From the Consortium for Risk-Based Firearm Policy

GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS:

An Evidence-Based Approach for State Policy

December 2, 2013

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Consortium for Risk-Based Firearm Policy

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Summary

The Consortium for Risk-Based Firearm Policy (Consortium) includes the nation's leading researchers, practitioners, and advocates in gun violence prevention and mental health. In March of 2013, members of the Consortium met for a two-day conference to discuss research evidence and identify areas of consensus. This initial meeting resulted in a commitment to advance evidence-based gun violence prevention policy recommendations through the newly formed Consortium.

The current national dialogue around mental illness and gun violence is refracted through the lens of news accounts of mass shootings by individuals described as psychotic or mentally disturbed. Such acts galvanize public attention and reinforce the widespread perception that serious mental illness generally causes violent behavior. With the benefit of clear hindsight, these tragedies often appear to have been predictable and preventable. However, mass shootings are statistically rare events and thus inherently difficult to predict.

These rare events need to be seen in the context of the broader problem of firearms-related injury and mortality in the population; an estimated 31,000 people die and 74,000 suffer non-fatal gunshot injuries each year.[1] On the day of the massacre at Sandy Hook Elementary School in December, 2012, an estimated 85 other people died of gunshot injuries throughout the US, including in gang shootings, intimate partner attacks, and suicides; another 85 died the day before, and the day after.[2] Although major mental illnesses are associated with increased risk of violent acts, policies targeted at this group alone will be ineffective at reducing the risk of the vast majority of violence towards others. Mental illness, however, plays a very significant role in gun suicides, which account for over half of gun deaths, and interventions aimed at people with mental illness may be more effective here.

Importantly, the research evidence points to several key factors that are associated with risk of committing firearm violence – toward self and others – in people both with and without mental illness, including history of violent crime, perpetration of domestic violence, alcohol abuse, and drug abuse. Current federal policies do not adequately reduce access to firearms by individuals who meet these evidence-based criteria for risk of violence. The policy recommendations proposed in this report are based on the best available research evidence, and hold promise for preventing gun violence by persons at high risk of committing gun violence – including suicide. While some updates to federal firearm disqualification criteria related to mental health are needed, the Consortium has concluded that rather than focusing on mental health as a single factor in isolation, future gun violence prevention policy efforts should use evidence-based criteria shown to increase the risk of violence – including suicide – to disqualify individuals meeting those criteria from purchasing or possessing firearms. In addition, new mechanisms to remove firearms from individuals at immediate risk of harming themselves or others should be created. Importantly, successful implementation of our recommendations depends on all firearm transfers requiring a background check under federal law.

The Consortium supports three distinct paths for intervention at the state level. The first concerns a needed expansion of current state mental health firearm disqualification policies. The second path expands state firearm prohibitions to include people who meet specific, evidence-based criteria that elevate their risk of committing violence. The third introduces a new mechanism to remove firearms from individuals who pose a serious risk of harm to self or others. With this threefold approach we offer policy makers a way forward that is informed by the best available evidence, meaningful for the victims and families affected by gun violence, and respectful of individuals with mental illness and their care providers.

Recommendation #1: Current state law should be strengthened to temporarily prohibit individuals from purchasing or possessing firearms after a short-term involuntary hospitalization. Concurrently, the process for restoring firearm rights should be clarified and improved.

1.1 States should enact new legislation temporarily prohibiting individuals from purchasing or possessing firearms after a short-term involuntary hospitalization. This prohibition should be predicated on a clinical finding of danger to self or danger to others.
1.2 Restoration of an individual's ability to purchase or possess a firearm following a firearm disqualification due to mental illness should be based on an evaluation by a qualified clinician and a finding that the petitioner is unlikely to relapse and present a danger to self or others in the foreseeable future.

Recommendation #2: States should enact new prohibitions on individuals' ability to purchase or possess a firearm that reflect evidence-based risk of dangerousness.

Our recommendations for new temporary firearm prohibitions focus on groups at heightened risk of future violence:

2.1 Individuals convicted of a violent misdemeanor.
2.2 Individuals subject to a temporary domestic violence restraining order.
2.3 Individuals convicted of two or more DWI or DUIs in a period of five years.
2.4 Individuals convicted of two or more misdemeanor crimes involving a controlled substance in a period of five years.

Recommendation #3: Develop a mechanism to authorize law enforcement officers to remove firearms when they identify someone who poses an immediate threat of harm to self or others. States should also provide law enforcement with a mechanism to request a warrant authorizing gun removal when the risk of harm to self or others is credible, but not immediate. In addition, states should create a new civil restraining order process to allow family members and intimate partners to petition the court to authorize removal of firearms and temporarily prohibit firearm purchase and possession based on a credible risk of physical harm to self or others, even when domestic violence is not an issue.

3.1: Authorize law enforcement to remove guns from any individual who poses an immediate threat of harm to self or others. Law enforcement officers are well versed in the "use of force" continuum, and may also use risk/lethality assessments to judge the risk of particular situations. In emergency situations, this authority can be exercised without a warrant.
3.2: Create a new civil restraining order process to allow private citizens to petition the court to request that guns be temporarily removed from a family member or intimate partner who poses a credible risk of harm to self or others. This process should mirror the restraining order process in most states and include a temporary *ex parte* order as well as a long-term order issued after a hearing in which the respondent had an opportunity to participate. Respondents to an

order issued through this process (Gun Violence Restraining Order or GVRO) will be prohibited from purchasing and possessing guns for the duration of the order and required to relinquish all firearms in their possession for the duration of the order. Law enforcement officers should be able to request a warrant through this process to remove guns when there is a credible risk of harm that is not immediate.

3.3: Include due process protections for affected individuals. Specifically, provide respondents with an opportunity to participate in a hearing after having their guns removed by law enforcement (3.1) or through the GVRO process (3.2) and assure processes are in place for returning all removed guns at the conclusion of the temporary prohibition.

Introduction

The Consortium for Risk-Based Firearm Policy (Consortium) includes the nation's leading researchers, practitioners, and advocates in gun violence prevention and mental health. In March of 2013, members of the Consortium met for a two-day conference to discuss evidence, identify areas of consensus, and formulate evidence-based policy recommendations to prevent gun violence. This initial meeting was a success, with one result being a commitment to advance evidence-based gun violence prevention policy recommendations through the newly formed Consortium.

While much of the national dialogue around recent mass shootings has focused on the relationship between mental illness and violence, the research evidence shows that the large majority of people with mental illness do not engage in violence against others and most violence is caused by factors other than mental illness.[3, 4] However, research suggests that small subgroups of individuals with serious mental illness, including psychiatric inpatients and individuals experiencing first-episode psychosis, are at elevated risk of violence.[5] In addition, mental illnesses such as depression significantly increase the risk of suicide,[6, 7] which accounts for more than half of gun deaths in the United States each year.[8]

Policies to prevent the tragic toll of gun violence on our families and communities are greatly needed. Policy approaches should be evidence-based, promote public safety, and respect persons with mental illness. The Consortium recognizes that violence prevention policies targeting broad groups of people with mental illness – most of whom will never be violent – could further stigmatize those with mental illness and potentially create barriers to mental health treatment seeking.[9-11] Given the heightened risk of violence toward self and others in the period surrounding psychiatric hospitalizations,[12, 13] the Consortium recommends that current state laws be strengthened to include a temporary firearm prohibition following short-term involuntary hospitalization. This expanded prohibition should be accompanied by an improved state firearm restoration process.

The Consortium has concluded that rather than focusing primarily on mental illness, future gun violence prevention policy efforts should focus on preventing access to firearms by persons exhibiting dangerous behavior. Evidence-based criteria shown to increase the risk of violence – including suicide – should be used to disqualify individuals meeting those criteria from purchasing or possessing firearms. In addition, new mechanisms to remove firearms from individuals posing an immediate risk of harming themselves or others should be developed.

The Role of Research Evidence

Many recent gun violence prevention policy discussions have assumed a direct causal connection between mental illness and violence. The research evidence suggests that violence has many interacting causes, and that mental illness alone very rarely causes violence.[14-17] As a result, strategies that aim to prevent gun violence by focusing solely on restricting access to guns by those diagnosed with a mental illness are unlikely to significantly reduce overall rates of gun violence in the United States.[18, 19] Research

evidence is needed to inform public dialogue and policy discussions regarding gun violence prevention.

