

# Legal Regulation of Restoration of Firearms Rights After Mental Health Prohibition

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The federal government and many states have laws restricting access to firearms by those who have been involuntarily committed to a psychiatric institution or adjudicated not competent to stand trial or not guilty by reason of insanity. The federal government and many states also have statutes allowing individuals under these mental health firearm prohibitions to regain their firearms rights. Restriction of firearms rights by reason of mental health prohibitions is legally referred to as a “disability,” and programs that can restore firearms rights are styled “relief from disability” (RFD) programs. The legal procedures and evidentiary standards for RFD hearings vary widely and typically do not include a current psychiatric risk assessment. This article reviews the confusing and sometimes contradictory legal framework of federal and state RFD programs.

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Discussions of whether firearms regulations are effective and serve legitimate government interests are accompanied by contentious debates informed more by political positions than by facts. Nevertheless, both sides of the anti- and pro-firearms regulation debate share one rare area of agreement: both routinely call for keeping guns out of the hands of people with mental illness. Support for such restrictions is assumed to be essential for public safety. The risk of allowing those with serious mental illness access to firearms typically is considered equivalent to the risk of arming violent criminals. For example, both Michael Bloomberg, a prominent firearms regulation advocate,<sup>1</sup> and Wayne La Pierre, Chief Executive Officer of the National Rifle Association (NRA),<sup>2</sup> have called in the same breath for keeping guns out of the hands of individuals with mental illness and of violent felons and criminals.

In fact, the federal government and many states have laws barring gun ownership by persons who have been involuntarily committed to a psychiatric institution or who have been adjudicated incompetent

to stand trial or not guilty by reason of insanity in criminal proceedings. Federal and state prohibitions against gun ownership based on statutory mental health criteria are legally termed “disabilities”; restoration of firearms rights after prohibitions based on mental health exclusions is styled “relief from disability” (RFD).

In this article, we review the legal basis for prohibiting gun ownership to those who meet regulatory mental health criteria as well as the legal framework for restoration of firearms rights to those so prohibited. Exactly how and whether individuals who have had their firearms rights restricted for mental health reasons may seek relief is often unclear and varies based on federal and state RFD laws. There is substantial confusion regarding whether relief under federal law also provides state relief and *vice versa*. Assessing current state regulations required personal communication with the offices of some state attorneys general, as documentation was not available. In addition, RFD statutes are a rapidly evolving area of the law. The information presented herein is accurate as of June 2017.

## Firearms Possession and Mental Health Prohibitions

### Federal Law

The Omnibus Crime Control and Safe Streets Act of 1968<sup>3</sup> was the first federal statute prohibiting cer-

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tain categories of individuals from receiving, possessing, or transporting firearms, including felons and those “adjudged by a court . . . of being mentally incompetent.” The federal Gun Control Act,<sup>4</sup> also passed in 1968, made it a crime for federally licensed firearms dealers to transfer firearms to anyone who had been “adjudicated as a mental defective” or who had “been committed to any mental institution” and to anyone who was “an unlawful user of or addicted to any controlled substance.” The Gun Control Act provided an RFD process for felons,<sup>5</sup> but no relief provisions for those barred from owning firearms because of mental health exclusions. Therefore, federal mental health firearms prohibitions were indefinite.

In 1986, the federal Firearms Owners Protection Act (FOPA)<sup>6</sup> merged the two 1968 laws. FOPA also expanded the Gun Control Act statutes to include relief from disabilities for any prohibited persons, not just felons. The Act created a process allowing those prohibited from firearms ownership on the basis of mental health exclusions to regain firearms ownership rights. In addition, FOPA (§ 105)<sup>6</sup> allowed for judicial review of an unfavorable decision by a federal authority.

In 1993, Congress passed the Brady Handgun Violence Prevention Act,<sup>7</sup> which, among other things, created the National Instant Criminal Background Check System (NICS). NICS consists of three databases to which states and government agencies voluntarily submit information about those individuals who should be denied firearms ownership for non-criminal reasons.<sup>8</sup> These include individuals adjudicated as having mental illness or committed to a mental institution or those who are unlawful users of or addicted to controlled substances.

