *Heller* appeared to reject strict scrutiny, which presumes that challenged laws are unconstitutional”; and (c) a mix of strict and intermediate scrutiny, arguing that when a “law burdens the ‘core’ right of self-defense in the home with a firearm, a higher standard of review applies than when a law burdens more peripheral elements of the Second Amendment.” *Id.* at 3–6. *See also* *United States v. Chovan*, 735 F.3d 1127, 1142–43 (9th Cir. 2013) (Bea, J., concurring) (noting multiple sources that question the applicable standard and the clear uncertainty in the courts after *Heller* and *McDonald*).

82. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). In order to obtain a license to carry a weapon in public, an individual must demonstrate “proper cause,” defined as “a special need for self-protection distinguishable from that of the general community.” The Second Circuit applied an intermediate scrutiny analysis, because the requirement did not burden the “core” Second Amendment right to possess a firearm for self-defense in the home, and it concluded that the requirement was “substantially related” to the state’s interest in public safety. *Id.* The U.S. Court of Appeals for the Ninth Circuit disagreed with this conclusion in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014). It struck down a San Diego law with a virtually identical “good cause” requirement for carry

determined that the means-end scrutiny typically applied to constitutional questions is appropriate when considering Second Amendment challenges to state gun-control regulations.⁸³ In considering the proper level of means-end scrutiny to be applied in analyzing state gun-control laws, the court concluded that “heightened scrutiny, [either strict or intermediate] is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).”⁸⁴ New York’s requirement of “proper cause” for a carry license imposed such a substantial burden on law-abiding citizens,⁸⁵ and the SAFE Act almost certainly imposes such a burden as well.⁸⁶

The court in *Kachalsky* next considered which level of “heightened scrutiny,” intermediate or strict, is appropriately applied to a Second Amendment challenge to a state gun-control law that only affects possession outside of the home. It concluded that, because such a “regulation does not burden the ‘core’ protection of self-defense in the home,” intermediate scrutiny was most appropriate.⁸⁷ However, the court

licenses, holding that the “core component” of the Second Amendment right is self-defense and the licensing scheme completely banned “the typical responsible, law-abiding citizen . . . [from bearing] arms in public for the lawful purpose of self-defense.” *Id.* at 1169.

83. *Kachalsky*, 701 F.3d at 92. The *Kachalsky* court rejected the plaintiff’s assertion that it would be appropriate to “apply [a] First Amendment prior-restraint analysis in lieu of means-end scrutiny to assess the” constitutionality of gun-control laws, since no court has “import[ed] *substantive* First Amendment principles wholesale into Second Amendment jurisprudence.” *Id.* at 91. It also pointed out that the Court in *Heller* “rule[d] out a rational basis review because it ‘would be redundant with the separate constitutional prohibitions on irrational laws.’” *Id.* at 93.

84. *Id.* at 93 (quoting *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012)).

85. *Id.*

86. Arguably, a court could do away with a challenge to the SAFE Act by holding that it does not substantially burden a citizen’s Second Amendment right, and therefore no form of heightened scrutiny need be applied. The argument would assert that the SAFE Act affects only a relatively small population of individuals who are voluntarily seeing mental health professionals and who exhibit signs of dangerousness. However, in 2012, almost 15 percent of the adult population was receiving mental health services. See *Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Dec. 2012), http://www.samhsa.gov/data/NSDUH/2k12MH_FindingsandDetTables/2K12MHF/NSDUHmhr2012.htm#sec2-1 [hereinafter *2012 Drug Use Survey Results*]. In addition, since revocation of a license is akin to a full ban, it imposes a substantial burden on the ability to exercise the right for those whose licenses are revoked. If the requirement to show proper cause is a substantial burden on the right to bear arms, it seems difficult to find that a revocation of the right is not.

87. *Kachalsky*, 701 F.3d at 93 (“Although we have no occasion to decide what level of scrutiny should apply to laws that burden the ‘core’ Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the ‘core’ protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.”)

clearly left open the possibility, explicitly stated in other circuits,⁸⁸ that strict scrutiny is more appropriate in the context of prohibitions applicable to the “core” Second Amendment right to possess a hand gun for self-defense within the home.⁸⁹ It noted that, “[t]he state’s ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home.”⁹⁰ Therefore, in light of the Second Circuit’s focus on this qualitative difference, strict scrutiny likely would be applied in analyzing the SAFE Act because it authorizes the state to revoke a license to possess a firearm in the home.⁹¹ However, if the SAFE Act was applied only to the revocation of a public carry license, a court might conclude that intermediate scrutiny was more appropriate. Therefore, in Parts V.C and V.D, the SAFE Act will be analyzed under both levels of scrutiny.

C. APPLICATION OF STRICT SCRUTINY TO RESTRICTIONS ON POSSESSION OF A HANDGUN IN THE HOME

In a case involving the revocation of a license to possess a handgun in the home, the constitutionality of the SAFE Act is highly questionable. To survive a constitutional review applying strict scrutiny to this “core” Second Amendment right, the SAFE Act must be (1) justified by a compelling governmental interest, (2) narrowly tailored to achieve that goal or interest, and (3) the least restrictive means for achieving that interest.⁹² The stated goal of the SAFE Act is to promote public safety by “ensur[ing] that persons who are mentally ill and dangerous cannot retain or obtain a firearm.”⁹³ As the Second Circuit noted in *Kachalsky*, “New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.”⁹⁴ Therefore, the real question under a strict scrutiny

88. See sources cited *supra* note 80.

89. *Kachalsky*, 701 F.3d at 93–94.

90. *Id.* at 94. See also *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (explaining that intermediate, rather than strict, scrutiny should be used when assessing an individual’s Second Amendment rights outside the home).

91. Indeed, the application of intermediate scrutiny to a law burdening rights outside of the “core” of the Second Amendment protection all but forecloses application of anything but strict scrutiny to a law burdening the “core” Second Amendment protection, unless the court opts for a non-traditional form of scrutiny, determines that there really is no qualitative difference between the core and the periphery of the Second Amendment right, or somehow determines that the SAFE Act does not burden the “core” right.

92. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (using a strict scrutiny analysis to determine whether an employee’s rights were violated under the Free Exercise clause); *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000) (applying strict scrutiny to hold that a law restricting cable channels was an unconstitutional infringement on individuals’ First Amendment rights).

93. Sponsor’s Memorandum, 2013 Legis. Bill. Hist. N.Y. S.B. 2230 (McKinney), available at <http://www.nysenate.gov/files/pdfs/S2230.pdf>.

94. *Kachalsky*, 701 F.3d at 97 (citing *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376

analysis is whether the SAFE Act is narrowly tailored and the least restrictive means available for achieving the state's stated goal. This is where the SAFE Act comes up short.

On its face, the SAFE Act is not narrowly tailored to identify and impact only those individuals who are dangerous due to mental illness. The first step in the process established by the SAFE Act, which is the “means” by which the SAFE Act seeks to achieve its goal, is a report by a “mental health professional,” a broadly-defined term including, among others, podiatrists, dermatologists, registered nurses and social workers who may have very little training or experience in determining either mental illness or dangerousness. The SAFE Act does not expressly require that the patient who is the subject of the report be diagnosed with a mental illness,⁹⁵ and the report does not need to be predicated on an explicit threat against an identifiable victim. Instead, a mental health professional is only asked to provide a brief description of the reasons why he or she believes the patient is “likely to engage in conduct that will cause serious harm to self or others.”⁹⁶ These are not means narrowly tailored to the stated goal of restricting “mentally ill and dangerous” individuals from possessing firearms. Rather, the SAFE Act imposes a blanket duty on mental health professionals to report generalized concerns about their patients when such professionals may not be well equipped to diagnose mental illness or predict dangerousness, and may have inadequate information to make a judgment about a diagnosis.

