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Joseph M. Lehman

University of Illinois at Urbana-Champaign, jlehman3@illinois.edu

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All Men are Created Equal: Originalism, the Second Amendment, and Mental Disability

Joseph Lehman

University of Illinois at Urbana-Champaign

Abstract

Since the Supreme Court decided *District of Columbia v. Heller* in 2008, legal scholars, lawyers, and judges have disagreed about the classes of people to whom the Second Amendment applies. At least two federal appellate courts, in weighing in on this debate, have decided that the federal law barring those who were, at any point in their lives, and for any length of time, committed to a mental institution – 18 U.S.C. § 922(g) – does not violate the right to bear arms.

The Second Amendment prohibits this categorical exclusion. Going beyond the absence of historical support for this categorical prohibition, the common law practice of suspending – not eliminating – rights of those suffering from mental illness suggests that the Second Amendment was understood to permit only temporary suspension of rights. While at least three federal appellate courts have addressed this issue, substantive looks into the history of the right to bear arms have been relegated to either concurring or dissenting opinions. Proper protection of the rights of those who have overcome mental illness requires an originalist analysis of the relationship between rights and mental health. This analysis compels the conclusion that any categorical prohibition on a formally mentally ill individual from owning a firearm violates the Second Amendment.

Keywords: gun rights; originalism; second amendment; mental health

Definitions

(All definitions are from the Merriam-Webster Online Dictionary unless otherwise noted).

Categorical: absolute; unqualified.

Originalist: a legal philosophy that the words in documents and especially the U.S. Constitution should be interpreted as they were [publicly -JL] understood at the time they were written.

Common Law: the body of law developed in England primarily from judicial decisions based on custom and precedent, unwritten in statute or code, and constituting the basis of the English legal system and of the system in all of the U.S. except Louisiana.

Jurisprudence: the science or philosophy of law.

Abridge: to reduce in scope.

About the Author: *Joseph Lehman is a Senior studying English and Legal Studies at the University of Illinois at Urbana-Champaign, set to graduate in December 2021. His research interests include the American legal history, and Constitutional and statutory interpretation.*

Editor's Note: Submissions to JUSWR are written in APA (American Psychological Association) Style, the preferred style for the social sciences. Mr. Lehman's submission is written in Bluebook Style, a reflection of his legal training. Headings and citations appear differently in this submission than in the others.

I. Introduction

The Centers for Disease Control and Prevention calculates 50% of all Americans suffer from a mental illness at some point in their lives.[1] From depression to substance abuse, mental health crises take many forms. Mental health problems, however, are not always permanent, and those afflicted can find themselves in remission; treatment and the abolition of stigma can help to improve a person's mental health.[2] This ability to change allows those afflicted with mental illness to seek change: getting therapy, seeing a doctor, getting treatment. Just as modern medicine recognizes the possibility of mental health remission, English common law reflected the same understanding.

Unfortunately, modern Federal law ignores this ability to heal. 18 U.S.C. § 922(g)(4) provides that those: "who [have] been adjudicated as a mental defective or who [have] been committed to a mental institution" may not "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Accordingly, when an individual who, at one point, had been involuntarily committed to a psychiatric facility attempts to exercise their right to bear arms, the federal government is there to stop them. While some may find this law to be good public policy, it not only cements the idea of once-disabled-always-disabled into Second Amendment jurisprudence, but it also violates the Second Amendment. To apply these rights appropriately, judges must return to the original public understanding of the Second Amendment.

[1] Centers for Disease Control and Prevention, Mental Health and Data Publications, CDC.gov, (Jan. 14, 2021), https://www.cdc.gov/mentalhealth/data_publications/index.htm.
[2] Christina Lengfelder, Mental Health: a Fundamental Component of Human Development, United Nations Development Programme, (Jan. 14, 2021), http://hdr.undp.org/en/content/mental-health-fundamental-component-human-development.

II. Historical Analysis

"History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous.*"[3] The question, then, becomes to what extent does history permit the limiting of the Second Amendment rights of those who suffered from mental illness?

At the time the Framers wrote the Second Amendment, legal experts considered mental illness to be temporary. While many laws restricting the rights of felons existed around 1787, "one searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership."[4] It is true a citizen's rights could be restricted *while* he suffered from a mental illness. *Blackstone's Commentaries* note, for example, the "marriage of lunatics and persons under phrenzies…before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void."[5] Under this scheme, the suspension of rights may continue only so long as the individual is actually afflicted with a mental illness. The common law permitted the deprivation of rights from people suffering with mental illness, but those deprivations "were not once and for all. Since at least the time of Edward I, the English legal tradition provided that those who…recovered their sanity should have their rights restored."[6]

One modern commentator notes that, in the context of firearms, "in eighteenth-century America, justices of the peace were authorized to lock up lunatics who were dangerous to be

[3] *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J. dissenting) (emphasis original).
[4] Carlton F. W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1378 (2009).
[5] 1 St. George Tucker, *Blackstone's Commentaries*, 872 (1803).
[6] *Tyler v. Hillsdale Cnty. Sheriff's Dept.,* 873 F.3d 678, 706 (6th Cir. 2016) (Batchelder, J., concurring) (Citing Frederick Pollock & F. William Maitland, *The History of English Law Before the Time of Edward I,* 507-08 (1898)).

