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# Heller's Scapegoats

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## HELLER’S SCAPEGOATS\*

KATIE ROSE GUEST PRYAL\*\*

*In the United States, a psychiatric diagnosis, or involuntary civil commitment to a psychiatric ward—which is considered treatment in the medical context—almost always leads to quasi-criminalization in the legal context. After such diagnosis or treatment, you are rendered, automatically and permanently, a member of one of our nation’s most vulnerable populations and stripped of rights based on your status. In no area is the U.S. populace in greater agreement over this stripping of rights than in the areas of gun control and civil commitment, especially in our apparently new “era of spree-killings.” When it comes to stripping gun rights and involuntarily treating people with psychiatric disabilities (“PPDs”), politicians and pundits on the left and the right are eerily aligned. This Article provides an answer as to why: PPDs are our society’s scapegoats, the tool we use to externalize our fear of the unpredictable violence of what appears to be the rise of spree-killings. Involuntary civil commitment and gun control work together to scapegoat PPDs: often the response to an act of otherwise unexplainable violence is for pundits and politicians on the left and the right to discuss ways to involuntarily commit PPDs and ways to prevent PPDs from getting their hands on guns.*

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## INTRODUCTION

For the final legal writing exam during a recent semester, all the first-year students were given the same closed-universe assignment. In the fact pattern, a husband brings his wife to the Emergency Department (“E.D.”) of a local hospital because she is behaving erratically. The E.D. psychiatrist evaluates the wife. Because the wife had been taking prednisone, a steroid, for a severe case of poison ivy, the doctor diagnoses her with steroid-induced psychosis. After treating her with a benzodiazepine to calm her, and seeing that she has regained lucidity, the doctor asks if the wife would like to stay the night in the psychiatric unit. She says she does not want to. Rather than force her to stay, the doctor releases the wife into her husband’s care with orders not to let her drive. Unfortunately, the next day, she takes the car keys without her husband’s knowledge and drives erratically, paralyzing herself from the waist down in a single-car accident. The husband and wife sue the hospital for patient-dumping.<sup>1</sup> Their expert witness asserts in an affidavit that the psychiatrist in the E.D. should have involuntarily committed the wife until her psychosis passed.

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1. Patient-dumping occurs when a hospital does not take appropriate steps to stabilize a patient’s condition before discharge. See Emergency Medical Treatment & Labor Act (“EMTALA”), 42 U.S.C. § 1395dd(b) (2012) (requiring stabilization of patients before they can be discharged from the hospital).

Soon after they received the problem, my students—nearly *all* of them—came into my office troubled that the psychiatrist had not involuntarily committed the wife the night she presented at the E.D. with erratic behavior. They demanded to know why the doctor did not lose his medical license for such a major oversight. They could not believe that the doctor would risk the plaintiff's life and, in this particular case, legs, over such a small thing as an involuntary stay in a psych ward.

Of course, the students' conclusions about the doctor's oversight were wrong legally because the cause of action was for patient-dumping. By offering a bed, the doctor had likely done his duty under the relevant statute and could not be held liable.<sup>2</sup> More importantly, the students' conclusions—indeed, their anger toward the doctor—revealed that they were operating with a wildly incomplete picture of what it means to be designated mentally ill in America, a place where *there is no such thing as a small stay in a psych ward*.

What my students failed to understand—and how could they?—is how a psychiatric diagnosis, or involuntary civil commitment to a psychiatric ward, which is treatment in the medical context, leads almost always to quasi-criminalization<sup>3</sup> in the legal context. A diagnosis or commitment renders a person, automatically and permanently, a member of one of the most vulnerable populations in the United States.

There are many unexpected ways that U.S. citizens are stripped of privacy and rights based on status (of being psychiatrically disabled) or history of treatment (of being involuntarily committed).<sup>4</sup>

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2. EMTALA only requires that an emergency patient receive appropriate screening, stabilization, and, if appropriate, transfer to another location for continued treatment. *Id.* § 1395dd. Because the doctor in this case not only screened and stabilized the patient, but also offered her a bed in the ward for the night, he met his duties under EMTALA. *See id.* Whether the doctor committed malpractice under the relevant state law was a separate legal issue.

3. I borrow the term “quasi-criminal” in the context of psychiatry from Christopher Slobogin. CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 19 (2006). Despite the quasi-criminal nature of the mental health system in the United States, Slobogin points out that “mental health law is a legal backwater.” *Id.* Furthermore, “[d]espite the fact that they can lead to significant losses of liberty, commitment and competency cases continue to be handled by ‘special,’ lower-level courts that are often not even courts ‘of record’ because their proceedings are not transcribed.” *Id.* at 20. Basically, Slobogin asserts, “this area of the law occupies a very low status.” *Id.* The cause? “The primary reason for this state of affairs is society’s general disregard for and ignorance about people with mental disability.” *Id.*

4. *See, e.g.,* Leslie Doty Hollingsworth, *Child Custody Loss Among Women with Persistent Severe Mental Illness*, 28 SOC. WORK RES. 199, 199 (2004) (observing an “increased likelihood of child custody loss for most women with persistent mental

What is perhaps most remarkable about this rights-stripping is how many nondisabled Americans actually have no problem with this rights-stripping, as I will demonstrate in this Article,<sup>5</sup> despite their differences in political opinions on other issues.<sup>6</sup>

In no area is this radical agreement more stark than in the debates over gun control, civil commitment, and mental illness, especially in our new, apparent “era of spree-killings.”<sup>7</sup> When it comes to stripping gun rights and involuntarily treating people with psychiatric disabilities<sup>8</sup> (“PPDs”), politicians and pundits on the left and the right are eerily aligned.<sup>9</sup> This Article provides an answer as to why: people with psychiatric disabilities are our society’s scapegoats, the tool we use to externalize our fear of the unpredictable violence

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illness”); David Sherfinski, *Mental Illness in Youth Could Prevent Gun Purchases in Adulthood*, WASH. TIMES (Jan. 7, 2014), <http://www.washingtontimes.com/news/2014/jan/7/mental-illness-in-youth-could-prevent-gun-purchase/> (pointing out the Department of Justice’s weighing of whether to include someone who was treated for a mental illness while a minor on the national background check system for gun purchases, thereby preventing the person from being able to purchase a gun as an adult); Lisa T. McElroy & Katie Rose Guest Pryal, *The Worst Part of the Bar Exam*, SLATE (Aug. 7, 2014, 8:08 AM), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2014/08/bar\\_examiners\\_ask\\_lawyer\\_applicants\\_about\\_mental\\_health\\_the\\_question\\_policy.html](http://www.slate.com/articles/health_and_science/medical_examiner/2014/08/bar_examiners_ask_lawyer_applicants_about_mental_health_the_question_policy.html) (“[M]ost state bar examiners—agencies that serve under each state’s highest court—still ask bar applicants about their mental health histories.”).

5. And even some people with psychiatric disabilities (“PPDs”) themselves—they distance themselves from those other PPDs whom they perceive as worse. See *infra* notes 124–36 and accompanying text (discussing Andrew Solomon).

6. See *infra* Part III.D for further discussion of how politicians and pundits across the political spectrum agree on civil commitment and gun control vis-à-vis PPDs.

7. The “era of spree-killings” is my term. According to research, the number of mass killings per capita does indeed seem to be rising. But, as I discuss *infra*, our news media also now cover spree-killings in a unique fashion. These two factors work together to create an “era,” or moment in time, in which the shootings capture the public imagination. For more on the recent rise of spree-killings, see Editorial, *The Quickening Pace of Gun Sprees*, N.Y. TIMES (Sept. 26, 2014), <http://www.nytimes.com/2014/09/27/opinion/the-quickening-pace-of-gun-sprees.html> (“The average annual number of shooting sprees with multiple casualties was 6.4 from 2000 to 2006. That jumped to 16.4 a year from 2007 to 2013, according to the study of 160 incidents of gun mayhem since 2000.”); Mark Follman, *More Guns, More Mass Shootings—Coincidence?*, MOTHER JONES (Dec. 15, 2012), <http://www.motherjones.com/politics/2012/09/mass-shootings-investigation> (“[T]he rate of mass shootings has increased in recent years—at a time when America has been flooded with millions of additional firearms and a barrage of new laws has made it easier than ever to carry them in public places.”).

8. The use of the language of “disability” to describe what many refer to as “mental illnesses” is a sign of progress in our society. For example, mental “disorders” are now recognized as disabling conditions by the Social Security Administration. 20 C.F.R. § 404.1520a (2014). The SSA provides an appendix in which it lists the psychiatric disabilities that it considers disabling for the purposes of its administration. 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.00 (listing mental disorders for adults).

9. See *infra* Part III.D (discussing this alignment of opinion).

of what appears to be the rise of spree-killings. This scapegoating makes PPDs some of the most vulnerable quasi- and actual participants in our criminal justice system.

Involuntary civil commitment and gun control work together to scapegoat PPDs: often the response to an act of otherwise unexplainable violence is for pundits and politicians on the left and the right to discuss ways to round up PPDs (using various degrees of sympathetic language)<sup>10</sup> and ways to prevent PPDs from getting their hands on guns.<sup>11</sup>

Because, in the context of the scapegoat, the topic of involuntary commitment is inextricable from the context of gun rights, I discuss them together in this Article. In Part I, I outline the theory of the scapegoat and show how scapegoating functions to isolate PPDs in U.S. society and render them vulnerable. In Part II, I examine the gun control debate, in particular the *District of Columbia v. Heller*<sup>12</sup> opinion of 2008, to illustrate how PPDs (along with other outsider populations) are scapegoated in arguments over gun control, in order to create fear of dangerous people and thereby justify the ownership of guns. After all, if there were no scary people that one needed to protect oneself against, one would not need a gun for self-protection. In Part III, I turn to the emergency involuntary commitment debate through the lens of the Washington Navy Yard shooting of September 16, 2013, to illustrate how scapegoating PPDs functioned to reassure the American populace in the wake of violence.

In both sections, I show how PPDs are scapegoated by politicians, pundits, and judges on both the left *and* the right. As I demonstrate *infra*, there can no longer be a spree-killing without a newscaster or politician asking, “Was the killer crazy”? Mental illness has become our society’s go-to means to explain away gun violence and thereby protect the individual right to bear arms. But when reading *Heller*, and the debates surrounding involuntary emergency civil commitment, it is difficult to see how PPDs also possess the individual right to own a gun and protect their homes; it is as though PPDs are, in Second Amendment terms, not people at all.

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10. See *infra* Part III for near-unanimous arguments in favor of easing the standards for involuntary emergency civil commitment.

