

Mental Health Firearm Laws and Restoration of Firearm Rights

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Disclosures

- I have no conflicts of interest to disclose.
- Some of the slides in this presentation were originally created by Liza Gold, M.D. or Michael Norko, M.D. for our presentation at the 2018 Annual Meeting of the American Academy of Psychiatry and the Law. Shown with permission.
 - “Mental Illness and the Right to Bear Arms: Assessments for Restoration of Rights” (October 25th, 2018).

A Confused (and Controversial) Picture



OUTLINE

- FEDERAL LAW
- FEDERAL STATISTICS
- CALIFORNIA LAW
- RESTORATION OF FIREARM RIGHTS
- REPORTING LAWS AND RESTRAINING ORDERS
- CONCLUDING THOUGHTS

Federal Law

Gun Control Act of 1968

- Federal firearms licensee is barred from transferring firearm to a person who “*has been adjudicated as a mental defective or has been committed to any mental institution.*”
- Also prohibits people who are an “unlawful user of or addicted to any controlled substance.”

Interpretation of the Gun Control Act

- Code of Federal Regulations defines “adjudicated as a mental defective” as:
 - (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
 - » (1) Is a danger to himself or to others; or
 - » (2) Lacks the mental capacity to contract or manage his own affairs.
 - (b) The term shall include –
 - » (1) A finding of insanity by a court in a criminal case; and
 - » (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

Interpretation of the Gun Control Act

- Code of Federal Regulations defines “committed to a mental institution” as follows:
 - “A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.” (Emphasis added.)

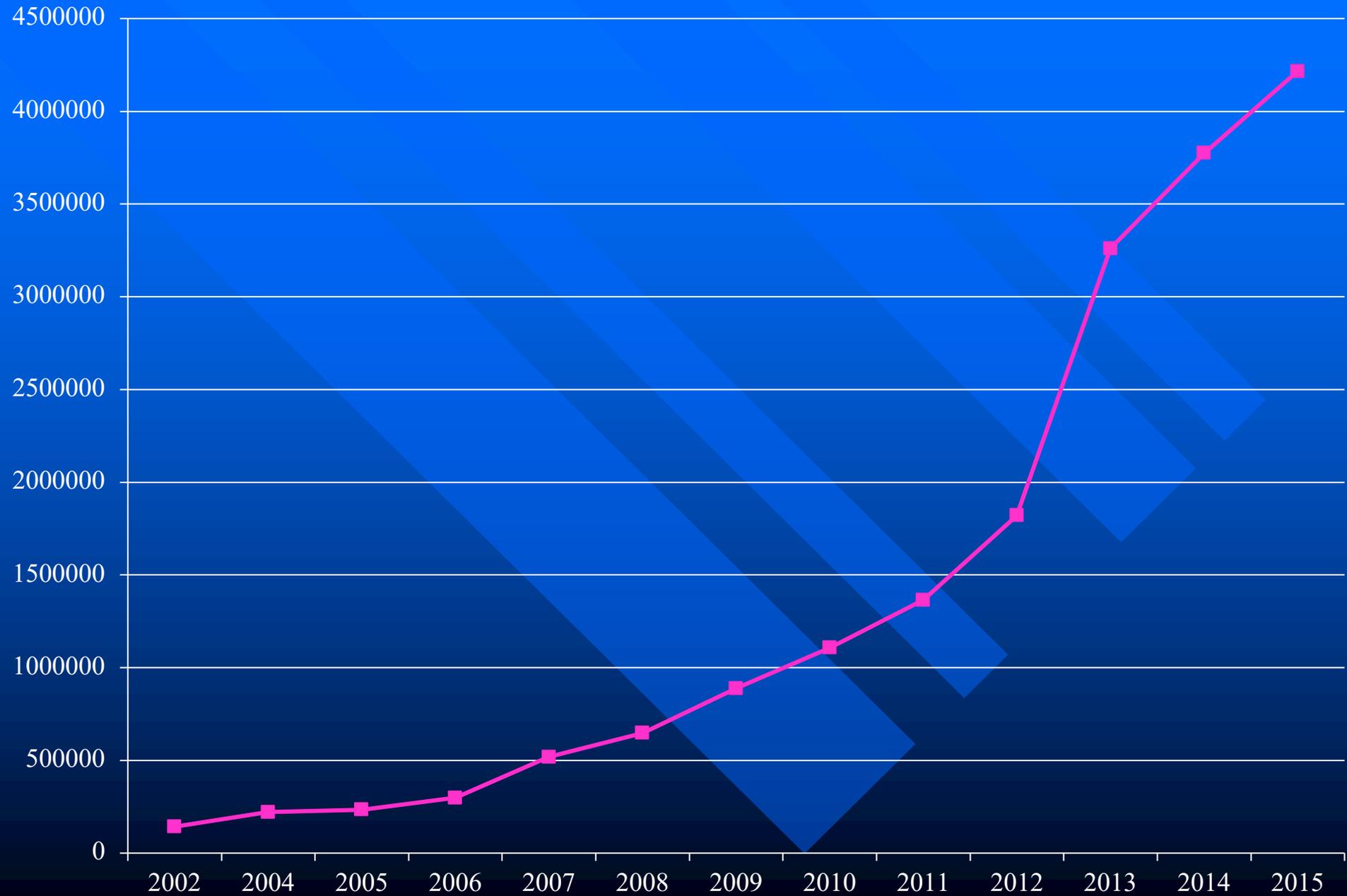
Brady Handgun Violence Prevention Act of 1993

