Why Wait Until the Crime Happens? Providing for the Involuntary Commitment of Dangerous Individuals Without Requiring a Showing of Mental Illness

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WHY WAIT UNTIL THE CRIME HAPPENS?

PROVIDING FOR THE IN VOLUNTARY COMMITMENT OF DANGEROUS INDIVIDUALS WITHOUT REQUIRING A SHOWING OF MENTAL ILLNESS

By: Adam Lamparello

INTRODUCTION

Most violence is not committed by persons with mental illness … [a]ttempts that aim to prevent events like those that took place at Columbine and Virginia Tech by focusing on detection and intervention among persons with severe mental illness will not make society much safer."²

Although in the past social scientists and psychiatrists have consistently overestimated their abilities to predict violence and to identify dangerousness, our knowledge may have progressed to the point that we can now accurately predict violence and identify dangerousness in specific circumstances."³

The vast majority of states require that, for purposes of involuntary commitment, an individual must: (1) have a mental illness; and (2) present an imminent or substantial danger to himself or herself or to others.⁴ The problem with this standard is that it leaves open the possibility for non-mentally ill individuals to commit horrific acts of violence because, without such illness, they would not meet the standard for involuntary commitment. Put differently, based upon numerous empirical studies, mental illness, in

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² Douglas Mossman, “The Imperfection of Protection Through Detection and Intervention,” 30 J.LEGAL MED. 109, 136 (2009) (Mossman further states that “one can give many solid (and better) reasons for treating mental illness besides reducing violence, and mental illness contributes to just a small fraction of the violence that Americans experience.”) Id. at 140


⁴ See e.g., ALASKA STAT. §47.30.755(A); ARIZONA REV. STAT. §36-540(A); CALIFORNIA WELF. & INST. CODE §5250; COLORADO REV. STAT. §27-10-102(5); DELAWARE CODE ANN. tit. 16 §5010; DISTRICT OF COLUMBIA CODE ANN. §21-545(B); GEORGIA CODE ANN. §37-3-1(9.1).
and of itself, does not bear a significant causal relationship to violent behavior. In fact, mental illness is only a causal factor in violent behavior when it is accompanied by and co-occurring with another factor known to have a causal relation to violence, such as substance abuse.

Furthermore, empirical studies have identified a substantial amount of environmental and biological factors (such as frontal lobe disorder and other brain injuries) that are causally related to violent acts, and it is these and other factors that should be incorporated into modern statutory schemes governing involuntary civil confinement. Otherwise, individuals that may be biologically prone to violence – or may become violent based upon environmental factors – can and will commit acts of violence because there exists no means of intervention or detection before the crime happens.

That is the purpose of this Article – to propose a new standard for involuntary confinement that does not require a finding of mental illness, but instead, based upon numerous actuarial assessments, focuses on determining an individual’s likelihood of engaging in immediate and foreseeable acts of violence. This new statutory scheme, as

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5 See Dawn J. Post, “Preventative Victimization: Assessing Future Dangerousness in Sexual Predators for Purposes of Indeterminate Civil Commitment,” 21 HAMLINE J. PUB. L. AND POL’Y 177, 207-208 (1999) (including a non-exhaustive list of causal factors such as age, sex, race, social class, history of alcohol or opiate abuse, educational attainment, residential and employment stability, and statistics of violence in the offender’s demographic).

6 See Erica Beecher –Monas, Edgar Garcia-Rill, “Genetic Predictions of Future Dangerousness: Is there a Blueprint for Violence?” 69 SPG LAW & CONTEMP. PROBS. 301, 332-337 (discussing biological factors that may be causally related to violence). The authors explain as follows:

All behavior is a complex intermingling of nature and nurture … Although most violence is perpetrated by young men against other young men, violent tendencies can develop prenatally or in early infancy or can emerge after the onset of puberty. Environmental factors often play a role … Structural dysfunction may also contribute to violent behavior. Damage, the decreased metabolizing and uptake of glucose, reduced blood flow to the frontal lobes, and reduced function have all been observed in the frontal cortex of violent individuals and murderers. … [These injuries are] associated with an increased risk of aggressive and violent behavior.

Id. at 324-329.
discussed in detail *infra*, would allow for the brief detention of potentially dangerous individuals, and thereafter permit a further period of confinement if it is demonstrated that the offender poses a high likelihood of engaging in violent acts. Unlike most extant statutes, a showing of mental illness will not be required.

Ultimately, the proposed statute allows for the intervention and brief detainment of individuals on a much *earlier* basis, for the purpose of preventing the types of horrific tragedies that have occurred in our country, from Charles Whitman, to Columbine, to Jonesboro, Arkansas, to Red Lake, Minnesota, and to workplace shootings that have occurred across the country. This Article argues that an initial, and potentially extended, civil commitment can – and should – be warranted where, by clear and convincing evidence, an individual: (1) poses an immediate, foreseeable threat to others (the “dangerousness” component’); (2) has engaged in at least one overt act of violence within the past thirty (30) days; and (3) is engaged in behaviors that are, based upon empirical data and actuarial assessments, causally related to the commission of violent acts. Should the brief intervention reveal that an individual poses a grave threat of immediate and/or foreseeable violence to the community, then further confinement may be warranted as long as due process standards are carefully and specifically implemented.

In other words, we have the ability, in a manner that comports with due process, to stop a crime before it happens. Part II will discuss the Columbine and Virginia Tech massacres, and how the involuntary commitment statutes in these states failed to protect the public from such dangerous individuals. Part II continues by discussing the constitutional due process standards enunciated by the United States Supreme Court governing involuntary confinement. Part III examines the current statutory schemes
regarding involuntary civil confinement, and concludes that these statutes fail to identify many individuals that are likely to engage in serious acts of violence. Part IV sets forth a two-tiered model statute, which allows for the brief, and in some cases extended, detainment of individuals based upon the immediate and foreseeable likelihood that such individuals will engage in violence.

**PART II**

**THE MASSACRES AT COLUMBINE AND VIRGINIA TECH**

Perhaps the most tragic aspect of the Columbine and Virginia Tech massacres was not only the failure of school officials to heed the early and imminent warning signs, but also for the courts to lack the statutory authority to involuntary commit these individuals – for an initial brief period – to assess their level of dangerousness and potential for violence. The Colorado statute would have been insufficient to prevent this horrific tragedy. Specifically, while the Columbine shooters certainly posed an imminent threat to others, there was no evidence that they suffered from a mental illness. In the Virginia Tech tragedy, while the shooter arguably satisfied the statutory standard, it was determined that outpatient treatment was the proper remedy.

**A. DYLAN KLEBOLD AND ERIC HARRIS**

The tragedy at Columbine would never have happened had there been a statute in Colorado that allowed for the involuntary commitment of both Dylan Klebold (“Klebold”) and Eric Harris (“Harris”) – on a short-term basis – to assess their level of dangerousness and potential for violence. The overt acts and explicit threats made by

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7 [COLO. REV. STAT. §27-10-111(1)](https://www.colorado.govALES) states in pertinent part as follows: “The court or jury shall determine that the respondent is in need of care and treatment only if the court or jury finds such person mentally ill and, as a result of such mental illness, a danger to others or to himself or gravely disabled.”
these individuals established by clear and convincing evidence that, if left untreated, they would engage in a horrific act of violence in the immediate future. For example, Klebold and Harris were purchasing firearms (including a rifle, semiautomatic and sawed-off shotgun) and storing them in their bedrooms in preparation for the ensuing attack at Columbine. Furthermore, Klebold and Harris established a website whereby they specifically named students that they intended to “blow up” with “pipe bombs” at the school. They also “made videotapes of themselves shooting their guns and played them in school.” Perhaps most disturbing is the fact that, in February of 1999, Klebold wrote a story for one of his classes detailing an assassin who “shoots down students and bombs the city.” He further stated that the “man unloaded one of the pistols across the fronts of [the] four innocents … [t]he streetlights caused a visible reflection of the droplets of blood … I understood his actions.” Klebold’s teacher described the account as “the most vicious story she’d ever read.”