11. See *infra* Part II for near-unanimous arguments in favor of preventing PPDs from purchasing firearms.

12. 554 U.S. 570 (2008).

## II. PEOPLE WITH PSYCHIATRIC DISABILITIES: OUR MODERN-DAY SCAPEGOATS

People with psychiatric disabilities (“PPDs”) in U.S. society are scapegoats for a variety of social ills, most notably and recently, gun violence.<sup>13</sup> For example, the political left and right have united in disturbing ways on both the political and punditry fronts in their scapegoating of PPDs after violent “spree-killing” events, despite well-respected research that shows that PPDs are not more likely than people in the regular population to commit violent crimes,<sup>14</sup> and indeed, they are far more likely to be the *victims* of such crimes.<sup>15</sup> The overrepresentation of PPDs in the criminal justice system, in our post-deinstitutionalization era, most often stems from minor infractions such as overuse of alcohol or “self-medica[tion] with . . . street drugs”<sup>16</sup> rather than violent crime.<sup>17</sup> Despite the data showing the lack

13. See *infra* Part III for specific examples of scapegoating of the mentally ill in the context of particular gun violence tragedies.

14. See, e.g., Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder*, 66 ARCHIVES GEN. PSYCHIATRY 152, 152 (2009) (studying a U.S. sample of more than 34,000 PPDs over a four-year period to see which factors predict violent behavior); Jillian K. Peterson et al., *How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?*, 38 LAW & HUM. BEHAV. 439, 439 (2014) (“Although offenders with mental illness are overrepresented in the criminal justice system, psychiatric symptoms relate weakly to criminal behavior at the group level.”). Elbogen and Johnson’s results showed that “severe mental illness alone did not significantly predict committing violent acts; rather, historical, dispositional, and contextual factors were associated with future violence.” Elbogen & Johnson, *supra*, at 155. Indeed, “severe mental illness did not rank among the strongest predictors of violent behavior in this sample.” *Id.* at 157. Furthermore, the study “revealed that people with any type of severe mental illness were not at increased risk of committing serious/severe violent acts such as use of deadly weapons, inflicting extreme physical harm, or forcing sexual acts.” *Id.*

15. See, e.g., Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 242 (2015) (“Extensive surveys of police incident reports demonstrate that, far from posing threats to others, people diagnosed with schizophrenia have victimization rates 65% to 130% higher than those of the general public.”); Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62 ARCHIVES GEN. PSYCHIATRY 911, 911 (2005) (“More than one quarter of persons with SMI [severe mental illness] had been victims of a violent crime in the past year, a rate more than 11 times higher than the general population rates even after controlling for demographic differences between the 2 samples.”).

16. E. Fuller Torrey et al., *More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States*, TREATMENT ADVOC. CENTER 3 (May 2010), [http://www.treatmentadvocacycenter.org/storage/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf).

17. See, e.g., Elbogen & Johnson, *supra* note 14, at 157; Megan Cassidy, *The Revolving Door: Wyoming Reliance on Jails for Mental Health Services Comes with Consequences*, STAR-TRIB. (Apr. 27, 2014), [http://trib.com/news/state-and-regional/the-revolving-door-wyoming-reliance-on-jails-for-mental-health/article\\_b5792c78-2613-5417-](http://trib.com/news/state-and-regional/the-revolving-door-wyoming-reliance-on-jails-for-mental-health/article_b5792c78-2613-5417-)

of violent tendencies on the part of PPDs, public perceptions of the dangerousness of PPDs is dramatically high.<sup>18</sup> In one study, “75% of the sample viewed people with mental illness as dangerous.”<sup>19</sup> This misconception stands in stark contrast with a recent multivariate study that pulled out multiple risk factors, showing that “if a person has severe mental illness without substance abuse and history of violence, he or she has the same chances of being violent during the next 3 years as any other person in the general population.”<sup>20</sup>

With such considerable agreement on the supposed dangerousness of PPDs, it is not surprising that PPDs serve as a social scapegoat.<sup>21</sup>

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a77d-b3ae8ee10c97.html. Cassidy discusses how Wyoming’s jails and prisons have become de facto mental health facilities for PPDs who commit minor infractions or who are addicts:

Wyoming advocates say many of these inmates are not hardened criminals. Like Overfield, many people with mental illnesses will repeatedly commit minor offenses that are triggered by their afflictions. A drug addiction, some say, is preferable to acknowledging their own mental illness. For others, advocates say, treatment is simply not accessible.

Cassidy, *supra*.

18. Elbogen and Johnson note that their research on the lack of dangerousness of PPDs contradicts the public’s perception of PPDs: “Such data are at odds with public fears such as those reported in a national survey in which 75% of the sample viewed people with mental illness as dangerous.” Elbogen & Johnson, *supra* note 14, at 157 (citing Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1330–33 (1999)). Furthermore, they note “60% believed people with schizophrenia were likely to commit violent acts.” *Id.* (citing Bernice A. Pescosolido et al., *The Public’s View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUBLIC HEALTH 1339, 1341 (1999)).

19. Elbogen & Johnson, *supra* note 14, at 157.

20. *Id.*

21. Feeding into this scapegoat mentality is the fact that many of the perpetrators of the high-profile spree-killings do indeed have psychiatric disabilities. But this fact clouds the issues at hand. Proponents of individual gun rights, such as the National Rifle Association (“NRA”), argue that all PPDs should lose their gun rights because of the acts of a very small violent few, hiding that the vast majority of gun violence and gun deaths are *not* caused by PPDs and that most gun violence does *not* occur during spree-killings. See *Statistics on Gun Deaths & Injuries*, SMARTGUNLAWS.ORG (Nov. 16, 2012), <http://smartgunlaws.org/gun-deaths-and-injuries-statistics/> (citing *Web-Based Injury Statistics Query & Reporting System Injury Mortality Reports, 1999–2010, for National, Regional, and States*, NAT’L CENTER FOR INJ. PREVENTION & CONTROL, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://webappa.cdc.gov/sasweb/ncipc/dataRestriction\\_inj.html](http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html) (scroll to bottom and click “I Agree”) (last visited May 4, 2015)). Based on recent data from the CDC (from 2010), 31,076 Americans died in gun-caused homicides, suicides, and unintentional shootings. *Id.* An additional 73,505 sought treatment in hospital emergency departments for nonfatal gunshot wounds. *Id.* These statistics show that there is a massive amount of gun violence in the United States each year—over

But what do I mean, exactly, by a “scapegoat” in this context? Philosopher Kenneth Burke described scapegoating as, “in its purest form, the use of a sacrificial receptacle for the ritual unburdening of one’s sins[.]”<sup>22</sup> The scapegoat is a “‘representative’ or ‘vessel’ of certain unwanted evils”; it is a “sacrificial animal.”<sup>23</sup> For Burke, then, the scapegoat provides a symbolic place wherein a social group can unload its worst: worst thoughts, worst deeds, or worst group-members. This unloading ritualistically cleans the social group. Thus, as James Jasinski explains, Burke saw the scapegoat as a means of purifying society of its sins, or of removing its guilt, through a process of “externalization.”<sup>24</sup>

Externalization can take place in the realm of law-making. Joseph E. Kennedy took on the practice of scapegoating in terms of criminal punishment, and, in many ways, I extend his research here to PPDs. In writing about “[m]onstrous crimes and monstrous criminals,” Kennedy points out that these groups “provide appetizing fare for a society hungry for agreement and cohesion.”<sup>25</sup> He explains how, when we associate *all* criminals with the tiny few who might fit the description of “monstrous,” “we exaggerate the worst in order to experience the best: moments when we feel as a society that we have

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104,000 shootings in 2010 alone—yet only a tiny portion of this violence can be attributed to spree-killings perpetrated by PPDs. See *Deaths: Final Data for 2013*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/injury.htm> (last updated Feb. 6, 2015). One can observe the data and sum the firearm homicides (11,208), the firearm accidents (505), the firearm suicides (21,175), and the deaths by firearm discharges of “undetermined intent” (281) for 2013. *Deaths: Final Data for 2013*, CENTERS FOR DISEASE CONTROL & PREVENTION tbl.10 & 12, [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf). The sum yields a total of 33,636 deaths for 2013. *Id.* at tbl.18; see Metz & MacLeish, *supra* note 15, at 242 (noting, after providing copious evidence that the vast majority of violent crime is not perpetrated by mentally ill people, “blaming persons with mental disorders for gun crime overlooks the threats posed to society by a much larger population—the sane”).

22. KENNETH BURKE, *PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE* 16 (1954). For more on Burkean scapegoating in the context of PPDs and violence, see generally Katie Rose Guest Pryal, *Reframing Sanity: Scapegoating the Mentally Ill in the Case of Jared Loughner*, in *RE/FRAMING IDENTIFICATIONS* 159 (Michelle Ballif ed., 2014).

23. KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION* 39 (1973).

24. JAMES JASINSKI, *SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN CONTEMPORARY RHETORICAL STUDIES* 504 (2001).

25. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *HASTINGS L.J.* 829, 830 (2000). Kennedy builds his theory of the “secular sacred” upon Emile Durkheim’s theory of punishment. *Id.* at 833; see EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (George Simpson trans., MacMillan Co. 1933) (1893).

transcended the many differences that keep us apart.”<sup>26</sup> This exaggeration in order to transcend differences that Kennedy describes is scapegoating. Externalization is important to the process as well: “The essence of scapegoating is the attempt to identify the sources of social problems as external to the group.”<sup>27</sup> For example, we externalize our fear of gun violence by imagining that it is mostly perpetrated during a few high-profile spree-killings by people who have serious mental illness (“SMI”). Doing so might make us feel better about ourselves—after all, no one we know would ever do *that*—but it ignores the fact that the vast majority of gun violence is not perpetrated in spree-killings or by people with SMI.<sup>28</sup>

In his article, Kennedy focuses on the rise of the myth of the “monstrous criminal” in the 1980s and 1990s and the concurrent rise in severe punishments in the U.S. criminal justice system during those decades.<sup>29</sup> However, his observations about the function of scapegoating are now appropriate in what I suggest is our new age of the spree-killing.<sup>30</sup> Spree-killings create a similar sort of shared feeling of out-of-control violation as that described by Kennedy.<sup>31</sup> And the externalized scapegoat that captures the imagination of the in-group are PPDs—the mentally ill, the psycho-killers, the madmen. The nightmare of PPDs with guns provides the social “cohesion” that Kennedy describes, allowing the crossing of political aisles by folks who might not otherwise do so. Scapegoats provide an opportunity for political unification.

The two proposals that unify nearly all political groups in the United States against this new scapegoat are stripping otherwise-protected Second Amendment gun rights from PPDs, discussed in Part II, and easing the emergency involuntary civil commitment

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26. Kennedy, *supra* note 25, at 830.