In the second step of the process, the “means” to achieve the state's goals under the SAFE Act, after the filing of a report by a mental health professional, the Director of Community Services effectively decides if a gun license will be revoked. If he or she agrees with the report, revocation of the patient's license is a foregone conclusion. The Director must report to the DCJS, which merely confirms the existence of the gun license and reports to the appropriate licensing authority, which is then required, without further process, to revoke or suspend any outstanding license.⁹⁷

(1997); *Schall v. Martin*, 467 U.S. 253, 264 (1984); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981); *Kuck v. Danaher*, 600 F.3d 159, 166 (2d Cir. 2010)). The *Kachalsky* court also noted that, while “public safety interests often outweigh individual interests in self defense” outside the home, “the state's ability to regulate firearms is circumscribed in the home.” *Id.* at 94.

95. See *supra* text accompanying notes 73–74 (discussing the development by the OMH of a SAFE Act reporting form that provides a space for a diagnostic code 799.9, “Diagnosis Deferred,” which can be entered when a “practitioner has inadequate information to make any judgment about a diagnosis” (citing Gray, *supra* note 74, at 16)).

96. THE OFFICE OF DIVISION COUNSEL, *supra* note 53, at 13.

97. See *supra* note 53 and accompanying text.

Despite the importance of the Director as the ultimate decisionmaker, there is no guidance as to the manner in which the Director is to make such decision. The Director is not required to meet the patient in an effort to determine if he or she suffers from mental illness or poses a real threat and may base his or her decision solely on the initial report. In addition to the general uncertainty regarding the ability of any professional determination of future dangerousness,⁹⁸ the Director, who is the administrator of the Mental Hygiene Department of a city or county of New York,⁹⁹ may have little experience or expertise in diagnosing mental illness or dangerousness. Directors and their designees are not required to be practicing psychiatrists or have any expertise in diagnosing future dangerousness.¹⁰⁰ As the SAFE Act is not clearly designed to ensure that it primarily impacts only those individuals who are both mentally ill and dangerous, it is neither narrowly tailored nor the least restrictive means available to achieve the state's goal of protecting the public by limiting such individuals' access to firearms.

New York will, of course, disagree with the foregoing assessment of the SAFE Act. It will assert that the Act, while not a model of clarity, is constitutional as applied. As described above, the OMH takes the position that, because the SAFE Act contains language similar to "the standard for emergency admissions for observation, care and treatment" in a psychiatric facility under New York Mental Hygiene Law section 9.39,¹⁰¹ "decision making with respect to a [SAFE Act] report [therefore] requires a clinical determination that a person's clinical state creates . . . a substantial risk of physical harm . . . manifested by threats of or attempts at suicide . . . or . . . homicidal or other violent behavior."¹⁰² New York will also point out that the form developed by the OMH for filing reports under section 9.46 requires a diagnosis code indicating some diagnosis of mental illness and may assert that the "Diagnosis Deferred" option is intended to be limited to emergencies and cases where a diagnosis is difficult but a patient is believed to be suffering some form of mental illness. Therefore, New York will assert that, as applied in accordance with the guidance of the OMH, the

98. The reliability of any determination of generalized "dangerousness," even by psychiatrists, has been called into question by many studies. *See, e.g.*, Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 484–92 (2011) (noting that the general consensus is that predictions of future dangerousness are "unreliable and unscientific").

99. N.Y. COMP. CODES R. & REGS. tit. 14, § 102.4(c) (2014) ("Director of community services means the chief executive officer of a local governmental unit, by whatever title known.").

100. *Id.* § 102.6 (Directors may have a degree in "public administration, hospital administration, human services administration, business administration or . . . equivalent degrees.").

101. SAFE ACT GUIDANCE DOCUMENT, *supra* note 69.

102. *Id.*

Act requires a clinical diagnosis of mental illness causing a substantial risk of harm based on actual threats, attempts at suicide, or homicidal behavior. If the Act is, in fact, applied on that basis, the constitutional argument in its favor appears much stronger because the Act contains real standards tied to mental illness and dangerousness.

However, even if one were to gloss over the fact that the Guidance Document and the reporting form issued by the OMH are not rules or regulations, do not carry the force of law, and therefore do not necessarily impact the meaning of the Act as written, its procedures are inadequately tailored to protect individuals who are the subject of SAFE Act reports from “erroneous decisions.”¹⁰³ In order to protect the right enunciated under *Heller*, “courts must recognize Second Amendment Due Process principles.”¹⁰⁴ While Second Amendment rights may “not extend to certain people, including the mentally ill, . . . [that] doesn’t mean that Second Amendment rights can be permanently lost based simply on a government official’s determination of mental illness, made without any adversarial proceeding at which the defendant can make his case.”¹⁰⁵ Yet, under the

103. See *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[T]he function of legal process is to minimize the risk of erroneous decisions.” (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Speiser v. Randall*, 357 U.S. 513, 525–526 (1958))). In *Addington*, the Court held that the minimum burden of proof for civil commitments was “clear and convincing evidence . . . demonstrat[ing] . . . that persons with mental illness are substantially more likely than not to be a danger to themselves or others.” Austin Baumgarten, Comment, *Medical Treatment Demands Medical Assessment: Substantive Due Process Rights in Commitments*, 45 U.C. DAVIS L. REV. 597, 605 (2011). The contrast between the processes for revoking the fundamental right to freedom, versus the fundamental rights protected by the Second Amendment, is discussed further *infra* note 111.

104. Eugene Volokh, *A Second Amendment-ish Victory for People Who Had Been Temporarily Committed to Mental Institutions with No Adversary Proceedings*, VOLOKH CONSPIRACY (Jan. 13, 2012, 6:33 PM), <http://www.volokh.com/2012/01/13/a-second-amendment-ish-victory-for-people-who-had-been-temporarily-committed-to-mental-institutions-with-no-adversary-proceedings>. For example, in *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012), the U.S. Court of Appeals for the First Circuit considered whether a temporary, emergency commitment without a judicial determination of mental illness in an adversarial proceeding can constitutionally result in a permanent ban on the possession of firearms under the federal Gun Control Act. Section 922(4) of the Gun Control Act bans possession by an individual who has been “committed to a mental institution.” The court noted that “[o]rdinarily, to work a permanent or prolonged loss of constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required.” *Id.* at 48. The court noted that “Congress sought to piggyback [dispossession based on mental illness] on determinations made in *prior judicial proceedings* to establish status,” and went on to hold that a permanent ban after *Heller* must follow from an adjudication of mental illness, like Maine’s involuntary commitment statute which would require that a court “holds an adversary hearing—providing counsel for the patient and an opportunity to testify and to call and cross-examine witnesses.” *Id.* at 48, 50. “As for the broader problem of those hospitalized under [Maine’s emergency commitment procedure] alone, Congress might well be able to impose a *temporary* ban on firearms possession or perhaps even a permanent one if procedures existed for later restoring gun rights.” *Id.* at 50 (emphasis added).

