

Armed and Dangerous at 80: The Second Amendment, the Elderly, and a Nation of Aging Firearm Owners

by
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I. Introduction: Two Tales of Woe

A. Nattie Kennebrew, Los Angeles, California

On the afternoon of January 28, 2009, handyman Gerardo Ramos went to eighty-two year old Nattie Kennebrew's second floor apartment in Los Angeles, California, to fix the kitchen garbage disposal.¹ Gerardo Ramos was forty-six years old, well-liked, and friendly.² He had visited Nattie Kennebrew's apartment two weeks prior for similar repairs.³ By all accounts, Mr. Kennebrew, a resident of the apartment complex for fifteen years, was a loner who preferred to keep to himself, a military veteran and retired locksmith, with no family locally and few acquaintances.⁴

Unbeknownst to Gerardo Ramos, Mr. Kennebrew suffered from the advanced stages of dementia and had become increasingly paranoid.⁵ Mr. Kennebrew was convinced that someone was stealing his veteran's administration benefits.⁶ On January

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¹ Andrew Blankstein, *Judge Says 86-Year-Old Murder Suspect Must Remain in Custody*, L.A. TIMES, Apr. 10, 2013.

² Richard Winton, *Gerardo Ramos, 46*, L.A. TIMES, Jan. 28, 2009.

³ *Id.*

⁴ Andrew Blankstein & Rong-Gong Lin II, *Judge Refuses to Free Murder Defendant, 86, From Mental Hospital*, L.A. TIMES, May 9, 2013.

⁵ County of Los Angeles v. Super. Ct., 222 Cal. App. 4th 434, 438 (2013).

⁶ Blankstein & Lin II, *supra* note 4.

28, 2009, that “someone” became Gerardo Ramos. Mr. Kennebrew, armed with a .357 Magnum, shot and killed Gerardo Ramos.⁷ Mr. Kennebrew then attempted to shoot building manager Vykto Arce, but failed.⁸ Sources say the gun simply misfired.⁹

Mr. Kennebrew was arrested and charged with one count of murder, one count of assault with a deadly weapon, and one count of attempted murder.¹⁰ He was eventually found incompetent to stand trial and committed to a California state hospital.¹¹ As of 2013, Mr. Kennebrew, then eighty-six, legally blind, and in overall poor health, remained in state custody awaiting the time he will be found competent to stand trial on the outstanding homicide charges.¹²

B. *Kenneth Alan Reed, Orlando, Florida*

In the early afternoon on July 14, 2013, units from the Orange County Sheriff’s Office responded to a shooting at a home in the Alafaya Palms’ neighborhood of suburban Orlando, Florida.¹³ Deputies met with the victim Ann Waters who stated she had been shot several times by seventy-six year old Kenneth Alan Reed.¹⁴ Ms. Waters indicated that she was Mr. Reed’s live-in caregiver and had been so for the past five years.¹⁵

According to Ms. Waters, around 3:30 p.m. on July 14, 2015, she was lying in bed when Mr. Reed shot at her two to three times.¹⁶ Ms. Waters indicated that Mr. Reed was angry with her because she did not drive him to the store earlier that day.¹⁷ When deputies arrived at the scene, Mr. Reed was found sitting in a car outside the residence with a rifle by his side.¹⁸ Ms. Wa-

⁷ *Id.*

⁸ *County of Los Angeles*, 222 Cal. App. 4th at 434.

⁹ Blankstein, *supra* note 1.

¹⁰ *Id.*

¹¹ *County of Los Angeles*, 222 Cal. App. 4th at 446.

¹² *Id.*

¹³ Mark Schlueb, *Investigators: Elderly Man Arrested After Shooting Caregiver*, ORLANDO SENTINEL, July 14, 2013.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

ters indicated that she did not want to press charges because Mr. Reed suffered from dementia.¹⁹

Nonetheless, Deputies arrested Mr. Reed and booked him into the Orange County Jail.²⁰ The State Attorney's Office initially filed charges against Mr. Reed for aggravated battery with a firearm.²¹ Later, upon learning that the bullet fired at Ms. Waters' head actually grazed her skull, the Assistant State Attorney upgraded the charge to attempted first degree murder with a firearm.²² Mr. Reed was found incompetent to stand trial.²³ On January 26, 2015, the Court conducted a reevaluation of the case and found that Mr. Reed, now seventy-eight, remained incompetent to stand trial and continued Mr. Reed on conditional release at a local halfway home.²⁴

At the time of the shootings, both Nattie Kennebrew and Kenneth Alan Reed had been diagnosed with some form of dementia.²⁵ Notably, both men lived at home and owned at least one firearm.²⁶ There was no indication that either man had recently purchased or attempted to purchase a firearm.²⁷ Instead,

¹⁹ *Id.*

²⁰ Information filed by Assistant State Attorney Kenneth D. Lewis, dated Aug. 15, 2013. Electronic Clerk of Court records for the Ninth Judicial Circuit Court of Orange County, Florida (accessed on Nov. 5, 2015).

²¹ *Id.*

²² Motion to Revoke Pretrial Release dated Sept. 30, 2013 and Amended Information filed by Assistant State Attorney Kenneth D. Lewis, dated Oct 3, 2013. Electronic Clerk of Court records for the Ninth Judicial Circuit Court of Orange County, Florida (accessed on Nov. 5, 2015).

²³ Order Adjudging Defendant Not Competent to Proceed and Placing Defendant on Conditional Release dated Jan. 16, 2014. Electronic Clerk of Court records for the Ninth Judicial Circuit Court of Orange County, Florida (accessed on Nov. 5, 2015).

