

Law and Psychiatry

Issues Related to Possession of Firearms by Individuals with Mental Illness: An Overview Using California as an Example

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Reid intro

Since 1968, federal law has prohibited individuals with a history of certain types of mental health adjudications from purchasing or possessing firearms.¹ The implementation of a nationwide system of background checks in 1999, following the passage of the Brady Handgun Violence Prevention Act,² has, at least to some degree, facilitated the identification of individuals who are federally banned from owning firearms. An increasing number of states also have their own laws in this area,^{3,4} making the issue relevant to more clinicians. In some states, including California, the criteria for being barred from possessing firearms are more stringent than those provided for by federal statute.

This column uses California as an example to illustrate laws and practices relating to firearm possession by individuals with a history of psychiatric illness. Federal laws and court decisions and the laws of other states have recently been reviewed elsewhere.^{3,5} Mental health professionals should be aware of the potential ramifications of firearm laws for their patients and be prepared to respond to requests to render an opinion regarding an individual's suitability for restoration of the ability to possess firearms. This last issue, although little explored to date, has the potential to develop into a new area of expertise within forensic psychiatry.

In some states, laws addressing firearms and mental illness distinguish between categories of weapons, for example handguns versus rifles and shotguns.⁵ In California, however, the statutes prohibiting firearm possession by individuals with a history of mental illness treatment are broader, banning possession of a broad category of implements, including all firearms (except antiques) and other so-called "deadly weapons." The law specifies "any firearm whatsoever or any other deadly weapon." These other deadly weapons are enumerated in California Penal Code section 12020 and include a variety of martial arts weapons such as nun-

chaku and throwing stars as well as other devices such as brass knuckles and blackjacks. Many of the other dangerous weapons are in fact illegal for anyone in the state to possess, with some exceptions. For simplicity, the text of this article will use the term firearm.

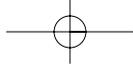
California Statutes

California codifies firearm laws relating to mental health treatment in the Welfare and Institutions Code, sections 8100-8108. Section 8100(b)(1) provides for a 6-month ban for outpatients who communicate a serious threat of physical violence against a reasonably identifiable victim to a licensed psychotherapist. The ban begins when the therapist makes a "Tarasoff" warning to a police department. The patient can petition for relief before the 6 months are over.

Section 8103 enumerates the legal statuses that prohibit an individual from possessing firearms. These include being adjudicated a danger to others as a result of a mental disorder and being found incompetent to stand trial or not guilty by reason of insanity. In addition, when a patient is placed on a mental health conservatorship (1-year, renewable), the imposing court has the discretion to bar the person from possessing firearms if it finds that such possession would pose a danger to the safety of the person or others. In all these situations, the prohibition ends when the person changes status (e.g., is restored to competency or sanity or the conservatorship is terminated), with the exception of individuals found not guilty by reason of insanity of certain serious violent felonies listed in the statute. For such individuals, the firearms ban is indefinite and does not end with a court finding of restoration to sanity.

The subsection of the law with the broadest application is 8103(f)(1). Added to the law in 1990, this statute

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provides that, when an individual is placed on a 72-hour hold on grounds of danger to self or others (but not on grounds of grave disability) and admitted to a treatment facility, he or she is thereafter prohibited from purchasing or possessing firearms for a period of 5 years. As described in Welfare and Institutions Code section 5150 *et seq*, the process of involuntary inpatient psychiatric treatment in California begins with this 72-hour hold. The hold is initiated when, based on a face-to-face evaluation, an authorized evaluator (a psychiatrist, a social worker, or a peace officer) determines that there is probable cause to believe that, as a result of a mental disorder, the individual poses a danger to self or others or is gravely disabled. Once initiated, the 72-hour hold is not subject to any process of appeal or review, except when the hold has been placed “in the field” (e.g., by a peace officer). In the latter case, the receiving clinician at the treatment facility decides whether to continue the hold and admit the patient, or terminate the hold and release the patient (sections 5151 and 5152). California case law has established that the hold does not have meaning in terms of firearm possession *unless* the patient is admitted⁶ (see below).

