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Dangerous People or Dangerous Weapons: Access to Firearms for Persons With Mental Illness

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ONE OF US CAN KNOW WITH ANY CERTAINTY WHAT might have stopped these shots from being fired, or what thoughts lurked in the inner recesses of a violent man’s mind,”1 said President Barack Obama while trying to console the nation in the wake of the January 2011 attempted assassination of Rep Gabrielle Giffords in Tucson, Arizona. The shooting at a civic gathering left 6 bystanders dead, renewing the politically divisive debate about the appropriate response to violence: ban dangerous weapons or prohibit dangerous individuals from possessing firearms?

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

The US Supreme Court’s recent decision that the Second Amendment confers an individual’s right to bear arms renders it increasingly difficult to enact generally applicable laws regarding firearms, but the court explicitly supports “long-standing prohibitions” on possession of firearms by individuals with mental illness.2 In hindsight, Jared Lee Loughner—the youth accused of shooting Giffords—is easily labeled as having mental illness, but prospectively identifying such dangerous individuals is difficult.

Gun Control Laws: Inefficient and Ineffective

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

The Gun Control Act of 1968 restricts “prohibited persons” from purchasing firearms, including individuals addicted to controlled substances, those involuntarily committed to a mental institution or adjudicated as incompetent or dangerous, or those who receive a verdict of not guilty by reason of insanity.3 In theory, the National Instant Criminal Background Check System (NICS) contains the definitive list of individuals to whom licensed dealers cannot sell firearms. In practice, however, many prohibited persons are never entered into the NICS’s database.

Reasoning that the NICS breaches federalism, the Supreme Court ruled in 1997 that Congress could not compel states to report prohibited persons who attempt to purchase firearms to the US Federal Bureau of Investigation.4 Consequently, reporting is inaccurate and incomplete; some states overreport (including outpatients with mental illness) and others underreport (including only those individuals who are involuntarily committed for ≥90 days or only those who are committed to public hospitals). Moreover, as of 2007, 28 states did not report inpatients with mental illness at all.5 The General Accounting Office estimates that the NICS’s mental illness data fall short by more than 2 million individuals.6

Even if listed in the NICS, prohibited persons can successfully avoid background checks. Unlicensed (second-hand) dealers (like the individual who sold guns to the Columbine shooters) are excluded from conducting background checks and can sell at gun shows, which is a notorious loophole. Additionally, states can issue Brady permits that allow licensed sellers to waive background checks; 19 states offer these permits, 7 of which do not exclude persons with mental illness from purchasing firearms.7

The Gun Control Act incentivizes states to further regulate by making it a federal offense to sell firearms to individuals whose possession would violate state law.3 Yet not all states impose regulations based on mental illness and those that do have variable laws; some states restrict only access

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to concealed weapons or rely (in part) on buyer self-identification as having a mental illness.7 Thus, even where state law supplements federal regulations, determined purchasers often access firearms.

Categorically restricting access to firearms for persons with mental illness has proved difficult and ineffectual, reducing neither suicide rates nor homicide rates. Universally applicable restrictions appear more effective; states with the most stringent firearms laws have the lowest per-capita homicide rates.8 Yet the Supreme Court’s rulings push states to regulate dangerous persons rather than dangerous firearms. Thus, policy makers must find narrow and accurate ways to identify individuals who are unlikely to use firearms safely.

Regulating People, Not Firearms

Successfully reducing firearms-related violence requires effectively identifying dangerous individuals and keeping firearms out of their hands. However, both are difficult. Categorical restrictions, which are designed to protect the public with minimal infringement on Second Amendment rights, paradoxically threaten both public safety and individual rights. prospectively identifying dangerous individuals is fraught with error. Research shows that unless a person with mental illness also has a comorbid substance abuse or has a history of violence, he or she is no more likely to be violent than anyone else, even if recently discharged from an institution.9 Nonetheless, restrictions on the sale of firearms are based on the defined thresholds of involuntary commitment, adjudicated dangerousness, and receipt of verdict of not guilty by reason of insanity. Because these proxies often follow rather than precede acts of violence, they have limited utility.

Not only can prohibited persons access firearms, but removing firearms postpurchase is even more problematic. Only a minority of states requires a license to purchase or possess a handgun, some of which remain valid for years or indefinitely. Even where states have the capacity to match adjudications with purchasing records, law enforcement lacks the resources to track down and remove weapons from prohibited persons.

Categorical restrictions do not reliably keep firearms from violent persons. Nearly 3 million individuals meet the criteria for firearms restrictions relating to mental illness, but only a few hundred thousand are listed in the NICS.6 Regulating people and not firearms will always prove deficient in the wake of the next tragedy. Nevertheless, even imperfect legislation must protect patient privacy and dignity.

Medical Privacy

Mental health records contain sensitive information and fear of disclosure may dissuade individuals from being honest with physicians or even seeking treatment. Nonetheless, the Supreme Court has upheld restrictions on access to firearms based on involuntary commitment or adjudication as a “mental defective.”10 Accordingly, state law often requires mental health professionals to alert authorities if a patient is dangerous to himself or herself or to others. For example, Illinois inpatient facilities must report involuntary hospitalizations to the police for inclusion in the NICS.

Individuals also waive the right to privacy when purchasing firearms from a licensed dealer. Buyers complete firearms transaction records that fully disclose (subject to federal prosecution) personal information, which the Department of Justice can both access and release freely. Although the NICS limits otherwise unauthorized access, the Gun Control Act does not require states to safeguard privacy such as by prohibiting overreporting or disclosure to nonessential personnel. Overinclusive reporting policies (eg, of diagnosis or outpatient treatment) unnecessarily infringe on medical privacy and deter patients from seeking care.

New Restrictions for Sale of Firearms

Given the ineffectiveness of current restrictions on access to firearms for “dangerous” individuals with mental illness, the government must improve safeguards against firearms-related violence. Congress should adopt sensible reforms, which the Supreme Court would likely uphold: (1) ban large-sized ammunition magazines, (2) withhold state funding for incomplete reporting to the NICS or inadequate privacy protections, (3) ensure more rapid and reliable background checks, and (4) close the gun show loophole. Legislators must take seriously the epidemic of firearms-related violence in the United States.

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REFERENCES