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THE DANGEROUSNESS MYTH: HOW COURTS AND CONGRESS ROUTINELY IMPOSE LIFETIME FEDERAL FIREARM BANS ON THE MENTALLY ILL

Abstract

This article identifies the most damaging forces to gun rights for the mentally ill in the USA. Moreover, the American civil commitment adjudicatory system is critiqued, how state courts routinely apply the dangerousness standard too broadly when making commitment decisions is highlighted, and Congress' role in exacerbating the problem is pinpointed in the article. The American Psychological Association is also called to issue strict guidelines to psychiatric professionals concerning the legal standard of dangerousness to reduce unnecessary civil commitments in the article. Lastly, the article proposes a Congressional solution to avoid future unconstitutional deprivation of rights.

Annotasiya

Bu məqalə ABŞ-də ruhi xəstələrin silah hüquqlarına ən çox zərər vuran mənfi təsir qüvvələrini müəyyənləşdirir. Bundan əlavə, məqalədə Amerikanın psixiatriya stasionarına qeyri-könüllü yerləşdirilmə barədə işlər üzrə məhkəmə sistemi tənqid olunur, eləcə də ştat məhkəmələrinin mütəmadi olaraq qeyd olunan işlər üzrə qərarlarında təhlükəlilik meyarını çox geniş tətbiq etməsi və Konqresin problemin kəskinləşməsindəki rolu vurğulanır. Həmçinin məqalədə Amerika Psixologiya Assosiasiyasının lüzumsuz psixiatriya stasionarına qeyri-könüllü yerləşdirilmələrin sayının azaldılması üçün psixiatrlara hüquqi cəhətdən təhlükəlilik meyarı ilə bağlı ciddi təlimatlar verməsinin önəmindən bəhs edilir. Son olaraq, məqalə konstitusiyaya zidd olaraq hüquqlardan məhrum edilmələrin gələcəkdə qarşısını almaq üçün Konqres tərəfindən həll edilməsini təklif edir.

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Introduction

To date, most Americans adjudicated mentally ill suffer a "lifetime ban" on firearm ownership.[1] However, this runs afoul of the Second Amendment of the United States Constitution, which, since 1791, has read: *"a well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed"*.[2] The Amendment "*guarantees the individual right to possess and carry weapons in case of confrontation*".[3] The brightest scholars, justices, judges, lawyers, and laymen of the USA have debated for centuries about the Amendment's scope.[4] Some fruit from those debates, for better or worse, were the limitations on firearm

[1] "Unless Congress or the Washington legislature enacts a program relieving him from § 922 (g) (4)'s prohibition, the law amounts to a total prohibition on firearm possession for [Plaintiff] – in fact, a lifetime ban". *See* Mai v. United States, 952 F. 3d. 1106, 1120 (9th Cir. 2020).

[2] *See* The Second Amendment of the USA Constitution (1791).

[3] District of Columbia v. Heller, 554 U. S. 570, 592 (2008); *See also* New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U. S. ___ (2022) (slip op., 17) ("The Second Amendment "is the very product of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense".) (citing Heller, 554 U. S. 635).

[4] *See e.g.*, United States v. Cruikshank, 92 U. S. 542, 553 (1875) (holding that the Second Amendment is not applicable to the states); *See also* Presser v. Illinois, 116 U. S. 252, 265 (1886) (affirming that the Second Amendment is not applicable to the states); *See* McDonald v. City of Chicago, 561 U. S. 742, 767 (2010) (holding that the Second Amendment *is* applicable to the states and that "individual self-defense is "the central component" of the Second Amendment right".); *See also* United States v. Miller, 307 U. S. 174, 178 (1939) (reading the Second Amendment in accord with its Militia Clause, art. 1, § 8, held that the Second Amendment cannot "guarantee the right to keep and bear (a sawed-off shotgun)".); *See* Heller, 554 U. S., 570 (2008) (holding that the Second Amendment confers an individual right to bear arms, including for self-defense); Bruen, 597 U. S. ___, (holding that the Second Amendment guaratees an individal right to publicly carry a firearm for self-defence); *See also* Carl T. Bogus, The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms (2002); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chicago-Kent Law Review, 3 (2000); *See also* Richard E. Gardiner, *To Preserve Liberty – A Look at the Right to Keep and Bear Arms*, 10 Northern Kentucky Law Review 63, 63 (1982); *See also* Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 Northern Kentucky Law Review 13, 13 (1982).

ownership imposed on persons deemed mentally incompetent through involuntary commitment.[5] However, a lifetime ban must constitute infringement.

The American legal system utilizes civil adjudication to involuntarily commit persons into treatment facilities who are suspected to have a mental illness and pose a risk of imminent danger to themselves or others. When a person is involuntarily committed, federal law revokes that person's right to possess a firearm. The problem with this system rests not on its sound principles. It is unwise for persons struggling with serious mental illness to have access to firearms. Rather, the problem lies in its execution. State courts that consider whether a respondent should be involuntarily committed apply the "dangerous" standard far too broadly, resulting in innumerable unnecessary involuntary commitments. Although there is a federal law on the books that permits restoration of the right to bear arms for persons previously involuntarily committed, Congress has refused to fund the program for decades. To conform with the common-law understanding of legal capacity, the right to bear arms must be restored to the involuntarily committed upon recovery. For the rehabilitated, anything short of total restoration violates the Second Amendment.[6]

Safeguarding the rights of the mentally ill is a task undertaken by few. Far fewer advocate to restore the right to bear arms to the recovered mentally ill. This must change. It is both unjust and unconstitutional that the recovered mentally ill suffer a lifetime ban on firearm possession.