27. *Id.* at 833.

28. See *supra* note 14 and accompanying text.

29. See Kennedy, *supra* note 25, at 831–32.

30. For more on the term “spree-killings” and my suggestion about its newness, see *supra* note 7.

31. For example, after the spree-killing in Tucson, Arizona, *Time* ran an article to help ease readers’ feelings of out-of-controlness. Kate Pickert & John Cloud, *If You Think Someone Is Mentally Ill: Loughner’s Six Warning Signs*, *TIME* (Jan. 11, 2011), <http://content.time.com/time/nation/article/0,8599,2041733,00.html>. The article leads with questions echoing the public sentiment after the shooting: “What signs that trouble lay ahead were missed? What signs were observed but ignored? In short, what can be done to prevent a potentially ill or unstable person from harming others?” *Id.* It then provides a numbered list of the “six warning signs in Loughner” that readers can look for in their own coworkers or classmates to ostensibly prevent future spree-killings. *Id.*

standard, what some euphemistically refer to as “increased mental health intervention,” discussed in Part III.

### III. SCAPEGOATS AND GUN RIGHTS

In the area of gun rights, paradoxically, there is a conjunction between the policies of the left and the right as they relate to people with psychiatric disabilities (“PPDs”). The left favors gun regulations to begin with,<sup>32</sup> so regulation of PPDs’ gun rights fits with their preexisting disposition. The right wants to limit the regulation of guns, so they have an incentive to blame problems of gun violence on a relatively small set of people and, thus, leave the rest relatively unregulated.<sup>33</sup>

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32. For example, after the spree-killing in Newtown, Connecticut, in December 2012, Democratic President Barack Obama, Democratic Vice President Joe Biden, and former Democratic Congresswoman Gabby Giffords (herself wounded in a spree-killing in Arizona in 2011), campaigned for tighter background check laws for gun purchases. Republicans in Congress defeated the bill in April 2013. Howard Kurtz, *Senate Defeats Background Checks*, DAILY BEAST (Apr. 17, 2014), <http://www.thedailybeast.com/articles/2013/04/17/senate-defeats-background-checks.html>.

33. This blame shifting played out vividly in the case of an Arlington, Texas, open-carry activist, Veronica Dunnachie, who murdered her husband and her stepdaughter over marital issues on December 10, 2014. Domingo Ramirez, Jr., *Affidavit: Domestic Dispute Led to 2 Deaths in Arlington*, STAR-TELEGRAM (Dec. 11, 2014, 2:22 PM), <http://www.star-telegram.com/news/local/crime/article4428614.html>. Dunnachie was “an active member of the Open Carry Tarrant County organization,” but the open carry and other gun rights organizations that she had supported were quick to ostracize her. See Dan Solomon, *After an Open Carry Tarrant County Member Was Charged with Shooting Her Husband and His Daughter, All Sides of the Gun Debate Got Ugly*, TEX. MONTHLY (Dec. 15, 2014), <http://www.texasmonthly.com/daily-post/after-open-carry-tarrant-county-member-was-charged-shooting-her-husband-and-his-daughter>. The gun rights blog BearingArms.com scapegoated Dunnachie in classic fashion, pushing her out of the in-group and into the realm of the outsiders who do not deserve to own guns: “[T]he story about Dunnachie runs with the headline ‘BAD APPLE’ in all capital letters, suggesting that she’s an outlier who in no way represents the group.” *Id.* The blog then ran this statement:

There are 100 million gun owners in the United States, and millions of them belong to Second Amendment groups. They are far more law-abiding than [sic] the average citizen, a fact that citizen control cultists religiously ignore. The reality of the matter is that the vast majority of the violently mentally ill involved in the debate are on the side of gun control. They often support gun control because . . . they are too mentally unstable to own and use firearms responsibly, and they project their deficiencies upon the rest of the world.

Bob Owens, *BAD APPLE: Texas Open Carry Supporter Arrested for Double Homicide*, BEARINGARMS.COM (Dec. 12, 2014, 10:24 AM), <http://bearingarms.com/bad-apple-texas-open-carry-supporter-arrested-double-homicide/>. Thus, the group sets the fault-lines of the debate firmly with the sane and gun-toting on one side, and the mentally ill—cast in as bizarre a light as possible—on the other.

Thus, for the political right (which includes the majority of Justices in the *Heller* opinion), the Second Amendment right to keep and bear arms rests, rhetorically, on the backs of those groups who are forbidden to do so. Put simply, in *Heller*, there would be no need for guns for self-protection if there were no outsiders—scapegoats—that one needed protection against. These scapegoats include, among others, PPDs. As I will discuss in this section, PPDs are thus scapegoated in the era of spree-killings by having their gun rights stripped away.<sup>34</sup>

Justice Scalia enumerated our society's gun-scapegoats in the majority opinion in *Heller*, in which he first pointed to *other* scapegoats throughout Anglo-American legal history. Historically, in England, Catholics who did not attend Church of England services were banned from “universal” (i.e., Protestant) gun ownership.<sup>35</sup> More recently, in the post-Civil War period in the United States, laws in the former slave states banned African Americans from owning guns.<sup>36</sup> These groups—Catholics, African Americans, and the others Scalia lists—provided the externalized scapegoats for their particular societies at their particular points in history.

Today, the groups that serve as scapegoats to maintain our Second Amendment individual right to bear arms, as articulated by Justice Scalia in *Heller*, include felons<sup>37</sup> and, for the purposes of this section, those labeled by the courts as “mentally ill.” When we argue for the rights of the majority by stripping rights—with near unanimity of those making the rights-stripping argument—from a disfavored minority, we are scapegoating.

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34. Others have addressed this topic from other angles, for example, the risk of suicide that PPDs present should allow for the restriction of their gun rights. *See generally* Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1 (2013) (arguing that the risk of suicide that PPDs present should allow for the restriction of their gun rights); Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633 (2014) (suggesting that PPDs who are psychotic should lose their gun rights); Frederick E. Vars, *Putting Arms at Arm's Length: Precommitment Against Suicide* (Univ. of Ala. Legal Studies Research, Paper No. 2500291, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2500291](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500291) (proposing the creation of a voluntary, confidential, federal-background check system that those at risk of suicide could add their names to as a means of protecting themselves from future self-harm by guns).

35. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

36. *Id.* at 614–15.

37. The U.S. Code forbids the sale of firearms to felons, 18 U.S.C. § 922(d)(1) (2012); it also makes it unlawful for felons “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” *Id.* § 922(g)(1).

For example, according to Wayne LaPierre, executive vice president of the National Rifle Association (“NRA”), individual gun ownership is indeed a right, just not a right that “homicidal maniacs” possess—a classic rhetorical scapegoating,<sup>38</sup> and one that is often echoed by NRA supporters.<sup>39</sup> LaPierre’s volatile (and ableist<sup>40</sup>) language is reflected, in more muted tones, in the *Heller* opinion itself. Surprisingly, it is reflected not only in the opinion of the conservative majority, but also in the opinions of the liberal wing of the bench, as I demonstrate in Part II.B.

A. *Scalia’s Majority Opinion in District of Columbia v. Heller*

Scalia states, at the beginning of Part III of his majority opinion in *Heller*, “Like most rights, the right secured by the Second Amendment is not unlimited.”<sup>41</sup> He then proceeds to enumerate what might, in the majority’s view, constitute valid limitations on people who can own guns: “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”<sup>42</sup> Scalia then extends his prohibitions from certain people to certain locales, allowing for “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>43</sup> In opposition to these locale limitations and these human scapegoats, Scalia sets up an in-group with a locale to stimulate fear: “And whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home.”<sup>44</sup> In Table 1, I have created a visual map of Scalia’s arguments.

38. See *NRA Chief Criticizes Navy Yard for Being ‘Unprotected’ Before Mass Shooting*, REUTERS (Sept. 22, 2013), <http://www.reuters.com/article/2013/09/22/us-usa-guns-idUSBRE98L0C920130922> [hereinafter *LaPierre Comments*].

39. See, e.g., Owens, *supra* note 33. The gun-rights group BearingArms.com writes that the mentally ill support gun control because they “are too mentally unstable to own and use firearms responsibly.” *Id.* This is an odd argument for the pro-gun group to make, to be sure, as the position they attribute to “the mentally ill” seems quite logical—that is, voluntarily giving up one’s guns when one knows one cannot use them responsibly.

40. “Ableism is a form of discrimination or prejudice against individuals with physical, mental, or developmental disabilities that is characterized by the belief that these individuals need to be fixed or cannot function as full members of society.” Laura Smith, Pamela F. Foley & Michael P. Chaney, *Addressing Classism, Ableism, and Heterosexism in Counselor Education*, 86 J. COUNSELING & DEV. 303, 304 (2008).

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

42. *Id.*

43. *Id.*

44. *Id.* at 635 (emphasis added).

**Table 1: Rhetorical Fear Tactics in *Heller* Majority Opinion**

	<b>In-Group: Not Okay to Ban Guns</b>	<b>Scapegoat: Okay to Ban Guns</b>
<b>Disability Status</b>	Able-Minded	Mentally Ill
<b>Criminal Status</b>	Law-Abiding	Criminal
<b>Locale to Stimulate Fear</b>	Hearth and Home	Schools, Government Buildings

In Part IV of the opinion, shortly after this enumeration of these valid limitations of the Second Amendment, Scalia turned his focus “to the law at issue here,” the portions of the District of Columbia gun ordinance that banned handguns and required trigger locks.<sup>45</sup> Thus, the law had two main elements at issue in the *Heller* case: (1) a total ban of handguns, including handguns in the home;<sup>46</sup> and (2) a requirement that all lawful firearms in the home (e.g., shotguns) be disassembled or bound by a trigger lock at all times.<sup>47</sup>

Scalia’s take on these laws, and the rights that they supposedly violated, looked like this: “[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”<sup>48</sup> Thus, he attacks the first part of the law for its targeting of handguns. Scalia continues: “The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”<sup>49</sup> Here, Scalia calls on the rhetorical commonplace of the “home,” the family, the sacredness of the hearth, in order to craft agreement in his audience with his argument that banning a certain gun (a handgun) in a certain place (the home) does not fit into that

45. *Id.* at 628; *see also* Firearms Control Regulations Act of 1975, 23 D.C. Reg. 1091, 1097, 1129 (July 23, 1976) (banning handguns and requiring trigger locks).

46. *Heller*, 554 U.S. at 628.

47. *Id.*

48. *Id.*

49. *Id.*

class of Second Amendment exceptions he described in Part III (e.g., schools and government buildings). By calling upon the commonplace of the home, Scalia invokes fear of home invaders to emotionally persuade his readers to agree with him, and ultimately, to agree that the gun ban should be struck down.