105. Volokh, *supra* note 104.

SAFE Act, an adversarial proceeding is not required prior to revocation of a license. Rather, the patient is simply notified of the action by the licensing authority after the revocation is effective. Revocation of the license is not merely a temporary measure, and some process is clearly due before government actions are allowed to burden a fundamental constitutional right.¹⁰⁶

In the state of New York, an individual may challenge a notice of revocation of a gun license under the mental hygiene provisions of the SAFE Act in an Article 78 proceeding.¹⁰⁷ Under Article 78, “unless the licensing agency’s determination was arbitrary and capricious, ‘[t]he agency’s determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result.’”¹⁰⁸ After *Heller*, however, a “rational basis” is not sufficient to restrict Second Amendment rights, especially if a disqualification under the SAFE Act was never accompanied by an official determination of dangerousness due to mental illness.¹⁰⁹ While the state may take emergency action to temporarily deprive an individual of his or her Second Amendment rights based on allegations of dangerousness, it likely must also provide “effective [post-deprivation] means to recover the right to bear arms if the subject had *in fact* never been mentally ill or dangerous.”¹¹⁰

106. New York courts have disagreed on whether a finding of mental illness effects a permanent disqualification as a matter of law. Compare *In re Pistol Permit Revocation of David H.*, 408 N.Y.S.2d 759, 760 (Sup. Ct. 1978) (holding that section 400.00 of the Penal Law, the revocation statute, “renders ineligible anyone who has [e]ver suffered any such [mental] illness and that mental capacity at any subsequent time is irrelevant” (emphasis added)), with *In re Application of Robert T. for Reinstatement of His Pistol Permit*, 26 Misc.3d 292, 297 (N.Y. Sup. Ct. 2009) (“disagree[ing] with the interpretation of the statute in the David H. decision,” and deciding that a finding of mental illness is only something to be considered upon a prior application for reinstatement of a license).

107. In New York City, section 15-22 of Title 38 of the Rules of the City of New York provides that a resident of New York City can request a hearing, within 30 days of being notified of the revocation, at which he or she can challenge said revocation. However, the law does not specify the standard that a judge or licensing official must apply in determining whether to reinstate the license. There is no explicit requirement that the licensing authority determine dangerousness due to mental illness, and while the parties have the right to call witnesses at such hearing, “[t]he rules of evidence . . . in the courts of this State shall not be strictly enforced.” 38 RCNY § 15-25(2).

108. Bridge, *supra* note 42, at 163–65 (quoting *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998)).

109. “[D]espite *Heller*’s rejection of rational-basis review, New York state courts will apparently only overturn the NYPD License Division’s decision to deny a handgun license application if it is arbitrary and capricious. However, if an applicant were to challenge the denial of a license in federal court on Second Amendment grounds, then New York’s ‘privilege not a right’ doctrine and arbitrary-and-capricious standard of review would likely be declared unconstitutional, since they clearly contradict the explicit holdings of *Heller* and *McDonald*.” Bridge, *supra* note 42, at 165.

110. *United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012).

The procedural failings of the SAFE Act become evident once one compares it to New York's emergency commitment laws, which the OMH considers to have virtually identical standards for the decision to impinge on an individual's rights.¹¹¹ The emergency commitment laws allow an individual to be involuntarily admitted to a mental hospital if such individual is "alleged to have a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others."¹¹² However, under the emergency commitment procedures, the patient can only be held for "forty-eight hours unless within such period such finding is confirmed after examination by another physician who shall be a member of the psychiatric staff of the hospital."¹¹³ After fifteen days, the patient must be released unless he or she is involuntarily committed following the required notice, a hearing, and a judicial determination of mental illness requiring treatment in a psychiatric facility.¹¹⁴ While the SAFE Act burdens an enumerated

111. Although the deprivation of the Second Amendment right to bear arms may not be as serious as confinement, the right is still "fundamental" and has been described as a liberty interest. See Jonathan Zimmer, Comment, *Regulation Reloaded: The Administrative Law of Firearms After District of Columbia v. Heller*, 62 ADMIN. L. REV. 189, 211–14 (2010) ("Allowing firearms regulators too much discretion in regulating the liberty interest is likely an infringement of due process . . ."); *id.* at 213 ("For example, New York City's application of the state's handgun permit law, in practice, is so labyrinthine that only wealthy or politically connected citizens can get handgun licenses, while the city routinely denies handgun licenses to taxi drivers because it claims they do not carry enough cash to be an attractive target for robbers."). The contrast between the seriousness of the procedural protections for involuntary commitment, and the lack of protection for the revocation of the Second Amendment right, calls into question the validity of the SAFE Act. Such procedural protections are intended to ensure that a deprivation of a constitutional right is "grounded in objective findings of the patient's dangerousness and serious mental illness." Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 257 (2011). See also O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (explaining that states cannot involuntarily commit non-dangerous individuals). The requirements of procedural and substantive due process in connection with involuntary civil commitments are taken seriously in New York. In *Rodriguez v. City of New York*, 72 F.3d 1051 (2d Cir. 1995), the Second Circuit held that state officials "may not subject an individual to an involuntary commitment when the admissions evaluation does not conform to prevailing medical standards." Baumgarten, *supra* note 103, at 609. In *Bolmer v. Oliveira*, 594 F.3d 134 (2d Cir. 2010), the Second Circuit held that "if a physician's admitting assessment of a patient for an involuntary commitment falls below [such] medical standards, the assessment can shock the conscience and qualify as a substantive due process violation." Baumgarten, *supra* note 103, at 603. Unless the court meant to exempt all people merely alleged to be mentally ill from possession, a clear process is necessary to protect from "erroneous decisions." See *supra* note 103.

112. N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney 2011) (emphasis added). All that is required for such a commitment is that "a staff physician of the hospital upon examination of such person finds that such person qualifies under the requirements of this section." *Id.* § 9.39(a)(2).

113. *Id.* If the patient, a family member, a friend, or the mental hygiene legal service gives written notice of a request for a court hearing, the hearing must take place within five days of the notice. If the court determines that there is reasonable cause to retain the patient, he or she may be kept in the hospital for a maximum of fifteen days.

114. *Id.*

constitutional right based on a similar rationale as that supporting New York's emergency commitment laws, it contains none of the procedural protections required of an emergency commitment.

New York takes the position that a gun license, even a license to possess a handgun for self-defense in the home, is a privilege, not a right. However, the Supreme Court has made it clear that there is such a right under the Second Amendment. In order to deny the exercise of that right due to mental illness, the individual whose rights are denied must in fact be mentally ill and dangerous. A law that burdens individuals who are not dangerous due to mental illness is not narrowly tailored and would therefore be unconstitutional under a strict scrutiny standard. The SAFE Act does not clearly require a determination of dangerousness due to mental illness prior to the denial or revocation of a license. Instead, the Act merely relies on a general allegation of dangerousness with no clearly delineated process for confirming the allegation and no express requirement for a determination of mental illness. Even if one were to accept that the SAFE Act, as applied in light of the guidance from the OMH, requires an allegation of mental illness and dangerousness, there is no requirement of a judicial determination to ensure that the allegation is accurate. The procedures currently in place, such as an Article 78 proceeding, merely require a finding that the licensing authority's decision was not arbitrary and capricious.¹¹⁵ These procedures do not require an official determination of dangerousness due to mental illness and are consequently insufficient to protect individuals who may have the "core" of their enumerated Second Amendment right restricted by the SAFE Act. Therefore, the SAFE Act is unlikely to survive a Second Amendment challenge under a strict scrutiny standard because it is not narrowly tailored or the least restrictive means of achieving the state's goal of promoting public safety by "ensur[ing] that persons who are mentally ill and dangerous cannot retain or obtain a firearm."¹¹⁶

D. APPLICATION OF INTERMEDIATE SCRUTINY TO RESTRICTIONS ON
CARRY LICENSES

In *Kachalsky*, the court concluded, based on a review of the long

115. An attempt to determine whether the action of the licensing authority was arbitrary and capricious seems nonsensical and may provide no protection at all. The licensing authority has no discretion under the SAFE Act and must revoke a license once notified by the Director of his or her agreement with a report filed by a mental health professional. By eliminating the licensing authorities' discretion, the SAFE Act seems to render futile even the superficial judicial review provided by an Article 78 proceeding.