Unless they have other risk factors for violence, individuals with common mental health conditions, such as anxiety and depression, are not much more likely to be violent toward others than individuals without these conditions.[20] Similarly, most people with serious mental illness – which includes conditions such as schizophrenia and bipolar disorder – are never violent toward others, and are in fact more likely to be victims than perpetrators of violence.[21-23] However, research suggests that small sub-groups of individuals with serious mental illness, at certain times, such as the period surrounding a psychiatric hospitalization or first episode of psychosis, are at elevated risk of violence.[24, 25] In addition, the population with serious mental illness experiences high rates of co-occurring substance use,[26, 27] an important risk factor for violent behavior in the general population.[28] Importantly, only a very small proportion of violence in the United States – about 4% – is attributable to mental illness.[29] While this is low in relative terms, we recognize the tragic consequences of this type of violence for victims, survivors, and society.

Current federal law prohibits persons who have been involuntarily committed to inpatient psychiatric care, persons found incompetent to stand trial or acquitted because of serious mental illness, and persons placed under conservatorship because of serious mental illness from having a gun.[30] To date, few research studies have examined how gun violence prevention policies focusing on persons with mental illness affect risk of committing violence toward others in this group. One study examined how implementation of the federal law in Connecticut affected arrests for violent crime in a cohort of more than 23,000 people with serious mental illness.[31] Swanson and colleagues found that the state's initiation of reporting gun-disqualifying mental health records to the National Instant Background Check System resulted in a significant reduction in risk of arrest for violent crime among persons prohibited from having a gun due to mental illness.[32]

Swanson and colleagues concluded that mental health background checks and NICS reporting *can work*, with the clear policy implication that states should improve their reporting of gun-disqualifying records of persons with a history of mental health adjudication.[33] However, the investigators also noted that the potential impact of the policy was limited by the fact that only about 7% of persons with serious mental illnesses who were receiving services in Connecticut's public behavioral healthcare system *had* a gun-disqualifying record of involuntary commitment; states vary widely in their rates of civil commitment, and Connecticut's rate is low.[34] As a result, almost all (96%) violent crimes in this study population with serious mental illness were committed by individuals who did not have a federal *mental health* firearm disqualification in effect at the time of the crime.[35] It should be noted, however, that many of these individuals did have a disqualifying *criminal* record in effect.[36] The lesson for Connecticut is that while the current federal mental-health disqualification has reduced violence somewhat since NICS was provided with the necessary data, enforcing the mental-health disqualification is no substitute for enforcement of criminal prohibitors.[37] Further, there is a case to be made for, gun seizure policies that are focused on dangerousness and history of violence, rather than on mental health diagnoses *per se.*

State laws to restrict firearm access due to mental illness vary. Most state laws align with federal law, but several states have implemented mental illness-focused firearm prohibitions that are stricter than federal law. Given the research evidence showing heightened risk of violence toward self and others in the period surrounding psychiatric hospitalizations,[38, 39] the Consortium has concluded that state laws should focus on preventing access to firearms during this period. For example, California prohibits individuals who are admitted to a short-term involuntary hospitalization[40] from purchasing or possessing a firearm for five years.[41]

Although the public dialogue about mental illness and violence has focused on violence toward others, mental illness is much more strongly linked with risk of suicide. Depression is the mental illness most strongly associated with risk of suicide.[42] Suicide is the second leading cause of death among young adults aged 25-34, and the 10th leading cause of death among all Americans.[43] Although most suicide attempts do not involve guns, over half of completed suicides are firearm suicides.[44] Evidence shows that because of the lethality of firearms, 90% of firearm suicide attempts result in death.[45] Critically, the majority (approximately 60%) of gun deaths in the United States are suicides.[46] In 2011, nearly 20,000 people died as a result of firearm suicide, almost twice as many as were killed as a result of firearm homicide that year.[47]

To date, almost no studies have examined how gun violence prevention policies targeting persons with mental illness affect suicide.[48] Ludwig and Cook (2000) conducted research showing that the implementation of the Brady Law in states with waiting periods for a gun purchase was responsible for a 6% decline in the suicide rate for adults over age 55.[49] Multiple research studies have shown that easy access to firearms increases risk of suicide.[50-66] This finding suggests that state policies that restrict firearm access among persons with mental illness, particularly those with depression, could help to prevent suicide.

In the large majority of cases, mental illness does not lead to violence.[67] In contrast, the evidence suggests that other factors – including conviction for violent misdemeanor crimes,[68] perpetration of domestic violence,[69-71] alcohol abuse,[72, 73] and drug abuse[74] and– significantly increase individuals' risk of committing future violence. Use of these evidence-based criteria to prohibit firearm purchase and possession by individuals at high risk of committing future violence is a promising avenue for gun violence prevention policy. The strongest predictor of future violence is prior violent behavior.[75, 76] To date, however, few mechanisms exist to remove firearms from individuals exhibiting dangerous behavior. The Consortium therefore recommends development of a legal mechanism to temporarily remove firearms from individuals posing an immediate danger to self or others for any reason.

<u>The Paths Forward:</u>

The Consortium supports three distinct paths for intervention at the state level. The first concerns a needed expansion of current state mental health firearm disqualification policies. The second path expands state firearm prohibitions to include people who meet specific, evidence-based criteria that elevate their risk of committing violence. The third

introduces a new mechanism to remove firearms from individuals who pose a serious risk of harm to self or others. With this threefold approach we offer policy makers a way forward that is informed by the best available evidence, meaningful for the victims and families affected by gun violence, and respectful of individuals with mental illness and their care providers.

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Recommendation 1.1: States should enact new legislation temporarily prohibiting individuals from purchasing or possessing firearms after a short-term involuntary hospitalization. This prohibition should be predicated on a clinical finding of danger to self or others.

Short-term involuntary hospitalization typically occurs without a judicial or administrative order for civil commitment. It is triggered by the finding of a mental health practitioner or other authorized person that an individual is a danger to self or others, allowing the individual to be transported for evaluation and subsequently admitted to an inpatient psychiatric unit for involuntary care.

Every state currently has a process in place that delineates the findings and procedures for short-term involuntary hospitalization when a person is determined to be a danger to self or to others. We believe that short-term involuntary hospitalization is a meaningful and reliable indicator of an individual's dangerousness and recommend that states implement a temporary firearm prohibition of five years following an individual's admission to short-term involuntary hospitalization.

We recommend:

A person should be disqualified for five years under state law: (a) if the person was admitted to or detained in a mental health facility for emergency treatment based on a clinical evaluation conducted by a mental health practitioner who has statutory authority to initiate the process of involuntary hospitalization; and (b) if the civil commitment criteria were confirmed by the a physician upon admission to the mental health facility.

This expansion of the mental health disqualification is contingent upon states also having a meaningful and clinically informed restoration standard for individuals who are subject to this temporary prohibition. The Consortium's recommendation for restoration following a short-term involuntary hospitalization can be found on page 15 of this report.

There is a question of the constitutionality of a temporary firearm prohibition based on a process that does not include judicial or administrative review. The 2008 Supreme Court decision *District of Columbia v. Heller*[77] recognized an individual right to possess a handgun in the home for purposes of self-defense.[78] Subsequently, the U.S. Court of Appeals for the First Circuit in 2010 decided *U.S. v. Rehlander*[79], which challenged Maine's long-standing, statutory firearm prohibition after emergency involuntary hospitalization for mental illness.[80] The court found that permanent firearm disqualification without judicial process after a short-term involuntarily hospitalization was unconstitutional.[81] While not calling into question the permanent deprivation of firearms rights attached to civil commitment following a court order, the court noted the important procedural differences between civil commitment and temporary involuntary hospitalization.[82, 83] The court noted that *Rehlander* would have been a different case if the federal mental health prohibition in 18 U.S.C. 922(g) addressed "ex parte hospitalizations and provided for a temporary suspension of the right to bear arms pending further proceedings. It could also be different if section 922 permitted one temporarily hospitalized on an emergency basis to recover, on reasonable terms, a suspended right to possess arms on a showing that he now no longer posed a risk of danger."[84] The decision implies that deprivations of firearm rights may be permissible without full due process protections as long as they are temporary or the person may seek a hearing.