But there is another undercurrent of fear at play here, one that Scalia may or may not be playing on consciously (although, as he is a master rhetorician, I would think his rhetorical moves are intentional). Scalia invokes fear in passing with his list of exceptions to the Second Amendment: fear of felons (via gun bans for felons), fear of harm to our children (via gun bans near schools), and, for my purposes here, fear of mental illness (via gun bans for PPDs). Scalia scapegoated two classes of persons—felons and PPDs—to justify the free flow of handguns to the rest of the American populace. It is fear of the mentally ill that justifies the stripping of their Second Amendment rights. Scalia does not point to any scientific studies linking the gun violence to mental illness, which would be difficult, as most studies show less of a link between gun violence and mental illness, as I have shown previously in this Article.<sup>50</sup> Instead, Scalia employs calm language pointing to the “longstanding prohibitions on the possession of firearms by felons and the mentally ill,”<sup>51</sup> never doubting that his readers agree that such laws are not only constitutional but also good policy.

Not only did Scalia’s scapegoating technique create fear to justify the stripping of gun rights from PPDs, it also created a cohesive insider group populated with non-PPDs, a classic rhetorical move, setting up an us-versus-them dichotomy, where the “them” are quite scary to many people. Although Scalia did not call PPDs “homicidal maniacs on the street” like LaPierre did,<sup>52</sup> he touched on the same pressure point of fear with his language in the opinion when setting up his scapegoating dichotomy. And—here is the final twist—this fear in turn justifies gun ownership by the in-group, because the in-group now has a reason to own guns for personal defense: the scapegoat.

Scalia thus subtly plants in his readers’ minds the notion that such bans on guns for felons and mentally ill exist because those

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50. See *supra* notes 14 and 21 and accompanying text; see also Metzl & MacLeish, *supra* note 15, at 241 (“Databases that track gun homicides, such as the National Center for Health Statistics . . . show that fewer than 5% of the 120,000 gun-related killings in the United States between 2001 and 2010 were perpetrated by people diagnosed with mental illness.”).

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

52. See *LaPierre Comments*, *supra* note 38.

people, when they get their hands on guns, commit unspeakable acts—at least in the mythos of the scapegoat. And fundamental rights to gun ownership for nonfelons and non-PPDs exist for those groups to protect themselves, at least in part, against the scary, scapegoated outsiders. (I remind readers once more that most acts of gun violence are not committed by homicidal maniacs on the street,<sup>53</sup> despite what Scalia and LaPierre would like us to believe.)

*B. Breyer's Dissenting Opinion in District of Columbia v. Heller*

In his dissent, Justice Breyer (joined by Stevens, Souter, and Ginsburg—the liberal wing of the bench in 2008) agreed with Justice Scalia that the Second Amendment right “is not absolute.”<sup>54</sup> Like Scalia’s opinion, Breyer’s opinion is laced with fear, noting at the outset that the District’s gun ban was a “permissible legislative response to a serious, indeed life-threatening, problem.”<sup>55</sup> In Breyer’s opinion, the fear is of firearms themselves, in particular firearms possessed by a particular class of people who are dangerous.<sup>56</sup> The opening to his opinion invokes this class of people: “[T]he District’s regulation . . . focuses upon the presence of handguns in high-crime urban areas.”<sup>57</sup> And he closes his opinion similarly: “[T]here simply is no untouchable constitutional right guaranteed by the Second

53. See Ramirez, *supra* note 33 (describing a December 2014 killing of a man and his daughter by the man’s estranged wife); *supra* note 21 and accompanying text (enumerating statistics on gun violence generally, demonstrating how most gun killings and injuries do not occur during high profile spree-killings); see also Lauren Kirchner, *The Very Weak and Complicated Links Between Mental Illness and Gun Violence*, PAC STANDARD (Dec. 18, 2014), <http://www.psmag.com/navigation/health-and-behavior/weak-complicated-links-mental-illness-gun-violence-96672> (finding those who have mental illness are less likely to commit gun violence). Kirchner interviewed social scientist Jonathan Metzl, author of a recent study on mental health and gun violence, who found, “[I]f somebody has a long-term, chronic mental illness diagnosis, they are actually less likely to commit a gun crime. It’s exactly the opposite of what you would think in the aftermath of these [spree-killing] shootings.” *Id.*

54. *Heller*, 554 U.S. at 681 (Breyer, J., dissenting). Justice Stevens also wrote a dissenting opinion, but his opinion specifically addressed “[w]hether [the Second Amendment] protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense.” *Id.* at 636–37 (Stevens, J., dissenting). For this reason, Stevens’s opinion does not invoke the scapegoat. Breyer, on the other hand, states that he concurs with Stevens, and then provides this purpose for his opinion: “I shall show that the District’s law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense.” *Id.* at 681 (Breyer, J., dissenting). In order to do so, as I demonstrate in this section, Breyer does invoke the scapegoat.

55. *Id.* at 682.

56. *Id.* at 681.

57. *Id.*

Amendment to keep loaded handguns in the house in crime-ridden urban areas.”<sup>58</sup>

The phrase “crime-ridden urban areas” invokes many things, but one cannot say that it is free of racial implications. Breyer’s words participate implicitly in Scalia’s scapegoating. In this instance, Breyer uses the term “urban” as code for black criminals, scapegoating this particular group as a way to justify the D.C. gun ban in particular:

The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals.<sup>59</sup>

With these words, Breyer uses fear to make his point as aptly as Scalia does.

Breyer does not agree with Scalia that guns are necessary to protect against these dangerous outsider groups; however, Breyer does agree that certain groups are dangerous. His solution, therefore, is that the gun ban should stand to ensure that these dangerous groups—such as urban criminals—cannot get their hands on guns.<sup>60</sup> Put another way, Breyer never disagrees with Scalia’s assessment of dangerous groups; he only disagrees that these groups should serve as *exceptions* to the rule that the rest should be able to possess guns: “I am similarly puzzled by the majority’s list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny.”<sup>61</sup> These include, he states, quoting Justice Scalia: “‘prohibitions on the possession of firearms by felons’” and “‘prohibitions on the possession of firearms by . . . the mentally ill.’”<sup>62</sup> Breyer takes Scalia to task for this list, pointing out the flaws in Scalia’s interpretation of the scope of the Second Amendment: “Why these? Is it that similar restrictions existed in the late 18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count . . . ?”<sup>63</sup> But Breyer

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58. *Id.* at 722.

59. *Id.* at 682.

60. *Id.* (“[A] legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban.”).

61. *Id.* at 721.

62. *Id.*

63. *Id.*

is not arguing against Scalia's list because he believes that felons and the mentally ill should be allowed to possess guns. He is simply pointing out the flaw in Scalia's reasoning that suggests that gun possession is a universal right—universal with a few named exceptions.

Thus, what Breyer does *not* do is contemplate the invalidity of the list in the first place—only the interpretative dance that brought Scalia to the point of needing to provide a list of exceptions at all. Indeed, Breyer does not argue that this list should be shortened; on the contrary, he seems to believe that this list should be lengthened and only quarrels with the fact that Scalia limits it to only those particular people. Breyer never suggests that the mentally ill should not be singled out as a group that is particularly dangerous. Indeed, his opinion is just as fear-ridden as the majority opinion.

*C. Scapegoating and Guns: Taking Aim at the Wrong Problem*

Both Scalia's and Breyer's opinions show that legal arguments both for and against gun control rely on fear, in particular fear of people believed to be dangerous. This use of fear to further one's political aims is scapegoating.

Not only is scapegoating the mentally ill and other groups in order to further a political agenda or make legal arguments distasteful, it results in bad policy. The policy problems that arise from stripping gun rights from the mentally ill in the fashion that the *Heller* majority contemplates are these: (1) the majority opinion targets the wrong group of PPDs in our society's quest to cure gun violence and (2) targeting PPDs as the cause of gun violence will scare off PPDs from seeking treatment.

In more ways than one, the majority opinion in *Heller* targets the wrong group of PPDs in its quest for constitutional gun control. Unlike felons, whose status of "felon" derives from their interaction with the state, PPDs' status of "mentally ill" is not so easily marked. Thus, like other forms of restrictions on PPDs (such as those that arise during bar examinations<sup>64</sup>), the restriction on gun ownership by a PPD relies first upon the PPD having received treatment for a psychiatric disability. For the purposes of the federal gun control statute, a PPD must have either been "adjudicated as a mental defective or . . . been committed to any mental institution,"<sup>65</sup> or be either "an unlawful user of or addicted to any controlled substance

64. See McElroy & Pryal, *supra* note 4.

65. 18 U.S.C. § 922(d)(4) (2012).

(as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802 (2012)).”<sup>66</sup> *Treatment* is how a PPD gets marked as mentally ill in the first place.

Thinking about gun restrictions in a logical fashion, given the low prevalence of violence among PPDs as demonstrated by scientific research,<sup>67</sup> the people who are seeking treatment for their disabilities are *not* the people who are most likely to be dangerous—on the contrary.<sup>68</sup> But only by seeking treatment in the first place does a person get “tagged” as “mentally ill” for the purposes of Scalia’s reasoning in the *Heller* majority opinion. For example, in the introduction for this Article, I described a woman who sought treatment at a hospital, placing herself on the psychiatric “radar” so to speak. Her presence at the hospital where she sought treatment put her at risk of involuntary commitment for temporary psychosis caused by medication for poison ivy. But her involuntary commitment would have tagged her as mentally ill and likely interfered with her ability to purchase or even own a gun.<sup>69</sup> If the woman in my hypothetical were a devout gun owner, would this risk of losing her guns have had a chilling effect on her seeking of treatment? This question leads me to my second point.

If a person is a devout gun owner, but might otherwise have considered seeking treatment for a psychiatric disability, this targeting of the mentally ill as the scapegoat for gun violence will likely scare her away from seeking treatment. It is hard enough to seek psychiatric help: treatment is expensive; treatment is stigmatizing; treatment is often difficult to come by as fewer and fewer psychiatrists participate with health plans or accept new patients.<sup>70</sup> Adding another

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66. *Id.* § 922(d)(3).

67. *See supra* notes 14 and 21 and accompanying text (summarizing the scientific research on the low rates of violence among PPDs despite the misconceptions of the public).

68. On the contrary, PPDs are more likely to be the victims of violence. *See supra* note 15 and accompanying text.

69. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 922(d)(4), 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(d)(4) (2012)) (prohibiting any person from “sell[ing] or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person has been adjudicated as a mental defective or has been committed to any mental institution”); *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics> (last visited Jan. 25, 2015) (providing general information about National Instant Criminal Background Check System (“NICS”) and its purpose).