116. Sponsor's Memorandum, *supra* note 93.

history of state regulation of public carry, that there was a “qualitative difference” between the constitutional protections of the right to possess a firearm for self-defense in the home and the right to carry a firearm for self-defense in public.¹¹⁷ It therefore applied an intermediate scrutiny test in determining that the “proper cause” requirement of the Sullivan Act for public carry licenses is constitutional after *Heller*.¹¹⁸ Under that analysis, the SAFE Act would pass “constitutional muster if it is substantially related to the achievement of an important governmental interest.”¹¹⁹

As the SAFE Act is clearly supported by an “important governmental interest” in public safety, the issue is whether it is “substantially related” to the achievement of that interest. The court in *Kachalsky* permitted broad restrictions on the ability of law-abiding citizens to carry a firearm in public, finding that the “proper cause” requirement was substantially related to public safety. If an individual who is not alleged to be dangerous due to mental illness can be denied a carry license under an intermediate scrutiny standard, a court applying a similar standard may be reluctant to overturn the denial or revocation of a carry license to an individual who is the subject of such an allegation, and may therefore uphold the SAFE Act.

However, while a court might be reluctant to do so, it could conclude that the SAFE Act should fail even under an intermediate scrutiny analysis. Arguably, the Act is not substantially related to the government’s interest in preventing individuals who are dangerous due to mental illness from possessing firearms because it may burden a large portion of the population who are not mentally ill and dangerous.¹²⁰ In order to effect a permanent

117. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012).

118. *Id.* at 96–99. The Ninth Circuit in *Peruta* disagreed with this analysis, concluding, based on its own detailed historical analysis of public carry regulations, that there was no “qualitative” difference between possession in the home and in public. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2012). The *Peruta* court decided that “carrying a gun in public for the lawful purpose of self-defense is a constitutionally protected activity.” *Id.* at 1167. The court asserted that, while a state can regulate the form of carry, either open or concealed, it cannot ban both. *Id.* (“Put simply, a law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down.”). As the San Diego law did not allow open carry, the court concluded that San Diego’s requirement to show “good cause” for a concealed weapon permit was unconstitutional under any level of constitutional scrutiny because it effectively acted as a complete ban on the right of a “typical responsible, law-abiding citizen” to carry a firearm for self-defense in public. *Id.* at 1169. Regardless of this disagreement, neither the Second Circuit nor the Ninth Circuit directly addressed the question whether restrictions on the carrying of a firearm in public by individuals alleged to be dangerous due to mental illness raise constitutional questions. The answer to this question likely turns on whether the restriction is “presumptively lawful,” because it is consistent with “longstanding prohibitions,” or, if not, whether it can survive an intermediate scrutiny analysis. As the SAFE Act is not consistent with “longstanding prohibitions,” it would likely be subjected to an intermediate scrutiny analysis with respect to public carry.

119. *Kachalsky*, 701 F.3d at 96.

120. This argument carries equal, if not greater, weight under a strict scrutiny analysis. However,

deprivation of the “fundamental” Second Amendment right, some clearly delineated process, traditionally an adjudication of mental illness or a commitment to a mental hospital or institution, is necessary to determine that an individual is actually dangerous due to their mental illness. However, by relying on mere allegations of mental illness and dangerousness from “mental health professionals,” the SAFE Act targets and impacts the large portion of the population that seeks mental health treatment,¹²¹ even though “treatment has been shown to significantly *reduce* the risk of violence in the mentally ill.”¹²² While there is a general perception, perpetuated by media coverage of mass shootings,¹²³ that the mentally ill are more dangerous than the general population, “only 3%–5% of violent acts are attributable to serious mental illness,”¹²⁴ and “the best available data suggests that . . . only a tiny percentage of such [violent] acts (2–3% [of the 3–5%] in a major study) involve guns.”¹²⁵ In order to target the very small percentage of violent acts attributable to the use of firearms by the mentally ill, the SAFE Act takes aim at the approximately 15 percent of the adult population who are responsibly seeking treatment.¹²⁶ Therefore, as the SAFE Act impacts a large number of individuals but does not contain procedures ensuring that it impacts only the small percent who

due to the procedural shortcomings of the SAFE Act, under a strict scrutiny analysis it would likely be unnecessary to delve this deeply into the relation of the law to its stated goal. However, under intermediate scrutiny, the state has more discretion in tailoring the means to the ends of the SAFE Act, and therefore additional arguments may be necessary to show that the means utilized are not substantially related to the ends. Therefore, this argument has been placed under the intermediate scrutiny discussion, despite its applicability to a strict scrutiny analysis as well.

121. Almost 15 percent of the adult population was receiving mental health treatment in 2012. *See 2012 Drug Use Survey Results*, *supra* note 86.

122. Lindsey Lewis, Note, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUSTON J. HEALTH L. & POL’Y 149, 153 (2011) (emphasis added).

123. Emma E. McGinty, Daniel W. Webster & Colleen L. Barry, *Effects of News Media Messages About Mass Shootings on Attitudes Toward Persons with Serious Mental Illness and Public Support for Gun Control Policies*, 170 AM. J. PSYCHIATRY 494, 494 (2013).

124. Paul S. Appelbaum & Jeffrey W. Swanson, *Gun Laws and Mental Illness: How Sensible Are the Current Restrictions?*, 61 PSYCHIATRIC SERVS. 652, 653 (2010). This is only taking into account violence caused by, or attributable to, mental illness alone, discounting violence caused by other factors such as substance abuse. *See also id.* at 652 (questioning whether, based on these statistics, “the disproportionate emphasis on restricting firearms access by persons with mental illness reflects sound public policy or is a manifestation of exaggerated public perceptions of the danger associated with mental illnesses”).

125. AM. PSYCHIATRIC ASS’N, RESOURCE DOCUMENT ON FIREARM ACCESS, ACTS OF VIOLENCE AND THE RELATIONSHIP TO MENTAL ILLNESS AND MENTAL HEALTH SERVICES (2013), available at www.psych.org/File%20Library/Learn/Archives/rd2013_Firearms.pdf. Even though it is rarely a focus of the debates surrounding gun control, it must also be taken into account that there are almost 20,000 firearm suicides each year, and “mental illness is much more strongly linked with the risk of suicide” than violence towards others. CONSORTIUM ON STATE POLICY, *supra* note 14, at 8.

126. *2012 Drug Use Survey Results*, *supra* note 86, at 2.

are in fact mentally ill and dangerous,¹²⁷ a court could conclude that it is not substantially related to its stated purpose.

VI. IS THERE A BETTER ANSWER?

Regardless of its constitutionality, the SAFE Act may be bad policy. The “longstanding prohibitions” on gun ownership by individuals with mental illness are based on the belief that individuals suffering from mental illness are a major cause of gun violence, especially widely publicized mass shootings.¹²⁸ These views are often promoted by groups opposed to strict gun-control laws, are directed at the general public, and have come to be widely accepted in light of recent, highly publicized mass shootings by individuals with mental illness. The reality, however, is that mass shootings are very rare and that neither mental illness nor mass shootings are a significant cause of gun violence. Individuals with a serious mental illness only account for approximately 4 percent of all violent crime in the United States, the majority of which is not committed with a firearm.¹²⁹ In addition, while mass shootings generate significant publicity and demands for governmental action, a study published in March 2013 by the Congressional Research Service estimated that there were “78 public mass shootings . . . [that] claimed 547 lives” from 1983 through early 2013.¹³⁰

127. There is an argument that dangerousness is irrelevant and any mental illness provides a justification for the denial of Second Amendment rights. For example, all felons are prohibited from possessing firearms under laws presumed constitutional in *Heller*, even though many felons are convicted of non-violent offenses. Therefore, a requirement of dangerousness may be unnecessary. However, while all felons are not found to be “dangerous,” they all *adjudicated* guilty of a serious criminal violation, justifying the loss of certain constitutional rights. In addition, there is clear statistical evidence showing that felons “are much more likely to commit subsequent violent crimes—including homicide—than are nonfelons.” Katherine A. Vittes, Daniel W. Webster & Jon S. Vernick, *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS, *supra* note 63, at 65, 66). Due to the statistical evidence of the increased risk of future dangerousness by felons, which is very different from the statistical evidence with respect to the broad population with diagnosable mental illnesses, and the history of dispossessing felons of many rights upon conviction, these laws carry fewer constitutional questions than mental health prohibitions.