Unfortunately, the administrators at Columbine, along with investigators at the Jefferson County Sheriff’s Office, took minimal action to intervene and potentially prevent this horrifying tragedy. Amazingly, because police had previously investigated

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9 Id.
10 Id.
11 Id.
12 Id.
13 Id. (emphasis added).
14 Id.
Harris’s home and found a pipe bomb, Columbine administrators “took no action because certainly they wouldn’t have wanted to interfere with an ongoing investigation.” 15 In addition, Columbine officials were alerted to the website where Klebold and Harris were threatening to kill several students, yet nothing was done.16 Columbine’s administrators never talked to Klebold’s or Harris’s teachers, family, or friends, and, after reading the story by Klebold in which he detailed the murders of four children, they again did nothing. On April 20, 1999, Klebold and Harris killed 13 students and injured 21 others.

B. SEUNG HUI CHO

Likewise, the Virginia Tech massacre would never have happened had there been a statute permitting the involuntary confinement – for a brief period – of Seung Cho based upon the likelihood that he would engage in a violent act in the immediate or foreseeable future. Instead of focusing on the “dangerousness” component, the Court focused primarily upon Cho’s mental state when making the confinement determination.

To begin with, as far back as his middle school years, Cho was known to behave in an

15 Id. The article also explains that, a year before the attack, those in charge of security at Columbine, Joe Schallmoser and Howard Cornell, “were worried that Columbine was just the kind of place where a school shooting might happen.” Consequently, in August of 1998, eight months before the Columbine attack, they “wrote a security plan that required school officials to notify and meet with parents and law enforcement as soon as they learned of ‘a threat by any student’ to ‘commit any act of violence.’ They said that ‘Columbine didn’t follow the plan.”

isolated, withdrawn, inhibited and non-communicative manner. These behaviors continued through his high schools years, as Cho’s “speech was barely audible … he did not respond in complete sentences…[and] was not verbally inter-active at all and was shy and shut down.” At the conclusion of his high school career, counselors determined that Cho suffered from depression and social anxiety disorder.

It was at Virginia Tech, however, that Cho began to exhibit the early and imminent warning signs of dangerousness both to himself and others. To begin with, in the fall of 2005, Cho went to a dormitory party and unexpectedly brandished a knife and proceeded to repeatedly stab the carpet. He also produced a paper in one of his classes in which he criticized his classmates (for consuming meat), stating, “[y]ou low-life barbarians make me sick to my stomach. I hope y’all burn in hell for mass murdering and eating all those little animals.

Cho’s dangerous behavior then began to escalate. He was found with a very large knife in his desk. After further bizarre behaviors, which included sending strange emails to a female student, the Virginia Tech police intervened and took him into custody for an initial evaluation. The pre-screener found that Cho suffered from a mental illness, was a danger to himself or others, and required in-patient hospitalization. Critically, however,

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18 Id. at 36.
19 Id. at 39.
20 Id at 42.
21 Id.
22 Id.
23 Id. at 47.
at a subsequent hearing in which Cho was evaluated by an independent psychologist, the pre-screener’s findings were overruled.

The attending psychiatrist instead found that “Cho is mentally ill; [but] that he does not present an imminent danger to (himself/others), or is not substantially unable to care for himself, as a result of mental illness; and that he does not require involuntary hospitalization.”\(^{24}\) Ultimately, and in what represents the cornerstone of this Article, the Court found that, while “Cho presents an imminent danger to himself as a result of mental illness” only out-patient treatment was required.\(^{25}\) Cho was subsequently discharged.\(^{26}\) The Court had the authority to detain Cho, yet let him go. If Virginia had a statute requiring the in-patient detainment of Cho based upon the fact that he was an imminent danger to himself or other (regardless of mental illness), the Virginia Tech tragedy may never have happened.

Following this hearing, Cho continued his bizarre behavior, including writing very violent stories and remaining non-communicative in class.\(^{27}\) One student remarked that Cho “was the kind of guy who might go on a rampage killing.”\(^{28}\) Indeed, in the fall of 2007, Cho “began to purchase guns and ammunition.”\(^{29}\) The “red flags” were so apparent that Cho should have, but was not, subject to involuntary confinement. Multiple sources “were expressed over Cho’s behavior in the dorm,” but this was not brought to

\(^{24}\) *Id.* (emphasis added).

\(^{25}\) *Id.*

\(^{26}\) *Id.* at 49.

\(^{27}\) *Id.*

\(^{28}\) *Id.* at 51.

\(^{29}\) *Id.* at 52.
the attention of the school’s Care Committee. Various faculty members “spoke up loudly about a sullen, foreboding male student who refused to talk, frightened classmates and faculty with macabre writings, and refused faculty exhortations to get counseling.”

On April 16, 2007, Cho killed 32 students and injured approximately thirty others before killing himself, even though both a psychiatrist and Court had previously determined that he presented an imminent threat to himself and others.

C. THE CONSTITUTIONAL REQUIREMENTS FOR INVOLUNTARY IN-PATIENT CONFINEMENT

As will be set forth in greater detail infra, this Article proposes a new standard governing the involuntary, in-patient civil confinement of dangerous individuals in such a way that: (1) comports with existing constitutional standards; and (2) provides for the early detection and intervention of those individuals likely to engage in immediate and foreseeable acts of violence. Before reviewing the extant statutes governing involuntary commitment:

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30 Report of the Virginia Tech Review Panel, Chapter 4, p. 52.

31 Id.


The real danger at hand is the effect of such a narrow threshold on involuntary civil commitment. While it may give individuals extensive rights, it sacrifices the needs of the mentally ill who do not qualify and must suffer without treatment. Individuals who are too mentally ill to recognize that they are in need of treatment or refuse to consent to treatment cannot be involuntarily committed until their condition has become significantly worse and treatment may be less successful. In this sense, the ‘imminent danger’ standard is unbalanced because it preserves individual autonomy but severely undermines traditional theories of state power to care for and protect the mentally ill and society … [Furthermore], [a] lower threshold for involuntary civil commitment is associated with lower incarceration rates and higher commitment rates due to increased exercise of parens patriae power rather than police power.

confinement, it is necessary to examine the current constitutional framework within which such statute must operate.

1. **The Federal Level**

   In *O’Connor v. Donaldson*, the Court held that involuntary civil commitment implicates important due process concerns. Specifically, involuntary commitment “must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.” Furthermore, a “finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him … in simple custodial confinement.” This is particularly true where such individual “is capable of surviving safely in freedom, on their own or with the help of family and friends.” Moreover, in *Jackson v. Indiana*, the Court held that “the nature and duration of a commitment must be reasonably related to its purposes in order to satisfy due process.”