To effect change, this article identifies the two most damaging forces to the recovered mentally ill's gun rights in the USA — the American civil commitment adjudicatory system and Congress. Two solutions are recommended, one for the adjudicatory system and one for Congress, to ensure the civil liberties of both the allegedly and recovered mentally ill are protected.

More precisely, part I of the article contextualizes the history of the right to bear arms and outlines the common law traditions of recoverability and restoration. Then, part II analyzes how state courts and Congress inhibit restoration, and in so doing violate the Second Amendment. Finally, Part III encourages the American Psychological Association to limit findings of dangerousness, and proposes a Congressional solution to prevent future deprivations of the right to bear arms.

[5] 18 U. S. C. § 922 (g) (1); *See also* Heller, 554 U. S., 626 (leaving untouched "longstanding prohibitions on the possession of firearms by felons and the mentally ill".).

[6] *See* Bruen, 597 U. S. ___ (slip op., 8) ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct fall outside the Second Amendment's unqualified command".).

I. On the history of the Second Amendment and the recoverability of the mentally ill

History guides good jurisprudence. This is especially so in the Second Amendment context. "*Heller … demands a test rooted in the Second Amendment's text, as informed by history*".[7] Thus, it follows that any adequate analysis of the Second Amendment's application should begin with a detailed investigation into the historical development of the right to bear arms. Likewise, because this article is specific to the recovered mentally ill, a thorough investigation into the law's historical treatment of recoverability must follow. Only then may it be shown that recovered persons are guaranteed the right to bear arms under the Second Amendment.

A. The Second Amendment — a brief history and its importance

Early America was rich in political and philosophical discourse, particularly related to the ratification of the Constitution and whether it required a formal Bill of Rights. The Federalists, championed by Alexander Hamilton and James Madison, believed that adding a Bill of Rights to the Constitution would serve no purpose, as the Constitution failed to provide any positive grant of power to deprive citizens of individual rights.[8] However, the Anti-Federalists, led by Patrick Henry, James Winthrop, and George Mason, persisted that a Bill of Rights was necessary, as it would enhance the protection of the rights included therein.[9] Despite being firmly rooted in opposing philosophical trenches, both the Federalists and the Anti-Federalists agreed on the Second Amendment's scope and purpose.

The Federalists observed that protecting the individual right to bear arms was necessary for individuals *"to defend their own rights and those of their fellow-citizens"*, despite arguing that its codification in a Bill of Rights was unnecessary.[10] The Anti-Federalists were concerned, however, that without a formal declaration of the right to bear arms in a Bill of Rights accompanying the Constitution, then the government could easily turn to tyranny and

[7] *Id.*, ___ (slip op., 10).
[8] *See* Alexander Hamilton, The Federalist Papers: No. 84 (1788). Available at: https://avalon.law.yale.edu/18th_century/fed84.asp (last visited May 12, 2022).
[9] *E.g.*, Patrick Henry, Speech in the Virginia Convention, 12 June 1788, *in* The Documentary History of the Ratification of the Constitution Digital Edition (2009) (eds. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, Margaret A. Hogan). Available at: https://csac.history.wisc.edu/wp-content/uploads/sites/281/2017/07/Patrick_Henry_Speech_in_the_Virginia_Convention1.pdf (last visited May 12, 2022).
[10] *See* Alexander Hamilton, The Federalist Papers: No. 29 (1788). Available at: https://avalon.law.yale.edu/18th_century/fed29.asp (last visited Apr. 19, 2022).

undermine the individual rights of the populace.[11] Prominent Anti-Federalist Richard Henry Lee noted that *"the militia ought always to be armed and disciplined"*,[12] and that the *"militia, when properly formed, are in fact the people themselves, and render regular troops…unnecessary"*.[13] Further, *"the right to have weapons for non-political reasons such as self-protection or hunting…appeared so obviously to both Federalists and Anti-Federalists to be the heritage of free people as never to be questioned"*.[14]

Much to the dismay of the late Federalists and Anti-Federalists, the formation of a standing military[15] and technological advancements in weaponry[16] severely undermined any chance of a militia led by the governed from overthrowing the government. It is quite safe to say that any chance of successfully overthrowing the government in the United States by means of weaponry available to the public, the militia, is slimmer than slim. Yet, the Second Amendment still demands our protection because a standing military or emergency response team can never outmode self-preservation — "*the central component of the Second Amendment right*".[17] The Supreme Court formally held that the Second Amendment protects the right to possess a firearm for self-preservation in *District of Columbia v. Heller*.[18] And the Supreme Court held in *New York Pistol & Rifle Association, Inc. v. Bruen* that the right to possess a firearm for self-preservation remains untouched even when safety is "*protected generally by … Police Department[s]*".[19]