- Established national background check for all firearms purchases.
 - Set up a new system, the National Instant Criminal Background Check System (NICS).
 - » The “NICS Index” contains information not contained in other criminal databases, including some mental health information.

NICS - 2016

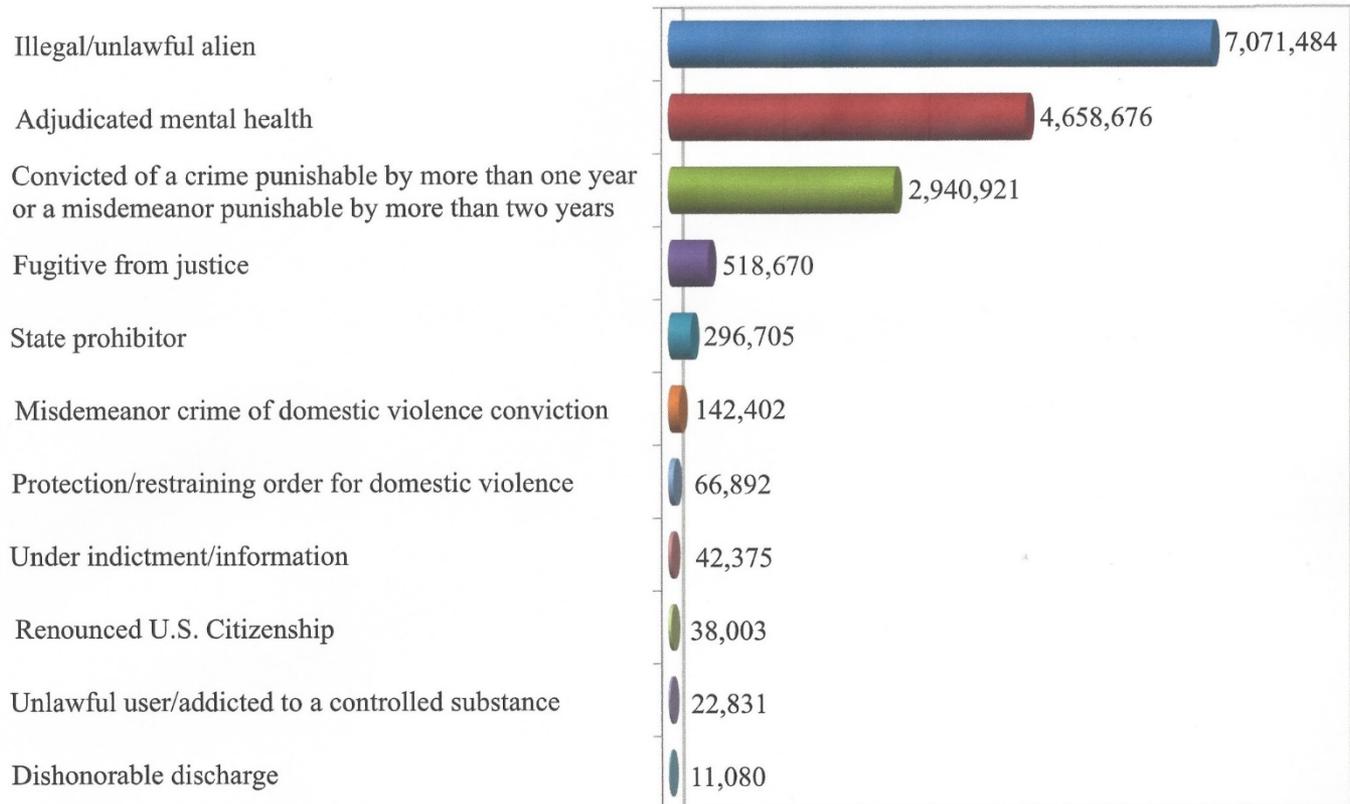
- Total of 15,810,039 names in the NICS Index (all reasons)
- 4,658,676 (30%) in mental health category
- 1,393,729 denials between 1998 and 2016
 - Only 26,998 denials for mental health (2%)