128. A Gallup poll taken in September 2013 found that 48 percent of participants believed that a “[g]reat deal” of the fault for gun violence was due to a “[f]ailure of the mental health system to identify individuals who are a danger to others.” Aaron Blake, *On Gun Violence, Americans Blame Mental Health System over Gun Laws*, WASH. POST (Sept. 20, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/20/on-gun-violence-americans-blame-mental-health-system-over-gun-laws>. This failure of the mental health system to *identify* individuals who are dangerous was believed to be the number one cause of gun violence. *Id.* A statistically distant second was “easy access to guns,” while “drug use” was a close third. *Id.*

129. See *supra* text accompanying note 125.

130. JEROME P. BJELOPERA ET AL., CONG. RESEARCH SERV., R43004, PUBLIC MASS SHOOTINGS IN THE UNITED STATES: SELECTED IMPLICATIONS FOR FEDERAL PUBLIC HEALTH AND SAFETY POLICY,

Without minimizing the devastation caused by such tragic incidents and the need for greater efforts at prevention, these incidents must “be seen in the context of the broader problem of firearms-related injury and mortality in the population; an estimated 31,000 people die [from gunshot injuries] and 74,000 suffer non-fatal gunshot injuries each year.”¹³¹ Furthermore, individuals having no history of mental illness committed a number of these mass shootings.¹³² With mental illness representing such a small fraction of gun violence, gun-control efforts focused solely on the mentally ill are “unlikely to significantly reduce overall rates of gun violence in the United States.”¹³³

In addition to deflecting the gun-control debate from the broader problem, a focus on mental illness and mass shootings can make matters worse by stigmatizing individuals who suffer from mental illness and discouraging those in need of therapy from seeking help, when therapy can dramatically reduce the risk of violence.¹³⁴ The SAFE Act interferes with

2 (2013), available at http://journalistsresource.org/wp-content/uploads/2013/03/MassShootings_CongResServ.pdf. The study defines a “mass shooting” as a firearm homicide in which there are at least four deaths, not including the shooter, in which the gunman selects victims somewhat indiscriminately, and in which the violence is not a means to an end, thus excluding gang crime and terrorist activity. *Id.*

131. CONSORTIUM ON STATE POLICY, *supra* note 14, at 2; *See also* ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008: ANNUAL RATES FOR 2009 AND 2010, at 24–25 (2011) (finding that less than 1 percent of homicides were “[h]omicide incidents involving three or more victims . . . [approximately] three-quarters (77.2%) of . . . [which] involved guns,” and few of which would be considered “mass shootings.”). Assuming that 60 percent of the 547 CRS-estimated public mass shooting deaths, *see supra* note 130, were committed by individuals with a mental disorder—a high-end estimate that has been criticized by a number of other experts—approximately 328 mass shooting deaths, or less than one-tenth of 1 percent of all shooting deaths from 1983 to 2013, were caused by individuals suffering from mental illness. *Compare Criminologist Says Mass Murder in U.S. Is Declining*, WBUR (Sept. 23, 2013), <http://hereandnow.wbur.org/2013/09/23/mass-murder-decline> (“About 60 percent of those who commit mass public killings suffer from a serious mental illness.”), and Steve Kroft, *Untreated Mental Illness an Imminent Danger?*, CBS NEWS (Sept. 29, 2013), <http://www.cbsnews.com/news/untreatedmental-illness-an-imminent-danger-2> (“About half of these mass killings are being done by people with severe mental illness, mostly schizophrenia”), with *Response Letter to CBS 60 Minutes*, MENTAL HEALTH ASS’N OF NEB. (Oct. 8, 2013), <http://www.mha-ne.org/response-letter-to-cbs-60-minutes> (stating that the asserted correlation of 50–60 percent between mental illness and mass shootings “is far from accurate . . . [and that a] survey of mass shootings between 2009 and 2013 found that perpetrators had a known mental health condition in only 11 percent of these incidents.”).

132. *Response Letter to CBS 60 Minutes*, *supra* note 131.

133. CONSORTIUM ON STATE POLICY, *supra* note 14, at 6.

134. *See* Jeffrey Swanson, *Mental Illness and New Gun Law Reforms: The Promise and Peril of Crisis-Driven Policy*, 309 J. AM. MED. ASS’N 1233, 1233 (2013) (“Three problems beset New York’s new reporting law The first is overidentification; the law could include too many people who are not at significant risk. The second is the chilling effect on help seeking; the law could drive people away from the treatment they need or inhibit their disclosures in therapy. The third is invasion of patient privacy; the law amounts to a breach of the confidential patient-physician relationship.”); McGinty,

the patient-client relationship by mandating disclosure by mental health professionals without appropriate controls—such as those developed over the years in *Tarasoff* legislation—intended to balance the need for disclosure of serious threats with the need to maintain patient-therapist confidentiality.¹³⁵ There is no perfect solution to the problem of gun violence so long as there is a constitutional right to possess firearms. However, there are better solutions than the SAFE Act to limit the risk that firearms will be used by dangerous individuals while ensuring that gun-control regulation stays within the parameters of the Second Amendment.

Rather than focusing on mental illness as a convenient scapegoat for gun violence, gun-control laws should be based on identifiable behaviors and conditions that can be proven to increase the likelihood that an individual will engage in gun violence.¹³⁶ In addition to being sound policy, such an approach increases the likelihood of constitutionality post-*Heller* by focusing on factors with a greater relationship to the potential for gun violence and providing a much clearer means-ends link than laws such as the SAFE Act. Recognizing these issues, two reports published in December 2013 by the Consortium for Risk-Based Firearm Policy (“Consortium”), a group of national experts on mental illness and gun violence, proposed a series of federal and state reforms aimed at “reducing access to firearms by individuals who present an elevated risk of suicide or violence to other people.”¹³⁷ In addition to mental-health-related restrictions on gun ownership, the group called for restrictions on gun

Webster & Barry, *supra* note 123, at 500 (conducting a study showing that “[i]n the aftermath of mass shootings, the public is exposed to a torrent of news stories describing the shooter with serious mental illness, his history, and his actions during the shooting. These portrayals of the shooting events raise public support for gun-control policies but also contribute to negative attitudes toward those with serious mental illness. Negative public attitudes have been linked to poor treatment rates among persons with serious mental health conditions.”).

135. See Swanson, *supra* note 134, at 1233 (“Mental health professionals already have an established duty to take reasonable steps to protect identifiable persons when a patient threatens harm. However, clinicians can discharge that duty in several ways, as the situation demands, often without compromising a therapeutic relationship that depends on confidentiality.”). Although research on the issue is limited, some argue that *Tarasoff* reporting itself discourages patients from seeking treatment and discussing violent tendencies, and discourages “[mental health] professionals . . . [from] treat[ing] the most at risk patients.” Griffin Edwards, *Doing Their Duty: An Empirical Analysis of the Unintended Effect of Tarasoff v. Regents on Homicidal Activity*, 57 J.L. & ECON. 321, 344 (2014).