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36 *O’Connor*, 422 U.S. at 576. The *O’Conner* Court further held as follows:

   The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement … That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution … One might as well as if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”

37 *Id.* at 575.


committed individuals retain a “liberty interest” and are thus entitled to safe conditions of confinement, freedom from unreasonable bodily restraint, and, at a minimum, procedures designed to protect those interests.\footnote{Id. at 315-316, 319. The Youngberg Court explained that “the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the due process clause … [a]nd that right is not extinguished by lawful confinement, even for penal purposes.” Id. at 315.} Furthermore, in \textit{Zinermon v. Birch},\footnote{494 U.S. 113 (1990).} the Court held that an individual must be “dangerous” to warrant involuntary confinement, holding that “the involuntary placement process serves to guard against the confinement of a person who, though mentally ill, is harmless…”\footnote{Id. at 133-134 (holding that “[p]ersons who are mentally ill and incapable of giving informed consent to admission would not necessarily meet the standard for involuntary placement, which requires either that they are likely to injure themselves or others, or that their neglect or refusal to care for themselves threatens their well-being.”) Id. at 133.} The \textit{Zinermon} Court also held that an individual cannot be committed as a “voluntary” patient if he does not have the ability to give informed consent.\footnote{Id.; cf. \textit{Washington v. Silber}, (W.D. Va. 1992) (holding that an involuntarily committed patient could be forced to take antipsychotic drugs against his will, in light of the fact that the patient was substantially unable to care for himself and there were no less restrictive alternative to involuntary confinement).}

In \textit{Addington v. Texas},\footnote{441 U.S. 418, 419, 432-433 (1979)} the Court held that, for purposes of involuntary confinement, the State must demonstrate by \textit{clear and convincing} evidence that an individual has a mental illness that renders him a danger to himself or others.\footnote{Id.} In \textit{Kansas v. Hendricks}\footnote{521 U.S. 346 358 (1997).} the Court held that “[a] finding of dangerousness alone is ordinarily not a sufficient ground upon which to justify \textit{indefinite} involuntary commitment.”\footnote{Id. at 358 (emphasis added).} Critically,
however, the Court in *Hendricks* did hold that “[w]e have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’” In other words, the *Hendricks* Court never required the States to incorporate mental illness within their involuntary commitment statutes. It only required the existence of some “additional factor,” which is precisely the focus of the proposed statute. Importantly, *Hendricks*, along with *Kansas v. Crane* are notable because they upheld a statute in Kansas which authorized the involuntary commitment of sexual offenders after completion of their sentence, provided that such individuals were found to be suffering from: (1) a mental abnormality or defect; and (2) lacked volitional control.

2. **The State Court Level**

Decisions at the state court level have also impacted the nature and scope governing involuntary confinement. For example, in *In re Commitment of Dennis H.*, 52

49 Id (emphasis added); see also Jennifer Honig, Susan Stefan, “New Law, Policy, and Medicine of Involuntary Treatment: A Comprehensive Case Problem Approach to Criminal and Civil Aspect Outpatient Commitment Debate,” 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139, 139 (2005) (re-iterating that proof of dangerousness must be accompanied by an additional factor, thus implying that mental illness is not a required component of involuntary commitment); but see *Foucha v. Louisiana*, 504 U.S. 71 (1992) (in a 5-4 ruling, the Court held that an insanity acquittee, whose mental illness had been successfully treated, cannot be subject to continued confinement solely on the basis that he is a danger to the community.)

50 521 U.S. 346 (1997) (The Court’s ruling was also dependent upon its determination that the statute was non-punitive in nature); see also David Cole, “Out of the Shadows: Preventative Detention, Suspected Terrorists, and War,” 97 CAL. L. REV. 693, 710-711 (2009) (discussing general principles governing in-patient confinement).

51 Id. at 356-357; see also *In re Commitment of W.Z.*, 173 N.J. 109 (2002) (upholding a virtually identical statute in New Jersey).

52 647 N.W.2d 851, 862, (2002). In so holding, the Court stated as follows:

It is well-established that the state ‘cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.’ This does not mean, however, that substantive due process requires the state to restrict the scope of its mental health.
the Wisconsin Supreme Court rejected the claim that, for purposes of involuntary commitment, an individual must present an *imminent* threat of physical harm. Instead, the Court held that “substantive due process has not been held to require proof of imminent physical dangerousness to self or others as a necessary prerequisite to civil confinement.”\(^{53}\) In so holding, the Court found constitutional a section of Wisconsin’s involuntary commitment statute that required only a “substantial probability” that an individual may engage in acts of violence due to loss of volitional control.\(^{54}\) Similarly, in *In re Albright*,\(^ {55}\) the Kansas Court of Appeals held that a finding of “imminency was not required to justify involuntary confinement, holding that such commitment “merely ‘requires a showing that the potential for doing harm is great enough to justify such a massive curtailment of liberty.’”\(^ {56}\) In accepting this lower threshold determination for violence, the Court referred to other decisional law, where the imminency standard was replaced by “a serious threat to himself or others,”\(^ {57}\) a “likelihood of inflicting serious

\(^{53}\) *Id* at 862.

\(^{54}\) *Id* at 859.


\(^{56}\) *Id.* at 4 (quoting *In re Harris*, 654 P.2d 109 (1982)) (emphasis added).

\(^{57}\) *Id.* at 4 (quoting *Stamus v. Leonhardt*, 414 F.Supp. 439, 451 (S.D. Iowa 1976));
harm on himself or on others,”\textsuperscript{58} or “a serious threat of \textit{substantial harm} to himself or others.”\textsuperscript{59}

In further eviscerating the “dangerousness,” component of involuntary commitment, the Courts in several states have held that an individual need not engage in an overt act of violence. For example, in \textit{Covell v. Smith},\textsuperscript{60} the District Court for the Eastern District of Pennsylvania held that “[a] finding of “dangerousness” \textit{does not require an overt act by the individual}.\textsuperscript{61} Likewise, in \textit{Burriel v. Spurgeon},\textsuperscript{62} in rejecting Petitioner’s habeas claim, the Court held that “there is no clearly established Supreme Court law requiring proof of a ‘recent overt act’ to support a civil commitment … [a]ccordingly, Petitioner is not entitled to habeas relief.”\textsuperscript{63} Furthermore, in \textit{In re A.S.B.}, the Montana Supreme Court issued a monumental decision, holding that involuntary commitment was justified where the plaintiff’s mental illness, if untreated, may deteriorate to such a point where he became a threat to public safety.\textsuperscript{64} Thus, based upon relevant decisional law, if there is an individual suffering from a mental illness that poses

\begin{itemize}
\item \textsuperscript{58} \textit{Lynch v. Baxley}, 386 F.Supp. 378, 391 (M.D. Ala. 1974).
\item \textsuperscript{59} \textit{Doremus v. Farrell}, 407 F.Supp. 509, 515 (D. Neb. 1975); \textit{but see Suzuki v. Yuen}, 617 F.2d 173 (9th Cir. 1980) (“the proper standard [for involuntary commitment] is that which requires a finding of imminent and substantial danger as evidenced by a recent overt act, attempt or threat.”)
\item \textsuperscript{60} No. 95-501, 1996 WL 750033 (E.D. Pa. December 30, 1996).
\item \textsuperscript{61} \textit{Id.} at *4 (emphasis added).
\item \textsuperscript{62} No. ED CV O7-1131-(AG(E) (C.D. Cal. March 5, 2008).
\item \textsuperscript{63} \textit{Id.} at *8 (also noting that the Supreme Court has ‘not specifically defined the dangerousness element of the … substantive due process standard.’) \textit{Id.} (citation omitted).
\item \textsuperscript{64} 180 P.3d 625, 630 (Mont. 2008).
\end{itemize}
a “potential” for violence -- yet has not exhibited any actions manifesting violent behavior -- then he or she could still be subject to civil confinement.65

PART III
THE LEGISLATIVE STANDARDS GOVERNING INVOLUNTARY COMMITMENT AND THEIR FAILURE TO IDENTIFY THE MOST DANGEROUS INDIVIDUALS

In light of relevant decisional law, each of the fifty states has drafted its own statutes governing involuntary commitment. The problem is that nearly every state statute includes factors that: (1) are not constitutionally required by relevant Supreme Court jurisprudence; and (2) fail to identify the most dangerous individuals because of the “mental illness” requirement. In other words, while the states have correctly included the “dangerousness” element in their statutes, they have incorrectly required the presence of a mental illness, which is, based upon empirical data, not in and of itself a causal factor in violence.