The restriction established by section 8103(f)(1) is stricter than that provided under federal law, which provides for a lifetime federal prohibition on firearms purchase or possession following “adjudication as a mental defective” or a “commitment to any mental institution.”⁷ As interpreted by the U.S. Bureau of Alcohol, Tobacco and Firearms, involuntary detention in a psychiatric facility “for observation” (as in California’s 72-hour hold) is specifically excluded.⁸ The California Department of Justice, which performs background checks on individuals attempting to purchase firearms in the state, implements the law in accordance with this principle.⁹ Thus, an individual who has been on a 72-hour hold is not federally barred from owning firearms and will pass a background check performed in California once the 5-year ban expires or is ended by court order.

Section 8103(g) provides for a 5-year ban on firearms possession for patients certified for longer periods of involuntary treatment (14 or 30 days). In contrast to the 72-hour hold, being certified on grounds of grave disability also triggers a ban on firearms possession in 14- and 30-day commitments. Such commitments are also sufficient to trigger a federal ban on firearm possession, which is indefinite and thus supersedes the California law. Consequently, an individual who has previously been placed on a 14-day or longer hold would still be unable to purchase or possess firearms legally

even after 5 years. In other words, in the case of these longer commitments, the 5-year California ban provided by section 8103(g) is legally moot in the sense that it has no practical significance, since the individual is barred during the 5 years (both by federal and California law) and, when the California ban has expired after 5 years, he or she is still federally barred from possessing firearms. This may also be the case with mental health conservatorships, although I have not been able to locate any information specifically addressing this issue.

Another question that has apparently not been litigated involves the status of a patient who is released from a 14- or 30-day hold at a probable cause hearing or in a writ of *habeas corpus* proceeding. Probable cause hearings are required for 14- and 30-day holds. Patients for whom probable cause is found can still challenge this finding before a judge by filing a writ of *habeas corpus* (Latin for “that you have the body”¹⁰) hearing. This is a legal procedure in which an individual being held involuntarily in a psychiatric hospital petitions a court to review the confinement. The court must then find by a preponderance of the evidence that the individual continues to meet the legal criteria for involuntary hospitalization. However, there is no mechanism in place to remove the firearm prohibition triggered by the initial certification if the patient is later released after either a probable cause or writ of *habeas corpus* hearing.

Section 8103(f)(5) allows individuals prohibited from possessing firearms on the basis of a 72-hour hold because of danger to self or others to petition the court in their county of residence, once within the 5-year period, for early relief from the prohibition. There is no statutory requirement that the individual be evaluated by a mental health clinician—or any healthcare professional—as part of the petition process. The respondent county attorney has the burden of showing by a preponderance of evidence that the petitioner is not likely to use firearms in a safe and lawful manner.

Section 8102 provides for the confiscation of firearms found in the possession of an individual “detained or apprehended for examination of his or her mental condition” or who is a person described in sections 8100 or 8103. Firearms are automatically returned after 30 days unless the confiscating agency petitions to have them destroyed. The firearm owner can then request a hearing challenging the petition.

California Case Law

Two appeals court decisions have been published related to an individual committing suicide using a firearm purchased after the person had received involuntary inpatient psychiatric treatment. The first case, *Katona v. County of Los Angeles*,¹¹ was decided in 1985, prior to the 1990 addition of the 5-year ban for persons placed on a 72-hour hold. At that time, there was no provision in California law to prohibit a person with a history of being involuntarily admitted for danger to self from later purchasing a firearm. Thus the court held that, since “decendent was not within one of the statutorily proscribed categories, the Department of Justice would not and was under no duty to notify [the firearm dealer] of any impediment to the delivery of the firearm, and [the firearm dealer] violated no statute when it delivered the gun to the decendent... It is clear... that the thrust of the deadly weapon control scheme is to prevent harm to third persons and is not concerned with harm to the gun possessor himself” (p. 58).