In 1997, the Bureau of Alcohol, Tobacco, and Firearms (BATF) issued regulations defining terms used in the federal legislation including “committed to a mental institution.”<sup>9</sup> The agency specified that this meant a formal, involuntary commitment by a court, board commission, or other lawful authority and did not include a person voluntarily admitted to a mental institution or held involuntarily in a mental institution on an emergency or temporary detention. In 2014, the Department of Justice proposed revising the regulatory definition of “adjudicated as a mental defective” to include persons:

found incompetent to stand trial or not guilty by reason of mental disease or defect;

lacking mental responsibility or deemed insane; and found guilty but mentally ill [Ref. 10, p 774].

The proposed regulation also clarifies that the term “committed to a mental institution” includes a person committed to involuntary inpatient or outpatient treatment.<sup>10</sup> Invitation to comment on the proposed rule was published in the Federal Register on January 7, 2014, but the proposed changes have not been further discussed or adopted.

### State Law

Simpson observed in 2007 that state laws regarding mental health restrictions on firearms ownership and termination of such restrictions “exhibit marked diversity, ranging from no statutory mention whatsoever to provisions that are significantly more restrictive than those of the Gun Control Act, including the absence of any mechanism for terminating the prohibition” (Ref. 11, p 333). A decade later, this observation still holds true.

Some states, such as Alaska and Kentucky, have no state law preventing firearms ownership because of mental health exclusions. Other states, such as Kansas,<sup>12</sup> prohibit only individuals who have been involuntarily committed. Some states have highly specific mental health prohibitors. For example, Hawaii prohibits anyone who “is or has been diagnosed as having a significant behavioral, emotional, or mental disorder as defined by the most current diagnostic manual of the American Psychiatric Association or for treatment for organic brain syndromes” from owning, possessing, or controlling any firearm, “unless the person has been medically documented to be no longer adversely affected by the . . . mental disease, disorder, or defect.”<sup>13</sup> After the tragic Virginia Tech mass shooting in 2007, Virginia law was amended to prohibit firearms ownership by “any person involuntarily admitted to a facility or ordered to mandatory outpatient treatment.”<sup>14</sup>

States that have laws exceeding federal regulations find themselves in an unusual position. More restrictive state criteria have no federal equivalents in the NICS database, and so prohibited individuals under these state criteria cannot be recorded in the NICS system. For example, California prohibits individuals with mental illness who are placed on a 72-hour involuntary hold from owning or possessing firearms for the five-year period after release from the facility. This prohibition applies whether individuals on the

72-hour hold are subsequently voluntarily or involuntarily admitted to a psychiatric facility or discharged from the hold without further treatment.<sup>15</sup> However, individuals prohibited on the basis of having a history of a 72-hour hold would not be reported to the federal background check system, because the current basis for the federal prohibition is limited to involuntary commitment.

### **The Creation of Relief-From-Disabilities Programs**

The Brady Act<sup>7</sup> also required all licensed federal firearms dealers to participate in the federal background check system. When legally challenged by the states, the Supreme Court ruled that Congress could not compel state officials to enact or enforce a federal regulatory program such as NICS.<sup>16</sup> Congress subsequently passed the NICS Improvement Amendments Act (NIAA) of 2007.<sup>17</sup> The NIAA was intended, among other things, to improve state compliance with NICS and tighten scrutiny and regulation of firearms purchasers, especially those with mental illness.<sup>18</sup> This legislation for the first time included provisions requiring or authorizing the establishment of federal and state programs to allow individuals to seek relief from mental health firearms disability if circumstances warranted.

The Bureau of Justice Statistics states that this relief provision was included to address concerns that before the NICS Improvement Act, a person's adjudication as a "mental defective" was effectively a lifetime prohibition.<sup>19</sup> Notably however, the NRA refused to support passage of the NIAA unless a relief provision was included for those under mental health prohibitors.<sup>20,21</sup>

### **Federal and State RFD Programs**

Under the NIAA's provisions, all federal agencies that impose mental health adjudications or involuntary commitments, such as the Veterans Administration (VA), are required to provide a process for relief from mental prohibitions. The NIAA also authorizes the Department of Justice (DOJ) to provide NICS Act Record Improvement Program (NARIP) grants to improve states' infrastructure for collecting and submitting records to NICS, including the records of individuals with prohibitory mental health records.