Put differently, these statutes assume that dangerous individuals must suffer from a mental disorder, and that is simply incorrect. To make matters worse, the relevant statutes do not require, as discussed in Part IV, the showing of the most relevant early and imminent warning signs of violence that should accompany the “dangerousness” calculus. As a result, a dangerous but not-mentally ill individual can, in nearly every state, engage in acts of horrific violence because he or she is not eligible for involuntary commitment. In other words, we must wait until the crime happens, rather than prevent it through early intervention. A sample of current statutes is demonstrative of this approach.

65 See e.g., In re Harris, 654 P.2d 109 (Wash. 1982); Hatcher v. Wachtel, 269 S.E.2d 849 (W.Va. 1980); Stamus v. Leonhardt, 414 F.Supp. 439 (D.C. Iowa 1976); Doremus, 407 F.Supp. at 515; but see Reome v. Levine, 692 F.Supp. 1046 (D.C. Minn. 1988) (holding that confinement of an individual based upon dangerousness alone was insufficient where the patient was not mentally ill.)
A. RELEVANT STATE STATUTES GOVERNING INVOLUNTARY CONFINEMENT – THE WRONG EMPHASIS ON MENTAL ILLNESS

This section will begin by: (1) surveying several statutes that are representative of and consistent with those in all states, in that they require a showing of mental illness for purposes of in-patient treatment; and (2) proceed to demonstrate that mental illness, in and of itself, is not a causal factor in violent behavior.

1. ALABAMA

AL. CODE §22-52-10.4 provides in relevant part as follows:

(a) A respondent may be committed to in-patient treatment if the probate court finds, upon clear and convincing evidence, that:

(i) the respondent is mentally ill;
(ii) as a result of the mental illness the respondent poses a real and present threat of substantial harm to self and/or others;
(iii) the respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently; and
(iv) the respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable.

2. ARKANSAS

ARK. CODE ANN. §20-47-207(c) provides in relevant part as follows:

“A person shall be eligible for involuntary admission if he or she is in such mental condition as a result of mental illness, disease or disorder that he or she poses a clear and present danger to himself or herself or others.”

3. CONNECTICUT

CONN. GEN. STAT. ANN. §17(a)-498(c) provides as follows:

“If, on such hearing, the court finds by clear and convincing evidence that the person complained of has psychiatric disabilities and is dangerous to himself or herself or
others or is gravely disabled, it shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status pursuant to section 17a under due course of law.”

4. **FLORIDA**

**FLA. STAT. ANN. §394.467(1)** provides in relevant part as follows:

“A person may be placed in involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that:

(a) He or she is mentally ill and because of his or her mental illness:

1. (a) he or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose and placement for treatment; or

   (b) he or she is unable to determine for himself or herself whether placement is necessary; and

2. (a) He or she is manifestly incapable of surviving alone or with the help of willing and responsible family or friends … and, without treatment, is likely to suffer from neglect of refusal to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; or

   (b) There is a substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm.

5. **ILLINOIS**

Finally, **ILL. COMP. STAT. 5/1-119** provides as follows:

“Persons subject to involuntary admission” means:

(1) A person with mental illness and who because of his or her illness is reasonably expected to engage in dangerous conduct which may include
threatening behavior or conduct that places another individual in reasonable expectation of being harmed;

(2) A person with mental illness and who because of his or her illness is unable to provide for his basic physical needs so as to guard himself or herself from serious harm without the assistance of family or outside help; or

(3) A person with mental illness who, because of the nature of his or her illness, is unable to understand his or her need for treatment and who, if not treated, is reasonably expected to suffer or continue to suffer mental deterioration or emotional deterioration, or both, to the point that the person is reasonably expected to engage in violent behavior.

Each of the above statutes is consistent with and representative of enactments across the country, which nearly all require the existence of a mental illness as a prerequisite to involuntary confinement. As one commentator noted, “courts tend to regard the severity and type of symptoms of an individual’s mental illness, including self-destructive

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66 See e.g., ALASKA STAT. §47.30.755(A); ARIZONA REV. STAT. §36-540(A); CALIFORNIA WELF. & INST. CODE §5250; COLORADO REV. STAT. §27-10-102(5); DELAWARE CODE ANN. tit. 16 §5010; DISTRICT OF COLUMBIA CODE ANN. §21-545(8); GEORGIA CODE ANN. §37-3-1(9.1); HAW. REV. STAT. §334-60.2; IDAHO §66-329(11); INDIANA CODE ANN. §12-26-7-5(A); IOWA CODE §229.1(16); KANSAS STAT. ANN. §59-2946(f); KENTUCKY REV. STAT. ANN. §202A.026; LOUISIANA REV. STAT. ANN. §28:55(E)(1); MAINE REV. STAT. ANN. tit. 34-B, §3864(6)(A); MARYLAND CODE ANN., HEALTH-GEN. §10-632(E)(2); MASSACHUSETTS GEN. LAWS ANN. ch. 123 §(8)(a); MICHIGAN COMP. LAWS ANN. §330.1401; MINNESOTA STAT. ANN. §253B.09(1); MISSISSIPPI CODE ANN. §41-21-73(4); MISSOURI ANN. STAT. 632.350(5); MONTANA CODE ANN. §53-21-126(1); NEBRASKA REV. STAT. ANN. §71-925(1); NEVADA REV. STAT. §433A.310(1); NEW HAMPSHIRE REV. STAT. ANN. §135-C:34; NEW JERSEY STAT. ANN. §30:4-27.2(M); NEW MEXICO STAT. ANN. §43-1-11(C); NEW YORK MENTAL HYG. LAW §905(B), 937(A); NORTH CAROLINA GEN. STAT. §122C-268(j); NORTH DAKOTA CENT. CODE §25-03.1-07; OHIO REV. CODE ANN. §5122.15(C); OKLAHOMA STAT. ANN. tit. §43A-1-103(13)(A); OREGON REV. STAT. §426.005(1)(D); PENNSYLVANIA CONS. STAT. ANN. §7301; RHODE ISLAND GEN. LAWS §40.1-5-8(j); SOUTH CAROLINA CODE ANN. §44-17-580; SOUTH DAKOTA CODIFIED LAWS §27A-1-2; TENNESSEE CODE ANN. 33-6-501; TEXAS HEALTH & SAFETY CODE ANN. §574.034; UTAH CODE ANN. §62A-15-631(10); VERMONT STAT. ANN. tit. 18, §7101(17); VIRGINIA CODE ANN. §37.2-817.C; WASHINGTON REV. CODE ANN. §71.05.240; WEST VIRGINIA CODE §27-5-4(j); WISCONSIN STAT. ANN. §§51.20(1)(a)(1), 51.20(a)(2); WYOMING STAT. ANN. §25-10-110(j); also available at www.treatmentadvocacycenter.org.

67 See Elizabeth A. McGuan, “New Standards for the Involuntary Confinement of the Mentally Ill: “Danger Redefined,” 11 MARQ. ELDER’S ADVISOR 181, 200-206 (discussing the definition of “dangerousness,” and how it has been defined differently among the States, from the threat of “imminent harm,” or “substantial likelihood” of engaging in violent behavior).
behavior, as indicative of whether involuntary commitment is warranted.”

68 However, as stated supra, mental illness alone does not bear a significant causal relationship to dangerous behavior. Thus, those individuals who are extremely – and imminently – dangerous (but not mentally ill) are not subject to confinement, and thus remain a grave threat to the community.