The *Heller* Court defined the Second Amendment's scope using *"history, not militia-related purposes"*.[20] Relying on contextual clues, events predating the Second Amendment's drafting, the English common law tradition,[21] and the

[11] Henry, *supra* note 9. However, "positivism tends towards tyranny — rule for private gain". Robert E. Ranney, Reorienting the Legal Academy, Notre Dame Journal of Law, Ethics & Public Policy: Considerations (forthcoming 2022).
[12] Richard H. Lee, Letters of a Federal Farmer (1787). Available at: https://leefamilyarchive.org/papers/essays/fedfarmer/06.html (last visited Apr. 19, 2022).
[13] Richard H. Lee, Letters of a Federal Farmer (1788). Available at: https://leefamilyarchive.org/papers/essays/fedfarmer/18.html (last visited Apr. 19, 2022).
[14] Halbrook, *supra* note 4, 18.
[15] Complications with mobilizing troops during World War I led to the creation of a standing "regular army of national citizen soldiers compiled in peace organized in divisions ready for immediate use", while retaining the "army of volunteers". *See* United States War Department, *Report of the Secretary of War*, 1 Annual Reports of the War Department, 125 (1913). Available at: https://tinyurl.com/USWarDept (last visited Apr. 19, 2022).
[16] Check out this list of technological advancements, inclusive of biorecognition receptors and "soldier-robot teams" announced by the US Army in 2019. *See* US Army, Army Releases Top 10 List of Coolest Science, Technology Advances (2019), https://www.army.mil/article/231039/army_releases_top_10_list_of_coolest_science_technology_advances (last visited Apr. 19, 2022).
[17] McDonald, 561 U. S., 767 (quoting Heller, 554 U.S. at 599); *See also* Heller, 554 U. S., 628 ("the inherent right of self-defense has been central to the Second Amendment right".).
[18] Heller, 554 U. S., 570.
[19] Bruen, 597 U. S. ___ (slip op., 22).
[20] Stephen Breyer, Making Our Democracy Work: A Judge's View, 165 (2010).
[21] For an extensive commentary on the Second Amendment's English common law foundational precepts, *see* Gardiner, *supra* note 4, 64-73. However, "the English common law tradition" should

writings of Sir William Blackstone,[22] the Court reasoned, *"in the eighteenth century an individual's right to possess guns was important both for purposes of defending that individual and for purposes of a community's collective self-defence"*.[23] Two years later the Court reaffirmed and expanded this holding in *McDonald v. City of Chicago*, pronouncing that the right to bear arms is *"fundamental to our scheme of ordered liberty"*[24] and extending the Second Amendment's reach to the states.[25] And now, twelve years post–*McDonald*, the Court reaffirmed both *Heller* and *McDonald*, rejected the use of means-end scrutiny, and held that "*the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms*".[26]

It is undeniable that danger lurks throughout life, so retaining a weapon for self-defence is integral to the meaning of the Second Amendment. For evidence of the right's importance, look no further than Nazi Germany. In the mid-late 1930s, the Third Reich began limiting firearm access to Jews. In March 1937, *"the Gestapo proscribed issuance of hunting licenses to Jews because they were considered enemies of the state"* and *"all hunting permits held by Jews were revoked"*.[27] Leading up to the Holocaust, the Third Reich enacted its highly restrictive Weapons Law – just one of seven laws passed during the entire Third Reich – in March 1938.[28] The law explicitly prohibited arms manufacturing, sales, repair, and cartridge reloading if one *"is a Jew"*.[29] Under the Weapons Law, carrying a firearm required a license and the issuing authority had total discretion to limit the license's validity or to simply not grant one at all. The following guidance was provided regarding the issuance of such licenses:[30]

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not be understand as "an exceptional one, … it is best seen as a local variant of the *ius commune*, which shares the basic classical framework of *ius* and *lex*, of *ius naturale*, *ius gentium*, and *ius civile*, and so on". Robert E. Ranney, Why Common Good Constitutionalism Matters Post-*Dobbs*, Marked by Nature (July 22, 2022), https://markedbynature.com/2022/07/22/why-common-good-constitutionalism-matters-post-dobbs/ (quoting Adrian Vermeule, Common Good Constitutionalism, 56 (2022)) (last visited Jul. 24, 2022).

[22] Citizens possess a "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression". *See* William Blackstone, 1 Commentaries on the Laws of England in Four Books, 144 (1893).

[23] Breyer, *supra* note 20 (discussing the rationale behind the Court's holding in Heller).

[24] McDonald, 561 U. S., 767, applying Duncan v. Louisiana, 391 U. S. 145, 149 (1968), where the Court reasoned that "because…trial by jury in criminal cases is fundamental to the American scheme of justice, it is held that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases".

[25] McDonald, 561 U. S., 805.

[26] Bruen, 597 U. S. ___ (slip op., 10).

[27] Stephen Halbrook, Gun Control in the Third Reich, 168 (2013).

[28] Waffengesetz, Reichsgesetzblatt I, 265 (1938).