70. Brian Krans, *Study: Half of Psychiatrists Don’t Accept Health Insurance*, HEALTHLINE (Dec. 11, 2013), <http://www.healthline.com/health-news/mental-half-of-psychiatrists-dont-take-health-insurance-121113> (“Though mental health parity laws are in

barrier to treatment—loss of gun rights—means that a person who might have sought help may not do so. Should this devout gun owner present at the hospital with her troubles, she might fear that she runs the risk of involuntary commitment—and loss of her guns—a risk that she is less likely to run if she simply stays away from doctors altogether.

Thus, the Court has targeted the wrong group for gun bans (those who voluntarily sought treatment and are thus least likely to be dangerous) and scared off another group from treatment altogether (making them more likely to be a public health problem because they go untreated). At best, the scapegoating of the mentally ill in *Heller* is terrible public policy.

#### IV. SCAPEGOATS AND EMERGENCY INVOLUNTARY CIVIL COMMITMENT

As Prendergast, Price, Pryal, and other disability scholars have noted, people with psychiatric disabilities (“PPDs”) struggle for agency—legal, rhetorical, and otherwise.<sup>71</sup> Prendergast writes, “If people think you’re crazy, they don’t listen to you.”<sup>72</sup> But the stakes are higher these days, as Prendergast notes, due to the quasi-criminalization of mental illness: “[T]he question of how one listens to the mentally ill in an age in which they have been oppressed by the effective criminalization of their condition becomes vital.”<sup>73</sup> The quasi-criminalization of mental illness has come to the fore recently for a variety of reasons, including public debate that has pushed emergency involuntary civil commitment (“ICC”) as a “Precrime”<sup>74</sup> solution to spree-killing tragedies such as the Washington Navy Yard shooting of September 2013.<sup>75</sup> Other reasons include the use of jails

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effect, the head of the American Psychiatric Association says ‘intimidating’ experiences with insurance companies keep some psychiatrists from accepting coverage.”).

71. MARGARET PRICE, MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE 58–102 (2011); Catherine Prendergast, *On the Rhetorics of Mental Disability*, in EMBODIED RHETORICS: DISABILITY IN LANGUAGE AND CULTURE 189, 203 (Martin Nystrand & John Duffy eds., 2003); Katie Rose Guest Pryal, *The Genre of the Mood Memoir and the Ethos of Psychiatric Disability*, 40 RHETORIC SOC’Y Q. 479, 479 (2010).

72. Prendergast, *supra* note 71, at 203.

73. *Id.*

74. See Philip K. Dick, *The Minority Report*, in THE PHILIP K. DICK READER 323, 323 (1987) (creating a fictional world in which mutants can see future crimes before they are committed and Precrime agents can arrest and imprison the potential criminals before they commit the crimes).

75. See *infra* Part III.A (discussing in greater detail the spree-killing at the Washington Navy Yard).

and prisons as quasi-mental hospitals in decades since the closure of public hospitals (deinstitutionalization) and the poor treatment of PPDs while they are incarcerated.<sup>76</sup>

In the direct aftermath of a spree-killing, debates over emergency ICC come to the fore.<sup>77</sup> Largely missing from these public debates over emergency ICC are the voices of mentally ill people themselves—at least for a while—even though they would be most affected by any changes in the law.<sup>78</sup> Their voices are missing because the genres in which these public debates take place—news reports and opinion pieces published in major news outlets, for example—rhetorically exclude them—either by disallowing their participation or encouraging PPDs with nonvisible disabilities to keep their disabilities hidden. For example, claiming mental illness as part of one’s identity would hurt a journalist’s credibility (ethos) as an impartial writer, or an opinion writer’s credibility as a reasoned arguer, as mental illness, as perceived by the U.S. public, ruins a person’s ability to think in a reasoned and impartial fashion. After all, “To be disabled mentally is to be disabled rhetorically.”<sup>79</sup>

Even more troubling, these genres reveal a convergence of opinion from the left and the right, an agreement that PPDs often pose a danger to the public and should be subject to less strict procedural protections when facing emergency ICC.<sup>80</sup>

In this section, I show how this disabling rhetoric operates by examining popular news articles and other documents that were published after the Navy Yard shooting committed by Aaron Alexis,

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76. See, e.g., Cassidy, *supra* note 17 (“In Wyoming as well as around the country, jails and prisons operate as de facto mental health facilities, treating a disproportionately high number of offenders with mental illnesses, substance abuse issues and often both.”); *Rikers Island Jail Criticised for Keeping Mentally Ill Inmates in Solitary*, GUARDIAN (Nov. 6, 2013), <http://www.theguardian.com/world/2013/nov/06/rikers-island-jail-mentally-ill-solitary-confinement/> (“About 40% of Rikers’ 12,200 inmates have some kind of mental health diagnosis, and about a third of those have so-called serious mental illnesses such as schizophrenia and bipolar disorder. Of the roughly 800 inmates in solitary at any given time, just over half of them are mentally ill.”).

77. See *infra* Part III.C (detailing the discussion of public debates over ICC after the spree-killing at the Washington Navy Yard). The examples in this Part invoke earlier spree-killings to make their arguments.

78. In the immediate aftermath of a spree-killing, the voices of PPDs are often missing in reasoned debate. See *infra* Part III.C. However, as time passes, articles appear in which the voices of PPDs are present. See, e.g., Electra Draper, *Debate Rages in Colorado over Involuntary Holds for Mental Illness*, DENVER POST (May 25, 2014, 12:01 AM), [http://www.denverpost.com/news/ci\\_25831191/debate-rages-colorado-over-involuntary-holds-mental-illness](http://www.denverpost.com/news/ci_25831191/debate-rages-colorado-over-involuntary-holds-mental-illness).

79. Prendergast, *supra* note 71, at 202.

80. See convergence of opinion discussion *infra* Part III.C.

a man widely believed to be mentally ill at the time, revealing the predictable rhetorical patterns.<sup>81</sup> I highlight two of the most common of these genres: (1) early reports breaking news of Alexis's mental illness and (2) opinion pieces arguing for easing the emergency ICC standard as a Precrime solution to spree-killing violence—and revealing a convergence of the political left and right.

A. *Emergency Involuntary Civil Commitment Statutes: What Is at Stake?*

After the Washington Navy Yard shooting in Washington, D.C., on September 16, 2013, in which a single shooter named Aaron Alexis shot twelve people to death and wounded eight others,<sup>82</sup> criticisms rang out from many corners. One popular criticism noted how easy it was for Alexis to access a military base.<sup>83</sup> A second criticism dealt with guns; some asked how it was that Alexis could have lawfully purchased one, given his arrest record and history of mental instability<sup>84</sup> (invoking the scapegoating argument Scalia makes in *Heller*). Others, such as the National Rifle Association's ("NRA") Wayne LaPierre, criticized the military for not allowing all soldiers on military bases such as the Navy Yard to carry guns.<sup>85</sup> LaPierre

81. See *infra* Parts III.B & III.C (providing rhetorical analyses of the documents, revealing these patterns).

82. See, e.g., *12 Victims Killed, 8 Wounded in Shooting at D.C. Navy Yard, Suspected Gunman Killed*, NBC WASH. (Sept. 17, 2013, 3:37 PM), <http://www.nbcwashington.com/news/local/Confirmed-Shooter-at-Navy-Yard-One-Person-Shot-223897891.html>.

83. See, e.g., Carol D. Leonnig, Matea Gold & Tom Hamburger, *Military's Background Check System Failed to Block Gunman with a History of Arrests*, WASH. POST (Sept. 17, 2013), [http://www.washingtonpost.com/politics/contractor-would-not-have-hired-aaron-alexis-if-past-brushes-with-law-had-been-known/2013/09/17/e5bc83da-1faa-11e3-8459-657e0c72fec8\\_story.html](http://www.washingtonpost.com/politics/contractor-would-not-have-hired-aaron-alexis-if-past-brushes-with-law-had-been-known/2013/09/17/e5bc83da-1faa-11e3-8459-657e0c72fec8_story.html) ("The military's beleaguered background-check system failed to block Navy Yard gunman Aaron Alexis from an all-access pass to a half-dozen military installations, despite a history of arrests for shooting episodes and disorderly conduct."); see also Trip Gabriel, Joseph Goldstein & Peter Schmidt, *Suspect's Past Fell Just Short of Raising Alarm*, N.Y. TIMES (Sept. 17, 2013), <http://www.nytimes.com/2013/09/18/us/washington-navy-yard-shootings.html> ("[T]he access granted Mr. Alexis, a former Navy reservist who as an independent contractor serviced Navy computers, raises questions similar to those raised about another outside government contractor, Edward J. Snowden, who leaked national intelligence secrets.").

84. See, e.g., Alex Koppelman, *Aaron Alexis's Guns*, NEW YORKER (Sept. 17, 2013), <http://www.newyorker.com/news/news-desk/aaron-alexiss-guns> ("It appears that he bought his shotgun legally—reportedly last week, in Virginia. He was allowed to buy a firearm despite having apparently struggled with mental illness, and despite his involvement in some disturbing gun-related incidents.").

85. See, e.g., *id.* ("Some conservatives are starting to argue that the problem at the Navy Yard was actually that there weren't enough guns present—that Democrats have turned military bases into 'gun-free zones' where even trained combat veterans are vulnerable to lone madmen.").

famously stated after the Navy Yard shooting, “When the good guys with guns got there, it stopped.”<sup>86</sup>

Another set of critics asked why the police—and the state generally—are unable to more easily involuntarily commit mentally ill people on an emergency basis. These critics argued that such people, including Alexis, are “clearly disturbed”—at least that is how the *New Yorker* put it.<sup>87</sup> And, as one can imagine, the language describing PPDs in such articles went downhill from there, creating distance between the in-group (the sane) and the scapegoated group (PPDs). These critics want to loosen the emergency ICC standards across all states.<sup>88</sup> Essentially, the authors of these genres argue that because of outliers such as Alexis, *all* laws affecting *all* PPDs should be changed to allow for easier emergency ICC of *all* PPDs.