²⁴ *Id.*

²⁵ *County of Los Angeles*, 222 Cal. App. 4th 434 and Motion to Revoke Pretrial Release dated Sept. 30, 2013 and Amended Information filed by Assistant State Attorney Kenneth D. Lewis, dated Oct 3, 2013. Electronic Clerk of Court records for the Ninth Judicial Circuit Court of Orange County, Florida, *supra* note 22. Court records in both cases confirm that both Nattie Kennebrew and Kenneth Alan Reed suffered from some form of dementia at the time of the shootings.

²⁶ Blakenstein & Lin II, *supra* note 4; Schlueb, *supra* note 13.

²⁷ *Id.* Court records and community newspapers regarding the shootings provide no indication that either individual recently purchased the firearm used in the shootings.

both men already possessed and had clear access to the firearms used in the shootings. Sadly, in both cases, both men remain on some form of court imposed placement while awaiting trial.

This article will review the current federal and state statutes and regulations as they relate to the elderly²⁸ diagnosed with dementia or age related cognitive disorders and the continued firearm ownership by these individuals. Specifically, in light of the aging of the U.S. population, this article will review the current lack of federal and state regulations that comprehensively address continued firearm possession by the elderly who are diagnosed with dementia or a cognitive disorder and will examine recent proposals to address the issue of aging in place safely with a firearm. Part II will examine the aging population of the United States focusing on the increase of age related cognitive disorders and firearm possession by the elderly, Part III will review the Second Amendment and current federal legislation and the limitations of these regulations and Part IV will evaluate recent proposals made in an attempt to prevent additional firearm tragedies among the elderly.

II. Aging Into Firearm Ownership: Age Related Cognitive Disorders and Firearm Possession by the Elderly

A. A Nation Aging

The population in the United States is aging.²⁹ The statistics tout the coming tide of retired Baby Boomers and the increasing needs and demands of this population, and highlight the changes that the country will need to make in light of the aging population.³⁰ That is, beginning in 2012 and continuing until 2050, the United States will experience what is consider unprecedented growth in its older population.³¹ By 2050, the population age sixty-five and older will be an estimated 83.7 million, almost

²⁸ This article will use the terms “elderly” and “older adult” interchangeably.

²⁹ ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 9-10 (Richard J. Bonnie & Robert B. Wallace, eds., 2003).

³⁰ *Id.*

³¹ *Life Expectancy Increases in United States*, <http://countryeconomy.com/demography/life-expectancy/usa> (last visited Nov. 14, 2015).

double the estimated population of 43.1 million such elders in 2012.³² This estimate reflects a continuing pattern. “Between 1950 and 2000 . . . the population age 65 and older increased by 188 percent, and the population age 85 and older increased by 635 percent.”³³ Part of this phenomena is the fact that people in general are living longer.³⁴ For instance, in 1913, the life expectancy for a male was 50.3 years, and for a female 55.5 years.³⁵ By 2013, the life expectancy had increased significantly for a male to 76.50 and for a female to 81.30.³⁶

The aging of the U.S. population unfortunately results in an increase of “age-related diseases and disabilities.”³⁷ Scientists predict that by the year 2025, 7.1 million individuals will suffer from Alzheimer’s disease alone.³⁸ In addition to the increase in age-related diseases and disabilities, the predicted aging of the population also raises issues regarding affordable health care, long term care, and the proper environment for “aging in place.”³⁹

“Aging in place” refers to the goal of the elderly to live in their own homes and communities for as long as possible.⁴⁰ The emphasis is on the location and ease for the elderly to receive care and remain active in the community.⁴¹ However, one unique issue rarely considered is that of the aging firearm owner and the need for effective strategies for when that firearm owner develops dementia or age related cognitive disorder. As in the cases of both Mr. Kennebrew and Mr. Reed, the mixture of dementia or any cognitive disorder with firearm ownership can have devastating consequences.

³² *Id.*

³³ Bonnie & Wallace, *supra* note 29, at 9-10 (internal citation omitted).

³⁴ *Life Expectancy Increases in United States*, *supra* note 31.

³⁵ *Life Expectancy in the USA, 1900-98*, <http://www.demog.berkeley.edu/~andrew/1918/figure2.html> (last visited Apr. 2, 2016).

³⁶ *Life Expectancy Increases in United States*, *supra* note 31. The statistics result in increases in life expectancy of approximately twenty-five years per sex.

³⁷ Bonnie & Wallace, *supra* note 29, at 10.

³⁸ Carolyn Y. Johnson, *Signals Mixed on Dementia, Research Finds*, SUN SENTINEL, Feb. 14, 2016.

³⁹ *Id.*

⁴⁰ Jon Pynoos, Christy Nishita, Caroline Cicero & Rachel Caraviello, *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 79 (2008).

⁴¹ *Id.*

B. *Aging in Place with a Loaded Firearm*

The current trend is to encourage older adults to “age in place.”⁴² Aging in place recognizes the “source of identity [that] is cultivated from living in one place for an extended period of time, and the . . . deep-seated ties with family members and close friends.”⁴³

Alarming, as “aging in place” becomes more popular, recent statistics illustrate that the aging population in the United States is more likely than ever to own a firearm.⁴⁴ According to a 2014 Pew Research Poll, the age group with the highest firearm ownership is actually tied between that of 50-64 years old and 65 years and older.⁴⁵ Therefore, as the nation ages, it is likely that the number of individuals who “age in place” will do so with at least one firearm in the home. This projection raises a latent but deadly concern of how as a nation will address the issue of keeping individuals safe when they are aging in place with a firearm and, for some of them, without the mental capacity to use it safely.

C. *Age Related Cognitive Disorders*

The aging process can result in significant cognitive decline.⁴⁶ One of the most common threats of physical and mental decline is that of dementia.⁴⁷ In fact, experts estimate that “dementia is present in approximately 5 to 10 percent of persons ages 65 and older and 30 to 39 percent of persons age 85 and older.”⁴⁸

The term “dementia” describes symptoms such as mental confusion, memory loss, personality changes, confusion, disorien-

⁴² Pynoos et al., *supra* note 40, at 79.