[29] English translations of the law are published in Federal Firearms Legislation: Hearings before the Subcommittee to Investigate Juvenile Delinquincy, US Senate Judiciary Committee, 90th Cong., 2d. Sess. 489 (1968); *See also* Jay Simkin and Aaron Zelman, "Gun Control": Gateway to Tyranny, 53 (1993).

[30] *Id*., § 15.

"1. Licenses to obtain or to carry firearms shall only be issued to persons whose reliability is not in doubt, and only after proving a need for them.
2. Issuance shall especially be denied to:
3. Gypsies, and to persons wandering around like gypsies;
4. Persons for whom police surveillance has been declared admissible, or upon whom the loss of civil rights has been imposed, for the duration of the police surveillance or the loss of civil rights;
5. Persons who have been convicted of treason or high treason, or against whom facts are under consideration that justify the assumption that they are acting in a manner inimical to the state;
6. Persons who have received final sentence to a punishment of deprivation of liberty for more than two weeks…for resistance to the authorities of the state".

Without doubt, the right to bear arms demands zealous protection. This is especially true for society's most vulnerable classes – the mentally ill, the elderly, the poor, and minorities.

Indeed, the mentally ill are among the most likely to be victims of violent crime. *"Individuals with serious mental illness are 11 times more likely to be victims of a violent crime than the general public, and women with serious mental illness are more at risk than men"*.[31] Disturbingly, physical abuse against the elderly is on the rise. In 2019, the Center for Disease Control and Prevention reported that nonfatal physical assaults against men aged 60 and older increased by 75.4 percent from 2002 to 2016.[32] The rate for physical assaults against women similarly aged rose by 35.4 percent from 2007 to 2016.[33] The poor are also endangered. *"Persons in poor households at or below the Federal Poverty Level had more than double the rate of violent victimization as persons in high-income households"*.[34] Tragically, too, *"African Americans and Hispanics are more likely to be victims of violent crimes"*, and *"African Americans are disproportionately victims of homicide compared with whites or Hispanics"*.[35]

Even more, hate-fueled violence targeted at people who assert they are lesbian, gay, bisexual, or transgender is prevalent. *"Of the 7, 120 hate crime incidents reported in 2018, more than 1,300 – or nearly 19 percent – stemmed from anti-LGBTQ bias, according to the FBI's [2018] Hate Crime Statistics report"*.[36]

[31] Treatment Advocacy Center, Victimization and Serious Mental Illness (2016), https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3630-victimization-and-serious-mental-illness (last visited May 9, 2022).
[32] Center for Disease Control and Prevention, *Nonfatal Assaults and Homicides Among Adults Aged ≥60 Years – United States, 2002-2016*, 68 Morbidity and Mortality Weekly Report, 297 (2019).
[33] *Ibid.*
[34] Erika Harrell et al., Household Poverty and Nonfatal Violent Victimization, 2008-2012 (2014), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5137 (last visited May 9, 2022).
[35] US Department of Housing and Urban Development, Neighborhoods and Violent Crime (2016), https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html (last visited May 9, 2022).
[36] Tim Fitzsimons, Nearly 1 in 5 Hate Crimes Motivated by Anti-LGBTQ bias, FBI finds (2019), https://www.nbcnews.com/feature/nbc-out/nearly-1-5-hate-crimes-motivated-anti-lgbtq-bias-fbi-n1080891 (last visited May 9, 2022).

Intimate partner violence is also a prominent issue among these people.[37] Detecting these problems, Doug Krick founded the Pink Pistols, America's first gay pro-gun group. The group rightly boasts, *"self-defense is our right"*.

Pink Pistols is not the only identity-driven gun rights advocacy organization in the nation. There are also the National African American Gun Association, the Black Gun Owners Association, the Latino Rifle Association, the Hispanic American Rifle Association, and the Socialist Rifle Association, which is a group that purports to advance the gun rights of working class and poverty-stricken people. Although a lot of minority groups have Second Amendment advocacy organizations, there is not a single Second Amendment advocacy organization chartered on behalf of the recovered mentally ill. Likely, American stigma of the mentally ill is to blame.

Generally, Americans are quick to blame tragic mass shootings on mental illness – a position maintained by both pro- and anti-gun rights advocates. President Donald Trump infamously remarked after the summer 2019 mass shootings in El Paso and Dayton that *"mental illness and hatred pull the trigger, not the gun"*,[38] and President Joe Biden delivered a speech following the 2022 mass shooting in Uvalde in which he remarked that "*the mental health crisis deepen[s] the trauma of gun violence*".[39] However, merely believing that mental illness is the root cause of gun violence does not make it so. *"No more than a quarter of those who attempted or carried out mass shootings in recent years could be considered mentally ill. In fact, people with mental disorders are far more likely to be victims of violence than perpetrators"*.[40]

The National Alliance on Mental Health is one of the few organizations with courage to speak the truth about gun violence and the mentally ill. The Alliance maintains the position that gun violence is a public health crisis in America but points out that *"gun violence is overwhelmingly committed by people*

[37] Per the CDC's National Intimate Partner and Sexual Violence Survey, bisexual women are 1.8 times more likely to report ever having experienced intimate partner violence and 2.6 times more likely to report experiencing intimate partner sexual violence when compared with heterosexual women. *See* Taylor Brown, Jody Herman, Intimate Partner Violence and Sexual Abuse Among LGBT People (2015), https://williamsinstitute.law.ucla.edu/publications/ipv-sex-abuse-lgbt-people/ (last visited May 9, 2022).