No. of Mental Health Prohibition Records in NICS Federal Database



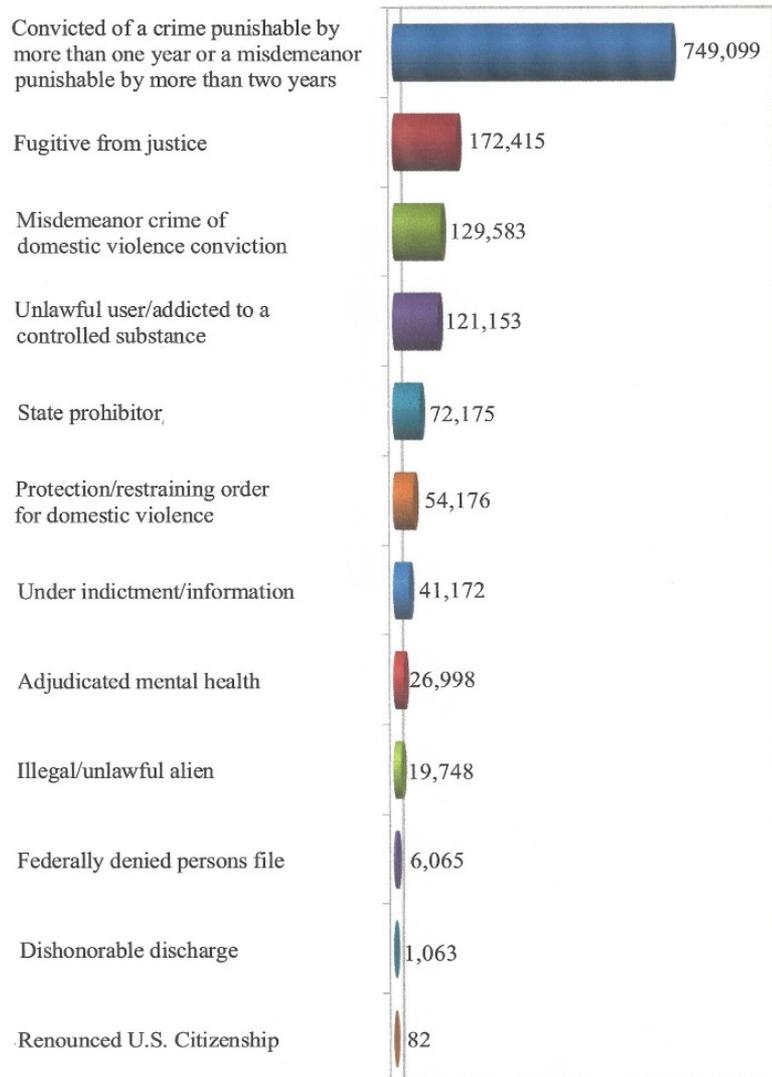
Total Active Records in the NICS Index

15,810,039



Program-to-Date Federal Denials
Reasons Why the NICS Section Denies
November 30, 1998 - December 31, 2016

1,393,729



California Law

CA Statutes: Welfare and Institutions Code

- §8100(b)(1): outpatients who communicate a serious threat of physical violence against a reasonably identifiable victim to a licensed psychotherapist.
 - **New (2014):** Five-year ban from the time the therapist informs the police. (Previously it was six months.)
 - Patient can petition for relief earlier.
 - Reporting is the responsibility of the police, not the therapist.

California Statutes Cont.

- §8103(f)(1): Persons placed on 5150 for danger to self or others (not grave disability).
 - Added to statute in 1990.
 - Provides for a five-year ban.
 - **New in 2020**: second 5150 within one year means a lifetime state ban. (Can petition for relief.)

Other States

Other States

- State mental health firearm laws vary widely.
- New laws modifying the language and/or substance of regulations are not uncommon – this is an active area for many state legislatures.
- A few states have no laws addressing any aspect of firearms relating to mental health diagnoses or treatment history.

Other States

- Some states' laws only address permits to carry a concealed firearm, not purchase or possession of firearms generally.
- Other jurisdictions, such as Connecticut, the District of Columbia, Hawaii, Illinois and Maryland, theoretically can prohibit firearm possession on the basis of diagnosis alone or voluntary hospitalization.

Firearms Possession Laws and the Mentally III

Table 1 Firearm Prohibitions by State

State	Statute	Type of Weapon	Prohibited Categories*	Duration of Prohibition	Provision for Restoration in Statute
Alabama	Ala. Code § 22-52-10.8	Firearm	Committed	Not specified	Yes
Alaska	None	N/A	N/A	N/A	N/A
Arizona	Ariz. Rev. Stat. § 13-3101(A)(6)(a)	Firearm	Adjudicated dangerous to self/others and court-ordered to treatment	Not specified	Yes
Arkansas	Ark. Code § 5-73-103(a)(2, 3)	Firearm	Adjudicated mentally ill or committed	Not specified	No