⁴³ *Id.*

⁴⁴ Rich Morin, *The Demographics and Politics of Gun-Ownning Households*, <http://www.preresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-ownership-households/> (last visited Dec. 1, 2015).

⁴⁵ *Id.*

⁴⁶ Edith Green, Brian H. Borstein & Hannah Dietrich, *Granny, (Don't) Get Your Gun: Competency Issues in Gun Ownership by Older Adults*, 25 BEHAV. SCI. & L. 405, 406 (2007).

⁴⁷ *Id.*

⁴⁸ *Id.* at 407.

tation, and/or intellectual impairment.⁴⁹ Alzheimer's disease is the most common form of dementia.⁵⁰ However, other lesser known disorders, such as Alcohol Abuse Associated Dementia and Lewy Body Dementia, can result in dementia as well.⁵¹ Even common physical health conditions frequently seen in the elderly, for example, high blood pressure, high cholesterol, diabetes, and heart problems, can result in dementia.⁵² Regardless of the actual clinical diagnosis, the statistics regarding dementia and cognitive impairment as they relate to aging are grim. Although dementia before the age of sixty is rare, the rate steadily climbs and by the age of seventy-five is about 10 percent, by the age of eighty is about 20 to 30 percent and by the age of ninety it is about 30 to 50 percent.⁵³ The initial symptoms of dementia appear gradually and include forgetfulness, difficulty in remembering, and impaired judgment.⁵⁴ In the advanced stages of dementia, a patient can suffer what is known as "uncharacteristic and increased aggressiveness" which can result in violent behavior.⁵⁵ Thus, a realistic concern as more Americans live longer is the likelihood that an older adult will develop an age related cognitive disorder or dementia.⁵⁶ This consideration coupled with the increase in firearm ownership among older adults demonstrates the need for a national discussion regarding effective restrictions on firearm ownership.

D. Seniors and Firearm Ownership

In 1997, the U.S. Department of Justice Office of Justice Programs National Institute of Justice conducted a national survey of private firearm ownership in the United States.⁵⁷ Accord-

⁴⁹ NANCY L. MACE & PETER V. RABINS, *THE 36-HOUR DAY: A FAMILY GUIDE TO CARING FOR PEOPLE WHO HAVE ALZHEIMER DISEASE, RELATED DEMENTIAS, AND MEMORY LOSS* 9 (2012).

⁵⁰ Green, Borstein & Dietrich, *supra* note 46, at 411.

⁵¹ MACE & RABINS, *supra* note 49, at 525.

⁵² Green, Borstein & Dietrich, *supra* note 46, at 411.

⁵³ MACE & RABINS, *supra* note 49.

⁵⁴ *Id.* at 12.

⁵⁵ Green, Borstein & Dietrich, *supra* note 46, at 411.

⁵⁶ *Id.*

⁵⁷ Phillip J. Cook & Jens Ludwig, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Research in Brief 4 (May 1997). The National Institute of Justice sponsored the Survey of Private Ownership of

ing to the findings, roughly 44 million Americans owned 192 million firearms.⁵⁸ Firearm ownership was the highest among the 40-64 age group at 32% followed closely by the 65 and older age group which reported at 27%.⁵⁹ The statistics reflect a continuing reversal in the “longstanding patterns” in the United States in that “residents age 65 and up are now the most likely of all citizens to own a gun.”⁶⁰ The stated motivations for the purchase of a firearm among older adults range from fear of violence and crime prevention to personal protection as well as a personal right.⁶¹ Regardless of the motivation of the purchaser, firearm ownership among the elderly presents a unique and potentially deadly issue. Clearly, an armed aging population coupled with increased rates of dementia raises the issue of what safeguards may be necessary to protect these individuals and society from unintended consequences of firearm ownership.⁶² Any discus-

Firearms, which was conducted by the Chilton Research Services during November and December of 1994. The objectives of the survey were to provide national estimates for “(1) Adult ownership of guns, by gun type; (2) Sources and motivations for gun acquisition; (3) Firearm safety and storage; (4) Defensive use of firearms; and (5) Attitudes toward gun control.” *Id.* at 4.

⁵⁸ *Id.* at 1.

⁵⁹ *Id.*

⁶⁰ Tim Vanderpool, *Why More Senior Citizens Are Carrying Guns*, CHRISTIAN SCI. MONITOR, Jan. 6, 2004.

⁶¹ *Id.* In a clear response to the uptick in personal firearm ownership in the 65-plus age group, firearm manufacturers have capitalized on the behavior by developing a firearm specifically designed by the senior population. In 2008, the New Jersey based firearm manufacturing company “Constitution Arms” began production of a firearm called the “Palm Pistol.” The “Palm Pistol” is an “ergonomically innovative single shot self-defense firearm chambered in a .39 special” as a firearm “that may be held in either hand without regard to orientation of the stock.” Essentially the “Palm Pistol” was developed so that it could “be fired via a squeeze ball in lieu of a trigger.” The manufacturer deemed it to be an “adaptive aid for seniors. . .with grip limitations due to hand strength, manual dexterity or phalangeal amputations.” Constitution Arms, *Palm Pistol*, <http://constitutionarms.com/palm-pistol/> (last visited Apr. 2, 2016).