To receive a NARIP grant, a state must certify, among other requirements, that it has implemented a program permitting individuals who have been adjudicated as having mental illness or disability or com-

mitted to a mental institution to obtain relief from the firearms disability imposed by law as a result of such adjudication or commitment. Eligibility for NARIP grants required these relief-from-disability programs to be certified by BATF as meeting the NIAA's specified restoration criteria.

A state relief-from-disabilities program that meets NIAA criteria must contain, at a minimum, provisions for:

- application for relief from the federal prohibition on the purchase and possession of firearms through a state procedure or with due process;
- a judicial appeal of a denial of the initial petition; and
- updating records by removing the person's name from state and federal firearms prohibition databases if relief is granted.<sup>22</sup>

Although not required, the DOJ also recommended that the state have a written procedure such as a state law, regulation, or administrative order, to address the NIAA's requirement for updating the NICS database when rights are restored.<sup>22</sup>

The access to substantial federal grants to improve or create reporting systems proved to be a powerful financial incentive and, as intended, resulted in improvements in states' participation in NICS.<sup>23,24</sup> After passage of the NIAA in early 2008, the NICS Index went from holding just over 400,000 state-submitted mental health records<sup>25</sup> to holding over 7.3 million as of December 2016.<sup>26</sup>

Because eligibility for the NARIP grants depended in part on having a BATF approved RFD program, the NIAA and federal funds also resulted in the proliferation of state RFD programs. Before 2008, only a handful of states had RFD programs.<sup>20</sup> Between 2009 and 2016, thirty states received NARIP grants totaling almost \$110 million.<sup>25</sup> According to the Department of Justice, as of April 2017, thirty-two states have enacted relief programs meeting the federal criteria as determined by BATF (Adams D, personal communication with D. Vanderpool, July 2017). A dozen more states have RFD programs that do not meet federal criteria (Table 1).

Nevertheless, the NIAA's requirements for relief from disability programs are relatively nonspecific. This lack of specificity, in combination with the politics complicating any proposal for firearms regulations, has resulted in wide variation in state RFD

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**Table 1** State Relief From Disabilities Programs

State*	Relief Program	Meets Federal Criteria
Alabama	Yes (AL ST § 22-52-10.8)	Yes
Alaska	Yes (AK ST § 47.30.851)	Yes
(no mental health prohibition)		
Arizona	Yes (AZ ST § 13-925)	Yes
Arkansas	No	N/A
California	Yes (CA ST Wel&Inst § 8103)	No
Colorado	Yes (CO ST § 13-9-124)	Yes
Connecticut	Yes (CT ST § 45a-100)	No
		(previously had approved program)
Delaware	Yes (DE ST 11 § 1448A)	Yes
Dist. of Col.	No	N/A
Florida	Yes (FL ST § 790.065)	Yes
Georgia	Yes (GA ST § 16-11-129)	No
Hawaii	Yes (HI ST § 134-6.5)	Yes
Idaho	Yes (ID ST § 66-356)	Yes
Illinois	Yes (IL ST 430 § 65/10)	Yes
Indiana	Yes (IN ST § 33-23-15-2)	Yes
Iowa	Yes (IA ST § 724.31)	Yes
Kansas	Yes (KS ST § 75-7c27)	Yes
Kentucky	Yes (KY ST § 237.108)	Yes
(no mental health prohibition)		
Louisiana	Yes (LA ST § 28:57)	Yes
Maine	Yes (ME ST 15 § 393)	No
Maryland	Yes (MD ST Pub Saf § 5-133.3)	Yes
Massachusetts	Yes (MA ST 123 § 36C)	Yes
Michigan	No	N/A
Minnesota	Yes (MN ST § 624.713)	No
Mississippi	Yes (MS ST § 97-37-5)	No
Missouri	Yes (MO ST § 571.092)	Yes
Montana	No	N/A
Nebraska	Yes (NE ST § 71-963)	Yes
Nevada	Yes (NV ST § 179A.163)	Yes
New Hampshire	No	N/A
(no mental health prohibition)		
New Jersey	Yes (NJ ST § 30:4-80.8,9,10)	Yes
New Mexico	No	N/A
New York	Yes (NY ST Ment.Hyg. § 7.09; NY ADC 14 NYCRR 543.5)	Yes
North Carolina	Yes (NC ST § 14-409.42)	Yes
North Dakota	Yes (ND ST § 62.1-02-01.2)	Yes
Ohio	Yes (OH ST § 2923.14)	No
Oklahoma	Yes (21 OK ST § 1290.27)	Yes
Oregon	Yes (OR ST § 166.274; OR ADC §859-300-0050)	Yes
Pennsylvania	Yes (18 PA ST § 6105)	No
Rhode Island	Yes (RI ST § 11-47-63)	No
South Carolina	Yes (SC ST § 23-31-1030)	Yes
South Dakota	Yes (SD ST § 23-7-49)	No
Tennessee	Yes (TN ST § 16-10-205)	Yes
Texas	Yes (TX ST Health&Saf §574.088)	Yes
Utah	Yes (UT ST § 76-10-532)	Yes
Vermont	Yes (VT ST 13 § 4825)	No
(no mental health prohibition)		
Virginia	Yes (VA ST § 18.2-308.1:3)	Yes
Washington	Yes (WA ST § 9.41.047)	No
West Virginia	Yes (WV ST § 61-7A-5)	Yes
Wisconsin	Yes (WI ST § 941.29)	Yes
Wyoming	No	N/A