California	Cal. Welfare and Institutions Code § 8103	Dangerous weapon	Invol. admitted for observation (for danger to self or others only) or certified for intensive treatment (any grounds)	Five years	Yes
Colorado	None	N/A	N/A	N/A	N/A
Connecticut	Conn. Gen. Stat. § 29-28(b)(5)	Pistol, revolver	Committed	Twelve months	No
Delaware	Del. Code tit. 11, § 1448A(2)	Deadly weapon	Committed	Not specified	Yes†
District of Columbia	D.C. Code § 7-2502.03(a)(6)	Firearm	Vol. or invol. committed	Five years	Yes†
Florida	Fla. Stat. § 790.25 2(b)(1)	Firearm	Adjudged mentally incompetent	Not specified	No
Georgia	Ga. Code § 16-11-178(b)	Handgun	Committed	Five years	Yes†
Hawaii	Haw. Rev. Stat. § 134-7(3)	Firearm	"Is or has been diagnosed as having a significant behavioral, emotional or mental disorder"	Not specified	Yes†
Idaho	None‡	N/A	N/A	N/A	N/A
Illinois	430 Ill. Comp. Stat. 65/4(2)(iv)	Firearm	"Has been a patient in a mental institution"	Five years	No
Indiana	Ind. Code § 35-47-2-7(b)(4)	Handgun	Is mentally incompetent	Not specified	No
Iowa	Iowa Code § 724.15 1(f)	Pistol/revolver	Ever adjudged mentally incompetent	Not specified	No
Kansas	None‡	N/A	N/A	N/A	N/A
Kentucky	None‡	N/A	N/A	N/A	N/A
Louisiana	None‡	N/A	N/A	N/A	N/A
Maine	None‡	N/A	N/A	N/A	N/A
Maryland	Md. Code § 5-133(b)(6, 7) and § 5-205(a)(1, 2)	Firearm	"Suffers from a mental disorder. . .and has a history of violent behavior," or ever "spent more than 30 consecutive days in a medical institution for treatment of a mental disorder"	Not specified	Yes†
Massachusetts	Mass. Gen. Laws § 129B(1)(iii)	Firearm	Committed	Not specified	Yes†
Michigan	Mich. Comp. Laws § 28.422(3)(f, g)	Pistol	Adjudged insane, or committed to invol. Inpatient or outpatient treatment	Not specified	Yes
Minnesota	Minn. Stat. § 62A.713 subd. 1c	Firearm	Committed	Not specified	Yes†
Mississippi	None‡	N/A	N/A	N/A	N/A
Missouri	Mo. Rev. Stat. § 571.070 1(2)	Concealable firearm	Currently adjudged mentally incompetent	Not specified	No
Montana	None‡	N/A	N/A	N/A	N/A
Nebraska	Neb. Rev. Stat. § 69-2404	Handgun	Prohibited by 18 U.S.C. § 922	N/A	N/A
				State database of treatment/commitments purged after five years	No