⁶² In 2012, the U.S. Department of Veterans Affairs, Office of the Medical Inspector & Geriatrics and Extended Care Strategic Healthcare Group, formally recognized the increase in firearm ownership among Veterans with dementia and thereby issued a publication entitled *Firearms & Dementia*, http://www.va.gov/vapublications/ViewPublication.asp?pub_ID=2731 (last visited Nov. 14, 2015). The publication provided “simple steps that can save someone you love” including the recommendation to (1) remove the firearm from the home altogether, (2) store the firearm in an offsite location, (3) sell the firearm,

sion as to the curtailment of firearm possession must be carefully considered in light of the Second Amendment.

III. The Second Amendment: The Right and the Limitations

A. A Second Amendment Primer

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶³

The Second Amendment is a part of the Bill of Rights or the first ten amendments to the U.S. Constitution.⁶⁴ The U.S. Supreme Court has held that when interpreting the Second Amendment, the Court should be guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from the technical meaning.”⁶⁵ The Court has also noted that there is a “strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”⁶⁶ Notably, the eighteenth century meaning of the term arms is “no different from the meaning today” and, thus, the “Second Amendment extends, prima facie, to all instruments that constitute bearable arms, event those that were not in existence at the time of the founding.”⁶⁷ In sum, the U.S. Supreme Court has recognized that the Second Amendment confers “an individual right to keep and bear arms.”⁶⁸ Recently, in *District of Columbia v. Heller*,⁶⁹ the Supreme Court held that although the

or (4) turn the firearm over to the local police station in order for the firearm to be destroyed.

⁶³ U.S. CONST. Amend. II.

⁶⁴ *An Overview of the 2nd Amendment* <http://constitution.laws.com/2nd-amendment> (last visited Apr. 2, 2016)

⁶⁵ *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (The Second Amendment was ratified on Dec. 15, 1791).

⁶⁶ *Id.* at 581.

⁶⁷ *Id.* at 582.

⁶⁸ *Id.* at 595.

⁶⁹ 554 U.S. 570 (2008).

Second Amendment right is an individual right belonging to all Americans, it is *not* an unlimited right.⁷⁰

B. *Heller: A Limited Right of Gun Ownership*

In *Heller*, the District of Columbia passed a law that (1) banned the possession of a handgun, (2) made it a crime to carry an unregistered firearm, and (3) prohibited the registration of handguns.⁷¹ Specifically, the law provided that no person can carry a handgun without a license issued by the chief of police.⁷²

The plaintiff, Dick Heller, worked at the Thurgood Marshall Judiciary Building as a District of Columbia special police officer and as part of his employment was authorized to carry a handgun.⁷³ As required under the D.C. law, Dick Heller applied for a registration certificate for his handgun in order to keep the handgun at his home.⁷⁴ His request was refused.⁷⁵ Dick Heller then filed suit in the U.S. District Court for the District of Columbia seeking:

to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of ‘functional firearms’ within the home.⁷⁶

The district court dismissed his complaint, holding that an individual did not have a right to carry a firearm separate and apart from militia use.⁷⁷ The Court of Appeals for the District of Columbia Circuit reversed, holding that the Second Amendment protected an individual’s right to carry a firearm and that the total ban under the D.C. law violated this right.⁷⁸ The U.S. Supreme Court granted certiorari.⁷⁹

Upon review, the Court held that a statute, such as the District of Columbia law, that prohibited the rendering of any lawful

⁷⁰ *Id.*

⁷¹ *Id.* at 574-75.

⁷² *Id.* at 570.

⁷³ *Id.* at 575.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 576.

⁷⁷ *See* *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109-10 (2004).

⁷⁸ *Parker v. District of Columbia*, 478 F.3d 370, 373 (D.C. Cir. 2007).

⁷⁹ *Heller*, 554 U.S. at 576.

firearm operable for the purpose of immediate self-defense and essentially banned handgun possession in the home, violated the Second Amendment.⁸⁰

Notably, the Court held that the Second Amendment does not permit a citizen “to carry arms for *any sort* of confrontation.”⁸¹ In particular, the Court noted that:

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁸²

The Court further noted that the “Constitution leaves the District of Columbia a variety of tools for combating” firearm violence; however, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”⁸³

Thus, in *Heller*, the Court clearly supported some identifiable restrictions on the possession of firearms, including the prohibition of the possession of firearms by the mentally ill.⁸⁴ Various federal and state regulations prohibit the sale of firearms to the mentally ill. However, as discussed below, the current federal and state regulations do little to address the issue of an elderly individual with dementia or age related cognitive disorder who ages in place with a firearm.

C. Federal Regulation of Firearms

The Gun Control Act of 1968 is a critical component of firearm control in the United States, in that the Act prohibits the sale or disposition of a firearm to the mentally ill.⁸⁵ Congress passed the Gun Control Act of 1968 in response to the assassinations of President John F. Kennedy in November of 1963, Dr.

⁸⁰ *Id.* at 636.

⁸¹ *Id.* at 595 (emphasis added).

⁸² *Id.* at 626-27.

⁸³ *Id.* at 636.

⁸⁴ *Id.*

⁸⁵ 18 U.S.C. § 44 (2015) The introduction to the Gun Control Act of 1968 provides that it is “[a]n act to amend Title 18, United States Code, to provide for better control of the interstate traffic in firearms.”

Martin Luther King, Jr., in April of 1968, and Senator Robert Kennedy in June of 1968.⁸⁶ Codified at Title 18 of Chapter 44 of the U.S. Code, section 922 contains specific prohibitions as it relates to firearms under federal law.⁸⁷

Under 18 U.S.C. § 922(d)(4), it is unlawful for any person to sell or otherwise dispose of a 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.”⁸⁸ Section 922(g)(4) likewise prohibits any person who has been adjudicated as a mental defective or who has been committed to a mental institution” from shipping or transporting “in interstate or foreign commerce . . . any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”⁸⁹

The Act defines “adjudicated mental defective” as “a determination by a court, board, commission or other lawful authority that a person, as a result of a marked subnormal intelligence, or mental illness, incompetency, condition, or disease is (1) a danger to himself or others or (2) lacks the metal capacity to contract or manage his own affairs.”⁹⁰ Markedly, the Act proscribes the sale or disposition of a firearm to one who has been adjudicated a mental defective, but does not address the situation of an older adult who ages in place with a firearm.