permitted to go abroad. If this significant infringement of liberty was permissible, then the lesser step of mere disarmament would likely be permissible as well."[7] This view of the relation between rights and mental infirmity suggests a legislature may limit firearm ownership in some cases, but must restore them when the afflicted individual "come[s] to their right mind."[8]

When a mentally unwell citizen "[recovered] his senses," the common law provided a number of ways to restore rights.[9] For example, the lord chancellor or the majority of an individual's trustees could declare an individual free from mental defect, which would then restore that individual's rights. The petitioner could also ask the Court of Common Pleas to hear his case, and the Court would "render an account when the [restriction on rights] should be removed."[10] The American legal tradition in the 18th Century mirrored the English practices by allowing judges to restrict the rights of individuals with severe mental illness, but "only so long as such lunacy or disorder shall continue, and no longer."[11] The Second Amendment surely must have been understood to protect a right that could be restricted in some cases, but must be returned eventually.

III. The 21st Century, Mental Illness, and the Right to Bear Arms

The rulings of modern courts, however, are out of step with the original understanding of the relationship between rights and mental illness. In 2005, a Pennsylvania state court involuntarily committed Bradley Beers to a psychiatric facility. The court found that, since Mr.

[7] *Supra* note 4 at 1377 (Citing Henry Care, *English Liberties, or the Free-Born Subject's Inheritance*, 329 (6th ed. 1774) (Internal quotation marks omitted).
[8] *Supra* note 5 at 690.
[9] Anthony Highmore, *A Treatise on the Law of Idiocy and Lunacy,* 104 (1807).
[10] *Id.* at 105.
[11] *Mai v. United States,* 974 F.3d 1082, 1090 (2020) (9th Cir. Sept. 10, 2020) (Bumatay, J., dissenting from denial of rehearing *en banc*). Citing Henry Care, *English Liberties, or the Free-born Subject's Inheritance,* 329 (6th ed. 1774) (internal quotation marks omitted).

Beers made suicidal statements and had access to a firearm, he needed to be committed for treatment. Mr. Beers successfully completed the treatment program and was discharged. In 2013, a physician determined Mr. Beers was capable of handling firearms in a responsible manner. Unfortunately, the federal government did not care about the doctor's assessment – they prevented Mr. Beers from purchasing a firearm. Mr. Beers sued, and the case ended up at the United States Court of Appeals for the Third Circuit.[12] The appellate panel determined that, since Mr. Beers suffered from mental illness 14 years earlier, precedent required the court to dismiss Beer's complaint. They went so far as to explain that "Beers cannot distinguish his circumstances by arguing that he is no longer a danger to himself or to others. Acceptance of his argument would sidestep the [rule]…that neither passage of time nor evidence of rehabilitation can restore Second Amendment rights that were forfeited."[13]

The court reached this conclusion, not through an individual neurological or psychological analysis of Mr. Beers. Instead, in determining that those formerly with mental disability were ineligible for the restoration of their rights, the court cited a previous opinion which argued that "the historical justification for disarming *felons* was because they had committed serious crimes, [and] risk of violent recidivism was irrelevant."[14] While the court cursorily mentions historical prohibitions on the mentally ill, the extent of their recidivism analysis consists solely of comparing the formerly mentally ill to felons.

Beers appealed to the Supreme Court, which vacated the original opinion and remanded with instructions to dismiss: a change in Pennsylvania law mooted the case.[15] Since the Supreme

[12] *Beers v. Attorney General United States*, 927 F.3d 150 (3rd Cir. 2019).
[13] *Id.* at 152. Quoting *Binderup v. Attorney General*, 836 F.3d 336 (2016) (internal quotation marks omitted).
[14] *Id.* at 156 (emphasis added).
[15] *Beers v. Barr,* 140 S.Ct. 2758 (Mem. op.) (May 18, 2020).

Court vacated on the grounds the case was moot, however, that means the Third Circuit's opinion in *Beers* is still persuasive.[16]

History repeated itself in 2020. Washington state resident Duy Mai sought to exercise his Second Amendment rights and purchase a firearm. The only problem was that, in 1999, a Washington State court involuntarily committed Mr. Mai to a psychiatric hospital for depression. Washington law prohibits those who have been involuntarily committed from owning a firearm but allows them to petition a state court to remove the restriction if the petitioner can demonstrate that he is no longer mentally ill.[17] Mr. Mai successfully did, and could buy a firearm under state law. Unfortunately, residents of the state of Washington are not eligible for a waiver of the categorical federal prohibition.[18] Mr. Mai challenged this law, but the Ninth Circuit, based on a handful of scientific studies from foreign nations, concluded there was "an ever-present increased risk of violence for those who were committed involuntarily, even well after they are released."[19]

Mr. Mai, seeking to vindicate his fundamental right to bear arms,[20] petitioned for a rehearing, which the court denied over multiple dissents. One judge pointed out that refusing to correct the original panel's decision allows the government to "forever deprive a person of the individual right to bear arms—if that person spends even one day committed involuntarily, even as a juvenile, and no matter the person's current mental health soundness."[21]