136. See, e.g., CONSORTIUM ON STATE POLICY, *supra* note 14, at 6–8; NAT’L PHYSICIANS ALLIANCE, GUN SAFETY & PUBLIC HEALTH: POLICY RECOMMENDATIONS FOR A MORE SECURE AMERICA 6 (2013); Philip J. Cook & Jens Ludwig, *Aiming for Evidence-Based Gun Policy*, 25 J. POL’Y ANALYSIS & MGMT. 691, 691–96 (2006).

137. Brevy Cannon, *Expert Group Unveils New ‘Risk-Based’ Firearms Policy Approach at U.Va.*, UVA TODAY, <http://batten.virginia.edu/content/batten-connections/expert-group-unveils-new-%E2%80%99risk-based%E2%80%99-firearms-policy-approach-uva> (last visited Jan. 6, 2015).

ownership by individuals who engage in “behaviors that demonstrate an elevated risk of violence, even when not accompanied by a record of mental illness.”¹³⁸

Such an evidence-based approach would allow for reasonable, lawful restrictions on gun ownership with a focus on dangerousness, not solely mental illness, and would be supported by procedures intended to ensure that Second Amendment rights were protected. A proposal for a better solution would include: (1) a licensing scheme with specified categories of ineligible individuals based on supportable evidence of dangerousness; (2) databases of ineligible individuals that were as complete as possible to support background checks; (3) a process for reporting and identifying individuals who may be dangerous and in possession of a gun; (4) a constitutionally appropriate process to review such reports and determine whether to revoke a license and confiscate a gun; and (5) a constitutionally appropriate process to determine when a gun license should be restored if an individual no longer poses a threat.¹³⁹

A. LICENSING SCHEME

There should be a licensing scheme that includes categories of individuals who are ineligible for a gun license based on objective identifiers of dangerousness supported by reliable studies.¹⁴⁰ The Consortium outlines a number of such categories.

1. Restrictions Based on Mental Illness

While experts agree that incidents of violence by individuals with mental illness represent only a small fraction of gun violence, studies indicate that such individuals are at an increased risk of violence “[in] the period surrounding a psychiatric hospitalization or first episode of psychosis” and increased risk of suicide during periods of severe depression.¹⁴¹ Noting “the tragic consequences of this kind of violence for victims, survivors, and society,” the Consortium suggested continuing

138. *Id.*

139. *See generally* CONSORTIUM ON STATE POLICY, *supra* note 14 (proposing an evidence-based approach to gun-control policy that expands the focus beyond the traditional categories of dangerous individuals).

140. *See, e.g., id.* at 8; Garen J. Wintemute, *Broadening Denial Criteria for the Purchase and Possession of Firearms: Need, Feasibility, and Effectiveness*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS, *supra* note 63, at 77, 78–90.

141. PAUL APPELBAUM ET AL., THE CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR FEDERAL POLICY 5 (2013). [hereinafter CONSORTIUM ON FEDERAL POLICY].

current policies restricting access to firearms by individuals who have been adjudicated “incompetent to manage their own affairs due to mental illness, or . . . found incompetent to stand trial or acquitted by reason of insanity.”¹⁴² It also suggested strengthening current federal prohibitions due to commitment by expanding restrictions to include individuals who are involuntarily committed to *outpatient* care “if there is a court finding of substantial likelihood of future danger to self or others.”¹⁴³ Since disparate state definitions of commitment leads to inconsistent NICS reporting, “[t]he prohibiting criterion of involuntary commitment should be [defined] . . . as a judicial or administrative order for involuntary commitment to a facility.”¹⁴⁴

In terms of state prohibitions, the Consortium recommended implementing temporary prohibitions after a “short-term involuntary hospitalization,” under which

[a] person should be disqualified for five years . . . : (a) if the person was admitted to or detained in a mental health facility for emergency treatment based on a clinical evaluation conducted by a mental health practitioner who has statutory authority to initiate the process of involuntary hospitalization; and (b) if the civil commitment criteria were confirmed by . . . a physician upon admission to the mental health facility.¹⁴⁵

The Consortium went on to address constitutional problems after *Heller* in three ways:

First, the [temporary] restriction is limited to five years; in the absence of some other disqualifying event or behavior, the person’s rights would be restored in five years by operation of law. Second, the temporary restriction of firearm rights would be predicated upon compliance with the state’s statutory requirements for emergency evaluation and upon a clinical finding by a physician upon admission to the facility that the commitment criteria are met. Third, this temporary restriction of firearm

142. *Id.* at 5. However, many experts have questioned the validity of the prior mental illness disqualification criteria. *E.g.*, Jeffrey W. Swanson et al., *Preventing Gun Violence Involving People with Serious Mental Illness*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS, *supra* note 63, at 33, 33–50 (discussing how “[r]evisions to the outdated federal criteria for mental health prohibitions on guns are needed . . . [, and] [i]deally, a balancing of safety and rights should inform more practical and less onerous rules for denying firearms rights to persons with mental illness who are dangerous, and the same balancing should inform parallel criteria for timely restoration of rights to persons with the mental illness who are no longer dangerous.”).

143. CONSORTIUM ON FEDERAL POLICY, *supra* note 141, at 9.

144. *Id.* See also CONSORTIUM ON STATE POLICY, *supra* note 14, at 11–12 (stating that the definition of involuntary commitment is not intended to preclude states from enacting additional temporary firearm prohibitions based on physician-certified emergency involuntary admission).

145. CONSORTIUM ON STATE POLICY, *supra* note 14, at 11.

rights would be accompanied by a fair and meaningful opportunity for disqualified individuals to have their rights restored after a one-year waiting period.¹⁴⁶

The recommendation is quite different from the SAFE Act. Although full process prior to disqualification is not afforded, the prohibition is temporary; a meaningful process in which a finding of dangerousness due to mental illness is required; and there is a clear process to both challenge a prohibition and to recover Second Amendment rights. These requirements reduce the impact of the law so that it does not overburden the Second Amendment rights of individuals who are not dangerous due to mental illness, restricting its application to the “small subgroups of individuals with serious mental illness . . . [that research shows] are at [an] elevated risk of violence.”¹⁴⁷

2. Restrictions Based on Indications of Dangerousness

The Consortium recommended maintaining current restrictions on high-risk individuals.¹⁴⁸ However, experts generally agree that the current classifications of “high-risk” individuals are inadequate.¹⁴⁹ As a result, state and federal prohibitions should be expanded by adding “groups of people who meet specific, evidence-based criteria associated with increased risk of committing violence,”¹⁵⁰ as described below.

Individuals convicted of a violent misdemeanor. Individuals should be prohibited from gun ownership for ten years if they have been convicted of a violent misdemeanor “involving the use of a deadly weapon, the threat of force, or stalking,” as “research evidence conclusively shows that individuals convicted of violent misdemeanors are at increased risk of

146. *Id.* at 11–19 (detailing the process and discussing the legal and clinical implications).

147. *Id.* at 6.

148. Such individuals, according to the Consortium, include: “felons; fugitives; persons convicted of a misdemeanor crime for domestic violence; persons subject to permanent domestic violence restraining orders; unlawful users or those addicted to a controlled substance; those who have been dishonorably discharged from the military; illegal aliens; and persons who have renounced their United States citizenship.” CONSORTIUM ON FEDERAL POLICY, *supra* note 141, at 14.