This chart is accurate as of June 2017. \* Unless otherwise indicated, the state has specific mental health firearms prohibitions. States without prohibitions may still have an RFD program to provide citizens relief from disabilities under federal law.

statutes. Whether federally approved or not, most states with RFD programs do not have a specific procedure to determine whether firearms rights should be restored. States may allow petitions to be heard by the courts (e.g., Virginia and California), by an existing board (Oregon), by a new board created to hear these petitions (as in Delaware), or by an agency (as in Maryland). In states lacking their own firearms regulatory restriction laws or RFD programs, such as Michigan, federal law regarding mental health prohibitory criteria apply, but no process for legal restoration of firearms rights is available.

Similarly, although almost all states require the decision-maker to consider public safety and the public interest, the evidentiary standard of proof varies from state to state. Some states, (such as Idaho), require a preponderance of the evidence to indicate that rights can be restored; some states (such as Missouri), require clear and convincing evidence; and some states (such as Florida) do not specify a standard of proof. In addition, whether restoration of firearms rights and RFD legal proceedings are available to those who have been adjudicated incompetent to stand trial or not guilty by reason of insanity, as opposed to those prohibited because of a history of involuntary commitment, remains unclear and undecided by case law.

### **A Right to Firearms Restoration**

In the landmark case of the *District of Columbia v. Heller* (2008),<sup>27</sup> the United States Supreme Court ruled gun ownership for lawful use is a right under the U.S. Constitution. The Court also indicated that the Second Amendment right to possess firearms is not absolute, and a wide range of firearms regulation laws are “presumptively lawful.” Because ownership of a firearm is a constitutional right, do individuals whose firearms rights have been legally restricted because of mental health prohibitions have a right to “relief” from their legally imposed “disability” (that is, a right to have their firearms rights restored)? If so, is restoration of firearms rights the responsibility of federal or state authorities?

### **Federal Relief**

Under federal law between 1986 and 1992, individuals seeking to regain federally prohibited firearms rights were able to petition BATF directly for restoration of gun rights.<sup>28</sup> During that time, relief was to be granted if BATF determined that the indi-

vidual applicant was not likely to endanger public safety, and granting relief would not be contrary to the public interest. Any applicant whose application was denied by BATF could seek judicial review of denial in federal court. However, Congress defunded this program in 1992, effectively barring the BATF from granting relief under any circumstances.<sup>29</sup>

In 2002, the Supreme Court in *United States v. Bean*<sup>30</sup> addressed the legal consequences of Congress’ action in precluding BATF from providing federal relief. In this case, the Court ruled unanimously that Congress’ decision to defund BATF’s relief program stripped the federal courts of jurisdiction to review claims arising from BATF denials of restoration applications. The Court held that “[T]he absence of an actual denial of [a] respondent’s petition by ATF precludes judicial review under §925(c)” (Ref. 30, p 78). The Court’s ruling indicated Congress’ actions had nullified the authority of both the ATF and federal judiciary to restore gun rights.<sup>29</sup> However, as mentioned, under the NIAA, federal agencies that impose mental adjudications or commitments must have RFD programs.