Before delving into the genres that argue for easing the procedural standards for emergency ICC, let us examine what is at stake in this debate: the emergency ICC statutes themselves. Every state has its own version of an emergency ICC standard under which a person can be detained under certain circumstances.<sup>89</sup> For example, North Carolina’s statute is a typical “dangerousness” statute, one that uses a “threat to self or others” standard to determine whether a person can be held for evaluation.<sup>90</sup> About half of U.S. states have dangerousness statutes like North Carolina’s.<sup>91</sup> The statute provides that “[a]nyone who has knowledge of an individual who is mentally ill and either (i) dangerous to self, . . . or dangerous to others, . . . or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness . . .” to submit an affidavit and petition the court to take such person into custody for evaluation by a physician or psychologist.<sup>92</sup> Note that the

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86. Andy Meek, *NRA’s Wayne LaPierre: “Good Guys with Guns” Could Have Stopped Navy Yard Shooting*, TIME (Sept. 22, 2013), <http://nation.time.com/2013/09/22/nras-wayne-lapierre-good-guys-with-guns-could-have-stopped-navy-yard-shooting/>.

87. Andrew Solomon, *An Avoidable Tragedy: Aaron Alexis and Mental Illness*, NEW YORKER (Sept. 20, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/09/psychiatry-mass-shootings-aaron-alexis-mental-illness.html>.

88. See *infra* Part III.C (discussing the articles arguing for loosening the emergency ICC standard).

89. An annotated list of each state’s ICC statutes can be viewed on the website for the Treatment Advocacy Center, a nonprofit mental health organization. See *Emergency Hospitalization for Evaluation*, TREATMENT ADVOC. CENTER, <http://www.treatmentadvocacycenter.org/legal-resources/state-standards/2275> (last visited Jan. 26, 2015).

90. N.C. GEN. STAT. § 122C-261 (2014).

91. See *Emergency Hospitalization for Evaluation*, *supra* note 89.

92. N.C. GEN. STAT. § 122C-261(a).

statute also allows commitment if the person's lack of self-care makes the person a danger. This is also typical.

But there have been major changes to the dangerousness standard in other states: the other half of U.S. states have changed their emergency ICC laws from a dangerousness standard to a "need for treatment" standard, or else added the need for treatment standard to the dangerousness standard to make it easier to involuntarily hold a person.<sup>93</sup> In Wisconsin, for example, a state agent may detain a person who meets the traditional dangerous standard,<sup>94</sup> or who shows *either* "[a] substantial probability of physical impairment or injury to himself or herself due to impaired judgment, as manifested by evidence of a recent act or omission."<sup>95</sup> *or* "[b]ehavior manifested by a recent act or omission that, due to mental illness or drug dependency, he or she is unable to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment."<sup>96</sup> The Wisconsin statute is thus far more expansive than the North Carolina statute, allowing officers to involuntarily commit any person they suspect of having a mental illness and who seems unable to provide self-care—even if the person does *not* seem dangerous. The Wisconsin statute retains the dangerousness standard, but it adds, as an option for the state, the need for treatment standard, giving officers more leeway in emergency ICC.

These statutes allow the state (in the form of police or another state agent) to apprehend and involuntarily hospitalize for evaluation a person who meets the standard under which a person can be detained in that jurisdiction, e.g., dangerousness, need for treatment, or some combination of both.<sup>97</sup> The state procedures usually work like this: A person arrives at a hospital and acts in a way that meets the statutory standard (e.g., apparently dangerous or in need of treatment). The hospital staff then detains the person. Or if the person behaves in a way that meets the statutory standard in public, the police detain the person and bring him or her to a hospital.<sup>98</sup>

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93. For a state-by-state comparison, see *Emergency Hospitalization and Evaluation*, *supra* note 89.

94. WIS. STAT. ANN. § 51.15(1)(a)(1), (2) (West 2012).

95. *Id.* § 51.15(1)(a)(3).

96. *Id.* § 51.15(1)(a)(4).

97. What follows is a summary of the procedures across the United States, drawn from CHRISTOPHER SLOBOGIN ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 810–11 (5th ed. 2009).

98. *Id.*

Once the person arrives at a hospital, the hospital's psychiatric lock-down ward can hold the person for forty-eight or seventy-two hours with mere probable cause or a similarly low standard, often upon the examination by only one or two doctors.<sup>99</sup> After the first hold period, another examination must take place, and sometimes a hearing before a judge (which can be by phone).<sup>100</sup> After this examination, a patient can be held for another two weeks or even longer.<sup>101</sup> None of this procedure rises to the procedural requirements of true involuntary civil commitment, which requires a more complete judicial process, as all of this procedure is operating on an emergency basis.<sup>102</sup>

After the Navy Yard shooting, the opinion pages of newspapers across the United States were plastered with calls for easing the emergency ICC standard as a way to prevent future tragedies.<sup>103</sup> This call for more ICC is a classic scapegoat argument: if we can just lock away the potential wrongdoers, then there will be no more wrongdoing. The objects of our fear will be permanently isolated, and we—those that remain—will be safe. Underlying this Precrime argument is the belief that the scapegoats (the mentally ill) are to blame for society's ills (unsafe gun use).

The procommitment opinion piece was not the only genre that emerged after the Navy Yard shooting, however, and viewing this genre alongside others can help reveal how these genres emerged and how they scapegoated PPDs. Prior to the procommitment arguments came the early news reports breaking the story of Alexis's mental illness. Following on the heels of these news reports came the arguments for easing the emergency ICC standard—in *direct response* to the news of Alexis's mental illness. As the next section shows, the news reports, which came first, laid the groundwork for the arguments for easing the emergency ICC standard.

### B. *Post-Shooting News Report Genre*

Before the policy debates began over ICC, news reports broke the story of the shooting and personal information about Aaron Alexis. Of the articles that fall into the news-report genre, I examine specifically the news reports that broke the story of Aaron Alexis's

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See discussion *infra* Part III.C.

psychiatric disability.<sup>104</sup> These reports share predictable conventions (that is, traits or characteristics) that arose in response to the rapidly evolving postcrisis situation involving a likely mentally-ill spree-shooter. For example, they share conventions with news reports that have appeared after other similar tragedies, such as the shootings in Tucson, Arizona, in 2011.<sup>105</sup>

The breaking news reports share some strong generic similarities (see Table 2). First, the authors of the news reports are journalists for major news outlets such as the Associated Press, Reuters, the *Washington Post*, or CNN. For each piece, either the venue or the author possesses great respectability as a news source. Despite this (or because of this) respectability, the articles tend to lead with wacky headlines that make Alexis sound as “crazy” and “other” as possible. For example, one such article was titled, “Aaron Alexis, Navy Yard Shooting Suspect, Thought People Followed Him with Microwave Machine.”<sup>106</sup> The articles then begin with quick summary paragraphs that highlight how “delusions” caused Alexis to go on a shooting rampage.<sup>107</sup> These headlines work in not-so-subtle ways to push Alexis into an outsider scapegoat position by making him seem strange, bizarre.

104. To find articles that fit this parameter, I used the search engine Google, the search terms “Aaron Alexis,” and a search time frame of September 2013. I pulled the top fifteen articles that Google presented. A quick read revealed that those published on September 17, 2013, did not contain accurate information or any information on Alexis’s mental health. I thus limited my search from September 18, 2013, to September 30, 2013.

105. Shortly after the shootings in Tucson, Arizona, in 2011 by Jared Loughner, similar news reports emerged, pointed to the mental illness of Loughner, his brushes with the mental health system, and the system’s failure to prevent the violence. *See* Pryal, *supra* note 22, at 159–67. Media articles covering tragedies that get classified as “terrorism,” such as the Boston Bombing, share a different set of conventions. Enumerating all of these conventions is beyond the scope of this article. However, they often deemphasize the mental health of the attacker.

106. Eric Tucker, *Aaron Alexis, Navy Yard Shooting Suspect, Thought People Followed Him with Microwave Machine*, HUFFINGTON POST (Sept. 18, 2013, 5:12 AM), [http://www.huffingtonpost.com/2013/09/18/aaron-alexis-microwave-machine\\_n\\_3946916.html](http://www.huffingtonpost.com/2013/09/18/aaron-alexis-microwave-machine_n_3946916.html); *see* Peter Hermann & Ann E. Marimow, *Navy Yard Shooter Aaron Alexis Driven by Delusions*, WASH. POST (Sept. 25, 2013), [http://www.washingtonpost.com/local/crime/fbi-police-detail-shooting-navy-yard-shooting/2013/09/25/ee321abe-2600-11e3-b3e9-d97fb087acd6\\_story.html](http://www.washingtonpost.com/local/crime/fbi-police-detail-shooting-navy-yard-shooting/2013/09/25/ee321abe-2600-11e3-b3e9-d97fb087acd6_story.html).

107. *See, e.g.*, Associated Press, *VA Sheds Light on Mental Health of Navy Yard Gunman Aaron Alexis*, CBS.COM (Sept. 18, 2013, 4:41 PM), <http://www.cbsnews.com/news/va-sheds-light-on-mental-health-of-navy-yard-gunman-aaron-alexis/>; Greg Botelho & Joe Sterling, *FBI: Navy Yard Shooter “Delusional,” Said “Low Frequency Attacks” Drove Him to Kill*, CNN.COM (Sept. 26, 2013, 12:25 PM), <http://www.cnn.com/2013/09/25/us/washington-navy-yard-investigation/> (“Aaron Alexis was under ‘the delusional belief that he was being controlled or influenced by extremely low frequency electromagnetic waves’ before he embarked on a bloody shooting rampage at the Washington Navy Yard, an FBI official said Wednesday.”).