The second case was decided after the 1990 amendment that specified that a 72-hour hold for danger to self or others was a trigger for firearms prohibition. In *Braman v. California*,¹² the court ruled that a cause of action was stated by the family of a man who committed suicide with a handgun he legally purchased after having been involuntarily hospitalized on a 72-hour hold for danger to self. The court observed that by “expanding the statutory categories to include a patient who is a danger to himself or herself, the Legislature has sought to prevent harm to those individuals from self-inflicted injury with a firearm.” (p. 355)

The other published decisions in this area all relate to section 8102, the statute allowing the seizure of firearms from individuals detained for examination of their mental condition. The reasoning of the courts in these cases is informative with regard to potential future challenges to provisions of section 8103 and is also relevant for practicing clinicians who may be called to testify in firearms proceedings.

In *People v. One .22-Caliber Ruger Pistol*,¹³ a hearing was held to determine whether Todd Veden’s confiscated firearms could be destroyed. The psychiatrist who treated him as an inpatient testified over Mr. Veden’s objection. The court ruled that the testimony of a psychiatrist at a section 8102 hearing does not violate psychotherapist-patient privilege. “Section 8102 protects firearm owners and the public from the consequences of firearm possession by people whose mental state endangers themselves or others. Information obtained

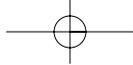
on the question of endangerment during section 5150 treatment and evaluation is admissible because it is necessary to prevent the threatened danger. Doctor Humeid’s testimony constituted substantial evidence in support of the trial court’s decision. Doctor Humeid testified that he treated Veden during his confinement and that he believed Veden should be deprived of firearms ‘for his own safety and also for the safety of the public at large...’” (p. 315).

In *Rupf v. Yan*,¹⁴ Alexander Yan raised several challenges to the proposed destruction of his confiscated firearms under the provisions of section 8102. He argued that:

1. the statute was unconstitutional as there was no relation between legislative intent and application, and it was vague and overbroad;
2. the right to bear a firearm is fundamental, so the law is subject to strict scrutiny;
3. the statute does not require a relationship between the weapons possessed and the incident precipitating the 72-hour hold;
4. the confiscated firearm should be returned when the patient is released;
5. a medical professional should make the assessment of dangerousness;
6. Sections 8100 & 8103 have more rigorous and precise standards.

The appellate court rejected all of these arguments, commenting that the “purpose of section 8102, like other statutes that limit the availability of handguns to persons with a history of mental disturbance, is to protect those persons or others in the event their judgment or mental balance remains or again becomes impaired”(p. 424). They also pointed out that in a section 8102 hearing, the plaintiff has the opportunity to call medical experts if he or she desires.

In *City of San Diego v. Kevin B.*,⁶ the city moved to destroy the confiscated firearms of an individual whom the police wished to place on a 72-hour hold but were unable to locate. The appellate court found in favor of the defendant, stating that section 8102 requires that the person receive a face-to-face evaluation. They reasoned that “on a practical level, unless the power to confiscate and forfeit weapons is closely tethered to the assessment and evaluation required by section 5151 and 5152, a risk arises that weapons will be taken from law-abiding citizens who in fact are not a danger to themselves or others. Absent assessment and evaluation by trained mental health professionals, the seizure and loss of weapons would depend solely on the necessarily subjective conclusion of law enforcement officers



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who may or may not have the mental health training and experience otherwise available at a designated mental health facility within the meaning of section 5150" (p. 942).

These California appellate decisions are generally similar to decisions regarding the limits of the federal law in this area, which have been reviewed elsewhere.^{1,5} Taken together, the body of case law illustrates the approach courts are likely to take when analyzing the pros and cons of firearm restrictions on individuals with a history of mental health problems. This approach could be briefly summarized as essentially supporting the premise that the government does not violate constitutional rights when it prevents individuals with a history of mental health problems from acquiring firearms, provided that there is sufficient evidence that the individual in question does in fact suffer from a mental disorder.