### **State Relief**

In 2011, Clifford Tyler, a 73-year-old Michigan resident, attempted to purchase a firearm. Mr. Tyler had been involuntarily committed to a mental health facility for 30 days in 1986, but had experienced no further mental health problems. Michigan has no state regulations regarding mental health exclusions for gun ownership. Nevertheless, under federal law, Mr. Tyler was prohibited from owning or possessing firearms because of his history of involuntary commitment and so the sale was denied. When Mr. Tyler attempted to get his firearms rights restored, he was told he could not do so because Michigan had not established a federally authorized program that could grant him federal relief. Mr. Tyler filed a federal lawsuit in 2012 alleging the *de facto* lifetime ban of his firearms rights violated his Second, Fifth, and Fourteenth Amendment rights.

The federal trial court granted the government’s motion for summary judgment, finding the ban constitutional. Mr. Tyler appealed,<sup>31</sup> and the Sixth Circuit Court of Appeals *en banc* ultimately heard the case. In 2016, a majority of the judges agreed with Mr. Tyler and remanded the case to the trial court.<sup>32</sup>

The Sixth Circuit counted 19 states with no restoration process, therefore creating a *de facto* perma-

ment bar on gun possession for individuals residing in these states. The court held, “[T]he proposition that persons who were once committed due to mental illness are forever ineligible to regain their Second Amendment rights” (Ref. 32, p 689) could not be supported. Although the Sixth Circuit’s ruling in *Tyler* is not binding in other jurisdictions, the court’s reasoning applies to every person in states without federally approved RFD programs who are barred from possessing firearms under federal mental health exclusions.<sup>33</sup> Notably, Mr. Tyler would have been a candidate for federal relief through the BATF program had it not been defunded.<sup>34</sup>

Other cases around the country have also highlighted the practical problems and inherent contradictions surrounding the process of determining how to restore firearms rights to individuals under mental health prohibition. In *Keyes v. Lynch* (2016),<sup>35</sup> the plaintiffs are two Pennsylvania men who both had been involuntarily committed. Unlike Michigan, Pennsylvania has an RFD program, but that program is not federally approved. Therefore, although both men had their firearms rights restored under Pennsylvania state law, their federal disability remained.

However, both plaintiffs were state employees and were required to carry firearms in their jobs, one as a state trooper and the other as a state correctional officer. They are allowed to possess firearms in their official capacities as law enforcement officers under an exception to the federal firearms disability for individuals benefitting in their official federal or state government capacity.<sup>36</sup> Nevertheless, because the state does not have a federally approved RFD program, they are not allowed to possess firearms as private citizens.

### **Federal or State Relief**

The prevailing authority for the restoration of firearms rights suspended because of mental health exclusions is determined by two factors, as demonstrated in Fig. 1:

- whether the mental health prohibition was imposed by a federal or state entity, and
- whether the individual’s state has a federally approved (i.e., a BATF certified, relief program).

Confusion may arise when the legal prohibition, such as involuntary commitment, is a prohibition under both state and federal law. If the state imposed

the disability, the state has to remove it. If the state prohibition is also a prohibition under federal law (even though it was imposed by the state), state law also provides relief under federal law, if the state’s relief program is federally approved. If the state has no RFD program, as in *Tyler*, or if its program is not federally approved as in *Keyes*, then no federal relief is available for a state-imposed disability.

If the federal government imposed the disability, the federal government must remove it. A federal prohibition may also be a prohibition under state law, again for example, in a state with a mental health prohibitor based on involuntary commitment. In these states, whether relief by the federal government also provides relief under state law, even though imposed by the federal government, varies by state.