Our policy recommendation changes firearm laws to expand the mental health firearm disqualifications to cover short-term emergency hospitalizations. We have addressed constitutional concerns in three ways. First, the restriction is limited to five years; in the absence of some other disqualifying event or behavior, the person's rights would be restored in five years by operation of law. Second, the temporary restriction of firearm rights would be predicated upon compliance with the state's statutory requirements for emergency evaluation and upon a clinical finding by a physician upon admission to the facility that the commitment criteria are met. Third, this temporary restriction of firearm rights would be accompanied by a fair and meaningful opportunity for disqualified individuals to have their rights restored after a one-year waiting period.

Recommendation 1.2: Restoration of an individual's ability to purchase or possess a firearm following a firearm disqualification due to mental illness should be based on an evaluation by a qualified clinician and on a finding that the petitioner is unlikely to relapse and present a danger to self or others in the foreseeable future.

Recommendation 1.2a: Restoration after a Civil Commitment

The current federal standards for firearm restoration following prohibition due to mental illness were set by the 2007 National Instant Criminal Background Check System (NICS) Improvement Act.[85] The NICS Improvement Act mandates that for states to receive grant funds from the federal government they must have a restoration process that provides due process protection and "relief" from the firearm prohibition if "the person's record and reputation are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[86]

These standards do not require a specific restoration process, which has resulted in varied approaches among the states.[87]

To assure an effective restoration process with judicial due process protections in place, we developed restoration language that outlines minimum requirements for states to apply when deciding whether to restore a prohibited person's ability to legally purchase and possess firearms. States should craft their restoration procedures to include these requirements and may add further requirements to ensure that only individuals fit to possess firearms can have their firearms eligibility restored.

Federal law prohibits individuals formally committed or adjudicated to be dangerous from firearm possession. Under the NICS Act, the development and implementation of restoration procedures for these individuals is left up to the states. As a result, states must address the restoration procedures for individuals who fall within the federal disqualifiers as well as individuals who fall within state-level disqualifiers. For restoration of rights to a person subject to a federal firearm disqualification we recommend use following language as a model:

Recommended Restoration Language

Any person prohibited from purchasing, possessing or transporting firearms [under the applicable section] may, no sooner than one year following his release from involuntary admission to a facility or from an order of mandatory outpatient treatment [or from the date of any other disqualifying mental health adjudication], petition the [applicable court in the city or county in which he resides] to restore his right to purchase, possess or transport a firearm.

The petition shall be accompanied by an opinion of a psychiatrist or licensed clinical psychologist with a doctoral degree who has personally evaluated the petitioner and can attest that: (i) the person no longer manifests the symptoms of mental disorder that necessitated the involuntary commitment [or other disqualifying mental health adjudication] or that otherwise significantly elevate the risk of harm to self or others; (ii) the person appears to have adhered consistently to treatment, if such treatment was recommended, for a substantial period of time preceding the filing of the petition and manifests a willingness to continue to be engaged in treatment with an appropriate mental health professional, if necessary; and (iii) if ongoing treatment is necessary, adherence to treatment is likely to minimize the risk that the person will relapse so as to present a danger to self or others in the foreseeable future.

The opinion of the clinician shall be accompanied by records and information concerning the person's mental health and treatment history, if any, including adherence to recommended treatment, history of suicide and prior violence, history of use of firearms and other weapons, history of use of alcohol and other drugs, and history of criminal justice involvement. If the state requests an independent clinical evaluation of the petitioner, the court shall appoint a psychiatrist or licensed clinical psychologist to conduct such an evaluation. After completion of the independent evaluation, if one has been ordered, and upon the request of either the petitioner or the state, the court shall conduct a hearing.

If, after receiving and considering the opinions of the evaluating clinician(s), accompanying records, and other relevant evidence, the court [or other governing authority] finds, by a preponderance of the evidence, that: (i) the petitioner no longer manifests the symptoms of mental disorder that necessitated the involuntary commitment [or other disqualifying mental health adjudication] or that otherwise significantly elevate the risk of harm to self or others; (ii) the petitioner has consistently adhered to treatment recommendations, if any, for a substantial period of time preceding the filing of the petition and expresses a willingness to continue to be engaged in treatment with an appropriate mental health professional, if necessary; (iii) if ongoing treatment is necessary, adherence to treatment is likely to minimize the risk that the petitioner will relapse so as to present a danger to self or others in the foreseeable future; and (iv) granting the relief would be compatible with the public interest, the court shall grant the petition.

Clinical Considerations

Three components of this model firearm restoration policy will require changes to some state restoration processes currently in place. These changes are informed by clinical considerations that the Consortium believes will result in a more effective restoration process.

When can an individual petition for restoration of his/her ability to purchase, possess, and transport firearms? Under our proposed language, an individual cannot apply for restoration for at least one year after his or her civil commitment ends. This "waiting period" is important because the risk for violence is greatest in the immediate time period after a commitment.[88, 89] Furthermore, having a year within which no restoration petition can be made allows for the clinician to observe the patient and monitor whether he or she is complying with treatment and, when relevant, maintaining sobriety from comorbid substance use. Evidence from research on violence among patients in an outpatient commitment setting has shown that risk of violence can be reduced when patients are compliant with treatment.[90] The waiting period increases the likelihood that there is a well-established pattern of treatment adherence and sobriety.

Who determines whether firearm rights should be restored? The Consortium's proposed language mandates that the judge[1] consider the clinical opinion of a psychiatrist or doctoral-level clinical psychologist regarding the petitioner's current mental state. Essentially, this opinion will be based on the petitioner's treatment history, and asks the clinician to verify "if ongoing treatment is necessary, adherence to treatment is likely to minimize the risk that the person will relapse so as to present a danger to self or others in the foreseeable future."

Clinical predictions of future violence are far from perfect[91] and as such our language includes a provision that instructs the judge to consider the records of the "person's mental health and treatment history, if any, including adherence to recommended treatment, history of use of alcohol and other drugs, and history of criminal justice involvement." This ensures that there is both a clinical consideration and a judicial consideration of the petitioner's mental health and treatment history, as well as the petitioner's involvement with the criminal justice system.

What factors should be considered when assessing restoration?

The model firearms restoration language specifies that the judge take into account whether granting relief from the prohibition would be "compatible with the public interest." This clause is part of the standards set by the NICS Improvement Act.[92] It requires the judge to consider other factors in the case, which may not be apparent in the mental health review but could lead to the conclusion that granting relief would be contrary to the public interest. The aim of our proposed restoration standard is to provide a model that includes a clinical perspective and a judicial process, and which balances public safety with the interests of the individual seeking restoration.

[1] Although we assume that most states will adopt a judicial restoration process, we recognize that some states may want to delegate these decisions to an administrative agency.

Legal Considerations

In addition to the clinical components of this proposal, three legal considerations are also important to ensuring effective and just restoration processes.

Who should bear the burden of initiating a restoration hearing? For a permanent firearm disqualification, the burden of initiating the hearing should fall to the petitioner. As a country we justify firearm disqualifications for the protection of public safety, and as the Supreme Court clearly indicated in the 2008 *Heller* decision there is no case law that prohibits the long-standing restrictions on firearm ownership by persons with mental illness.[93] Therefore, the burden of initiating the hearing should rest on the individual and not the state.

Which party should bear the burden of proof at the hearing? Our model law places the burden of proof on the petitioner at the hearing for restoration following a civil commitment. The petitioner has already had an adversarial hearing concerning the commitment and was deemed to be a danger to self or others as specified by the state's commitment criteria.[2] While the opportunity for restoration of firearm access must be allowed, in the interest of protecting public safety and because the government has already met its burden of proof in a prior hearing, the petitioner in this case must show that he or she no longer is at substantial risk of engaging in dangerous behavior.

Which standard of proof should the judge or administrator apply at the hearing? The final legal consideration is the standard of proof that should be applied at a restoration hearing. Case law after the 2008 *Heller* [94] decision indicates that the standard of proof should be a preponderance of the evidence.[95]

Recommendation 1.2b: Restoration following a Short-Term Involuntary Hospitalization

The restoration process outlined thus far is for relief from a permanent firearm prohibition following a formal civil commitment. For a permanent firearm prohibition there is always an opportunity for a judicial or administrative process to evaluate the likelihood that the patient is a danger to self or danger to others.