149. *Id.*

150. *Id.* See also CONSORTIUM ON STATE POLICY, *supra* note 14, at 20. See, e.g., Wintemute, *supra* note 140, at 88 (discussing disqualification of “persons who abuse alcohol” and “persons convicted of violent misdemeanors,” especially since a potentially large portion of violent misdemeanants are “arrested on felony charges but convicted at the misdemeanor level in plea bargaining arrangements”); Vittes, Webster & Vernick, *supra* note 127, at 72 (recommending prohibitions on abusers of alcohol and controlled substances, individuals under the age of 21, and “persons who have committed one or more serious juvenile offenses until age 30”); NAT’L PHYSICIANS ALLIANCE, *supra* note 136, at 6 (disqualifying violent misdemeanants, alcohol abusers, and juvenile offenders).

committing future violent crimes.”¹⁵¹ At least twenty-three states currently have such a prohibition, and research in these states has shown that it reduces arrest rates and gun crime among the disqualified individuals.¹⁵²

Individuals subject to temporary domestic violence restraining orders. Restrictions aimed at reducing intimate partner homicide are essential, as “[o]ne study found that approximately half of women killed by their intimate partners had contact with the criminal justice system related to their abuse within the year preceding these murders.”¹⁵³ Neither federal law, nor the law in most states, effects a prohibition upon the granting of a temporary, instead of a permanent, domestic violence restraining order.¹⁵⁴ However, jurisdictions that have implemented such a prohibition have shown a marked reduction in firearm-related intimate partner homicides.¹⁵⁵ Steps must be taken to take advantage of the opportunities for intervention created when women “seek assistance from the justice system.”¹⁵⁶ In order to protect domestic violence victims, “individuals subject to temporary domestic violence restraining orders [should] be prohibited from purchasing and possessing firearms for the duration of the temporary order.”¹⁵⁷ Furthermore, additional research should be done on the potential benefit of expanding the definition of state and federal prohibitions to uniformly cover “current and former” intimate partners, as well as individuals convicted of misdemeanor stalking.¹⁵⁸

Individuals convicted of two or more DWIs or DUIs in a five-year

151. CONSORTIUM ON FEDERAL POLICY, *supra* note 141, at 14–15. The Consortium recommended implementing such a law in both the federal sphere, which currently only disqualifies individuals with a misdemeanor conviction of domestic violence, as well as in states which do not already have one.

152. *Id.* at 15 (“[R]esearch has shown that California’s law prohibiting firearm ownership among violent misdemeanants resulted in reduced arrest rates for violent crime overall and gun crime specifically among individuals previously convicted for violent misdemeanor crimes.”). *See also* Wintemute, *supra* note 140, at 79–82 (outlining evidence regarding firearm violence and convicted misdemeanants).

153. CONSORTIUM ON FEDERAL POLICY, *supra* note 141, at 15.

154. April M. Zeoli & Shannon Frattoroli, *Evidence for Optimism: Policies to Limit Batterers’ Access to Guns*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS, *supra* note 63, at 53, 55–56 (discussing current federal and state prohibitions).

155. *Id.* at 56–58. In fact, some studies even found that “would-be killers do not replace guns with other weapons to effect the same number of killings,” *id.* at 57–58, which is an important effect of firearm prohibitions, especially in relation to suicide, that deserves further study.

156. Zeoli & Frattoroli, *supra* note 154, at 54.

157. *Id.* at 60. *See also id.* at 54–61 (discussing policies, such as a prohibition upon a temporary restraining order, that are necessary because “[t]he evidence is clear: when a woman is killed, it is most likely to be at the hands of an intimate partner with a gun”).

158. *See id.* at 61 (discussing the link between reports to law enforcement of stalking and violence, especially by current or former dating partners, within the year before many intimate partner homicides).

period. Although many state laws disqualify certain individuals who have problems with alcohol, the laws are not uniform and tend to be vague in their application.¹⁵⁹ Evidence shows that individuals who abuse alcohol are at a greater risk of harming themselves or others, and recent studies show that “gun owners were more likely than people who lived in a home without a gun to binge drink, drive under the influence of alcohol, and have at least 60 drinks per month.”¹⁶⁰ Due to the clear correlation between injury and alcohol abuse, objective disqualification criteria in both state and federal law are necessary to identify such high-risk individuals. Along this vein, the Consortium recommended that “individuals convicted of two or more DWI or DUIs in a period of five years be prohibited from purchasing or possessing firearms for at least five years.”¹⁶¹ This criterion was chosen since “those with multiple DUI arrests were more than three times as likely to be arrested for other misdemeanor and felony crimes” as compared to those with only one such arrest.¹⁶²

Individuals convicted of two or more misdemeanor crimes involving controlled substances in a five-year period. Although Federal law and many state laws prohibit individuals convicted of a drug-related felony and “illegal users of a controlled substance” from possessing a gun,¹⁶³ the Consortium believes that the definition of “illegal user” is unclear and difficult to enforce.¹⁶⁴ The definitional differences have caused inconsistency in NICS reporting and led the Consortium to advise

159. Daniel W. Webster & Jon S. Vernick, *Keeping Firearms from Drug and Alcohol Abusers*, 15 INJURY PREVENTION 425, 425 (2009) (discussing state prohibitions of “habitual drunkards” and “alcoholics”; arguing that “[f]or firearm prohibitions to be useful, statutory law or regulations must provide sufficiently precise definitions of the disqualifying criteria to allow those conducting background checks of prospective firearm purchasers, or those checking the legality of ongoing firearm possession, to determine readily whether a person falls into a prohibited category,” and that using criteria such as “drug addict or a habitual drunkard” is not sufficiently defined and objective to get the job done). See also CONSORTIUM ON FEDERAL POLICY, *supra* note 141, at 16.

160. CONSORTIUM ON FEDERAL POLICY, *supra* note 141, at 16.

161. *Id.*

162. *Id.* The use of DWI or DUI convictions as the definition of alcohol abuse for prohibitions on “firearm ownership is strongly justified by the research evidence.” *Id.* That being said, at first glance, this criterion seems difficult to square with due process requirements after *Heller*. However, the prohibition is for a five-year period, and individuals qualifying are convicted of two crimes that, while not violent, have both a close relationship to alcohol abuse and poor judgment while using alcohol. The temporary nature of the prohibition and clear correlation to firearm injury are likely enough to validate such laws.

163. *Id.* at 16–17 (“The physical and psychological effects of controlled substances, including agitation and cognitive impairment, can heighten risk for violent behavior and impair the decision-making and communication skills necessary to avoid violent conflicts. In addition, involvement in illicit drug markets is strongly associated with violence. Studies have shown that conflicts within illegal drug markets are the most common cause of drug-related violence.” (footnotes omitted)).

164. *Id.*

disqualification of “individuals who are convicted of two or more misdemeanor crimes involving controlled substances in a five-year period . . . for at least five years.”¹⁶⁵

B. DATABASE

There is a consensus that effective gun control depends in large part on the maintenance of a database of ineligible individuals that is accessible by persons involved in gun sales and by federal and state authorities. The failure of the NICS system has been well documented, but the government’s attempt to improve state reporting by providing additional funding “to a subset of states through the NICS Improvement Act . . . led to significantly increased reporting of civil commitment and other mental health records from funded states.”¹⁶⁶ Experts recommend expanding such funding and amending current federal law to require background checks not only from licensed dealers, but “when a firearm is purchased from a private, unlicensed seller.”¹⁶⁷

C. REPORTING

Reporting by Mental Health Professionals. With respect to mental health professionals, reporting should be limited to *Tarasoff*-type reports, which are already in place and therefore unlikely to contribute to lower treatment rates or decreased disclosure during treatment. Such reports also provide a better balance between the benefits of therapy and the risk of harm from gun violence than laws such as the SAFE Act.¹⁶⁸

Reporting by Others. Unlike the SAFE Act, which only provides for reporting by mental health professionals, the law should provide for reports by individuals including family members, friends, neighbors, teachers, and others who might be aware of threats of violence by individuals believed to possess a firearm.¹⁶⁹

165. *Id.* There are some limits in regards to the connection between drug abuse and firearm injury. *Id.* (noting that while individuals “with multiple misdemeanor crimes involving controlled substances are at increased risk of future violence, there is little evidence to suggest that non-criminal records of unlawful drug use—such as failed drug tests or drug-related arrests that do not result in conviction—[and single misdemeanor drug convictions,] represent individuals at heightened risk of violence.”).