Implementation by the California Department of Justice

All hospitals that admit patients on 72-hour holds report each instance when an individual is placed on a hold for danger to self or others to the California Department of Justice (DOJ). Fourteen- and 30-day holds are also reported. The names of the reported individuals are maintained in a database that is used in the background check that occurs whenever an application is made to purchase a firearm. Section 8108 exempts facilities and providers from liability for making these reports: "Mental hospitals, health facilities, or other institutions, or treating health professionals or psychotherapists who provide reports subject to this chapter shall be civilly immune for making any report required or authorized by this chapter."

On average, over 11,000 such notifications are made each month (information provided to the author under the U.S. Freedom of Information Act by the California DOJ, Firearms Division). Although the Firearms Division does not keep separate statistics by type of hold, it is likely that the majority of reports are for 72-hour holds, since these are more common than longer periods of involuntary treatment. A much smaller number of individuals—approximately 20 per month statewide—are reported due to Tarasoff warnings.

As noted above, section 8103(f)(5) gives individuals the opportunity to petition in the superior court of their county of residence for early relief from the firearms prohibition once during the 5-year period in which the prohibition is in effect. There is no statutory require-

ment that a mental health professional be involved in the hearing to determine whether the prohibition should be lifted. The California DOJ, Firearms Division receives notification that relief has been granted for approximately 30–60 individuals statewide each month (information provided to the author by the California DOJ under the U.S. Freedom of Information Act).

Statistics are not kept concerning the number of 8103(f)(5) petitions that are denied. However, other data suggest that most individuals with a history of involuntary mental health treatment in California do not attempt to purchase firearms. According to the California DOJ,¹⁵ 3,096 applications for the purchase of firearms (approximately 1% of the total applications) were denied in 2004 for all causes. Of these, 382 (12%) were denied because of mental health prohibitions. This is a small number indeed when one considers that somewhere in excess of 100,000 people are added to the California DOJ's database of banned individuals each year.

In Los Angeles County, the county with the largest population in California, an average of 6 Section 8103(f)(5) petitions are filed each month.¹⁶ All hearings are conducted in Superior Court Department 95, the division that hears cases relating to mental health issues, including civil commitments and certain types of forensic cases. This court has made an informal decision to have every petitioner evaluated by a forensic psychiatrist. The evaluation consists of a review of records from the involuntary admission triggering the ban, a psychiatric interview with the petitioner, and, if deemed necessary, contact with collateral sources such as family members or current treatment providers. The assistant district attorney in the department may choose to oppose the petition and, in many cases, testimony is heard, often including that of the forensic psychiatrist. Roughly half of the petitions filed are heard, and a ruling made by the judge. Of these, about 80% are granted.¹⁶

Implications for Mental Health Professionals

Ramifications of involuntary psychiatric treatment may extend beyond the treatment episode. One consequence, the loss of the right to purchase or possess firearms as a result of involuntary hospitalization, has received little attention in the psychiatric and legal literature until very recently.^{3,5,17} Under federal law, any individual who has been formally committed to a mental institution loses the ability to purchase or possess firearms. Some states, including California, also ban

firearm possession by individuals who have been involuntarily hospitalized for brief periods, without administrative or judicial review, as is the case with California's 72-hour hold. Clinicians who involuntarily hospitalize patients in jurisdictions with such provisions may wish to reflect on the actual need to use involuntary treatment in cases where inpatient care could be rendered on a voluntary basis. The impetus to consider the consequences to the patient of the loss of firearm rights may be particularly significant for individuals experiencing a temporary crisis who must possess firearms as a part of their employment. An actual case may serve to illustrate this point (some details have been changed).