B. MENTAL ILLNESS AND VIOLENCE – THE LACK OF A SIGNIFICANT CAUSAL LINK

The fatal infirmity in most States’ statutory schemes is that they require a showing of mental illness before an individual is eligible for involuntary confinement. This requirement undermines the very purpose of involuntary commitment statutes, because it allows dangerous but non-mentally ill individuals to remain free of early detection and intervention efforts. This is exacerbated by the lack of a causal relationship between mental illness and violent behavior.

As one commentator has explained, “[m]ost violence is not committed by persons with mental illness; studies suggest that [for example] individuals with schizophrenia account for only 5% of the violence that occurs society wide.”

69 Accordingly, “[a]ttempts that aim to prevent events like those that took place at Columbine and Virginia Tech by focusing on detection and intervention among persons with severe mental illness will not make society much safer.”

70 Indeed, in a study conducted by the Los Angeles County Bar Association, it was found that “[a]pproximately 90 percent of people with mental

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68 Pfeffer, supra note 31, at 295.


disorders are in no way dangerous or violent.”\textsuperscript{71} In fact, in “a report which followed patients one year after discharge from hospitalization, [mentally ill] patients who did not have \textit{co-occurring} substance abuse disorder were no more likely to have a violent incident than others living in the same neighborhoods.”\textsuperscript{72} Rather, “[t]he mentally ill may in fact be more likely to withdraw or harm themselves than to act aggressively toward others.”\textsuperscript{73} The report concluded that mental illness did not bear a causal relationship to violent behavior, unless it was accompanied by a diagnosis of substance abuse.\textsuperscript{74}

These findings were underscored by a study at the University at Oxford, which found that mental illness is only predictive of violence when there exists a co-occurring disorder such as drug or alcohol abuse. With respect to bi-polar disorder and schizophrenia, the report stated as follows:

\begin{quote}
[T]he overrepresentation of individuals with bi-polar disorder in violent crime statistics is almost entirely attributable to concurrent drug or alcohol abuse. This mirrors a recent study in schizophrenia by the same group which showed a minimal association with violent crime, unless there is also a drug or alcohol problem. In people without substance abuse problems, bi-polar disorder is not a problem for violent crime … This shows we need to focus our attention on how we can detect those individuals with bipolar disorder and schizophrenia with substance abuse problems, and prevent and treat those who are abusing substances.\textsuperscript{75}
\end{quote}

In other words, mental illness alone does not bear a causal relationship to the commission of violent acts. Stated simply, “patients discharged from psychiatric facilities who did not

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} (emphasis added).
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
abuse alcohol and illegal drugs had a rate of violence no different than that of their neighbors in the community."76 As one psychologist explains:

> It’s time that … we begin to knock down stereotypes and start breaking down the stigma associated with mental disorders. The first stereotype to go down – permanently, we hope – is that people who suffer from depression, anxiety, schizophrenia, an eating disorder, or any other type of mental disorder, are somehow more violent than others. This simply isn’t true, unless they are involved in substance abuse. Use and abuse of substances such as drugs or alcohol is often correlated with an increase in violence anyway … Violence is most often a criminal activity which has little correlation with a person’s mental health. Most people who suffer from a mental disorder are not violent – there is no need to fear them.77

Thus, “people with a mental illness … are no more likely than anyone else to harm strangers.”78

These findings are congruous with numerous empirical studies, including a comprehensive study entitled “Mental Illness and Violence: Proof or Stereotype,” which again confirmed that mental illness does not bear a causal relationship to violent conduct.79 In this study, researchers found that “there is no consistent evidence to support the hypothesis that mental illness … that is uncomplicated by substance abuse[,] is a significant risk factor for violence or criminality, once past history of violence is controlled.”80

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77 Id.


80 Id.
would be at risk of violence from someone with a non-substance abuse disorder.”

Additionally, “[p]ersons with mental illnesses are no more likely to be charged with a violent crime than those who do not have a mental illness.” Consequently, based upon the data considered in the study, the researchers concluded that “there is no compelling evidence that mental illness causes violence.”

Rather, individuals suffering from mental disorders are more likely to be the victims, rather than perpetrators, of violent crime. For example, existing research “shows that people with major mental illnesses are 2.5 times more likely to be the victims of violence rather than other members of society.” Another study found that “persons with severe mental illness are victims of violent crime in the course of a year … at a rate 11 times higher than that of the general population.” Specifically, people with mental illnesses “were eight times more likely to be robbed, 15 times more likely to be assaulted, and 23 times more likely to be raped than was the general population.” As one commentator explains, “[t]he direction of causality is the reverse of common belief: persons who are seriously mentally ill are far more likely to be the victims of violence.

81 Id.
82 Id.
84 Canadian Mental Health Association, supra note 77.
86 Id.
than its initiators.”\textsuperscript{87} The reasons supporting this conclusion are attributable, in part, to “minimal family or community support, low socioeconomic status, social stress, social isolation, poor self-esteem and personality problems.”\textsuperscript{88}

Ultimately, therefore, the extant statutes governing involuntary confinement make it more, rather than less, difficult to identify those individuals that are most likely to engage in violent conduct. Indeed, individuals who pose the greatest risk for violence are not mentally ill; instead, they are, among other things, substance abusers. Thus, by requiring a showing that a person suffers from a cognizable mental illness as a prerequisite to involuntary confinement, we are not only narrowing the class of individuals subject to confinement, but we are also incorrectly identifying those most at risk for engaging in acts of violence. This is particularly troubling because involuntary commitment statutes are not only designed to treat people with mental illnesses, but they are intended to protect the community from those most at risk for engaging in violent behavior. The current statutes do just the opposite – they exclude from confinement the vast majority of individuals who, based upon a number of factors not remotely related to mental illness, are likely to engage in violent criminal conduct.

Furthermore, the Supreme Court never required that a person must be mentally ill before involuntary commitment is warranted. Instead, in \textit{Kansas v. Crane} the Court said that a finding of dangerousness must be accompanied by an “additional” factor or factors,\textsuperscript{89} and those “additional” factors, this Article submits, should have been variables most likely to predict, based upon actuarial assessments and other data, whether a

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} Canadian Mental Health Association, \textit{supra} note 77.

\textsuperscript{89} \textit{Crane}, 521 U.S. 358.
particularly individual is highly likely to engage in criminal conduct. In other words, the involuntary commitment statutes have it backwards – they over-emphasize mental illness and under-emphasize dangerousness. It should be the reverse, and that is precisely what the proposed statute in this Article endeavors to accomplish. Stated simply, involuntary commitment statutes should be revised to focus upon the “dangerousness” component, and enunciate multi-factorial elements related to the dangerousness component that must be satisfied, i.e., an overt act of violence, in order to warrant confinement. Of course, under such a revised statute, individuals who suffer from mental illnesses will still be subject to confinement if they are dangerous, but the requisite causal relationship between mental illness and violence will not be required. In essence, the statute will broaden the scope of those subject to confinement, thus promoting greater treatment and public safety.

PART IV

THE REVISED STATUTE GOVERNING INVOLUNTARY COMMITMENT – FOCUSING ON IMMEDIATE AND FORESEEABLE DANGEROUSNESS

The proposed statute infra strives to reverse, for purposes of involuntary commitment, the emphasis from those who are mentally ill to those who pose an immediate, significant and foreseeable threat to the community. In this way, the proposed statute is broadening the class of individuals who may be subject to involuntary confinement, by now including dangerous, but non-mentally ill individuals.