We recommend a slightly different procedure for restoration following a temporary prohibition due to short-term involuntary hospitalization. In this context, the person's rights would be automatically restored by operation of law after five years. However, the person would have an opportunity to petition for restoration after a one-year waiting period. If the petition is supported by a clinical opinion that the criteria for restoration are met, the state will bear the burden of proving that the person still poses an elevated risk for violence. The proposed language is as follows:

[2] Our recommendations focus on the civil commitment process because involuntary commitment accounts for most mental health disqualifications. However, we believe that the petitioner should also bear the burden of proof when the disqualification has been based on findings of incompetence.

Recommended Restoration Language in Cases Involving Disqualification Based on Short-Term Involuntary Hospitalization

Any person prohibited from purchasing, possessing or transporting firearms [under the applicable code section] may, no sooner than one year after his release from an order for temporary involuntary hospitalization, petition the [applicable court in the city or county in which he resides] to restore his right to purchase, possess, or transport a firearm. The petition shall be accompanied by an opinion of a psychiatrist or doctoral-level clinical psychologist who has personally examined the petitioner regarding whether the person's condition has improved and whether the person continues to present a significantly elevated risk of becoming a danger to self or others.

The opinion of the clinician shall be accompanied by records and information concerning the person's mental health and treatment history, including adherence to recommended treatment, history of use of alcohol and other drugs, and history of criminal justice involvement. If the state requests an independent clinical examination of the petitioner, the court shall appoint a psychiatrist or doctoral-level clinical psychologist to conduct such an examination. After completion of the independent evaluation if one has been ordered, and upon the request of either the petitioner or the state, the court shall conduct a hearing at which the state shall bear the burden of persuasion.

If, after receiving and considering the opinions of the examining clinicians, accompanying records, and other relevant evidence, the court finds, by a preponderance of the evidence, that the person continues to present an elevated risk of becoming a danger to self or others or that granting the requested relief would be contrary to the public interest, the court shall deny the petition.

A finding that the person continues to present a significantly elevated risk of becoming a danger to self or others shall require evidence showing that the person continues to manifest the symptoms of mental disorder that led to the temporary emergency involuntary treatment or that, even if the symptoms are no longer manifest, there is a substantial likelihood of relapse.

This restoration model contains many of the same clinical determinations as the civil commitment restoration language. Again, we recommend a one-year waiting period, and the opinion of a psychiatrist or doctoral-level clinical psychologist as to the level of risk that the petitioner poses due to their mental illness and treatment history. However, unlike the civil commitment language, this model asks the state to show that the petitioner "continues to present a significantly elevated risk of becoming a danger to self or to others."

Although the clinical considerations are similar between the two model restoration standards, there are several differences in the legal aspects. State law in California has long included a temporary firearm prohibition following involuntary treatment at a mental institution. Researchers in California reviewed the demographic and psychiatric conditions of individuals who petitioned for restoration in Los Angeles County, after receiving involuntary emergency treatment for mental illness. They found that "nearly one in six petitioners was employed in law enforcement or armed security," for which being armed was a requirement of the job.[96] This research underlines the importance of a fair restoration process that would allow appropriate individuals to work in jobs where they must be able to carry a firearm. On the other hand this research also indicated that in the vast majority of temporary firearm prohibitions, the person never asks for restoration.[97] Overall, these data highlight the need for protections built into the restoration process to protect the individual, while still giving adequate weight to potential consequences of the mental disorder that led to the involuntary treatment.

Once again, the three legal questions related to due process protections for the petitioner in this model law are: who should bear the burden of initiating a restoration hearing; which party should bear the burden of proof at the hearing; and what standard of proof should be applied?

Who should bear the burden of initiating a restoration hearing? As with restoration after a civil commitment, we place the burden of initiating a restoration hearing on the individual who is seeking restoration. This standard is driven by an emphasis on public safety, as well as the fact that it would be burdensome for the state to initiate the restoration process for each individual.

Which party should bear the burden of proof at the hearing? As previously indicated, we place the burden of persuasion on the state to show that the individual "continues to manifest the symptoms of mental disorder that led to the temporary emergency involuntary treatment or that, even if the symptoms are no longer manifest, there is a substantial likelihood of relapse." The state in this instance should bear the burden of persuasion, because there was not an adversarial or judicial process before the deprivation. Therefore, the individual's right to bear arms must be provided with more legal protection.

Which standard of proof should the judge or administrator apply at the hearing? We recommend that the standard of proof be preponderance of the evidence. This is based on post-*Heller* California case law, which looks specifically at firearm deprivations associated with a short-term involuntary hospitalization. California Code section 8103 provides for a

firearm prohibition to last five years unless the person subject to the prohibition requests a restoration hearing, and state statutes set the standard of proof at a preponderance of the evidence. Subsequent cases demonstrate that the deprivation of gun rights after short-term involuntary hospitalization will pass constitutional muster so long as the deprivation is time-limited. In addressing the constitutionality of the "preponderance of the evidence" standard of proof in the case of *People v. Jason K* the California Court of Appeal stated:

> Applying the applicable legal principles, we conclude section 8103, subdivision (f)'s preponderance of the evidence standard preserves fundamental fairness and properly allocates the risk of an erroneous judgment pertaining to firearm use between the government and an individual who was hospitalized after a finding that he or she presented a danger to himself or others (§§ 5150, 5151).[98]

This case law highlights that the preponderance of the evidence achieves a balance of public safety with the individual rights. It is with this mind that we suggest that the standard of proof be placed at the preponderance of the evidence.

Recommendation #2: States should enact new prohibitions on individuals' ability to purchase or possess a firearm that reflect evidence-based risk of dangerousness.

In this section, we recommend prohibitions on individuals' ability to purchase and possess a firearm based on presence of evidence-based risk factors for violence. While most violence is not committed by individuals diagnosed with a mental illness, factors such as alcohol abuse, drug abuse, and violent behavior are strongly associated with perpetration of violence.[99-117]

Our recommendations for new temporary firearm prohibitions focus on groups at heightened risk of future violence:

2.1 Individuals convicted of a violent misdemeanor.
2.2 Individuals subject to a temporary domestic violence restraining order.
2.3 Individuals convicted of two or more DWI or DUIs in a period of five years.
2.4 Individuals convicted of two or more misdemeanor crimes involving a controlled substance in a period of five years.

Current Standards

In addition to the federal firearm disqualifications related to mental illness, current federal law also prohibits firearm possession by certain categories of individuals at high risk of committing violence, including: felons; fugitives; persons convicted of a misdemeanor crime for domestic violence; persons subject to permanent domestic violence restraining orders; unlawful users or those addicted to a controlled substance; those who have been dishonorably discharged from the military; illegal aliens; and persons who have renounced their United States citizenship.[118, 119]

To implement these federal prohibitions, states submit records of prohibited persons to the National Instant Criminal Background Check System (NICS), which licensed gun dealers check at point of sale to identify illegal purchasers. However, reporting by states is voluntary and some states fail to report complete records to NICS.[120, 121] For example, the majority of states do not submit complete records of unlawful drug abuse to NICS.[122]

Recommendations

We recommend expanding state firearm prohibitions to include four groups of people who meet specific, evidence-based criteria associated with increased risk of committing violence. The policies outlined in this section of the report have the potential to restrict access to firearms by those individuals who are most likely to commit future acts of violence against themselves or against others. The evidence base that underlies these categorical prohibitions demonstrates the potential of these policies to reduce gun violence.

Recommendation 2.1: Individuals convicted of a violent misdemeanor should be prohibited from purchasing or possessing firearms for at least ten years.

The research evidence conclusively shows that individuals convicted of violent misdemeanors are at increased risk of committing future violent crimes.[123-125] California's

law prohibiting firearm ownership among violent misdemeanants[126] resulted in reduced arrest rates for violent crime overall and gun crime specifically among individuals previously convicted of violent misdemeanor crimes.[127]

Aside from a firearm prohibition for individuals with a misdemeanor conviction of domestic violence, federal law does not currently prohibit individuals who commit violent misdemeanor crimes from purchasing and possessing a firearm. However, twenty-three states and the District of Colombia prohibit firearm purchase and possession among individuals convicted of one or more misdemeanor crimes.[128] We recommend that a similar prohibition be added to state firearm prohibitions, and that misdemeanor convictions involving the use of a deadly weapon, the use of force, the threat of force, or stalking should result in an automatic firearm prohibition of at least ten years.

Recommendation 2.2: Individuals who are subject to temporary domestic violence restraining orders should be prohibited from purchasing and possessing firearms for the duration of the temporary order.