This convoluted state of affairs has left individuals under mental health prohibitions, such as Mr. Tyler, in legal limbo when seeking to regain their firearms rights. As the 2014 Sixth Circuit panel observed:

[W]hether Tyler may exercise his right to bear arms depends on whether his state of residence has chosen to accept the carrot of federal grant money and has implemented a relief program. . . . An individual’s ability to exercise a “fundamental right necessary to our system of ordered liberty” . . . cannot turn on such a distinction [Ref. 31, p 334].

### **Relief From Disability Originally Imposed by a Federal Entity**

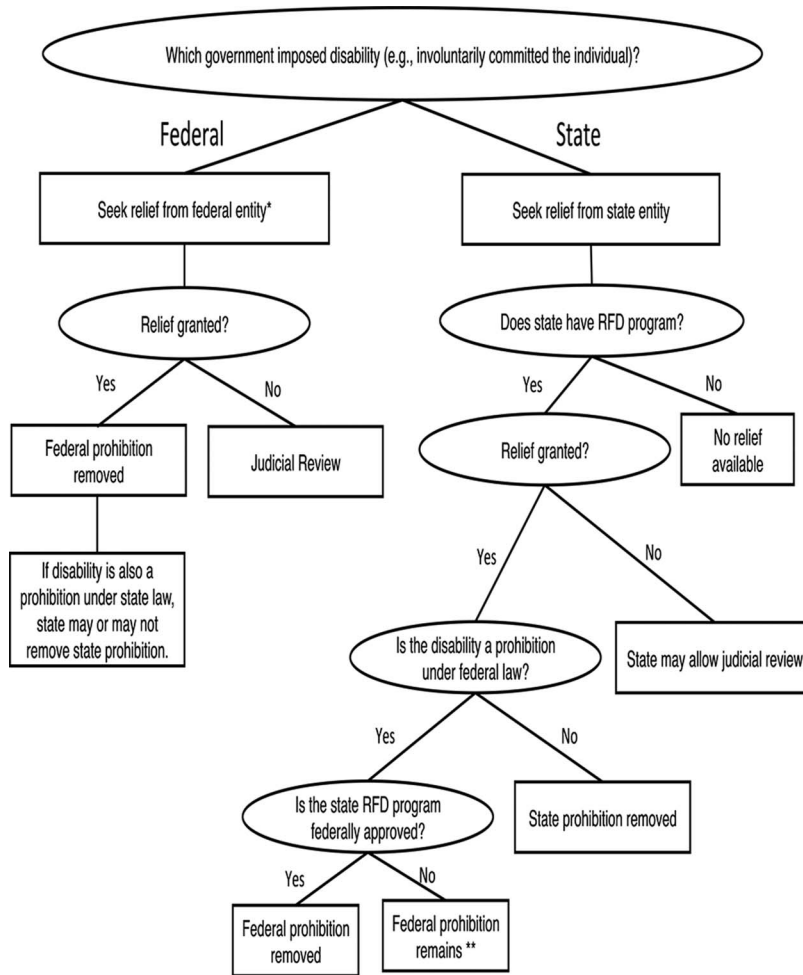
If a federal authority, such as the VA, originally imposed the disability, then the disability must be removed by a federal entity (Table 2).

Under the NIAA, all federal agencies that impose mental adjudications or commitments are required to have RFD programs. An individual can petition the federal authority for relief as per the process delineated by that authority’s relief program. If the federal authority fails to resolve an application for relief within 365 days, the agency is deemed to have denied the request for relief, and the individual can seek judicial review.<sup>37</sup>

Alternatively, an individual with a federal mental health prohibition can seek to have the adjudication or commitment that resulted in the prohibition “deemed not to have occurred,”<sup>38</sup> thus removing the prohibition against owning or possessing firearms. This determination can be based on:

- an adjudication that was set aside or expunged;
- the individual’s full release from mandatory treatment, supervision, or monitoring;

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\* If the action leading to this disability/prohibition on gun possession (such as involuntary commitment) was imposed by a federal entity, the federal entity must have a RFD program. This requirement is not affected by the ATF's defunding (see below).