[38] Melissa Healy, Americans Increasingly Fear Violence from People Who Are Mentally Ill. They Shouldn't (2019), https://www.latimes.com/science/story/2019-10-10/americans-fear-violence-from-mentally-ill-people (last visited Apr. 19, 2022).

[39] Darragh Roche, Biden Echoes Republicans by Connecting Mental Health to Gun Violence (2022), https://www.newsweek.com/biden-echoes-republicans-connecting-mental-health-gun-violence-uvalde-shooting-1712574 (last visited June 3, 2022).

[40] Healy, *supra* note 38. "There are important and complex considerations regarding mental health, both because it is the most prevalent stressor and because of the common but erroneous inclination to assume that anyone who commits an active shooting must de facto be mentally ill. The stressor "mental health" is not synonymous with a *diagnosis* of mental illness". *See* James Silver et al., A Study of Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013, 17 (2018). Available at: https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view (last visited Apr. 19, 2022); *See generally* Michael H. Stone, *Mass Murder, Mental Illness, and Men*, 2 Violence and Gender, 51. Available at: https://doi.org/10.1089/vio.2015.0006 (last visited Apr. 19, 2022).

without mental illness".[41] Therefore, the Alliance rightly advocates, *"people should not be treated differently with respect to firearms regulation because of their lived experience with mental illness"*.[42] Labelling people either currently or previously suffering from mental illness as "violent" only worsens the problem.

Americans' fear of the mentally ill is deeply rooted and will likely take ample time to reconcile. In the interim, though, the mentally ill are at risk of sustaining violence with no means of defending themselves. A meager step in the right direction is granting those people formerly adjudicated mentally ill who have since recovered an opportunity to restore their right to bear arms.

B. The common law recognized the recoverability of the mentally ill

In *Bruen*, the Supreme Court took great lengths to relay to the federal courts of appeals that history is the guiding factor in any Second Amendment analysis. "*The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees*".[43] Therefore, to justify any firearm regulation, the government "*must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation*".[44] It is no longer enough for the government to "*simply posit that the regulation promotes an important interest*".[45] For this reason, a court considering the constitutionality of a firearm regulation that "*addresses a general societal problem that has persisted since the 18th century"*, like mental illness, should construe *"the lack of a distinctly similar historical regulation addressing the problem as relevant evidence that the challenged regulation is inconsistent with the Second Amendment*".[46] Further, "*if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional*".[47] There is no evidence — historical or otherwise — to suggest that the modern practice of stripping the right to bear arms from people who have recovered from mental illness "*is consistent with this Nation's historical tradition of firearm regulation*".[48] The opposite is true.

"A lunatic is never to be looked upon as irrecoverable; his comfort is to be regarded, and not that of any representatives".[49] This sentiment rang true in 1807 and should ring true today. Unfortunately, we live in an era plagued with rampant

[41] National Alliance on Mental Health, Public Policy Platform of the National Alliance on Mental Health, 71 (2016).
[42] *Id.*, 72.
[43] Bruen, 597 U. S. ___ (slip op., 62) (quoting McDonald, 561 U. S., 780).
[44] *Id.*, ___ (slip op., 8).
[45] *Ibid.*
[46] *Id.*, ___ (slip op., 17).
[47] *Id.*, __ (slip op., 17-18).
[48] *Id.*, ___ (slip op., 8).
[49] Anthony Highmore, A Treatise on the Law of Idiocy and Lunacy, 104 (1807).

stigma of the mentally ill.[50] And that stigma shines brightest where change is affected slowest — the law.[51] Indeed, Justice Antonin Scalia ensured the Court's decision in *District of Columbia v. Heller* left untouched purported *"longstanding prohibitions on the possession of firearms by felons and the mentally ill"*.[52]

Civil restrictions on the mentally ill are long-standing, but retaining those restrictions after rehabilitation lacks the same historical pedigree.[53] "*Although the Supreme Court observed in* Heller *that bans on gun possession by the mentally ill are "longstanding", legal limits on the possession of firearms by the mentally ill are of 20th Century vintage*".[54] The reason why is simple — it benefits people to know that, if they were to slip into a state of mental infirmity for whatever reason, "*the wisdom of the courts*" is there to protect *"his person and property, to watch over the periods of imbecility, to provide for their necessities, and to render an account when the affliction shall be removed, with as scrupulous an exactness as the most anxious friend could be expected to do"*.[55]

And such rehabilitation throughout legal history is not unprecedented. Those who came before us understood mental illness to be curable and outlined legal processes for reinstating lost rights, privileges, and agency.[56]

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[50] "Nearly 9 in 10 [Americans] … think there is at least some stigma and discrimination associated with mental illness in society today, but more than a third say there is less compared to 10 years ago". Jennifer De Pinto, Fred Backus, Most Americans Think There is Stigma Associated with Mental Illness – CBS News Poll (2019), https://www.cbsnews.com/news/most-americans-think-there-is-stigma-associated-with-mental-illness-cbs-news-poll/ (last visited Apr. 19, 2022).