Most victims of intimate partner homicide are killed with a gun,[129, 130] and the research clearly shows that there is an increased risk of intimate partner homicide when an abuser has a firearm.[131-133] Importantly, these abusive relationships are often known to authorities. One study found that approximately half of women killed by their intimate partners had contact with the criminal justice system related to their abuse within the year preceding their murders. [134,135] The research shows that policy in this area can be effective. Cities in states with laws prohibiting respondents to domestic violence restraining orders from purchasing or possessing guns had 25% fewer firearm-related intimate partner homicides.[136] This research also illustrated that "would-be killers" do not replace guns with other weapons to effect the same number of killings."[137]

Temporary *ex-parte* orders are the first step in the domestic violence restraining order process. These temporary emergency orders, which occur in the absence of the respondent, reflect the immediate danger domestic violence victims often face and the dangerous nature of initiating separation in abusive relationships. Current state-level infrastructure around temporary domestic violence restraining orders ensures that a full hearing – with the respondent present – occurs within a short, defined timeframe. As a result, the temporary *ex-parte* protection order is quickly dismissed when a judge determines the order is not warranted. In response to evidence that temporary *ex-parte* restraining orders are associated with increased risk of violence,[138, 139] a number of states prohibit firearm purchase and possession by respondents for temporary *ex-parte* protection orders.[140]

Federal law currently prohibits firearm purchase and possession by respondents to permanent restraining orders or by those convicted of a misdemeanor crime of domestic violence.[141] These prohibitions are supported by well-corroborated evidence linking guns with domestic violence.[142-146] However, current state laws do not always prohibit firearm purchase and possession by respondents subject to temporary *ex-parte* restraining orders. Due to the risks respondents to temporary *ex-parte* domestic violence restraining orders

pose to victims of domestic violence, we recommend that individuals subject to temporary domestic violence restraining orders be prohibited from purchasing and possessing firearms for the duration of the temporary order.

Recommendation 2.3: Individuals convicted of two or more DWI or DUIs in a period of five years should be prohibited from purchasing and possessing firearms for at least five years.

The research consistently shows that alcohol abuse is associated with violence toward self and others.[147-156] For example, one study of adults in three large urban areas in the United States found that adults who abused alcohol were at increased risk for both homicide and suicide compared to adults who did not drink alcohol.[157] Another study found a strong association between victim and perpetrator alcohol abuse and intimate partner homicide.[158] Importantly, several studies have shown that firearm owners are at increased risk of abusing alcohol.[159-162] A 2011 study found that gun owners were more likely than people who lived in a home without a gun to binge drink, drive under the influence of alcohol, and have at least 60 drinks per month.[163] The same study also found that firearm owners who drank abusively were more likely than other firearm owners to engage in risky behaviors with firearms.[164]

While multiple states have laws prohibiting individuals who abuse alcohol from purchasing and possessing and firearms, the majority of laws fail to provide precise definitions of who is disqualified, making such policies difficult to implement.[165] One exception is Pennsylvania, which prohibits persons who have been convicted of three or more drunken driving offenses in a five-year period from having a gun.[166] In addition to providing a specific definition of alcohol abuser, use of DWI or DUIs as criteria to prohibit firearm ownership is strongly justified by the research evidence. One study found that compared to individuals with a single DUI arrest, those with multiple DUI arrests were more than three times as likely to be arrested for other misdemeanor and felony crimes.[167] In addition, studies have shown that people who drive under the influence are at increased risk of abusing illicit drugs[168, 169] and being arrested multiple times. [170]

Most state laws prohibiting firearm ownership among individuals who abuse alcohol are difficult to enforce and unlikely to be effective because the definition of abuse is not clearly enunciated. We therefore recommend that individuals convicted of two or more DWI or DUIs in a period of five years be prohibited by federal law from purchasing or possessing a firearm for at least five years.

Recommendation 2.4: Individuals convicted of two or more misdemeanor crimes involving controlled substances in a five-year period should be prohibited from purchasing or possessing firearms for at least five years.

The research evidence consistently shows that illegal use of controlled substances is associated with a heightened risk of violence.[171-175] The physical and psychological effects of controlled substances, including agitation and cognitive impairment, can heighten risk for violent behavior and impair the decision-making and communication skills necessary to

avoid violent conflicts.[176-178] In addition, involvement in illicit drug markets is strongly associated with violence. Studies have shown that conflicts within illegal drug markets are the most common cause of drug-related violence. [179-183]

Federal law currently prohibits illegal users of a controlled substance from purchasing or possessing a firearm.[184] According the General Accounting Office (GAO),[185] which interviewed state officials in 2012, the prohibition is poorly defined in current regulation and many states report confusion about which records of unlawful drug use they should submit to NICS. In addition, while felony drug convictions – like all felony convictions – lead to a permanent firearm disqualification under federal law, other records of unlawful drug use lead to a one-year firearm prohibition. According to the GAO, states are reluctant to submit records for such a short-term prohibition.

To address these issues, we recommend that the regulatory definition of "illegal user of a controlled substance" be clarified and that the one-year prohibition period be extended to five years. While the research evidence suggests that individuals with multiple misdemeanor crimes involving controlled substances are at increased risk of future violence,[186-195] there is little evidence to suggest that non-criminal records of unlawful drug use – such as failed drug tests or drug-related arrests that do not result in conviction – represent individuals at heightened risk of violence. We therefore recommend that individuals who are convicted of two or more misdemeanor crimes involving controlled substances in a five-year period should be prohibited from purchasing or possessing firearms for at least five years.

States should work with the federal government to ensure that all relevant and necessary records are submitted to the NICS system. Use of drug-related misdemeanor convictions to trigger firearm prohibition is feasible for most states and parallels our recommendations regarding alcohol abuse (2.1) and conviction for violent misdemeanors (2.3). While a single misdemeanor drug conviction does not necessarily heighten risk of future violence, multiple misdemeanor drug convictions in a short period of time indicates sustained involvement in the illicit drug market, which substantially increases risk of violence.[196-200]

Recommendation #3: Develop a mechanism to authorize law enforcement officers to remove firearms when they identify someone who poses an immediate threat of harm to self or others. States should also provide law enforcement with a mechanism to request a warrant authorizing gun removal when the risk of harm to self or others is credible, but not immediate. In addition, states should create a new civil restraining order process to allow family members and intimate partners to petition the court to authorize removal of firearms and temporarily prohibit firearm purchase and possession based on a credible risk of physical harm to self or others, even when domestic violence is not an issue.

3.1: Authorize law enforcement to remove guns from any individual who poses an immediate threat of harm to self or others. Law enforcement officers are well versed in the "use of force" continuum, and may also use risk/lethality assessments to judge the risk of particular situations. In emergency situations, this authority can be exercised without a warrant.

3.2: Create a new civil restraining order process to allow private citizens to petition the court to request that guns be temporarily removed from a family member or intimate partner who poses a credible risk of harm to self or others. This process should mirror the restraining order process in most states and include a temporary *ex parte* order as well as a long-term order issued after a hearing in which the respondent had an opportunity to participate. Respondents to an order issued through this process (Gun Violence Restraining Order or GVRO) will be prohibited from purchasing and possessing guns for the duration of the order and required to relinquish all firearms in their possession for the duration of the order. Law enforcement officers should be able to request a warrant through this process to remove guns when there is a credible risk of harm that is not immediate.

3.3: Include due process protections for affected individuals. Specifically, provide respondents with an opportunity to participate in a hearing after having their guns removed by law enforcement (3.1) or through the GVRO process (3.2) and assure processes are in place for returning all removed guns at the conclusion of the temporary prohibition.

Broad policies restricting gun access by people who have been diagnosed with a mental illness are neither justified nor likely to be effective in reducing gun violence in the United States.[201] Restricting gun access based on a credible threat of violence is promising, but has long been recognized as a challenge because such behavior by itself does not constitute a criminal act in most cases. As a result, threatening behavior by a co-worker, neighbor, or family member may cause concern but is unlikely to trigger a law enforcement response. When law enforcement is involved, they have few options to address the threat under current law because no crime has been committed. In order to address this shortcoming, the Consortium makes the following recommendations.

Recommendations

Recommendation 3.1: Authorize law enforcement to remove guns from any individual who poses an immediate threat of harm to self or others. Law enforcement officers are well versed in the "use of force" continuum, and may also use risk/lethality assessments to judge the risk of particular situations. In emergency situations, this authority can be exercised without a warrant.