Importantly, however, the statute is not punitive. Instead, it is designed, should involuntary confinement be deemed necessary, to provide effective treatment for an individual (rehabilitation), while also seeking to promote greater public safety (utilitarianism). In so doing, both the substantive and procedural due process rights of the
patient will be strictly protected, and the confinement will be conducted in safe manner that seeks to ensure effective treatment in the shortest possible timeframe.

A. **THE STATUTE: THE EARLY INTERVENTION AND PREVENTION ACT: PROCEDURES GOVERNING THE CONFINEMENT OF INDIVIDUALS LIKELY TO ENGAGE IN IMMEDIATE AND/OR FORESEEABLE ACTS OF VIOLENCE DANGEROUS INDIVIDUALS ("EIPA")**

**STATEMENT OF PURPOSE**

The purpose of this statute is to identify those individuals who pose a grave threat to engage in violent conduct towards themselves or others in the immediate or foreseeable future. Importantly, this statute does not require a finding of “mental illness” as a prerequisite to involuntary confinement, because empirical data has demonstrated that mental illness, in and of itself, is not a substantial causal factor in violent behavior.

This statute is neither punitive nor retributive in nature, but seeks to provide effective treatment for those individuals whose circumstances and prior experiences render them likely to engage in violent acts in the immediate and foreseeable future. More specifically, the statutory language, and procedures adopted therewith are intended to comply with an individual’s liberty interests, and procedural and substantive due process safeguards. For example, as set forth in more detail below, any individual committed under this statute shall have the right to a safe environment in which an individualized treatment plan is adopted to address the individual’s particular needs and characteristics. Such treatment shall be conducted in a manner that is designed to ensure not only a successful outcome, but in the shortest time possible and through the least restrictive means available.
Additionally, as set forth below, the Court within the respective jurisdiction where involuntary confinement is conducted shall serve to oversee and ensure that the administration and implementation of any treatment is conducted in a manner that relates to the specific purposes justifying the initial confinement. The Court shall have other oversight duties, including, but not necessarily limited to, determining why continued confinement and treatment is necessary, whether treatment is being properly administered consistent with the States’ initial treatment framework, setting forth particular intervals within which the State must report to the Court regarding the efficacy of the treatment, and ultimately placing a time-limit upon which the individual may be confined, regardless of whether treatment is successful. The burden shall be on the State to justify initial and continued confinement, and the defendant will have, at all times, the ability to contest this justification and seek immediate release.

The EIPA has the primary purpose of increasing public safety by treating those individuals who represent the greatest threat of engaging in violent behavior. This statute also assumes that individuals who are prone to immediate and foreseeable violence can successfully be treated in a manner that substantially reduces, if not eliminates, this proclivity, and thus improves the individual’s quality of life and reduces crime in the particular community where such individual reside.

B. DEFINITIONS

As set forth in the statutory language, the following definitions shall apply:

“Immediate threat of harm:” This term refers to the level of danger posed by the particular individual for whom the State seeks confinement. “Immediate” does not necessarily mean “imminent,” in that the harm sought to be prevented is predicted to
occur in a matter of hours or specified period of time. This would be impractical and unworkable because it is simply unpredictable. The term “immediate” shall instead be construed to mean that the threat is reasonably likely to occur in the near, rather than distant future, to such an extent that those individuals, such as family, friends, co-workers and others associated with the individual, believe that there is a high likelihood that the individual will, in a matter of days, even weeks, engage in an act of violence against either himself or herself or to others. There is no specific formula or criteria to determine whether the likelihood for violence is “immediate,” although it does require that its potential be real, substantial, and likely to occur within a short time period.

“Foreseeable” threat of harm: This term shall be construed to mean that, based upon an individual’s recent behavior, overt acts, and interactions with others, it is reasonably likely that an act of violence will be a reasonably likely consequence of or bear a causal relationship to that individual’s recent behavior, overt acts, and interactions with others. The term “foreseeable” does not – and should not – be construed as a qualification on the term “immediate.” Rather, it must be reasonably foreseeable, in the immediate future, that the individual’s potential for violence is likely to result from his or her preceding actions.

“Overt Act of Violence”: This term shall be construed to mean that an individual has engaged in an act of violence to himself or herself, towards others, or to property. The overt act shall not be limited to acts of physical violence, but shall include verbal threats, acts of intimidation, and other behaviors that are intended to or result in placing others in fear of bodily harm.
“Direct or Substantial Cause of Violent Behavior:” This term shall be construed to mean that an individual is engaged in behaviors that are predictive of or indicate that such individual is reasonably likely to engage in an act or acts of violence in the immediate or foreseeable future. The determination of whether an individual is engaged in behaviors causally related to violent behavior depends upon the administration of actuarial assessments, such as the Historical Clinical Risk-20 (HCR-20), Hare Psychopathy Checklist Revised (PCL-R), Level of Service Inventory, and Violence Risk Appraisal Guide (VRAG), which contain numerous factors, based upon prior research, that accurately predict whether a person is reasonably likely to engage in violent behavior. These tools shall be used in determining whether an individual poses an immediate and/or foreseeable threat of harm to himself or herself or to others.

“Early and Imminent Signs of Violent Behavior:” This term refers to behaviors identified through empirical studies indicating whether an individual is reasonably likely to engage in violent conduct. “Early” warning signs are often used as a method by which to justify an initial intervention, but for purposes of this statute, they shall not be sufficient to form the basis for involuntary confinement. Rather, there must also be both: (1) direct and/or substantial causes of violent behavior, and (2) behaviors/overt acts that

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91 [MORE EXPLANATION ABOUT THESE TESTS ONCE I GET THE ORDER FROM THE LIBRARY]

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suggest the commission of violence in the immediate future. With respect to the “early and immediate signs of violent behavior,” the following non-exhaustive list of factors shall be considered:

“Early Warning Signs”
- Social Withdrawal
- Excessive feelings of isolation and being alone
- Excessive feelings of rejection
- Being a victim of violence
- Feelings of being persecuted
- Uncontrolled anger
- Patterns of impulsive behavior
- Drug and alcohol use
- Access to or possession of firearms
- Threats of violence
- Physical fighting with peers or family members
- Destruction of Property
- Self-injurious behavior, including suicidal ideation
- Anti-social behavior
- Head Trauma
- Prior Criminal Record

“Immediate Warning Signs”
- Severe rage episodes
- Repeated acts of aggression
- Detailed threats of lethal violence
- Possession of a detailed plan outlining when and where violence is planned to occur

C. The Statutory Language

1. The EIPA §1.1 – Initial Confinement and Examination

Whoever, whether communicated to by family, friends or those associated with a particular individual, presents an immediate and/or foreseeable threat of harm to himself

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92 These factors are among many included in the United States’ Department of Education’s Report entitled, “Early Warning, Timely Response: A Guide to Safe Schools,” available at [http://www2.ed.gov/about/offices/list/osers/osep/gtss.html]; Several of these factors are also included in a Report by the Association of Threat Assessment Professionals, entitled “Risk Assessment Guideline Elements for Violence: Considerations for Assessing the Risk of Future Violent Behavior,” available at [cite]
or herself or others, and has engaged in at least one overt act of violence within the past thirty (30) days, and who presents at least two factors known to be a direct or substantial cause of violent behavior, and other factors known to be early and immediate signs of violent behavior, shall be confined, upon judicial determination, for a period of at least forty-eight (48) hours but not more than seventy-two (72) hours. During this initial confinement period, such individual shall be examined by the appropriate professionals, and using actuarial instruments, such as the HCR-20, PCL-R Revised, and Level of Service Inventory, such professional shall issue a recommendation stating whether involuntary confinement beyond the above prescribed period is necessary. Subsequent to this recommendation, the individual shall be entitled to release, until such time as a hearing is held before a Court of Law, in which the State must demonstrate, by clear and convincing evidence, that continued confinement is warranted. Such hearing shall be held no later than 72 hours after the initial recommendation by the relevant professional examiners.