Officer M was a career police officer with no previous psychiatric history who was in the process of reconciling with his estranged wife. When his wife expressed doubts about reuniting, he became dysphoric and drank alcohol to the point of intoxication. He called a friend and expressed feelings of hopelessness. The friend became concerned that Officer M might be suicidal and called the local police. The police took Officer M to a psychiatric hospital, where he was placed on a 72-hour hold for danger to self. He was released at the end of the hold, with no medications and no planned follow-up. The discharge diagnosis was adjustment disorder. As a result of the hold, he was placed on limited duty. He petitioned the court for relief from the 5-year ban. When evaluated by a forensic psychiatrist as part of the petition process, there was no evidence of mental illness or substance abuse. His petition was granted. Had this person been hospitalized voluntarily, a 5-year ban would not have been triggered.

As the number of states with laws of this type has increased, it becomes more likely that a treating clinician may be asked to give an opinion regarding restoration of firearm rights. As is the case with other assessments of future risk or dangerousness, reaching an opinion on this issue may be challenging, so that clinicians may wish to seek consultation or suggest that the requesting court obtain a forensic psychiatric evaluation.

Because most states do not specify a procedure to be followed in determining whether to lift a firearm prohibition, judges are free to make decisions without obtaining input from a mental health professional. It would appear that this state of affairs increases the risk of errors being made, both when individuals, who are in

fact at increased risk and should not be allowed to possess firearms, have their rights restored, and when individuals who are at low risk are denied. Mental health professionals who practice forensically may wish to consider offering their services to judges or attorneys dealing with these cases to reduce the chance of these types of errors being made. To the author's knowledge, there has been no formal outcome study of individuals after restoration of firearms rights in terms of suicide, homicide, arrest, or any other measure.

Conclusions

This column has focused on California's statutory and case law concerning prohibition of firearms purchase and possession by individuals with a history of mental health adjudications and involuntary psychiatric treatment and discussed how these laws have been implemented. With the exception of individuals placed on a 72-hour hold for grave disability whose involuntary treatment is not extended, every patient who is admitted involuntarily in California is prohibited from possessing firearms for at least 5 years. Several other states also have firearm laws that apply to a broader population than that identified by the federal definition. Clinicians who practice in jurisdictions with such laws should familiarize themselves with the potential impact of these statutes on their patients and should be prepared to respond to requests for opinions on restoration. This area represents a potential new source of referrals for forensic practitioners as well as for epidemiological and clinical research. Future research directions could include studies of the impact of firearm laws on patients (including on their employment), rates of prohibition, rates of prohibition relief, and rates of suicide and violence.

A discussion of the ethics, efficacy, and reasonableness of firearm prohibition laws is beyond the scope of this paper. Although the federal law is nearly four decades old, many state laws are of more recent origin. Discussions of this trend and of the ethics and effectiveness of firearms prohibitions for individuals with a history of psychiatric treatment have recently been published.^{3,17} Appelbaum¹⁷ commented that "given that only a tiny fraction of violence, including gun violence, is perpetrated by persons with mental disorders, efforts that center disproportionately on restricting their access reflect a deeply irrational public policy" (p. 1320). Concerns about confidentiality in the context of databases of individuals barred from purchasing firearms for mental health reasons have also been raised.^{3,17}

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No research has yet specifically examined the impact of firearm laws that affect individuals with histories of mental health problems in terms of important issues such as employment, health insurance, violence, or suicide. However, several studies have demonstrated an increased risk for death by suicide¹⁸⁻²¹ and homicide^{19,22} among firearm purchasers and owners. In one of these studies, a positive correlation between household handgun ownership and suicide rates could not be explained by differing rates of major depression, suicidal thoughts, or alcohol consumption.²¹ This finding suggests that individuals with psychiatric diagnoses may be at higher risk for suicide if there is a firearm in their household. Thus, there appears to be at least some evidence to suggest that limiting access to firearms on the basis of mental health issues may have the potential to reduce suicide rates. Clearly, much more research on this topic is needed.

Mental health practitioners should be aware of any laws in their jurisdiction affecting access to firearms by individuals with a history of mental illness or treatment. Such laws can have a significant impact on patients and may also present difficult challenges for treatment providers asked to give opinions about restoration. Despite some persisting questions about their appropriateness and fundamental fairness, these types of laws are increasingly common and highly likely to remain on the books for the foreseeable future.

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