**Table 2: Early Reports Breaking News of Alexis's Mental Illness**

<b>Authors and Venues</b>	<ul style="list-style-type: none"> <li>• Authors are journalists for major news sources including unattributed pieces for AP/Reuters.</li> <li>• Venues are CNN.com, CBS.com, <i>Washington Post</i>, <i>USA Today</i>, AP &amp; Reuters via <i>Huffington Post</i> (i.e., major news outlets).</li> </ul>
<b>Conventions of Genre</b>	<ul style="list-style-type: none"> <li>• Headline emphasizing craziness of Alexis.</li> <li>• Opening summarizing how delusions drove Alexis, proof from his own writings and inscriptions on his gun.</li> <li>• Evidence emphasizing the failure of military and gun-purchase background checks.</li> </ul>
<b>Purpose of Genre</b>	<ul style="list-style-type: none"> <li>• To pinpoint a motive for the killings (i.e., the delusions).</li> <li>• To place blame for the killings (e.g., on mental health care failures, gun control failures, or government background check failures).</li> <li>• To make Alexis an outsider/scapegoat.</li> </ul>

When the articles are read together, their shared purposes emerge. The articles primarily search for a *motive* for the killings—Alexis's delusions—and search for someone or something to *blame*. Alexis seems without motive; article after article point out that he shot people at random and did not act out of revenge.<sup>108</sup> Furthermore, due to his illness, he also seems relatively blameless in the sense that he lacked a “guilty mind” or “intent.” He is also dead (shot dead at the scene by government agents)<sup>109</sup> and therefore no longer around for us, as a society, to punish. Thus, lacking a wrongdoer to blame, the news reports shift blame to other places. They point to Alexis's employer, a government contractor whose background check system

108. See, e.g., Hermann & Marimow, *supra* note 106 (noting that “investigators believe that Alexis fired at random”).

109. See *12 Victims Killed, 8 Wounded in Shooting at D.C. Navy Yard, Suspected Gunman Killed*, *supra* note 82.

with the Department of Defense gave Alexis access to the Navy Yard in the first place.<sup>110</sup> They point to the ease with which the obviously crazy Alexis legally purchased the shotgun he used in the killings (in the state of Virginia).<sup>111</sup> The articles also point to an interaction with the police in Rhode Island in the weeks before the shooting, when Alexis told police that he was being stalked and arguably acted paranoid and delusional.<sup>112</sup> The Rhode Island police did not detain him because they did not believe he was dangerous<sup>113</sup>—that is, he did not meet the dangerousness standard for emergency ICC. By highlighting Alexis's erratic behavior, the articles also work to scapegoat Alexis (and others like him), pushing him into an external, outsider position. They also subtly (or not-so-subtly) argue for easing the emergency ICC standard.<sup>114</sup>

The opinion genres that followed the news reports dealt with the different argument topics first touched on in the news reports: Who was to blame for the failure to screen out Alexis as a government contractor? How can we limit access to guns for PPDs? Should we ease emergency ICC standards? These different arguments, spawned by the news reports, moved across genres into opinion pieces, political speeches, and others. The news reports posed this question, some patently, some latently: Is our emergency ICC process, at least in part, to blame for these killings? This question was bolstered by the click-bait headlines and laser-sharp focus on Alexis's mental state. The opinion-writing commentariat, from both sides of the political spectrum, responded: Yes.

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110. See Gabriel, Goldstein & Schmidt, *supra* note 83 (noting that there was “a growing list of questions about how Mr. Alexis, who had a history of infractions as a Navy reservist, mental health problems and run-ins with the police over gun violence, gained and kept a security clearance from the Defense Department that gave him access to military bases, including the navy yard, where he was shot to death by the police”); see also Miranda Green, *A Visit to Sharpshooters, Where Aaron Alexis Bought His Shotgun*, DAILY BEAST (Sept. 18, 2013), <http://www.thedailybeast.com/articles/2013/09/18/a-visit-to-sharpshooters-where-aaron-alexis-bought-his-shotgun.html> (noting that Sharpshooters customers did not see a connection between gun control and the Navy Yard shooting, attributing the violence instead to “the government’s security clearance system”).

111. See Green, *supra* note 110 (interviewing members of the gun range where Alexis bought his shotgun, where one member stated, “[I]t’s a mental health issue. . . . [S]omebody who is sensible is not going to do the wrong thing”).

112. See sources cited *supra* notes 106–07.

113. See sources cited *supra* notes 106–07.

114. See *infra* Part III.C (discussing proposed changes to the Emergency ICC standard).

*C. Involuntary Civil Commitment Opinion Piece Genre*

The news reports revealed that Aaron Alexis had a run-in with the police in Newport, Rhode Island, just weeks before the Navy Yard shooting. On August 7, 2013, while he was staying in a Newport hotel room, he called the police, reporting that “people were talking to him through the walls and ceilings of his hotel rooms and sending microwave vibrations into his body to deprive him of sleep.”<sup>115</sup> Despite his words, the police did not detain Alexis because he did not seem dangerous to them. Thus, the debate over the dangerousness standard and emergency ICC came to the fore. This debate took place, in part, on the opinion pages of major news outlets. These opinion pieces emerged as a genre, sharing certain conventions (that is, traits or characteristics) driven by the particular events of the Navy Yard shooting. They also shared conventions with similar pieces that emerged after spree-killing tragedies in the past.<sup>116</sup>

Table 3 outlines the conventions of the ICC opinion piece genre that arose in mainstream publications. The table contains only observations of the genre’s conventions based on the sample studied:

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115. Associated Press, *supra* note 107.

116. To find articles to fit this parameter, I used the search engine Google, the search terms “Aaron Alexis” and “need for treatment,” (both in quotation marks), with no time limiter. “Need for treatment” is the technical term for the legal standard that states adopt to loosen their civil commitment standards. I pulled all articles from major news sources that this search revealed. I did not pull from personal blogs or websites or from advocacy sites. I pulled over twenty different articles.

**Table 3: Opinion Pieces Arguing for Easing the Emergency Involuntary Civil Commitment Standard**

<b>Authors and Venues</b>	<ul style="list-style-type: none"> <li>• Authors include politicians,<sup>117</sup> psychiatrists,<sup>118</sup> and writers who have published books about mental illness.<sup>119</sup></li> <li>• One author published a major memoir in 1998 about his recovery from depression; he also has a doctorate in psychology.<sup>120</sup></li> <li>• Venues include major news outlets such as the <i>Washington Post</i> and <i>USA Today</i>.</li> </ul>
<b>Conventions of Genre</b>	<ul style="list-style-type: none"> <li>• Pieces link together the tragedies leading up to Navy Yard shooting (e.g., Tucson, Aurora, and Newtown) to point out a trend of violence and mental illness.</li> <li>• Pieces insist that mental illness is just like any other illness and needs treatment, but most mental illness goes untreated.</li> <li>• Pieces point out that most mentally ill are not violent, but also imply or openly state a connection between untreated mental illness and spree-killings.</li> <li>• At the end, pieces argue that “dangerousness” standard is too high, and we should adopt “need for</li> </ul>

117. See, e.g., Ron Barber, *A First Step in Addressing the Mental Health Aspect of Mass Shootings*, HILL (Feb. 12, 2014, 8:00 AM), <http://thehill.com/blogs/congress-blog/healthcare/198134-a-first-step-in-addressing-the-mental-health-aspect-of-mass>.

118. See, e.g., Sally L. Satel, *We Have the Tools to Prevent Another Shooting Spree*, BLOOMBERGVIEW (Sept. 19, 2013, 4:16 PM), <http://www.bloombergview.com/articles/2013-09-19/we-have-the-tools-to-prevent-another-shooting-spree.48>.

119. See, e.g., Pete Earley, Op-Ed., *Deeds Attack Shows that Our System Is a Mess*, USATODAY (Nov. 21, 2013, 5:26 PM), <http://www.usatoday.com/story/opinion/2013/11/20/pete-earley-creigh-deeds-mental-illness/3654793/> [hereinafter Earley, *Deeds Attack*]; Pete Earley, Op-Ed., *Getting the Mentally Ill the Help They Need*, WASH. POST (Sept. 27, 2013), [http://www.washingtonpost.com/opinions/a-lower-threshold-for-committing-mentally-ill-people/2013/09/27/52350fac-26bb-11e3-b75d-5b7f66349852\\_story.html](http://www.washingtonpost.com/opinions/a-lower-threshold-for-committing-mentally-ill-people/2013/09/27/52350fac-26bb-11e3-b75d-5b7f66349852_story.html) [hereinafter Earley, *Getting the Mentally Ill Help*].

120. Andrew Solomon, *Biography*, ANDREWSOLOMON.COM, <http://andrewsolomon.com/andrew-solomon-biography/> (last visited Jan. 26, 2015).

	treatment.”
<b>Purpose of Genre</b>	<ul style="list-style-type: none"> <li>• To argue that mentally ill people need greater access to medical treatment.</li> <li>• To point out that PPDs will not seek this treatment for themselves, so we must intervene and force treatment upon them.</li> <li>• To argue that ICC must be easier or the mentally ill will “slip through the social fabric,” (as Solomon and those on the left put it) or commit more spree-killings (as those on the right put it).</li> </ul>

As Table 3 illustrates, the authors included public leaders, such as politicians, medical experts, such as psychiatrists, and popular figures in the psychiatric disability, world such as those who have published memoirs about mental illness. The big-name venues that published these pieces calling for easier ICC standards, such as *The New Yorker* and the *Washington Post*, gave credence to the arguments.

One troubling aspect of this genre becomes apparent when you study its conventions: the pieces uniformly call for the “need for treatment” standard despite the authors’ similarly uniform observation that most PPDs are not violent, especially not towards others.<sup>121</sup> The authors tend to strike a sympathetic tone, verging on paternalistic, stating that they only want to get PPDs the treatment that they need. But then the authors take a darker turn: they link the Navy Yard shooting to what they argue is a pattern of spree-killings committed by PPDs<sup>122</sup> and suggest that the only way to stop these killings is to ease the emergency ICC standards.<sup>123</sup> Logically, this argument suggests that all PPDs *are* potentially prone to violence. Thus, the authors of these articles seem to speak out of both sides of their mouths.

121. See, e.g., Satel, *supra* note 118 (“As a psychiatrist, I have frequently seen psychotic patients brought into the emergency room by police, only to be released into the night because of a toxic combination of restrictive commitment laws and a desperate shortage of psychiatric beds. For the most part, such sad stories affect only the patients themselves and their families.”).

122. *Id.* (“The most important component of reform, however, is to ensure that these legal tools are used. Arizona, where Jared Lee Loughner shot Representative Gabrielle Giffords and 17 others in 2011, has a need for treatment standard.”).

123. *Id.* (“States shouldn’t stop there. More should adopt an even more progressive type of commitment statute: the ‘need for treatment’ standard.”).

Like the news report genre, many authors of the ICC genre were nondisabled people. With the ICC genre, these nondisabled people were making proposals for how to deal with PPDs that included ways to more easily confine them involuntarily. Such arguments prominently made by nondisabled people have prompted the disability rights movement to argue with slogans such as “Nothing About Us Without Us.”<sup>124</sup>

Only two writers examined here arguably could claim authority to speak on behalf of PPDs, rather than just about them. The first such writer, Pete Earley, is the author of a book about navigating the mental health system on behalf of his son, who has bipolar disorder.<sup>125</sup> In arguing—forcefully, in multiple major venues—for a need for treatment standard for ICC, Earley calls upon his negative experiences trying to get care for his son.<sup>126</sup> In other words, even though his position is one of a sympathetic advocate for PPDs, he is arguing that it should be easier to involuntarily commit PPDs. As disability studies scholar Melanie Yergeau and others have noted, advocacy groups composed predominantly of family members of people with disabilities often have markedly different agendas than do people with disabilities themselves.<sup>127</sup> Earley, by arguing for easing

124. See, e.g., JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT*, at ix–x (2000) (arguing that oppression of people with disabilities is rooted in their dependency and disempowerment, and urging nondisabled people to recognize that disabled people know what is best for themselves).