166. *Id.* at 18.

167. *Id.* See also Wintemute, *supra* note 140, at 88–90 (outlining details of a comprehensive background check system).

168. See *supra* note 135 and accompanying text.

169. A few such laws have been implemented at the state level. For a general discussion of such laws, see CONSORTIUM ON STATE POLICY, *supra* note 14, at 25–28. For an in-depth discussion of an Indiana seizure law, and the effectiveness of the law during its first two years of application, see George F. Parker, *Application of a Firearm Seizure Law Aimed at Dangerous Persons: Outcomes from the First*

D. PROCESS UPON THE FILING OF A REPORT

A process should be established for initial decisions and for a prompt, required review of any denial or revocation of a permit. Furthermore, such a process should be tailored to address emergency and non-emergency situations in which the police or a court reasonably believes that an individual poses a threat of harm to self or others. A report by a person, with knowledge of the individual that he or she is reporting, expressing a belief that such individual is dangerous and armed, should initiate a process of investigation. As an initial step in the process, the police should check appropriate databases to determine if the individual has a gun license. If he or she does, the police should check the appropriate databases to determine if the individual is ineligible on other grounds. If the individual is ineligible, the license should be revoked and any firearms removed.

If the individual is not otherwise ineligible, the law should require the police to further investigate the report.¹⁷⁰ This would include a review of the report itself and an analysis of any evidence-based indications of dangerousness, such as a history of controlled substance abuse, criminal convictions, or reports of domestic violence. Additionally, if deemed necessary, the police could contact the individual who submitted the report and the subject of the report. Ideally, this process will occur quickly, and the extent of the investigation should be based on some initial determination of the immediacy and legitimacy of the reported threat. If the police determine that the report is accurate and that there is evidence of an actual risk of harm by an individual with a gun, they should make an initial determination regarding the type of action that may be appropriate. Like commitment proceedings, there should be different standards: one for “emergency” action, which would take place without a warrant in a crisis situation; and a second for “non-emergency” action, which would include the initiation of a process to seek a warrant, from a court, for removal of a gun with respect to less immediate threats that may still be of concern.

Emergency Action Without a Warrant. If there is an immediate risk of harm, the license should be revoked and the gun removed without any prior judicial review. After seizure, there should be a process in place for initiating a prompt judicial review of the decision to confiscate the gun in order to ensure protection of Second Amendment rights.¹⁷¹

Two Years, 61 *PSYCHIATRIC SERVS.* 478 (2010).

170. CONSORTIUM ON STATE POLICY, *supra* note 14, at 28. The police are in the best position to investigate such reports, as they “regularly respond to crises and in these contexts routinely assess whether people pose a threat.” *Id.*

171. *Id.* at 28 The Consortium recommends the following process:

Non-Emergency Action With a Warrant. If the police determine that an individual poses a risk of harm to self or others, but that harm is not imminent, the police should request an appropriate court order for the removal of the firearm. Connecticut has implemented a warrant-based process for law enforcement to remove guns that allows the police to request a warrant only after they have “conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.”¹⁷² A judge may only issue a warrant following judicial review and a finding of probable cause. Once a firearm is removed, “the court must schedule a hearing within 14 days to determine whether the guns will be returned . . . [at which] the state has the burden of proof to meet a clear and convincing evidence standard.”¹⁷³ If the court does not believe that the state has met its burden, the individual’s firearms must be returned; otherwise they are held up to a year.¹⁷⁴

E. RESTORATION PROCESS

As part of a process to ensure the protection of Second Amendment rights, individuals who have lost such rights should have the opportunity to have them restored. In the case of an individual who has been denied a license or had a license revoked due to mental illness, the restoration process should require a qualified clinician to provide evidence on the petitioner’s mental health status and to affirm “that the petitioner is unlikely to relapse and present a danger to self or others in the foreseeable

After removing firearms when such a threat is identified, law enforcement will file a report with the court justifying the removal within 48 hours. The court will schedule a hearing within two weeks of the guns being removed and provide notice of the hearing to the gun owner. At the hearing the state will bear the burden of proof to demonstrate by clear and convincing evidence that the individual remains a risk to self or others. The court may consider the individual’s history of threatening or dangerous behavior, history of or current use of controlled substances, history of or current abuse of alcohol, and history of adherence to prescribed psychiatric medications. Prior involuntary commitment to a psychiatric facility or to outpatient psychiatric or psychological therapy may also be considered. The hearing will determine if law enforcement will retain the guns for safe-keeping. If the court determines the individual remains a risk, the court may order the firearms held for up to one year . . . [during which] the individual will be prohibited from purchasing firearms, and the NICS system (or state equivalent) should be updated to include this information.

Id.

172. CONN. GEN. STAT. § 29-38c(a) (Supp. 2014). The criteria for establishing probable cause includes, for example, “recent threats or acts of violence toward self, others, or animals,” and the criteria for establishing imminent risk includes “reckless firearm behaviors, threatened or actual violence, prior involuntary confinement in a psychiatric hospital, and illegal use of controlled substances or alcohol.” *Id.*

173. CONSORTIUM ON STATE POLICY, *supra* note 14, at 25.

174. *Id.*

future.”¹⁷⁵

The licensing scheme described in Part III.A should withstand constitutional scrutiny, even under a strict-scrutiny analysis. The state certainly has a compelling interest in public safety and crime prevention. While the licensing scheme applies to individuals who are not suffering from a mental illness, each of the grounds for disqualification is based on scientific studies providing the legislature with a legitimate basis for concern regarding a serious risk to public safety. In addition, unlike the SAFE Act, the procedures outlined above require a judicial determination that an individual is actually ineligible prior to the denial or revocation of a license or removal of a firearm, except in cases involving imminent threats. Even in circumstances of emergency, however, the proposed scheme would provide clear post-deprivation process in order to protect Second Amendment rights and ensure that they are not overburdened. As a result, the licensing scheme is narrowly tailored and the least restrictive means available for achieving the state’s compelling interest in preventing individuals who are likely to be dangerous to self or others, whether due to mental illness or other evidence-based indicia of dangerousness, from having access to firearms.

VII. CONCLUSION.

The focus of the gun-control debate should be on dangerousness, not mental illness. Mental illness, while clearly a part of the problem of gun violence, is only tied to a small percentage of the deaths and injuries caused by gun violence each year. Laws such as the SAFE Act, which are often enacted in response to high-profile, horrific incidents of gun violence by individuals suffering from severe mental illness, may help to calm public fears but are unlikely to have any significant impact on the broader problem of gun violence. Gun-control regulations after *Heller* should be informed by statistical evidence of dangerousness, not mass hysteria and stereotypes. By broadening the focus of the gun-control debate beyond the issue of mental illness, more effective gun laws can be established to protect the public while also protecting Second Amendment rights.

175. *Id.* at 12.