[51] Ironically, the legal profession suffers from a mental health crisis. Despite the crisis, the Kentucky Bar Association requires all applicants to disclose whether they "currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in a material way affects your ability to practice law in a competent, ethical and professional manner?" Although perhaps well intentioned, this question epitomizes stigma of the mentally ill (particularly in the legal field) and is counter-productive. It actually serves as a barrier to Kentucky bar applicants from receiving mental health treatment if they really need it. Both the University of Kentucky Rosenberg College of Law and University of Louisville Brandeis School of Law Student Bar Associations recently took note of this issue and requested the Justices of the Commonwealth of Kentucky and bar admission officials consider removing the question. As of the writing of this article, the Justices have agreed to consider removing the question but it has yet to be removed.

[52] Heller, 554 U. S., 626 (holding that the Second Amendment enshrines an individual right to possess a firearm unconnected with service in a militia); *But see* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F. 3d. 678, 708 (6th Cir. 2016) (Sutton, J., concurring) ("One's status as a 'felon' or as 'mentally ill' may change over the course of a lifetime, and *Heller* creates an exception only for those who currently fall into these categories, not for anyone who ever did".).

[53] *See* Bruen, 597 U. S. ___ (slip op., 48) (Breyer J., dissenting) (noting that prohibitions on the possession of firearms by the mentally ill "have their origins in the 20th century".); C. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings Law Journal 1371, 1374-1379 (2009); Tom Weihl, *The Presumption of Dangerousness: How New York's Safe Act Reflects Our Irrational Fear of Mental Illness*, 38 Seton Hall Legislative Journal 35, 40 (2014) ("Despite the rich history in this country of limiting the physical liberty of those who are deemed mentally unsound, the concept of prohibiting gun possession by the mentally ill is relatively new," being first addressed by Congress in the Gun Control Act of 1968.).

[54] Tyler, 837 F. 3d., 687 (citing United States v. Skoien, 614 F. 3d., 638, 641 (7th Cir. 2010)).

[55] Highmore, *supra* note 49, 104-105.

[56] *See* Leonard Shelford, A Practical Treatise on the Law Concerning Lunatics, Idiots, and Persons of Unsound Minds, lii (1833) ("It is now known that insanity is curable as any disease to which

For instance, in early England, *"the king was to provide that the lunatic and his family [were] properly maintained out of the income of his estate, and the residue [was] to be handed over to him upon his restoration to sanity"*.[57] The tradition dates back even to ancient Rome, where *"the uncertain duration of mental incapacity led the Romans to appoint a curator, and not a tutor,*[58] *to be the guardian of the lunatic. The curator was intended to supply that which the lunatic lacked, viz., civil capacity"*.[59] Following Roman footsteps, France[60] would name a curator *"to see that the revenues of the mentally ill are employed for his benefit and that he is reinstated in his rights as soon as his mental condition renders it possible"*.[61] Germany also followed suit.[62] With certainty, the classical legal tradition maintains that a mentally ill person may recover, and when he does, he regains full legal capacity.[63]

However, the United States slowly drifted away from this authentic

mankind are subject".); and liii ("[M]adness is, contrary to the opinion of some unthinking persons, as manageable as many other distempers, which are equally dreadful and obstinate, and yet are not looked upon as incurable; and that such unhappy objects ought by no means to be abandoned, much less shut up in loathsome prisons as criminals, or nuisances to society".) (citing William Battie, A Treatise on Madness 93-94 (1758)).

[57] S. F. C. Milsom, 1 The History of English Law Before the Time of Edward I, 507 (Reprint of 2nd edition, 2010) (citing Prerogative Regis, c. 11, 12 (Statutes, 226)). Available at: https://oll.libertyfund.org/title/maitland-the-history-of-english-law-before-the-time-of-edward-i-vol-1#lf1541-01_footnote_nt1661_ref (last visited May 25, 2022).

[58] "Whatever similarity there may be between a tutor and a curator, an essential distinction lies in this, that the curator was especially the guardian of property, though in the case of a furious [a man being of unsound mind] he must also have been the guardian of the person". *See* Curator, A Dictionary of Greek and Roman Antiquities (1875). Available at: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Curator.html (last visited May 25, 2022).

[59] W.G.H. Cook, *Mental Deficiency and the English Law of Contract*, 21 Columbia Law Review 424, 427 (1921).

[60] Note that the Medieval French distinguished between those suffering from temporal affliction and those with permanent affliction. *See* Phillipe de Beaumanoir, Coutumes de Beauvaisis 591 (F. R. P. Akehurst trans., 1992), circa 1270 ("Those who are *completely insane, so insane that they have no judgement* which allows them to look after themselves, should not hold property for it would be a bad thing to leave anything in the possession of such a man; but he should be properly supported out of what would have been his if he had been a person who could hold land".).