125. PETE EARLEY, *CRAZY: A FATHER'S SEARCH THROUGH AMERICA'S MENTAL HEALTH MADNESS* (2007).

126. See Earley, *Getting the Mentally Ill Help*, *supra* note 119. In an article arguing for easing the ICC standard, Earley quickly summarizes two negative encounters he had with mental health-care providers when he tried to get his son involuntarily committed:

In 2002, a Fairfax County emergency room turned me away because my college-age son, who was delusional and had been hospitalized twice for treatment of bipolar disorder, was deemed not sick enough to hospitalize. Police advised me to claim he was dangerous to get him admitted. Three years later, I called the county's Mobile Crisis Unit for help but was again told that I had to wait until my son became dangerous. When he did, that unit refused to come because the dispatcher decided, based on my call, that my son was too dangerous. Instead, the police came and shot my son twice with a stun gun.

*Id.* One might wonder what Earley's son thinks about being used as the poster boy in the national media for easing the standards for ICC. All we can do is wonder because Earley's son Kevin (Mike in Earley's writing) is not writing the op-eds for national newspapers. Kevin did get some airtime on his dad's blog in 2014, however. Kevin Earley, *If You Are Afraid to Tell Your Story, Stigma Wins*, PETEEARLEY.COM (July 14, 2014), <http://www.petearley.com/2014/07/14/son-says-afraid-tell-story-stigma-wins/>.

127. See generally, Melanie Yergeau, *Circle Wars: Reshaping the Typical Autism Essay*, 30 *DISABILITY STUD.* Q. 1 (2010) (pointing out that a “typical convention of the typical

the standard to need for treatment, claims to speak for what is best for PPDs, including his son, yet what he is arguing for is the same scapegoating tactic—rounding up the potential wrongdoers, the Precrime approach—albeit with softer language.

The second writer that could arguably be said to be speaking on behalf of PPDs, Andrew Solomon, wrote about Aaron Alexis and argued for the need for a treatment standard (thereby easing the emergency ICC standard) in *The New Yorker*.<sup>128</sup> Solomon has published two famous “mood memoirs”<sup>129</sup> about his own major depression.<sup>130</sup> Unlike Earley, however, Solomon does not draw on his own experience with mental illness in his opinion piece on ICC and the Navy Yard shooting. On the contrary, he creates rhetorical distance between himself and Alexis, whom he says suffered from “derangement,” was “clearly depressed,” and was “delusional”—among other things.<sup>131</sup> Rather than claiming authority to speak on the issue as a PPD, Solomon claims authority as a scientist: he uses scientific terms and relies upon his education, a doctorate in psychology from Cambridge University.<sup>132</sup> Indeed, Solomon’s article is titled, “An Avoidable Tragedy,”<sup>133</sup> falling squarely into the genre described here. The way Solomon positioned himself as a scientist and distanced himself from the “delusional” Alexis suggests that he does not want to be mistaken for a member of the scapegoated group (PPDs), at least not in a piece in which he argues for a Precrime solution to spree-killings. Thus, although Solomon has made a living writing memoirs of his own severe psychiatric disability, he is quick to

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autism essay [is] where experts *on* autism [including family members] know more than those *with* autism”).

128. Solomon, *supra* note 87.

129. For more on the memoir genre and the psychiatrically disabled, see, for example, Pryal, *supra* note 71, at 489, arguing that “mood memoirs” can be read as narrative-based responses to the rhetorical exclusion suffered by the psychiatrically disabled, and Catherine Prendergast, *Mental Disability and Rhetoricity Retold: The Memoir on Drugs*, in *CHANGING SOCIAL ATTITUDES TOWARD DISABILITY: PERSPECTIVES FROM HISTORICAL, CULTURAL, AND EDUCATIONAL STUDIES* 60, 65 (David Bolt ed., 2014), pointing out how memoirs of the psychiatrically disabled “document[] the experience of psychosis—and ensuring relief from it—from the inside.”

130. ANDREW SOLOMON, *THE NOONDAY DEMON: AN ATLAS OF DEPRESSION* 11 (2001); Andrew Solomon, *Anatomy of Melancholy*, *NEW YORKER*, Jan. 12, 1998, at 46, 46–61. Solomon has published more books on psychiatric disability, including, more recently, ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN AND THE SEARCH FOR IDENTITY* (2012).

131. Solomon, *supra* note 87.

132. Solomon, *supra* note 120.

133. Solomon, *supra* note 87.

place himself in the in-group, rather than the scapegoated group, in his article on Alexis and emergency ICC.

For example, Solomon writes at the conclusion of his piece: “But until we develop a social model that includes finding and treating those who suffer from these complaints, we will be subjected to scenes like the one at the Navy Yard over and over again.”<sup>134</sup> This language evokes fear of the scapegoated group—of the deranged, paranoid, spree-killer on the loose just waiting to commit another atrocity. His solution is to “find and treat” those who might harm us. He contrasts Alexis’s case to the 1999 school shooting at Columbine High School, located in Jefferson County, Colorado: “Some shootings, like Columbine, are perpetrated by people of whom no one would ever have expected such violent acts. Those events, which appear random, will be difficult to contain.”<sup>135</sup> However, Alexis’s situation was not like the situation in Columbine: “But many are perpetrated, as this one was, by people who are clearly disturbed. Some cases are hard to pick up. Alexis’s was not.”<sup>136</sup> Solomon’s position, then, is a gentler version of Precrime: we must “find” perpetrators before they commit spree-killing, and we must “treat” them to prevent the spree-killing. One can ask: What does “treatment” entail? And is it voluntary? What are we willing to subject PPDs to against their will to create a feeling of safety for ourselves? And given the “Columbine Exception” that Solomon describes, what is the point?

Furthermore, Solomon does not write from a position in which he identifies himself with the scapegoated Alexis. That Solomon himself is a PPD who suffered from terrible depression and shared his suffering publicly does not cause him to express empathy with Alexis in his piece. Rather, his language in the article places himself within the in-group and further externalizes and scapegoats Alexis.

*D. The Left and Right Converge on Emergency Involuntary Civil Commitment*

After the Navy Yard shooting, one of the more inflammatory public commentators on PPDs, NRA executive vice president Wayne LaPierre, said this: “If we leave these homicidal maniacs on the street . . . they’re going to kill. . . . They need to be committed is what they need to be. If they are committed, they’re not at the Naval

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134. *Id.*

135. *Id.*

136. *Id.*

Yard.”<sup>137</sup> LaPierre said this on NBC’s “Meet the Press” shortly after the Navy Yard shooting.<sup>138</sup> Earley, the father of a PPD, and Andrew Solomon, himself a PPD, both argued, also, for easing the emergency ICC standard and giving the state more power to round up PPDs and treat them against their will.<sup>139</sup> LaPierre’s political stance could not be farther from Earley’s and Solomon’s. Their tone and word choice could not have been more different. But they were arguing essentially the same position: easing the emergency ICC standard will prevent spree-killing tragedies like the one at the Navy Yard. Locking up the maniacs will keep the rest of us safe. These are scapegoating arguments, which sacrifice PPDs to make the rest of us feel better.

#### CONCLUSION

Most jurisdictions, including the federal government, have laws banning firearm ownership by persons with certain histories of mental illness.<sup>140</sup> The National Instant Criminal Background Check System, or NICS, helps implement these laws.<sup>141</sup> These laws vary and change,<sup>142</sup> but currently they are unified under our popular and political discourse that follows every spree-killing such as the one at the Washington Navy Yard. The Navy Yard tragedy prompted the NRA’s Wayne LaPierre’s comments that redirected public anger

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137. Joan Lowy, *NRA: Get “Homicidal Maniacs” Off Streets*, ASSOCIATED PRESS (Sept. 22, 2013, 2:13 PM), <http://bigstory.ap.org/article/nra-get-homicidal-maniacs-streets>.

138. *Id.*

139. *See supra* notes 87, 126 and accompanying text.

140. The Federal Gun Control Act, under which NICS is implemented, provides as follows: “It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution.” Gun Control Act of 1968, Pub. L. No. 90-618, § 922(d)(4), 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(d)(4) (2012)).

141. *Id.*

142. *But see* *United States v. Rehlander*, 666 F.3d 45, 46–50 (1st Cir. 2012) (suggesting that the mentally ill should have a right to carry guns until they receive a hearing declaring them unfit to use a gun [this opinion came out in large part due to *Heller*]). *See* Ian Millhiser, *First Circuit Suggests the Mentally Ill Cannot Lose Their Right to Buy or Carry Guns Without a Hearing*, THINKPROGRESS (Jan. 23, 2012, 6:10 PM), <http://thinkprogress.org/justice/2012/01/23/409334/first-circuit-suggests-the-mentally-ill-cannot-lose-their-right-to-buy-or-carry-guns-without-a-hearing/>. Given that the emergency hospitalization procedures do not require an adversarial proceeding, they are not sufficient to justify a permanent deprivation of the individual’s Second Amendment rights. *Rehlander*, 666 F.3d at 46–50. Because the private right to bear arms is a constitutional right, it requires more due process. *Id.* at 49–50. The court acknowledged that deprivation of this right is still appropriate for those who are mentally ill or dangerous, *id.* at 50, but the *Rehlander* decision narrowed the scope of the Gun Control Act’s application to the mentally ill.

away from guns and towards people with mental illness. But LaPierre's arguments are merely a hamfisted manifestation of a scapegoating that we are all complicit in, including Scalia, Breyer, and the NRA: PPDs are the sacrificial receptacle for the ritual unburdening of our nation's sin of gun violence, even though PPDs are irrefutably responsible for so little of it.<sup>143</sup> PPDs just make the news because they undergird the national conversation about guns. There cannot be a newsworthy murder any longer without a newscaster asking, "Was he crazy"? Mental illness is the go-to explanation to explain away gun violence.

When gun advocates and gun-control advocates talk about the right to bear arms, both sides say, "Well, except for the maniacs." This common refrain is the refrain of scapegoating.

Reading *Heller*, and the debates surrounding emergency ICC, it is difficult to see that PPDs also have the fundamental right to own a gun and protect their homes; it is as though PPDs are, in Second Amendment terms, no longer people at all. Indeed, emergency ICC, at its most fundamental level, completely removes a person from his or her home. We do not ask, *are PPDs actual people with homes, hearths, and families in need of protection at all?* When we speak of the ease with which PPDs should lose their gun rights and be involuntarily committed, the answer appears to be: *No, they are not.*

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143. See *supra* notes 14 and 21 for studies on the low correlation between PPDs and violence; note 15 for research showing how PPDs are far more likely to be the victims of violence than to perpetrate it; and note 7 for research showing the correlation between spree-killings (which are anomalies) to the rest of the gun violence that occurs annually in the United States.