[16] See e.g., *Folajtar v. Attorney Gen.*, No. 19-1687 (3rd Cir. Nov. 24, 2020) (Citing *Beers*).
[17] Wash. Rev. Code § 9.41.040(2)(a)(iv) (restricting mentally ill individuals from owning firearms); Wash. Rev. Code § 9.41.047(3)(a) (providing the mechanism to eliminate restrictions on the right to bear arms).
[18] *Mai v. United States,* 952 F.3d 1106, 1112 (9th Cir. Mar. 11, 2020).
[19] *Supra* note 11.
[20] *District of Columbia v. Heller,* 554 U.S. 570, 635 (2008) (Describing how the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").
[21] *Supra* note 11 at 1083.

The Ninth Circuit codified the idea of once-disabled-always-disabled, and the Third Circuit decided prior mental illness status was similar enough to felon status that they failed to engage with the idea mental health can change and improve. These decisions strike at the heart of the right to bear arms. Indeed, at its core, the Second Amendment exists for individuals to defend themselves and their homes. A person who was committed to an institution 20 years ago for depression has no less a fundamental right to protect himself than a person with no history of mental health problems. The decisions also disregard the original understanding of the right itself: categorical "eighteenth century laws disarming the mentally ill…simply do not exist."[22]

IV. A Return to Original Understanding

Courts ought to reject the black-and-white disability analysis used in the above cases. A return to applying Constitutional rights according to their original public meaning allows judges to both remain faithful to the text, and to do justice for Americans who suffered from and overcame mental disability. It so happens the common law method of restoring an individual's rights closely mirrors Mr. Mai's request to the Ninth Circuit. Yes, this may expand court dockets, but where fundamental rights are concerned, the balance of hardships strongly favors petitioners. Recall as well some state courts already make this inquiry: a state court reinstated Mr. Mai's right to bear arms under state law. In fact, the Sixth Circuit Court of Appeals took this route in 2016. The court reversed a district court dismissal of a complaint similar to the complaints in *Beers* and *Mai.*[23] While the case fractured the court, producing eight separate opinions, the majority nevertheless found that there was

[22] *Supra* note 4.
[23] *Tyler v. Hillsdale Cnty. Sheriff's Dept.,* 873 F.3d 678 (6th Cir. 2016).

> "Scant historical evidence conclusively supporting a permanent ban on the possession of guns by anyone who has been committed to a mental institution. In the absence of such evidence, it would be odd to rely solely on *Heller* to rubber stamp the legislature's power to permanently exclude individuals from a fundamental right based on a past involuntary commitment."[24]

It is true some mental health crises justify the suspension of this right. Sometimes people do need to be involuntarily committed when they pose a danger to themselves or others. Those who are involuntarily committed should not be wielding firearms in their hospital rooms, and this article does not argue that all mental health-related prohibitions violate the Second Amendment. Rather, in keeping with the meaning of the Second Amendment, courts must engage in an individualized assessment, and legitimately consider the restoration of an individual's fundamental rights. To uphold a categorical prohibition against people like Mr. Mai from owning firearms "effectively [gives] governments carte blanche to legislate the Second Amendment away."[25]

Under an originalist interpretation of the Second Amendment, the right to keep and bear arms may legitimately be suspended at the point when a person is suffering from a mental illness, and until such a time as the afflicted is no longer a danger to themselves or others. In both of the majority opinions, the *Beers* and *Mai* authors paid lip service by disclaiming a once-

[24] *Id.* at 687.
[25] *Mai v. United States,* 974 F.3d 1082, 1098 (2020) (9th Cir. Sept. 10, 2020) (VanDyke, J., dissenting from denial of rehearing *en banc*).

mentally-ill-always-mentally-ill. To put this into action, they need only strike down[26] laws categorically prohibiting those who have recovered from a mental illness from owning firearms.

V. Conclusion

The right to bear arms in self-defense is a fundamental right, and one that applies to the People: "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[27] "The mentally ill are [not] categorically excluded from our national community"[28] – they do possess the right to bear arms.

The thrust of mental health is mental illness is not always permanent. People like Mr. Beers and Mr. Mai can get better. Some courts, however, ignore this mental health spectrum. They see people as either mentally ill or not mentally ill. While the Third and Ninth Circuits may not be overtly interested in eliminating freedoms from those who suffered from mental illness, by deferring to the opinions of a select few social scientists, these courts sidestepped difficult questions posed at the intersection of disability and the law. They almost entirely avoid discussing the history of the Constitution and the common law, and instead decide to treat the rights of formerly mentally ill people as second-class rights. While legislatures may think these laws are good public policy, the responsibility lies with judges to uphold the Constitution, and to stop the government from encroaching on the rights of healthy, law-abiding citizens.

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[26] To the extent a court can strike down a law. An exploration of the writ of erasure is, however, beyond the scope of this article. For a good discussion of this topic, see Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy,* 104 Va. L. Rev. 933 (2018).
[27] *Supra* note 20 at 580.
[28] *Supra* note 3 at 453.