In addition to the Gun Control Act of 1968, Congress passed the Brady Handgun Violence Prevention Act (also known as the “Brady Law”) in 1993 which instituted the National Instant Criminal Background System (NICS).⁹¹ The Brady Law requires federally licensed firearm dealers to utilize NICS in order to de-

⁸⁶ U.S. Department of Justice Archive, *Appendix C, History of Federal Firearms Law in the United States*, <http://www.justice.gov/archive/opd/AppendixC.htm> (last visited Apr. 2, 2016).

⁸⁷ 18 U.S.C. § 44.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 27 C.F.R. § 478.11 (2015).

⁹¹ Federal Bureau of Investigation, *National Instant Criminal Background Check System*, <http://www.fbi.gov/about-us/cjis/nics/nics> (last visited Apr. 2, 2016). According to the Federal Bureau of Investigation’s website, the National Instant Criminal Background Check System is located at the Federal Bureau of Investigation’s Criminal Justice Information Services Division in Clarksburg,

termine whether an individual buyer is eligible to purchase the firearm.⁹² That is, “[b]efore ringing up the sale, cashiers call in a check to the FBI or to other designated agencies to ensure that each customer does not have a criminal record or isn’t otherwise ineligible to make a purchase.”⁹³ According to the Federal Bureau of Investigation, in the last decade, use of NICS has resulted in more than 100 million background checks and more than 700,000 denials.⁹⁴

Despite the apparent success of NICS, the system only regulates the proposed purchase of a firearm from a federal licensed firearm dealer and is dependent entirely on the use of the system by a federal licensed firearm dealer.⁹⁵ Thus, notwithstanding the steps taken by the Gun Control Act of 1968 and the Brady Handgun Violence Prevention Act of 1993, neither Act addresses the issue of an individual who has not been adjudicated a mental defective nor committed to a mental institution but who owns a firearm and who is in the beginning stages of dementia or cognitive disorder.

On the state level, the imposition of a guardianship⁹⁶ is a possible means for the removal of a firearm from an older adult with dementia or age related cognitive disorder. Nevertheless, only a few states have implemented regulations that govern firearm possession in guardianship proceedings.

D. State Regulation of Firearms in Guardianship Proceedings

Guardianship proceedings are addressed exclusively on the state level.⁹⁷ That is, no federal regulatory scheme for the imposition of a guardianship exists.⁹⁸ Instead, each state promulgates

West Virginia and “is customarily available 17 hours a day, seven days a week, including holidays (except for Christmas).” *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The term “guardianship” is used throughout this article and encompasses the term conservatorship.

⁹⁷ U.S. Senate, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity* 6 (Dec. 2007). Issued by: Senator Gordon H. Smith, Ranking Member, U.S. Senate Special Committee on Aging, Senator Herb Kohl, Chairman, U.S. Senate Special Committee on Aging.

⁹⁸ *Id.* at 8.

and administers its own individual guardianship statutes and regulations.⁹⁹ As a result of the individualized approach, there exists a patchwork of rules and regulations governing guardianships that vary from state to state. In 1997, in an attempt to provide uniform guidance in the area of guardianships, the Uniform Law Commission promulgated the Uniform Adult Guardianship and Protective Proceedings Act (the “UAGPPA”).¹⁰⁰ As of 2016, forty-two states and the District of Columbia had adopted the UAGPPA.¹⁰¹ Consequently, there still remains a lack of uniform guardianship procedure for some states in the nation and even a more varied approach to firearm ownership by a ward under a court imposed guardianship.¹⁰²

E. *Guardianships—the Means and the Challenges*

The doctrine of *parens patriae* refers to the power of the state to intervene in the lives of incapacitated individuals and derives from English common law which granted the crown the authority to “act on behalf of its citizens who are unable to act for themselves.”¹⁰³ The National Guardianship Association defines a guardianship, as “a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence.”¹⁰⁴

⁹⁹ *Id.*

¹⁰⁰ UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT, 8A U.L.A. 377 (amended 1997).

¹⁰¹ National Conference of Commissioners in Uniform State Laws, *Uniform Adult Guardianship Act Now the Law in 23 States*, http://www.uniformlaws.org/NewsStail.aspx?title_Uniform%20Adult%20Guardianship (last visited Nov. 28, 2015).

¹⁰² *Id.*; see also Mary Joy Quinn & Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 UTAH L. REV. 1611. The authors note that “[s]etting national standards for guardians . . . is complicated by . . . the variability of state laws governing guardianship, the authority to granted to guardians, the reporting requirements post appointment, the entities that serve as guardian, terminology and the nature of jurisdiction of the appointing court,” to name a few. *Id.* at 1611-12.

¹⁰³ RALPH C. BRASHIER, *MASTERING ELDER LAW* 32 (2d ed. 2015).

¹⁰⁴ The National Guardianship Association is a non-profit organization dedicated “to advance the nationally recognized standard of excellence in guardianship.” National Guardianship Ass’n, Inc., <http://www.guardianship.org> (last visited Apr. 2, 2016).