Restoration of Firearm Rights

Restoration of Firearm Rights

- States cannot be required to participate in NICS, so federal government made substantial grants available.
- Per the NICS Improvement and Amendments Act (NIAA), to be eligible for these grants, states had to include in their grant applications a **relief from federal firearms disability** procedure that would meet federal (ATF) criteria.
- This has resulted in a proliferation of state Relief from Disability (RFD) programs.

Restoration of rights: State Procedures for Relief of a Federal Prohibition

- Since there is no direct procedure for appealing to the federal government for lifting of a federal prohibition, it falls to each state to develop a mechanism for relief proceedings.
- 32 states have procedures certified by the ATF
 - 44 have RFD programs that allow state relief
- Delaware developed a new Relief from Disabilities Board for this purpose, with three members including a psychiatrist.
- Oregon assigned the task to its Psychiatric Security Review Board.
- In other states the decision may be made by a court, the state Mental Health Dept., the State Police or the Dept. of Corrections.

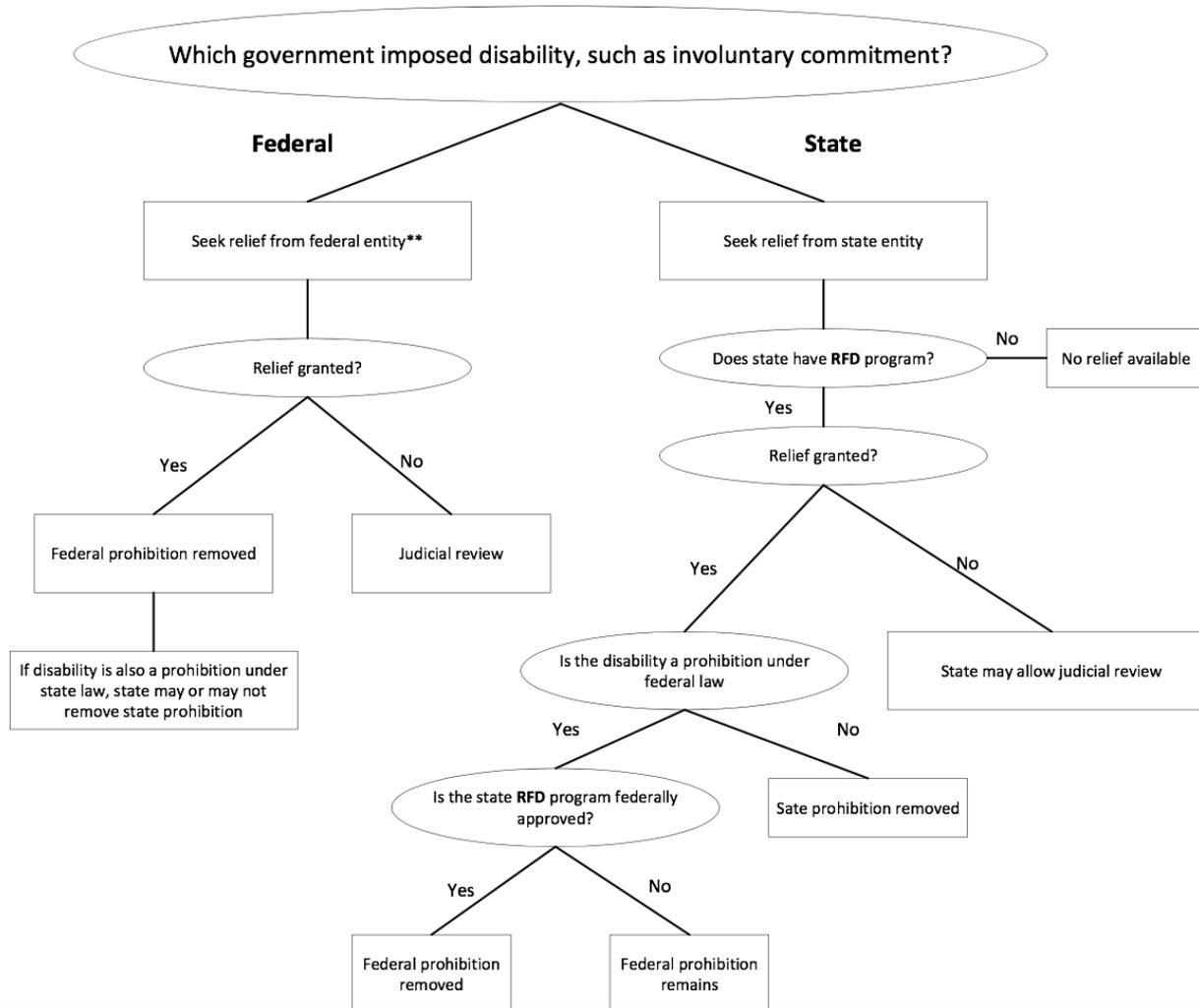
State RFD Programs

- As of 2017:
 - Only 15 states had RFD programs that required specified mental health evidence be presented at RFD hearings; of these 12 were federally approved
 - Of the 15 state programs: only 7 specify that evidence should include risk assessment; one state (Georgia) specifies risk assessment for danger to others but does not specify assessment for danger to self

State RFD Programs

- Only 12 states specify evidence be provided from a psychiatrist or psychologist; only two states specify that mental health professional be “independent” (Maine); or not current treatment provider (Oregon).
- Only 7 states require a recent (within 30-90 days, depending on state) mental health evaluation by a psychiatrist or psychologist
- Only 10 specifically require opinion that petitioner does not pose a threat to public safety or is dangerous to others
- Only 4 require opinion that petitioner does not pose threat to self

Relief from Disabilities



RFD Evaluations: General Principles

- “Competency to own or possess firearms”
- As in other competency evaluations, best approached by focusing on functional capacities rather than specific diagnosis or ultimate legal question of whether petitioner should or should not have firearms restored.
- Must conform to state statutory requirements: some states explicitly ask for opinions re “dangerousness” or “threat to public safety.”