[61] A. Wood Renton, *Comparative Lunacy Law*, 1 Journal of the Society of Comperative Legislation 235, 266 (1899).

[62] Shelford, *supra* note 56, lvi-lvii ("if the insane person again becomes mentally sound, the supersedeas of the curator can be applied for by himself, his legal guardian, or the Public Prosecutor. If the application is refused by the Court of Amstrichter an action can, as before, be instituted, and the case will be decided by means of it".).

[63] Harvard Law School's Professor Adrian Vermeule urges practitioners to abandon originalism and return to a classical jurisprudence. He points out that American public law no longer consults the *ius commune* – a synthesis of Roman law, canon law, and local civil law. *See* Adrian Vermeule, Common Good Constitutionalism 1 (2022). Professor Vermeule argues that abandoning the *ius commune* left Americans with no point of reference for juridical reasoning that promotes the common good. The result is a wholly positivist legal regime with only two players – originalists and progressivists. For more on the plight of positivism in the American legal academy. *See* Robert E. Ranney, Reorienting the Legal Academy (2022), Notre Dame Journal of Law, Ethics & Public Policy: Considerations (forthcoming 2022).

perception of mental illness in the law.[64] By the twentieth century, American law fostered an environment that permitted frequent violations against the human dignity of the involuntarily committed; even going as far as violating the person's body.[65] Americans began to believe *"that persons with mental illness lacked the capacity to make decisions" in toto*, and many still do.[66] It is also disturbing that, "*because many mental health institutions operated on private funding, it was quite possible for families to purchase the confinement of unwanted relatives*"[67] — and they did.[68] Even worse, *"when patients were eventually released from asylums, they often found that they had lost many of their civil rights (e.g., their property and custody rights)"*.[69] Still, despite this flagrant retraction of civil rights perpetrated against the involuntarily committed in America, the right to bear arms was historically left unabridged.

C. The twentieth and twenty-first century firearm fumble

That is no longer the case; now a person is stripped of their Second Amendment right to bear arms after being involuntarily committed to a mental institution.[70] However, this deprivation is novel.[71] Federal law mandates the involuntarily committed be disarmed — but has only done so for 54 years. For 192 years following the Declaration of Independence, 187 years following the adoption of the Articles of Confederation, 180 years following the ratification of the Constitution of the United States of America, 177 years following the ratification of the Second Amendment, and 100 years

[64] Renton, *supra* note 61, 273 ("the inquisition, with its accompaniments of traverse and commitment of the person and estate, prevails within the United States".).
[65] *See e. g.*, Indiana General Acts, 377 (1907) ("An act to prevent procreation of idiots, and imbeciles.") (later found unconstitutional by the Indiana Supreme Court in *Williams v. Smith*, 131 N. E. 2 (In. 1911)). However, the Supreme Court of the United States found constitutional a similar Virginia statute just sixteen years later in Buck v. Bell, in which positivist Justice Oliver Wendell Holmes, Jr. wrote for the majority and infamously remarked, "three generations of imbeciles are enough". 274 U. S. 200, 207 (1927).
[66] Megan Testa, Sara G. West, *Civil Commitment in the United States*, 7 Psychiatry, 30 (2010). Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3392176/#__sec4title (last visited Apr. 19, 2022).
[67] *Ibid.*
[68] *Ibid.* Consider the interesting case of Mrs. Elizabeth Packard, the wife of a Presbyterian clergyman. She was committed to an asylum in 1860 per her husband's request. "Mr. Packard initiated the hospitalization of his wife to punish her for having an unclean spirit, a decision that he based on her exploration of spiritual traditions outside the Presbyterian faith. Mrs. Packard was diagnosed with "moral insanity" and held for three years. *Ibid.* "Once released, Mrs. Packard learned that she had lost custody of her children and ownership of her property". Luckily, the story does have a happy ending. Mrs. Packard won her suit for wrongful confinement and later became an advocate for those accused of insanity and for the rights of women, though not all involuntarily committed persons shared the same fate.
[69] *Ibid.*
[70] 18 U. S. C., § 922 (g) (1).
[71] The Gun Control Act of 1968, 82 Stat. 1213, was enacted October 22, 1968. The Act made it unlawful "for any person who has been adjudicated as a mental defective or who has been committed to a mental institution to receive any firearm or ammunition which has been shipped through interstate or foreign commerce". *See* 82 Stat. 1213 § 922 (g) (4). Notably, this same act introduced the first firearm possession ban on convicted felons. *See* 82 Stat. 1213 § 922 (g) (1). The statutes are found in modern form at 18 U. S. C. § 922 (g) (1) and (g) (4), respectively.

following the ratification of the Fourteenth Amendment, the involuntarily committed were not disarmed under federal law. Although there is a legitimate policy interest in preventing people who are a proven danger to society from possessing dangerous weapons, the modern American prerogative is an overcorrection prohibiting *all* people either adjudicated mentally ill or committed to a mental institution from exercising their Second Amendment right forever and *without exception*. Fatally, this overcorrection cannot find its roots in this Nation's history and tradition concerning firearm regulations. In light of *Bruen*, this is a glaring breach of the Second Amendment.