Guardianships are administered at the state level with each state enacting and administering its own unique regulations.¹⁰⁵ Comprehensive data as to the number of guardianships nationwide are lacking since each state court system compiles and reports data differently.¹⁰⁶ AARP, Inc.,¹⁰⁷ estimates that there are currently one to three million adults nationwide under a court ordered guardianship.¹⁰⁸

Regardless of the exact number, due to the aging population and the potential for increase in dementia or age related cognitive disorders, the number of adults that will eventually require a guardianship will most likely continue to climb. Moreover, as demonstrated by the increase of firearm ownership by older adults, the need for a comprehensive approach to firearm ownership when an older adult is under a court-ordered guardianship is imperative. Unfortunately, as varied as the states are in the application of guardianship laws, so is the treatment of firearm ownership by those individuals under a court ordered guardianship. For example, both Nevada and Rhode Island have in place statutes that address the possession of a firearm by a ward in a guardianship proceeding. However, as discussed below, the action required by the court differs significantly.

1. State of Nevada

In 2014, the estimated population of the state of Nevada was 2,839,099 people.¹⁰⁹ Approximately 14.2% of that population was sixty-five or older.¹¹⁰ Moreover, in Nevada, the population sixty-five or older grew 72% between the years of 1990 and 2000 and the state experienced the largest increase of older adults in the United States.¹¹¹ Nevada state law provides for the imposi-

¹⁰⁵ Quinn & Krooks, *supra* note 102, at 1612.

¹⁰⁶ White Paper of the Conference of State Court Administrators (COSCA), *The Demographic Imperative: Guardianships and Conservatorships* 5 (Dec. 2010).

¹⁰⁷ AARP, Inc. is formerly the American Association of Retired People.

¹⁰⁸ Betsy Costle, *Choosing Home for Someone Else*, AARP (Nov. 12, 2013), <http://blog.aarp.org/2013/11/12/choosing-home-for-someone-else/>.

¹⁰⁹ U.S. Census Bureau, *Quick Facts: Nevada*, <http://quickfacts.census.gov/qfd/states/32000.html> (last visited Apr. 2, 2016).

¹¹⁰ *Id.*

¹¹¹ *Aging Trends and Challenges in Nevada*, <http://cdclv.unlv.edu/healthnv/aging.html> (last visited Apr. 2, 2016). This report was derived from the Justice &

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tion of a court ordered guardianship and addresses the issue of firearm possession by a ward.

Section 159.0487 of the Nevada Revised Statutes provides that “any court of competent jurisdiction may appoint a guardian of the person, a guardian of the estate, or guardian of both the person and estate.”¹¹² Unless otherwise limited by the court, a guardian of the person and estate has both “the custody and control of the person of the ward”¹¹³ and the duty to “protect, preserve, manage and dispose of the estate of the ward.”¹¹⁴

Notably, Nevada has passed legislation as it pertains to firearms and those individuals under court ordered guardianships. Specifically, Nevada Revised Statute § 159.0593 provides:

[i]f the court orders a general guardian¹¹⁵ appointed for a proposed ward, the court shall determine, by clear and convincing evidence, whether the proposed ward is a person with a mental defect who is prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(d)(4) or (g)(4). If a court makes a finding pursuant to this section that the proposed ward is a person with a mental defect, the court shall include the finding in the order appoint the guardian and cause a record of the order to be transmitted to the Central Repository for Nevada Records of Criminal History, along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.¹¹⁶

As used in this section, the term “person with a mental defect” is defined as a person “who as a result of marked subnormal intelligence, mental illness, incompetence, condition or disease is (1) a danger to himself, herself or others; or (2) lacks the capacity to contract or manage his or her own affairs.”¹¹⁷

Democracy Forum on the Leading Social Indicators in Nevada that took place on Nov. 5, 2004 at the William S. Boyd School of Law. The report was “a collaborative effort of the University of Nevada faculty, Clark County professionals, and the State of Nevada officials.” *Id.*

¹¹² NEV. REV. STAT. § 159.0487 (2014)

¹¹³ NEV. REV. STAT. §159.079 (2014).

¹¹⁴ NEV. REV. STAT. § 159.083 (2014).

¹¹⁵ The term “general guardian” although not defined by Nevada Statutes appears to be distinct from that of the term “special guardian” which is defined in section 159.026 as “a guardian of a person of limited capacity, including, without limitation, such a guardian is appointed because a person of limited capacity has voluntarily petitioned for the appointment and the court has determined that the person has the requisite capacity to make such a petition.”

¹¹⁶ NEV. REV. STAT. § 159.0593 (2014).

¹¹⁷ NEV. REV. STAT. §§ 159.0593 2(b)(1), (b)(2) (2014).

Thus, according to section 159.593, a Nevada court, upon the finding that an individual has a mental defect pursuant to 18 U.S.C. § 922(d)(4) or (g)(4), must transmit the order to the Central Repository for Nevada Records of Criminal History in order for the record to be included in the appropriate database of the National Instant Criminal Background Check System (NICS).¹¹⁸

Despite the clear reference to the core issue of a firearm in the possession of a ward, the Nevada statute fails to address a significant issue. The inclusion of the required information in the NICS, although important to prevent the future purchases of firearms by the individual, does not on its face address the continued possession of a firearm by the ward. Notably, section 159.0593, is the only reference in the Nevada state statutes to the topic of firearms in relation to court ordered guardianships.

2. State of Rhode Island

As of 2014, the state of Rhode Island had one half the population of that of Nevada with an estimated 1,055,173 people, of whom approximately 15.7% were age 65 or older.¹¹⁹

Chapter 33 of the General Laws of Rhode Island entitled “Probate Practice and Procedure” contains the state procedures for guardianships.¹²⁰ Specifically, the General Laws of Rhode Island § 33-15-1 provides the legislative intent for the guardianship statute as follows:

the legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives that person of all his or her civil and legal rights and that this deprivation may be unnecessary. The legislature further finds that it is desirable to make available, the least

¹¹⁸ NEV. REV. STAT. § 159.0593 (2014).

¹¹⁹ U.S. Census Bureau, *Quick Facts: Rhode Island*, <http://quickfacts.census.gov/qfd/states/44000.html> (last visited Apr. 2, 2016).