What if state statute requires assessment of “dangerousness” or “danger to public safety”

- In these cases, evaluators should
 - provide all the necessary supporting information utilizing a risk assessment model
 - note the distinction between the advisory role of the evaluator and the decision-making authority of the court before opining on whether restoration of firearms is “contrary to the public interest” and does or does not “present a danger to public safety.”

RFD Evaluation

- Why is the petitioner seeking restoration of firearm rights at this time?
- What was the nature of the event that resulted in MH prohibition?
 - Were firearms involved? If so, how?
 - Were any other weapons involved?
 - Was substance use involved?

NEW YORK SAFE ACT:

Secure Ammunition and Firearms Enforcement Act of 2013

- MHL 9.46: Mandates mental health professionals to report patients when they determine they are “likely to engage in conduct that would result in serious harm to self or others.”
- Patient is barred from purchasing or possessing firearms, and any registered firearm will be confiscated.

APA Position Statement

- Most recent update May, 2018
- ¶ 3: “Reasonable restrictions on gun access are appropriate, but such restrictions should not be based solely on a diagnosis of mental disorder.”
- ¶ 4a: “Non-adjudicated events should not serve as sufficient grounds for a disqualification from gun ownership and should not be reported to the NICS system.”

APA Position Statement

- ¶ 4c: “...extending restrictions on access to firearms to individuals who voluntarily seek mental health care and incorporating their names and mental health histories into a national registry is inadvisable because it could dissuade persons from seeking care and further stigmatize persons with mental disorder.”
- ¶ 5c: “Because privacy in mental health treatment is essential to encourage persons in need of treatment to seek care, laws designed to limit firearm possession that mandate reporting to law enforcement officials by psychiatrists and other mental health professionals report of all patients who raise concerns about danger to themselves or others are likely to be counterproductive and should not be adopted.”

Red Flag Laws

“Red Flag Laws”

- Approximately 14 states have these types of laws
- Terminology such as “Extreme Risk Protection Order” or “Gun Violence Restraining Order”

CA Gun Violence Restraining Order

- CA AB 1014 passed 2014, effective Jan. 1st, 2016
- Immediate family members or law enforcement can petition a judge for a GVRO based on concern about someone's increased risk of dangerous behavior
- Judge considers recent threats or acts of violence (toward self or others), past domestic violence, and substance abuse

Gun Violence Restraining Order

- If judge finds substantial risk of dangerous behavior to self or others, a temporary 21-day RO is granted if the judge determines that it is the least restrictive means to address the issue

Gun Violence Restraining Order

- After the 21-day GVRO, petitioner may seek an extension to a final order which lasts one year (renewable)
- Requires full hearing
 - Burden of proof is on the petitioner
 - If granted, restrained person can seek restoration once during the year
 - » The restrained person bears the burden of proof, by clear and convincing evidence

Gun Violence Restraining Order

- Possession of firearms while under GVRO is a misdemeanor, and also triggers a five-year prohibition, which begins when the one-year GVRO ends

Expanding the GVRO

- A 2016 bill would have expanded the ability to request a GVRO to coworkers and mental health professionals.
- Passed both houses in 2016; vetoed by then-Gov. Brown.
- 2019: A similar bill, with the mental health professionals removed, was signed by Gov. Newsom and went into effect January 1st, 2020.



Do These Laws Make Sense?

The Arguments Against

- Only 3-5% of violent crimes are attributable to serious mental illness
- Most of these do not involve guns
- Little data on whether people subject to most firearm prohibition laws are at higher risk
- History of violence is strongest predictor of future violence
 - Prior criminal record already bars legal purchase

The Arguments Against Cont.

- 40% of all firearms sales are by private owners (so no background check (in some states))
- Over 400 million guns in private hands (over 1/3 of American households)
- About 30,000 denials over 30 years due to mental health history (vs. roughly one million for criminal history)

The Arguments Against Cont.

- Many patients do not seek treatment: Often related to stigma
- Reporting laws may increase stigma
- Some patients may not seek treatment specifically because they do not want to risk loss of gun rights

Further Reading

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Thank you!

Questions?