We propose two mechanisms, based on existing state laws in several states that will establish clear authority for law enforcement to remove guns with and without a warrant when they identify an individual who poses a serious risk of harm to self or others. Such authority provides an important tool to reduce the immediate and short-term threat posed by such individuals.

Existing State Law

Connecticut, Indiana, and Texas each provide a process for law enforcement (police, sheriffs, and/or prosecutors) to assess whether an individual poses an imminent danger and whether the interests of public safety warrant a prohibition on the purchase and possession of firearms.

Connecticut

A 1998 shooting prompted the legislature to pass and the governor to sign a bill establishing a process by which two police officers or a state's attorney can file a complaint with the court based on probable cause that an individual "(1) poses a risk of imminent injury to self or others; (2) possesses one or more firearms. In such cases a judge may issue a warrant for law enforcement to search for and remove any and all firearms."[202] Law enforcement may only request a warrant after "conducting an investigation to establish that probable cause exists and determining that no reasonable alternative to avert the risk of harm exists."[203] Criteria for assessing both probable cause (e.g., recent threats or acts of violence toward self, others, or animals) and imminent risk (e.g., reckless firearm behaviors, threatened or actual violence, prior involuntary confinement in a psychiatric hospital, and illegal use of controlled substances or alcohol) are included in the law.[204] If the state establishes probable cause, a judge must issue a warrant. [205] After police serve the warrant and remove all guns, the court must schedule a hearing within 14 days to determine whether the guns will be returned or the warrant will stand.[206] At this hearing the state has the burden of proof to meet a clear and convincing evidence standard.[207] If that standard is met, the court may order the guns held for up to one year.[208] Any person whose guns are removed through this process may transfer those guns to an individual who is eligible to purchase and possess guns, otherwise the state will retain custody.[209] In cases where the state does not prove its case, all removed guns must be returned to the owner.[210]

During the first 10 years that the law was in effect, police and the state's attorney made at least 277 warrant requests resulting in 274 warrants issued and more than 2000 guns removed from individuals deemed to pose an imminent risk of violence. [211] Police removed guns from almost all (96%) of the people named in the warrants.[212]

Indiana

In 2004 one Indiana police officer was killed and four others were injured when responding to a complaint about a man with a gun. The shooter was also killed in the incident. Less than a year before, police removed several firearms and ammunition from the shooter after an encounter with the man resulted in an inpatient stay and a diagnosis of paranoid schizophrenia. These guns were later returned at the man's request, despite objections from law enforcement. After the shooting the Indiana legislature passed a bill that was signed by the Governor authorizing law enforcement to remove guns from an individual they deem to be dangerous.[213] The law defines dangerous in two ways: (1) someone who "presents an imminent present risk or possible future risk and who has not consistently taken medication to control a mental illness that may be controlled by medications;" or (2) "has a history to support a reasonable belief that the person has a propensity for violent or emotionally unstable conduct."[214]

Police do not need a warrant to remove guns from a person they identify as an immediate and substantial threat.[215] However, the law requires the officer involved to complete a written report justifying the gun removal within 48 hours.[216] After the confiscation, a hearing must occur for the purpose of determining whether the guns should continue to be held based on a "clear and convincing" standard.[217] The respondent in the hearing must be notified of the time, date, and location of the hearing.[218] It is the state's responsibility to establish clear and convincing evidence that the individual poses an immediate threat to self or others.[219] If the state meets the standard, any guns removed may be held for up to one year by the state, an approved third party, or a licensed firearm dealer.[220] The respondent also has the option of selling the firearms.[221] During this time the respondent is prohibited from purchasing additional firearms.[222]

Once the court approves a gun removal, individuals whose guns are held must wait at least 180 days before filing a petition to request a review of that decision.[223] The court must honor that request, and at the hearing the petitioner must prove by a "preponderance of the evidence" that he/she is not dangerous.[224] If the court determines that standard has been met, the petitioner may retake possession of his/her firearms. If the standard is not met, the petitioner may file another request to review the decision after 180 days have passed.[225]

At the conclusion of the court-ordered hold, or if the court determines that a continued hold is not warranted, the individual may retake possession of their guns.[226] When such an individual seeks to retain possession of his/her guns, law enforcement first conducts a NICS background check.[227] Unless that check reveals additional prohibitions on the respondent's ability to legally purchase and possess firearms, the respondent may retain possession of his/her firearms.[228]

During the first two years the law was in effect (2006 and 2007) one county court in Indianapolis heard 133 cases involving firearms removed under the new law.[229] In a minority of cases (9%) the judge ordered the guns returned to the owner.[230] Most of those cases (65%) were a response to suicide threat; a small portion (10%) was prompted by

active psychosis.[231] Police arrested few individuals when removing guns (5%), however most were either involuntarily (74%) or voluntarily (8%) transported for psychiatric evaluation.[232] During these first two years, implementation varied dramatically. Specifically, in 2007 68% of respondents either failed to appear at the court hearing (n=20) or were never served the notice of hearing (n=33), presumably because they could not be located. In contrast all respondents who had guns removed in 2006 participated in the subsequent hearing. [233]

More recent data suggest that implementation of the law continues to evolve. From 2010 to 2012 the Indianapolis county court that initially ordered guns be retained in more than 80% of cases returned weapons to the owners in nearly 80% of the cases.[234] Firearm license suspensions, a mechanism for prohibiting new gun purchases, also declined precipitously after the first year the law was in effect and challenges meeting the timeframes for hearings specified by the law have been noted.[235, 236]

Texas

A Texas law, which went into effect in September 2013, authorizes law enforcement to remove guns from the possession of persons with mental illness who pose an imminent risk to themselves or others.[237] As reported by local media, the law was part of a larger call to overhaul the state's mental health system and received support from law enforcement who view the new law as a way to better respond to mental health crises.[238] Passed almost unanimously by the Texas legislature, the new law allows an arresting officer to remove guns from the person taken into custody if the officer believes the person has a mental illness and as result poses "substantial risk of serious harm to the person or others unless the person is immediately restrained."[239] The law includes requirements for legal hearings and processes for returning or disposing of any guns that cannot be returned if the person transported is prohibited from possessing firearms.[240] California has long had a similar law.[241]

Texas law specifies that the arresting officer must provide the individual taken into custody with a receipt for all firearms removed and information about the process for reclaiming those firearms.[242] Within 15 days following the arrest, the law enforcement agency holding the guns must send to the person's closest family member information about the procedure for returning firearms removed by law enforcement at the time of arrest.[243] Within 30 days of the arrest, the law enforcement agency must request information from the court about the disposition of the individual taken into custody.[244] Within 30 days of receiving information from the court that the individual is no longer in custody, the agency must notify the individual that he/she can retain possession of their firearms once the agency verifies he/she is not prohibited from possessing firearms.[245] The agency is responsible for completing this background check within the 30-day period.[246] For those individuals whose arrest was followed by inpatient mental health treatment, the agency must notify them that they are no longer eligible to purchase and possess firearms; the process for appealing this disqualification; and the options available to them for legally disposing of their firearms. [247] No information about the implementation or impact of this law was available at the time of this writing.

In addition, many states authorize law enforcement to remove firearms when they arrive at the scene of a domestic violence incident for the safety of the officer, the victims and the public.[248, 249]

Based on these existing state laws, we suggest states adopt procedures that law enforcement may use to remove firearms from manifestly dangerous individuals either with or without a warrant.

Removing guns without a warrant. Police and sheriff's officers regularly respond to crises and in these contexts routinely assess whether people pose a threat, and employ strategies to minimize identified threats in accordance with their training and standardized approaches. After removing firearms when such a threat is identified, law enforcement will file a report with the court justifying the removal within 48 hours. The court will schedule a hearing within two weeks of the guns being removed and provide notice of the hearing to the gun owner. As the experience in Indiana demonstrates assuring implementation of this provision is crucial.[250] At the hearing the state will bear the burden of proof to demonstrate by clear and convincing evidence that the individual remains a risk to self or others. The court may consider the individual's history of threatening or dangerous behavior, history of or current use of controlled substances, history of or current abuse of alcohol, and history of adherence to prescribed psychiatric medications. Prior involuntary commitment to a psychiatric facility or to outpatient psychiatric or psychological therapy may also be considered. The hearing will determine if law enforcement will retain the guns for safe-keeping. If the court determines the individual remains a risk, the court may order the firearms held for up to one year by a licensed firearm dealer or local law enforcement agency. For the duration of this hold the individual will be prohibited from purchasing firearms, and the NICS system (or state equivalent) should be updated to include this information.