¹²⁰ On July 20, 2015, the Rhode Island General Assembly enacted the Uniform Adult Guardianship and Protective Proceedings Act as promulgated by the National Conference of Commissioners on Uniform State Laws Uniform Law Commission. The new legislation took effect on Jan. 1, 2016 and applies only to those proceedings begun after Jan. 1, 2016. The new legislation does not contain any additional reference to the issue of firearm possession by an individual under a court ordered guardianship. Chapter 241 2015—H6034 Substitute A enacted July 10, 2015, <http://webserver.rilin.state.ri.us/PublicLaws/law15/law15241.htm>.

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restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs.¹²¹

Section 33-15-4 clearly hallmarks the statute's intent in that it mandates a limited guardianship absent a finding of a total incapacity by the court.¹²² Moreover, under the General Laws of Rhode Island § 33-15-8, the guardian has "only the authority set forth by the limited guardianship order."¹²³

Although not contained in the Probate Practice and Procedure Chapter of the State of Rhode Island Statutes, Rhode Island has addressed firearm possession by an individual under a court ordered guardianship in Title II. Criminal Offenses of the Rhode Island General Laws.

Specifically, section 11-47-6 provides that "[n]o person under guardianship or treatment or confinement by virtue of being a mental incompetent . . . shall purchase, own, carry, transport or have in his or her possession or under his or her control any firearm."¹²⁴ Thus, in Rhode Island, the court has clear statutory direction to remove the firearm altogether from a ward.¹²⁵ This treatment is in direct contrast to the provision contained in the Nevada legislation which only requires the court to transmit a copy of the court's order for the ward's information to be contained in NICS.¹²⁶

Notwithstanding the above, the Nevada and Rhode Island statutes are limited to guardianship proceedings and court intervention. Neither of these statutes address the issue of an individual who has a cognitive disorder and who owns a firearm but who is not under a court-ordered guardianship. Some recent proposals outside of guardianship proceedings attempt to address this issue.

¹²¹ R.I. GEN. LAWS § 33-15-1 (2014).

¹²² R.I. GEN. LAWS § 33-15-4 (2014).

¹²³ R.I. GEN. LAWS § 33-15-8 (2014).

¹²⁴ R.I. GEN. LAWS § 11-47-6 (2014).

¹²⁵ *Id.*

¹²⁶ *See* NEV. REV. STAT. § 159.0593 (2014).

V. Alternative Proposals

A. Social Security Administration Action

Recently, the Social Security Administration proposed linking background checks for firearm ownership to the Social Security Program by means of the representative payee process.¹²⁷ The proposal stemmed from a Presidential Memorandum issued by President Barak Obama in 2013.¹²⁸ In this memorandum, entitled “Improving Availability of Relevant Executive Branch Record to the National Instant Criminal Background Check System,” the President directed the Department of Justice to issue guidelines to agencies, such as the Social Security Administration, in order to identify and share relevant federal records as part of the National Instant Criminal Background Check System.¹²⁹ As a result, the Social Security Administration determined that the agency is required to send information to the National Instant Crime Background Check System regarding Social Security beneficiaries who receive benefits via a representative payee.¹³⁰

Under the Social Security program, a representative payee acts as the agent for a social security beneficiary who is unable to manage or direct the management of Social Security benefits.¹³¹ To appoint a representative payee, the Social Security Administration reviews any prior legal restraints on the individual including any court ordered guardian, any pertinent medical evidence from a physician, psychologist, or qualified medical practitioner, and lay person evidence including face to face interviews with

¹²⁷ NRA Inst. for Legislative Action, *Florida Alert! Obama’s Social Security Administration to Strip Gun Rights of Millions of Seniors*, <http://www.nra.org/articles/20150721/alert-obams-social-security-administration-to-strip-gun-rights-of-millions-of-seniors> (last visited Nov. 28, 2015).

¹²⁸ Presidential Memorandum, *Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System*, Jan. 16, 2013, <http://www.whitehouse.gov/the-press-office/2013/01/16/>.

¹²⁹ *Id.* The enumerated agencies include: the Department of Defense; the Department of Health and Human Services; the Department of Transportation; the Department of Veterans Affairs; the Department of Homeland Security; the Social Security Administration; the Office of Personnel Management; the Office of Management and Budget; and such agencies or offices as the Chair [of the Working Group] may designate.

¹³⁰ NRA Inst. for Legislative Action, *supra* note 127.

¹³¹ BRASHIER, *supra* note 103, at 242.

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the beneficiary prior to making a determination.¹³² To that end, a representative payee is only appointed after the production of “convincing evidence of the beneficiary’s inability to handle financial affairs.”¹³³

For adult Social Security beneficiaries, the representative payee is typically a spouse, parent or other relative with custody of the beneficiary.¹³⁴ Upon appointment, the representative payee acts in a fiduciary capacity and determines the current and future needs of the beneficiary and the best use of the Social Security funds.¹³⁵ As of 2015, approximately 4.2 million individuals receive their Social Security benefits through a representative payee.¹³⁶ Arguably, under the current proposal, adults could be denied a firearm if they could not manage their own affairs due to “marked subnormal intelligence, or mental illness, incompetency condition or disease.”¹³⁷ Not surprisingly, the proposal resulted in an immediate outcry from national firearm advocacy groups and as of 2016 has not been implemented.¹³⁸ Although this proposal could have far-reaching consequences for the estimated 4.2 million individuals who currently have representative payees under the Social Security program, once again any result is limited to the Social Security system and to those individuals who receive benefits through a representative payee.