2. **THE EIPA §1.2 – THE HEARING TO DETERMINE WHETHER CONTINUED CONFINEMENT IS WARRANTED**

At such hearing concerning whether an individual should be subject to confinement beyond the period prescribed in §1.1, the State must come forth with specific evidence demonstrating, by clear and convincing evidence, that the individual possesses an immediate and/or foreseeable threat to harm himself or herself or others. The State’s evidence shall include, but will not necessarily be limited to, expert testimony explaining why, on the basis of prior actuarial assessments (i.e., the HCR-20), continued confinement is warranted. More specifically, the State shall set forth, based upon actuarial instruments, the
particular factors which render the individual an immediate and/or foreseeable threat to himself or herself or others. The State shall then have the additional burden of articulating a specific and individualized treatment plan i.e., behavioral therapy and/or a medication regime, that is related to the purposes justifying the individual’s continued confinement. The State shall also specify the time period within which such treatment plan is likely to be successful, and endeavor to select the shortest time period possible.

The individual for whom confinement is sought has the right to an attorney (paid for by the State if the individual is indigent) and any witnesses to testify on his behalf that such individual does not represent an immediate and/or foreseeable danger to himself or herself or others, and/or that such individual has sufficient support among family, friends and others that shall deem confinement unnecessary. The individual shall also have the right to present, at the State’s expense, any experts who will testify that the individual is not and does not present an immediate and foreseeable danger to the community, and such individual shall also have access to all actuarial and clinical instruments to support such contention.

3. **THE EIPA §1.3: THE TYPE OF CONFINEMENT WARRANTED BY THE INDIVIDUAL’S THREAT LEVEL**

After hearing all of the evidence proffered by both parties, the Court shall have the discretion to enter an Order either: (1) determining that continued confinement

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is not necessary because the individual does not satisfy the statutory factors delineated above governing involuntary confinement; (2) stating that continued confinement is necessary because the individual represents, by clear and convincing evidence, a threat to himself or herself or others, has engaged in at least one overt act of violence in the last thirty (30) days, and is likely to commit a further act of violence in the immediate and/or foreseeable future; or (3) that the individual has sufficient support among family, friends and others such that an immediate and/or foreseeable act of violence is not likely to occur. Based upon the Court’s determination regarding the level of risk presented by the individual, the following treatment options shall be available:

a. **EIPA §1.3(a) – Voluntary Commitment**

At any time prior to or during the hearing, the individual may knowingly, willingly and voluntarily consent to a period of confinement in which the individual is subject to intervention and treatment. Prior to such consent, however, the Court shall ensure that the individual’s consent is informed, and made knowingly, voluntarily and willingly. This consent is conditioned upon the State detailing to the individual the nature and purpose of confinement, the specific type of treatment he or she shall receive, and the estimated duration of confinement. Shall the State fail to delineate any of these components to the individual, then informed consent cannot be valid as a matter of law.
b. **EIPA §1.3(b) – Outpatient Commitment**

After the plenary hearing in which the Court considers all evidence and determines the level and nature of risk presented by the individual, it shall have, within its discretion, the authority to order the individual to undergo an out-patient commitment program. The reasons underlying such decision may include, but are not limited, to: (1) the individual having a sufficient support structure, i.e., family, friends and others associated with the individual, who can provide for the individual’s basic needs and ensure his safety as well as that of others; (2) the determination that the individual is not at risk to commit a violent act in the immediate and/or foreseeable future; (3) the individual presenting an alternative, out-patient program that the court deems sufficient to ensure successful treatment by the least restrictive means possible. However, should out-patient treat fail, the State shall have within its authority the power to petition before the Court that in-patient treatment is necessary to address and treat the individual’s violent proclivities.

c. **EIPA §1.3(c) – In-patient Commitment**

After a plenary hearing, if the Court determines that the individual poses an immediate and/or foreseeable threat to himself or herself or to others, it shall have the power to enter an Order authorizing the involuntary in-patient commitment of such individual. However, such decision will be contingent upon, and be the result of, a specific treatment plan designed by the State detailing the procedural and substantive aspects that are intended
to ensure a successful outcome within a particular time-period. Additional procedures governing in-patient commitment are delineated below.

4. **THE EIPA §1.4: THE TIME CONSTRAINTS AND PROCEDURES GOVERNING IN-PATIENT CONFINEMENT**

Should the State present clear and convincing evidence that the individual poses an immediate and/or foreseeable threat to himself or herself or to others, the State shall, as stated above, specify an initial time period (the first stage of confinement) within which it believes the particular treatment plan can be successfully implemented. In any case, however, the State may not seek to, or petition for, the first stage of confinement of any individual for a period exceeding thirty (30) days. The Court shall then review the State’s evidence and independently set forth the timeframe governing the first stage of confinement.

Thereafter, the State must re-appear before the Court every fifteen (15) days to demonstrate that: (1) the individual is receiving the treatment plan as outlined in its initial petition for confinement; and (2) the individual’s treatment is proceeding successfully. If, however, the State believes that an alternative treatment plan may be or is necessary, it must present to the court, by clear and convincing evidence, why such treatment is necessary. At this hearing, the State shall also inform the Court concerning whether the individual is likely to be discharged after the initial thirty-day period, or whether confinement after that period may be necessary. The procedures for extended confinement beyond the initial 30-day period are set forth below.

At anytime during his or her confinement, the individual shall have the opportunity to petition to the Court that: (1) confinement is no longer necessary because such individual
does not present an immediate and/or foreseeable risk to himself or herself or to others;

(2) the State is not providing the individual with the specific treatment plan that it proffered before the Court justifying the first thirty-day stage of confinement; (3) the defendant has been treated to such an extent that, with the support of family, friends and others, he or she is not an immediate and/or foreseeable harm to others; or (4) there are lesser restrictive means i.e., out-patient commitment, that will be reasonably likely to result in a successful treatment outcome.

5. **The EIPA §1.5: Extended Confinement Beyond the First 30-Day In-Patient Confinement Period**

   **a. The Extended Confinement**

Prior to the expiration of the initial thirty-day period, the State shall have the right to petition to the Court that confinement beyond the thirty day period is necessary. Importantly, however, the State may not base its justification upon the evidence used to support the initial thirty day confinement petition. The State must adduce, by clear and convincing evidence, that continued confinement is necessary because, *inter alia*: (1) the individual’s treatment plan requires more time to ensure a successful outcome; (2) the individual has not fully complied with the treatment plan, thus necessitating an extended period to ensure a successful outcome; or (3) the individual remains an immediate and/or foreseeable threat, based upon new evidence, which justifies continued confinement.

At this hearing, the individual shall have the right to State-appointed counsel as well as experts, who may testify that continued confinement is no longer
necessary because, among other things: (1) the treatment plan has been successful to a sufficient extent that the individual can live safely in the community and no longer represents an immediate and/or foreseeable harm to himself or herself or to others; (2) that the treatment plan is not – or will not – successfully assist the defendant, and that alternative methods will be both available and more effective.

6. **The EIPA §1.6: The Maximum Term of In-Patient Confinement**

In each case that concerns the involuntary confinement of an individual, the maximum term within which such individual may be confined shall not exceed ninety (90) days.

7. **The EIPA §1.7: Post-Release Procedures**

After the individual is released from confinement, the State shall have no authority to petition for that individual’s re-confinement unless original evidence emerges demonstrating that such individual: (1) presents an immediate and/or foreseeable threat of harm to himself or herself or to others; (2) has engaged in at least one overt act of violence within the past thirty (30) days; (3) presents at least two of the factors known to be a direct or substantial cause of violent behavior, along with other factors known to be early and immediate signs of violent behavior.