Removing guns with a warrant. When law enforcement agencies (police, sheriffs, and prosecutors) receive information from members of the public that a friend, neighbor, or coworker poses a risk of harm to self or others, they often have little recourse to avert harm. We recommend states adopt a Connecticut-style law that provides a warrant-based process for law enforcement to assess complaints about risk of harm and remove guns when such assessments warrant action with due process protections for those involved.

Recommendation 3.2: Create a new civil restraining order process to allow private citizens to petition the court to request that guns be temporarily removed from a family member or intimate partner who poses an immediate risk of harm to self or others.

Based on the experience of the 50 states with DVROs, we recommend states create a new civil restraining order process. This new process would provide family members and intimate partners with a mechanism to initiate a court proceeding to evaluate the credibility of reports about individuals who pose a serious risk of harm and assess that threat against an established standard, as described below. Where the standard is met, the court would have the option of issuing an order to remove any guns in the respondents'

possession. This Gun Violence Restraining Order (GVRO) offers a mechanism for intervening when a family member or intimate partner poses a risk of violence to self or others, even when domestic violence is not an issue.

Under U.S. criminal law the government initiates proceedings in response to a crime. Civil law offers a mechanism for private citizens to request the court's involvement in circumstances specified by law. Civil domestic violence restraining orders (DVROs) are one example of how civil law is used to address violence. DVROs are available in all fifty states and provide domestic violence victims with a process for engaging the court to structure protections to prevent future violence that does not involve a criminal complaint. DVRO processes are familiar to the public and generally regarded as an important part of a larger response system for domestic violence victims. Federal law prohibits respondents to certain DVROs from purchasing and possessing guns for the duration of the order, a provision repeated in at least 20 state laws. [251] Many of these state laws not only prohibit the abuser from purchasing or possessing firearms, but also mandate that the abuser surrender firearms already in his or her possession.[252]

Three studies suggest that state policies limiting DVRO respondents' access to firearms are associated with a reduction in domestic violence homicides in general, and domestic violence gun homicides in particular. [253-255] However, an evaluation of the law in North Carolina revealed that the firearm-related intimate partner violence was unaffected by the law.[256] This study was unique in that the authors included a measure of firearm possession by DVRO respondents, and this result may be because efforts to remove guns already in the abuser's possession were not occurring on a systematic basis. [257]

DVROs provide a mechanism for private citizens to bring to the court's attention individuals who are causing or threatening to cause violence in the context of an intimate relationship and are a tool for preventing future violence. States have the infrastructure in place to support restraining order applications, hearings, and service. Creating a new process to allow family members to petition the court when they have good cause to believe a relative poses an immediate risk of harm to self or others is a promising strategy to prevent gun violence.

Petitioning the court to prohibit purchase and possession. DVROs allow victims of domestic violence to seek an order to prevent further domestic violence and sometimes include a firearm prohibition as well. In contrast, the GVRO would focus solely on firearms, and would be based on a finding that the person presents a serious threat of harm to self or others. Nevertheless, the procedure that is used may be similar. The GVRO should follow the well-established infrastructure of the *ex parte,* temporary restraining order process. While processes differ among the states, generally the petitioner completes an application that includes information about the parties involved and the behaviors that led to the petition, and submits the completed application to the court. A judge then reviews the request and decides whether to issue a restraining order or deny the request. If a temporary restraining order is authorized under the expanded criteria and firearms are subsequently removed, the court will schedule a hearing at which the respondent has the right to be present with counsel. The hearing provides an opportunity for the respondent

to be part of the process when the court assesses whether to extend the temporary order. The process and procedure for the hearings should follow the procedures under the state's DVRO law.

Assessing immediate threat of harm. In assessing the threat of harm to self or to others the court may consider such factors as the petitioner's account of the threat; and the respondent's history of threatening or dangerous behavior, history of or current use of controlled substances, history of or current abuse of alcohol, and history of adherence to prescribed psychiatric medications. These factors may include threats of suicide. Prior involuntary commitment to a psychiatric facility or to outpatient psychiatric or psychological therapy may also be considered, if such information is available.

Implementing the prohibition. To assure that a court ordered prohibition on gun purchase and possession for the duration of the order is realized, states must include GVROs in the data reported to the NICS background check system. Similarly, processes for removing and storing guns, as authorized by the court, must also be established or clarified under state law. Firearms will be surrendered by or removed from the respondent immediately upon service of the *ex parte* order and held by a licensed firearm dealer or local law enforcement for the duration of the civil restraining order.

Returning removed firearms at the conclusion of the order. At the conclusion of the court order, state or local law enforcement will conduct a background check, including a check of the NICS system in accordance with existing practices under the state's DVRO system. If the respondent is not otherwise prohibited from purchasing or possessing a firearm, the respondent will have the opportunity to request that all firearms removed be returned, and the NICS system (or state equivalent) will be updated to allow the respondent to purchase guns. Law enforcement will notify the petitioner when the respondent to their order requests that guns be returned and provide the petitioner with information about petitioning the court to issue a new order.

Recommendation 3.3: Include due process protections for affected individuals. Specifically, provide respondents with an opportunity to participate in a hearing after having their guns removed by law enforcement (3.1) or through the GVRO process (3.2) and assure processes are in place for returning all removed guns at the conclusion of the temporary prohibition.

Rationale
The authority for law enforcement to remove guns under Recommendation 3.1 without court oversight is needed to be responsive to emergency situations in which the risk of harm to self or others is credible and immediate. This interest in public safety must be balanced against due process protections for individuals affected by this authority.

Due Process Protections
As described in the preceding sections, Recommendation 3.1 provides due process protections by requiring law enforcement officers who exercise this authority to file a report explaining their decision to remove guns and specifying that a hearing on the matter

must follow soon after the firearms are removed. Similarly Recommendation 3.2 calls for a civil *ex parte* hearing followed by a full hearing that includes the respondent.

Returning Removed Guns
All three recommendations support time-limited prohibitions. Provided the respondent is not otherwise prohibited from purchasing and possessing guns when the court order expires, processes are needed to assure guns are returned in a timely manner. Accordingly, both Recommendations 3.1 and 3.2 include gun return provisions.

General Policy Reform

This report provides guidance for the development of evidence-based policies to prevent gun violence. However, successful implementation of any firearm prohibition or expansion of state law depends on a) states entering all relevant records into the NICS firearm background check system and b) all firearm sales requiring a background check.

The NICS is the federal background check system licensed gun dealers check, at the point of sale, to verify that the purchaser is not prohibited from purchasing and possessing a gun. The system relies on input from the states. States submit the names of individuals prohibited from having a gun under federal law – due to mental illness or other reasons – to the federal NICS system. Reporting by states is voluntary, and many states lack the data systems necessary to report records to NICS. To date, many states do not report complete records – particularly records of civil commitment – to the NICS system.[258] States should work with the FBI to ensure that all relevant records are entered into NICS.

As the states increase their ability to ensure that records from civil commitment proceedings are automatically entered into the NICS background check system, there is a parallel opportunity for states to automate the system so that disqualifying domestic violence restraining orders or misdemeanor domestic violence convictions are automatically included in NICS. As with disqualifying mental health records, many states have been remiss in including disqualifying domestic violence records in the NICS firearm background check system. The first step to ensuring that violent abusers cannot access firearms is making sure that disqualifying records are included in the system.[259]

Even if every record of firearm disqualification was submitted to NICS, new firearm prohibitions would still not be fully effective without a background check on all gun sales. Current federal law only requires a background check when a firearm is purchased from a licensed firearms dealer, not when a firearm is purchased from a private, unlicensed seller. If we continue to allow prohibited purchasers to obtain firearms through private sales without a background check, firearm purchasers will be able to avoid screening altogether. In addition, even with enhanced laws and policies, response to this issue may vary considerably based on location, availability of services, and law enforcement commitment. Although these general policy recommendations do not represent novel legislation, they are essential to the effectiveness of the Consortium's recommendations.