B. *Medical Care Provider Involvement*

Another possible alternative is to involve an individual’s medical care provider in the discussion of whether a patient in cognitive decline should retain possession of a firearm. In fact, recently the American College of Physicians (ACP) acknowledged this issue and promoted the need for physicians to discuss

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ S. Noble, *Obama Announces Large-Scale Gun Grab That Will Affect 4.2 Million SSA Recipients*, INDEP. SENTINEL (July 18, 2015), <http://www.independentsentinel.com/obama-announces-massive-gun-grab-that-will-affect-4.2-Million-SSA-Recipients>.

¹³⁷ NRA Inst. for Legislative Action, *supra* note 127.

¹³⁸ *Id.*

firearm ownership with geriatric patients.¹³⁹ Particularly, in the opinion of the ACP, a firearm in the home poses lethal dangers to the older adult and this possibility warrants a need for a discussion of adequate firearm safety.¹⁴⁰ In fact, the ACP noted that:

[w]hen geriatric patients have cognitive or emotional deficits, complemented by deteriorating behavioral symptoms, to the extent that they pose a reasonably foreseeable risk for harm to themselves or others if armed, the primary care physician should consider recommending to family members (or their functional equivalents) that the firearm either be removed from the patients' home or unloaded and stored under lock and key.¹⁴¹

Arguably, a medical care provider or family physician is one of the first individuals to detect changes in the cognitive ability of a patient. However, this approach has been met with serious backlash, resulting in some states enacting legislation that prohibits or discourages a medical care provider from raising the topic with patients except within limited circumstances.

For example, Florida was one of the first states to take steps to discourage such inquiries by medical care providers.¹⁴² In 2011, the Florida legislature passed what is colloquially known as the "Docs v. Glocks" bill, now codified at section 790.338 of the Florida Statutes. Specifically, section 790.338(1) provides that:

[a] health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others.¹⁴³

The statute further provides in section 790.338(2) that:

[a] health care provider licensed under Chapter 456 or health care facility licensed under Chapter 395 shall respect a patient's right to privacy and should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a

¹³⁹ Marshall B. Kapp, *Geriatric Patients, Firearms, and Physicians*, 159 ANN. INTERN. MED. 421 (2013).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See FLA. STAT. § 790.338 (2011).

¹⁴³ *Id.*

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firearm in a private home or other domicile of the patient or a family member of the patient. *Notwithstanding this provision, a health care provider or health care facility that in good faith believes that this information is relevant to the patient's medical care or safety, or safety of others, may make such a verbal or written inquiry.*¹⁴⁴

Thus, the intent of the Florida statute is to “respect a patient’s right to privacy” and the purpose of the statute is to discourage medical care personnel from inquiring into the ownership of a firearm by a patient unless the provider in good faith believes that information as to the patient’s firearm possession is “relevant to the patient’s medical care or safety or safety of others.”¹⁴⁵

This limited good faith exception restricts the ability of a medical care provider to discuss firearm safety until the moment when the provider determines the information is relevant to a patient’s safety or to the safety of others. This limitation could severely hamper the accuracy of the information provided. The statute was immediately challenged by a group of medical care providers in *Wollschlaeger v. Governor of the State of Florida*.¹⁴⁶

In *Wollschlaeger*, a group of medical care providers challenged the constitutionality of section 790.338 on the grounds that it violated the medical providers’ First Amendment right to free speech.¹⁴⁷ Upon review, the U.S. Court of Appeals for the Eleventh Circuit upheld section 790.338, noting that although “[s]ociety has traditionally accorded physicians a high degree of deference due to their superior knowledge, educational pedigree,” nonetheless the Act codifies “the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient’s care.”¹⁴⁸

Thus, despite the strong support and encouragement of the medical care community to use the doctor’s office as a means of discussing firearm safety, unless the Floridian physician in good faith believes the information is relevant to the patient’s medical care or safety or the safety of others, then this inquiry remains

¹⁴⁴ *Id.* (emphasis added).

¹⁴⁵ *Id.*

¹⁴⁶ 760 F.3d 1195 (11th Cir. 2014).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

limited. Since the passage of the Floridian “Docs vs. Glocks” bill, a total of twelve states have considered enacting similar laws.¹⁴⁹ This result is concerning in that by the time a physician determines that firearm information is relevant to the patient’s medical care, it may be too late to have an in-depth and knowledgeable conversation with the patient. These statutory restrictions sharply cramp doctors in their ability to safeguard their patients and others.

V. Conclusion

The nation is aging at an unprecedented rate. With this change, comes the need for a more comprehensive statutory response to the continued possession of a firearm by an older adult when that older adult is faced with cognitive decline. Current legislation on the federal and state level attempts to address the issue of firearm possession by individuals with cognitive disorders but remains limited in application to those who are either adjudicated as mentally defective or have been committed to a mental institution. Current regulations fail to address the individual who legally possesses a firearm in his sixties and continues to possess the same firearm into his eighties who has not been adjudicated as mentally defective nor committed to a mental institution, but who has been diagnosed with dementia or a cognitive disorder. To avoid further unfortunate situations like those of Mr. Kennebrew and Mr. Reed, immediate action is required. At a minimum, all states should implement a mandatory review of guardianship legislation and make necessary changes in order to require the removal of all firearms from the possession of individuals under court-ordered guardianships. This, however, is simply the first step of many. The utilization of guardianships alone as the catalyst to remove a firearm from an older adult facing dementia or a cognitive disorder is insufficient. A nationwide conversation will ultimately be required to address the reality of an armed and aging population.

¹⁴⁹ Mary Anne Pazanowski, *Physicians Lose Again in Docs v. Glocks Case*, BLOOMBERG BNA (Dec. 17, 2015), <http://www.bna.com/physicians-lose-again-n5798206520/>. The states include Alabama, Kansas, Minnesota, Missouri, Texas, and West Virginia.