C. **Objections to this Proposal**

There are certainly likely to be several objections to this proposal, based upon both constitutional and workability grounds. These objections are both important and
necessary because they directly influence how the statute should be drafted, implemented and administered. The two primary objections to this proposal will be that: (1) we are confining individuals before they have committed any criminal act, which violates an individual’s liberty interest under the Constitution; and (2) there is no way to accurately predict whether an individual is likely to engage in violent behavior, thus rendering confinement unworkable, and *de facto* punitive.

1. **Involuntary Confinement of Individuals Reasonably Likely to Engage in Immediate and/or Foreseeable Acts of Violence is Tantamount to Confining an Individual before any Criminal Act has Been Committed.**

The first – and perhaps primary – objection to this proposal is that it seeks to confine innocent individuals based upon a belief that they will, at some point in the future, commit a criminal act. This type of confinement not only violates an individual’s liberty interests under the substantive due process clause of the fourteenth amendment, but also transgresses the very foundation upon which the deprivation of liberty is founded – that an individual must engage in a criminal act *before* confinement is warranted.

This argument has superficial appeal, but fails when considered in light of the current policies governing involuntary confinement. First, involuntary, in-patient confinement of the dangerous *and* mentally ill is already authorized in every state in the country. When confinement is ordered, such individuals have neither violated *any* criminal law, nor engaged in overt acts indicating that they will commit acts of violence in the imminent future. In fact, as set forth *supra*, courts at the state level have held that commitment of the mentally ill and dangerous is warranted even where such individuals have committed *no overt act* whatsoever indicating the propensity for violence. To make matters worse, many state statutes have dispensed with the requirement that the
individual pose a threat of “imminent” harm, and have instead authorized confinement, for example, where there exists a “substantial likelihood” that a violent act will occur in the near future.

Consequently, by requiring no overt act, and no imminent threat of harm, these statutes are placing emphasis on and seeking to confine those who have a mental illness. This is particularly troubling because, as stated supra, there is no direct causal relationship between mental illness and violent behavior. In other words, we are already confining people for reasons that have nothing to do with violations of any laws, at any time, or for any reason. If anything, the current involuntary commitment statutes seriously threaten to confine mentally ill individuals who present no harm whatsoever to themselves or others.

The proposed statute here, however, goes much further in protecting an individual’s substantive and procedural due process safeguards. The individual must, based upon numerous factors, including actuarial assessments, coupled with early and imminent warning signs that bear a causal relationship to violent behavior, present a danger to himself or herself or to others. Furthermore, the individual must have engaged in at least one overt act of violence within the past thirty (30) days. Thus, the finding of dangerousness is based more upon the facts of a particular case than it is upon predictions of or assumptions that an individual may engage in a violent act.

Moreover, the state has a substantial burden to justify the first and continued stages of confinement. The state must set forth a specific treatment plan that is likely to successfully rehabilitate the individual, and continued confinement past the initial thirty (30) day period is based solely upon the efficacy of the treatment and why such treatment
either needs to be continued or altered to ensure a successful outcome. Put differently, the statute is not punitive in nature. It is rehabilitative and utilitarian, because it strives to ensure proper treatment and thus promote increased public safety.

Finally, at any time, the individual can petition the Court for immediate release, or for a less restrictive means, i.e., an out-patient plan, of treatment. In any event, confinement can last no longer than ninety (90) days. Consequently, by focusing upon an individual’s behaviors (prior overt acts and warning signs directly linked to criminal behavior), this proposal creates a much more solid basis upon which to justify confinement. Furthermore, by excluding mental illness from this statute, it explicitly – and properly – recognizes that mentally ill individuals are not and do not pose a danger to themselves or others. The only instance in which a mentally ill individual should be confined is if the elements of this proposal are satisfied, and in any case, if they are, it will likely not be the result of a mental illness, but as described above, environmental and biological factors that warrant treatment.

B. There is No Method by Which to Accurately Predict Whether an Individual Is Reasonably Likely to Engage in Violent Behavior.

This argument is partially true but depends upon the tools that are used to assess the likelihood of future dangerousness. For example, clinical evidence, namely, the testimony of experts concerning whether an individual is likely to engage in future acts of violence, is notoriously unreliable. Expert testimony concerning future dangerousness is not very accurate. In 1983, in the context of long-term sentencing, the American Psychiatric Association stated as follows:

Psychiatrists should not be permitted to offer a prediction concerning long-term future dangerousness in a capital case, at least in those circumstances
where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area ... Medical knowledge has simply not advanced to the point where long-term predictions ... may be made with even reasonable accuracy ... [E]ven under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of three cases.94

As one commentator explains, “peer reviewed research … has more recently bolstered these conclusions.”95 Specifically, “[m]ental health professionals themselves are entirely skeptical of their own predictions, [and] academics appear to have unanimously accepted that such professionals are unreliable …”96 For example, a dangerousness prediction in the capital context has been described as “‘sobering, both in its inability to discriminate who will and will not engage in violent misconduct in prison and in the minority who fulfill the prediction.’”97 These studies reveal “low quality control for … dangerousness assertions and unreliability of the predictions in general.”98

Furthermore, “more recent and more methodologically sound studies indicate that mental health professionals are [only] moderately better than chance in predicting long-term dangerousness.”99 Moreover, “[e]ven with extensive interviewing … studies show


95 Id.

96 Id.


98 Shapiro, supra note 94, at 163.

that clinical predictions do not improve substantially.

As a result, the extant literature suggests that: (1) mental health practitioners’ future violence predictions are inaccurate; (2) they lack training in making future dangerousness predictions; and (3) based upon a number of factors, clinicians often overestimate rates of future violence.

Importantly, however, this proposal does not rely upon or even utilize clinical testimony. Instead, it incorporates several instruments, including the HCR-20, PCL-R, and Level of Service Inventory, which contain factors that are known to accurately predict whether an individual is likely to engage in violent behavior. Furthermore, this proposal requires that, prior to confinement, an individual actually engage in an overtly violent act, thus indicating a violence assessment that is specific to the individual. In other words, this proposal does not use the types of unreliable clinical testimony that lies at the heart of this counter-argument, and for that reason, this argument fails.

**CONCLUSION**

The massacre at Columbine could have, or at least may have, been prevented if Dylan Klebold and Eric Harris were subjected to state intervention and confinement based solely upon their likelihood of engaging in immediate and foreseeable acts of violence. These individuals created a website naming specific students that they wanted to murder. They possessed and accumulated firearms. They drafted stories of an extremely violent and horrific nature. These behaviors did not merely suggest that they were planning on committing one of the worst acts of school violence in our Nation’s history; they essentially broadcast their plans to everyone and anyone who paid attention. However, if

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100 Id. at 85.

101 Id. at 86.
anyone in Colorado sought to involuntarily commit either of these individuals, they would have had the unnecessary burden of demonstrating that Klebold and Harris were mentally ill.

However, mental illness is not causally related to violent behavior. It is likely that any attempts to confine them would have failed. Under the proposed statute delineated above, they would have never walked away from the courtroom. They would have been involuntarily confined in an in-patient setting. Similarly, Seung Hui Cho would have been identified as an immediate danger to the community. His confinement may have prevented the Virginia Tech tragedy. The same holds true for other individuals that engage in acts of violence, whether they are stalkers or those who engage in repeated acts of domestic violence. We should not have to wait for forty-five students to be killed in order to intervene. We can stop violence before it happens, and we should begin to do so – now.