\*\*Since 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from federal firearms disabilities. Accordingly, if the disability (such as involuntary commitment) was imposed by the state, but is a prohibition under both federal and state law, and the state either has no RFD program, or the state RFD program is not federally approved, the ATF cannot take applications for relief from the disability under federal law.

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Figure 1. Relief from disabilities.

- a finding that the individual no longer has the disabling mental health condition;
- a finding that the individual has otherwise been rehabilitated, or
- a finding that the adjudication or commitment was based solely on a medical finding without the opportunity for a hearing by the federal department or agency.<sup>39</sup>

If federal relief is provided, the federal disability will be removed, thereby restoring firearms rights under federal law. However, if the disability also was a prohibition under state law, federal relief may or may not automatically provide relief from the state prohibition.

### **Relief From Disability Originally Imposed by a State Entity**

The legal landscape for relief from disabilities at the state level is also unclear, as shown in Table 3.

In states with laws that impose firearms disabilities and have a relief program, if a state entity originally imposed the disability, then the state entity must remove it. If the state disability is removed, firearms rights are restored under state law. However, if the disability was also a prohibition under federal law, such as involuntary commitment, the federal prohibition may or may not be relieved (Halbrook S, personal communication with D. Vanderpool, November 2014). If the federal prohibition is identical to the relieved state prohibition, such as involuntary commit-

**Table 2** Federal Entity Originally Imposed Disability and Prohibition\*

Disability Prohibition of Firearms Possession	State RFD Program <sup>†</sup>	
	State RFD Program <sup>†</sup>	No State RFD Program
Both state and federal law. Example: Virginia has same prohibition as federal law based on involuntary commitment.	Petitioner must seek relief of federal disability from federal entity; states may or may not provide state relief based on federal relief; if not, seek relief of state disability via state relief program.	Petitioner must seek relief of federal disability from federal entity; states may or may not provide state relief based on federal relief; if not, no option for relief of state disability.
Only state law; not federal law. Example: 72-hour hold imposed at VA facility in California is a prohibition under California law, but not a prohibition under federal law.	Petitioner must seek relief of state disability via state relief program.	No relief available.
Only federal law; not state law. Example: Involuntary commitment is not a prohibition under Kentucky law, but is a prohibition under federal law.	Petitioner must seek relief of federal disability from federal entity.	Petitioner must seek relief of federal disability from federal entity.

\* Disability is based on action by federal entity, such as involuntary commitment. Action taken by federal entity may or may not result in prohibition against gun ownership under state law.

<sup>†</sup> State has an RFD program, regardless of whether it meets federal criteria.

ment, then the federal prohibition will also be relieved if the state RFD is federally approved. If the state program does not meet federal approval criteria, firearms prohibitions under federal law remain in effect.

State law that may be more restrictive than federal law can also create difficulties in fully recovering firearms rights. For example, California has some of the strictest firearms regulations in the United States and has had an RFD program since 1990. Because its RFD program is not federally certified, California has no provision for federal restoration of firearms rights. California law was amended in 2016, modifying statutory language requiring reporting to the NICS as of July 1, 2017.<sup>40</sup> This modification brings California’s RFD program into federal compliance

and possibly has made California eligible for both federal certification and NARIP grants.

Not all states with mental health prohibitions require an RFD hearing for firearms rights to be restored. Depending on the specific prohibitions, states may provide for automatic termination of the prohibition after a specified period of time without any type of legal or medical review. These states may also allow for a petition process to have rights restored earlier than the automatic date of termination of prohibition.

For example, California requires a five-year prohibition on owning firearms for individuals who have been placed on a 72-hour psychiatric hold.<sup>41</sup> Although the prohibition automatically expires at the

**Table 3** State Entity Originally Imposed Disability and Prohibition\*

Disability Prohibition of Firearms Possession	State RFD Program		
	Meets federal criteria	Not federally approved	No State RFD Program
Both state and federal law. Example: Virginia has same prohibition as federal law based on involuntary commitment	Petitioner must seek relief of federal and state disability via state relief program.	Petitioner must seek relief of state disability via state relief program, but no option for relief of federal disability.	Petitioner has no option for relief of state or federal disability.
Only state law; not federal law. Ex: 72-hour hold imposed at VA facility in California is a prohibition under California law, but not a prohibition under federal law.	Petitioner must seek relief of state disability via state relief program.	Petitioner must seek relief of state disability via state relief program.	No relief available.
Only federal law; not state law. Ex: Involuntary commitment is not a prohibition under Kentucky law, but is a prohibition under federal law.	Petitioner must seek relief of federal disability via state relief program.	No relief available.	No relief available.