Future Research Questions

<u>Research Priorities Related to Recommendation</u> #1: Current state law should be expanded to prohibit individuals from purchasing or possessing firearms after a short-term involuntary hospitalization. Concurrent updates to restoration should insure that the standards and processes are clinically based and consistent.

1. Study how state and federal laws prohibiting firearm possession by individuals involuntarily committed to inpatient psychiatric care or adjudicated mentally incompetent due to mental illness affect gun violence in states with different policy and social contexts. For example, the effects of the existing federal law on gun violence may differ depending upon states' gun laws, involuntary commitment policies and practices, rates of gun ownership, and population demographics.
2. Investigate whether background checks for firearm purchase serve as a deterrent to attempting firearm purchase among those with serious mental illness. The number of mental health records in the National Instant Criminal Background Check System (NICS), which licensed gun dealers check at point of sale to identify prohibited purchasers, has increased in the past three years. However, very few of these records have resulted in denials of firearm purchase. It is unclear whether this is because few people in this group want to purchase firearms, because the background check system serves as a deterrent to purchase attempts, or because prohibited persons who do wish to purchase firearms are able to evade background checks and obtain guns illegally.
3. Assess prevalence of gun ownership among subgroups of people with mental illness likely to be targeted by gun policies. A study using data from the NIMH National Comorbidity Study-Replication found that about 1 in 3 persons with lifetime diagnosable mental disorders had access to firearms, while about 5% carried a gun and 6% stored a gun unsafely; these figures did not differ significantly from rates in the general population.[260] However, the rates of gun ownership and access among persons who have been involuntarily committed or otherwise legally disqualified from firearms possession are unknown. Research to obtain this information would shed light on whether existing federal mental health prohibitions on firearms are being implemented and enforced, and whether they are effective in actually limiting gun access to prohibited persons with mental illness.
4. Evaluate the effects of state-specific laws to prevent some persons with mental illness who are not subject to involuntary hospitalization and have not been adjudicated incompetent from having guns, such as New York's SAFE Act, on violence toward others and suicide.
5. Investigate implementation of mental illness gun restriction policies across states and localities. Research in this area should seek to understand how, in practice, those prohibited from having a gun due to mental illness are prevented from purchasing and possessing firearms. Implementation research should also investigate the roles that healthcare providers, educators, law enforcement and

other stakeholders play in the implementation of policies to prevent persons with mental illness from accessing guns.

6. Study implementation of firearm restoration processes. Research in this area should examine the processes used in different states to restore firearm rights to persons prohibited from having guns due to mental illness.
7. Investigate how existing state and federal policies to prevent persons with mental illness from having guns affect suicide.
8. Study innovative approaches to preventing firearm suicides. Research should focus on evaluating policies and programs intended to restrict access to firearms among individuals at risk of attempting suicide.
9. Study the role of firearm access in the epidemic of suicide among military Veterans of different eras and in different age groups. Research on gun violence and suicide in this population of concern should investigate and compare firearm- and non-firearm-related suicide and violent crime risk among veterans with mental illness; among those who are enrolled and not enrolled in Veterans Health Administration (VA) services; and those with and without gun-disqualifying VA or state records of mental health adjudication or crime. Research should specifically examine the implementation and effectiveness of VA's policy to prohibit firearms from veterans with psychiatric disabilities who have been assigned fiduciaries to manage their VA benefits.
10. Study training of psychiatric residents, clinical psychologists, clinical social workers, and other professionals who respond to suicide threats. What are they taught about separating suicidal clients from their guns?
11. Investigate healthcare providers' attitudes and practices related to firearm restriction among persons with mental illness. Research should focus on how healthcare providers view the problem and what they do, currently, to try to limit access to guns when faced with a patient who may be at risk of suicide or of committing violence toward others.
12. Investigate if and how colleges and universities attempt to prevent access to firearms among students identified as at risk of harming themselves or others. As mental illnesses often develop among college-age young adults, a better understanding of how colleges and universities can help to prevent firearm suicide and violence toward others is critically important. Studies might focus specifically on how colleges and universities have implemented multi-disciplinary Threat Assessment Teams; effectiveness, and barriers to effectiveness of these teams; and how colleges attempt to balance concerns about student privacy, discrimination, campus safety, and college's perceived legal liability for adverse safety events as well as consequences of various policies and interventions (e.g., disclosing private health information and enforcing removal of enrolled students from campus when they are at risk.)
13. Investigate law enforcement policies and practices regarding prevention of access to firearms among individuals with serious mental illness.

14. Examine attitudes of people with mental illness toward gun restriction policies targeting individuals with serious mental health conditions. Research should focus on this population's support/opposition and perceived stigma of such policies.
15. Examine potential negative consequences of existing mental illness-focused gun policies, which can 'over-identify' the target population with mental illness and capture people at low risk of future violence. Future research should investigate how such policies affect stigma and discrimination, mental health treatment seeking, and therapeutic relationships.

<u>Research Priorities Related to Recommendation #2</u>: Enact new prohibitions on individuals' ability to purchase and possess a firearm based on presence of evidence-based risk factors for violence.

16. Evaluate the impact of state laws allowing removal of firearms from persons behaving dangerously (e.g., IN, CT), as alternatives or supplements to restrictions focused on persons with mental illness.
17. New models for removing firearms from persons behaving dangerously should also be developed and evaluated. For example, research in this area could inform development of a new expanded civil restraining order process to allow guns to be legally removed from individuals, including but not limited to those with mental illness, who pose a serious risk of harm to self or others.
18. Investigate which specific criteria should be used in making evidence-based judgments of dangerousness.

<u>Research Priorities Related to Recommendation #3:</u> Expand the current civil restraining order process to allow law enforcement and family members to petition a court to authorize seizure of firearms and issue a temporary prohibition on the purchase and possession of firearms based on a specific, substantiated threat of physical harm to self or others.

19. Examine potential negative consequences of existing mental illness-focused gun policies, which can 'over-identify' the target population with mental illness and capture people at low risk of future violence. Future research should investigate how such policies affect stigma and discrimination, mental health treatment seeking, and therapeutic relationships. Investigate implementation of existing state firearm seizure laws. To date, little is known about how and when such laws are used. Important research questions include:
    a. In what situations are existing firearm seizure laws being used?
    b. When law enforcement are notified that an individual is prohibited from having a gun, how likely are they to investigate and seize firearms?
    c. When persons are prohibited from having a gun due to state or federal law, how often are guns actually seized?
    d. How many guns that are seized are ultimately restored?

e. What is the process for firearm seizure and (if applicable) restoration?
f. What happens when seized guns are found to be illegal?
g. What types of guns do existing seizure laws cover? All types of firearms (e.g. handguns versus long guns)? What about other weapons, like Tasers?

20. Investigate whether existing state firearm seizure laws apply to guns owned by the prohibited individual only, or also to guns owned by others in the household? For example, if a woman is prohibited from having a firearm, could her husband's firearms be confiscated?

21. Evaluate how gun seizure laws affect those who need a firearm to do their job, such as law enforcement officers or security guards. The potential to use gun seizure as leverage for mental health or substance use treatment among this group should be examined.

22. Investigate which specific criteria should be used in making evidence-based judgments of dangerousness.

Additional Research Questions

23. Assess prevalence of gun ownership among subgroups of people with mental illness likely to be targeted by gun policies. For example, little is known about gun ownership about those who are involuntarily committed to inpatient psychiatric care.

24. Investigate whether background checks for firearm purchase serve as a deterrent to attempting firearm purchase among those with serious mental illness. The number of mental health records in the National Instant Criminal Background Check System (NICS), which licensed gun dealers check at point of sale to identify prohibited purchasers, has increased in the past three years. However, relatively very few of these records have resulted in denials of firearm purchase, and further research is needed to identify the reason.

25. Assess how 'stand your ground' laws intersect with mental illness. Do these laws, which create broad scope for self-defense claims in shootings, disproportionately and negatively impact people with mental disorders?

Conclusion

The Consortium for Risk-Based Firearm Policy (Consortium) includes the nation's leading researchers, practitioners, and advocates in gun violence prevention and mental health who are invested in promoting evidence-based policies that work to decrease gun violence. Our recommendations are informed by the best available research evidence. The recommendations in this report provide a blueprint for strengthening state firearm polices by expanding firearm prohibitions to encompass groups the research evidence shows are at heightened risk of committing violence, and developing mechanisms to allow for firearms to be removed from individuals who are at a serious risk of physical harm to self or others.

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