\* Disability is based on an action by a state entity, such as involuntary commitment. Action by state entity may or may not result in disability/prohibition on gun ownership under federal law.



end of five years, individuals are allowed to petition once within the five-year period for early relief from the prohibition.<sup>42</sup> Other states, such as Maine, require those under mental health prohibitions to petition for relief, but not sooner than five years after the date of discharge that led to the imposition of the firearms prohibition.<sup>43</sup>

States currently without a relief program can enact one at any time, and states with noncertified relief programs, such as California, can seek federal approval at any time. Conversely, states can change their relief program laws, which could lead to a determination by ATF that their program no longer meets federal criteria, as happened in Connecticut (Adams D, personal communication with D. Vanderpool, December 2014). In those states without an RFD program, such as Michigan in the *Tyler* case, no state or federal relief is available.

## Discussion

Relief from disability programs for those whose right to own firearms has been suspended based on state and federal mental health prohibitors have increased in recent years. However, those attempting to use existing statutes to regain their firearms rights face a confusing and at times contradictory body of federal and state laws. These programs are unfamiliar to the general public, as well as judges and attorneys, and mental health and medical professionals who may be asked to participate in the restoration process. In addition, the complex interplay between federal and state law has, in some cases, resulted in failure to provide any path by which those prohibited can regain firearms rights.

The stigmatization of mental illness embodied within the mental health prohibition criteria themselves is a source of confusion. Approximately 90 percent of adults in the United States believe individuals with severe mental illness should not be able to purchase guns,<sup>44</sup> primarily because people believe those with mental illness are violent.<sup>45</sup> However, most individuals with serious mental illness are much more likely to be dangerous to themselves than to others and are much more likely to be victims than perpetrators of violence.<sup>46–50</sup>

Thus, mental health prohibitory criteria do not capture a population at high risk of committing gun violence.<sup>46,47</sup> For example, as of December 2016, the NICS Index contained 15,810,039 names, 30% of which were adjudicated mental health, the second

largest of all 11 categories. Since the NICS index was created, less than two percent of all federal denials have been on the basis of mental health.<sup>51</sup> Little discussion has taken place in regard to making meaningful, evidence-based changes in federal and state laws that might actually identify individuals, with or without mental illness, who are at risk of committing violence against others with firearms.

Even less discussion has been given to the euphemistically termed relief from disability for individuals prohibited by the generally ineffective mental health criteria. Despite the lack of data or legal precedent, federal agencies had to enact RFD programs with little guidance. In many cases, state RFD statutes enacted since 2009 appear to have been cobbled together with a minimum of consideration to meet the NIAA's requirements for applying for federal grants. Some states (e.g., Kentucky) have enacted restoration statutes to ensure that their citizens are not denied firearms. Only a handful of RFD statutes take into account both the psychiatric status of the petitioner and matters of public safety.

The Consortium for Risk-Based Firearm Policy has suggested one promising, evidence-based model statute for federal and state governments.<sup>52,53</sup> This model includes language that requires a court or other governing authority to consider a mental health professional's opinion of a petitioner's past and current mental health status, as well as several other factors. The Consortium's model proposes that a court must find by a preponderance of the evidence that granting relief would, among other findings, be compatible with public interest.

An understanding of the incongruence between the intended goals of mental health prohibitions and the restoration of gun rights after such prohibitions offers opportunities to identify and address salient concerns for those trying to design effective firearms policy in regard to restoration of firearms rights. The authors hope that this review will stimulate discussion of both of the mental health prohibition criteria and the availability of relief. The goal of firearms reform relative to those with mental illness should be an equitable, evidence-based process balancing public safety, suicide prevention, gun violence, and the rights of individuals with mental illness.

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