There are now federal and several state statutes that prohibit persons previously involuntarily committed from owning firearms.[72] Not all states have legal mechanisms in place to restore the right, and at least sixteen of those states (and Puerto Rico and the U. S. Virgin Islands) which do have mechanisms in place fail to satisfy federal demands.[73] Making matters worse, the federal government's legal mechanism to restore the right to bear arms is impossible to utilize.

18 U. S. C. § 925 (c) permits a plaintiff to apply to the United States Attorney General *"for relief from disabilities imposed by Federal laws with respect to the possession of firearms"*. In 1986, persons who had been involuntarily committed to a mental institution could apply for the same relief when utilizing the provision.[74] However, this statutory framework is foreclosed to all plaintiffs — and has been for 30 years.[75] In 1992, Congress prohibited the ATF from expending any funds *"to investigate or act upon applications for relief from Federal firearms disabilities under 18 U. S. C. § 925 (c)"*.[76] In an attempt to justify its action, Congress opined that determining whether an applicant *"is still a danger to public safety is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made"*.[77]

Since the federal program is unavailable, one seeking to remove their

[72] *See e.g.*, 18 U. S. C. § 922 (g) (1); Alabama Code 1975 § 13A-11-72 ("No person of unsound mind shall own a firearm".); Missouri Revised Statutes § 571. 070 ("A person commits the offense of unlawful possession of a firearm if such a person knowing has any firearm in his or her possession and … such person is currently adjudged mentally incompetent".); North Carolina General Statutes § 14-404 ("A permit to purchase a handgun may not be issued to one who has been adjudicated mentally incompetent or has been committed to any mental institution".).

[73] Alaska, Connecticut, Indiana, Maine, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Oregon, Puerto Rico, South Dakota, Utah, Virgin Islands, and Washington State may restore firearm rights at the state level, but the plaintiff will remain federally disabled. Margaret Colgate Love, 50-State Comparison: Loss & Restoration of Civil/Firearms Rights, Restoration of Rights Project (2021), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/ (last visited Apr. 19, 2022).

[74] Firearms Owners' Protection Act, Pub. L. 99-304, § 105, 100 Stat. 449 (1986).

[75] More egregious is that during the 54 years that the federal government has disarmed the mentally ill, a relief provision was only available to them for a period of six years – between 1986 and 1992.

[76] Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. 102-393, 106 Stat. 1732.

[77] S. Rep. No. 353, 102d Cong., 2d. Sess. 19-20 (1992).

Second Amendment disability may only find solace within their resident state. However, consistency in elements and application are sorely lacking between states, which fosters a confusing environment for anyone seeking to restore their right to bear arms. Because of the various hurdles, statutory roadblocks, and bureaucratic red tape, recovered citizens are often left unarmed in the fight to regain their Second Amendment right. Not even the courts agree on how to handle the problem.

The United States Courts of Appeals for the Ninth and Third Circuits have both denied previously involuntarily committed individuals the opportunity to restore their right to bear arms, but the United States Court of Appeals for the Sixth Circuit has held otherwise. The Ninth Circuit asserts in *Mai* that although less "*dangerous*" than when originally committed, persons previously committed pose a greater risk to society than a non-committed individual — even after twenty-one years have passed, and when that past commitment occurred at the age of minority.[78] The Third Circuit, beating a similar drum, contends that neither rehabilitation nor passage of time are relevant in a Second Amendment rights restoration analysis.[79] The Sixth Circuit, however, notes in *Tyler* that *"prior involuntary commitment is not coextensive with current mental illness: a point Congress has recognized"*.[80] Accordingly, the Sixth Circuit granted an involuntarily committed person an opportunity to have his right to bear arms restored.

Each court recognized that *Heller* rejected rational-basis review as an option when considering if a ban on gun rights is constitutional. Notably, all three courts analyzed the issue of a lifetime ban on firearm possession under intermediate scrutiny rather than strict scrutiny.[81] The Ninth Circuit assumed intermediate scrutiny applied while reserving judgement on the matter. The

[78] In 1999, at the age of seventeen, Duy Mai was involuntarily committed to a mental institution after threatening to harm himself and others. After his release, Mai attained his GED, a bachelor's degree, and a master's degree. "He no longer suffers from mental illness, and he lives a socially-responsible, well-balanced, and accomplished life". *See* Mai, 952 F. 3d., 1110. His involuntary commitment during the twentieth-century prevented him from obtaining a firearm. The Ninth Circuit noted that, when confronted with "challenges remarkably similar to Mai's challenge" the Third and Sixth Circuits "reached opposite conclusions". *Id.*, 1113. In conducting its own analysis, the Ninth Circuit first asserted that "regardless of present-day peaceableness, a person who required formal intervention and involuntary commitment by the State because of the person's dangerousness is not a law-abiding, responsible citizen", likening the person to a "domestic-violence" perpetrator. *Id.*, 1115. The Ninth Circuit then conceded that Mai is suffering from a "lifetime ban", explaining that "unless Congress funds the relief from disabilities program … or the Washington legislature creates a relief from disabilities program pursuant to § 40915, federal law prohibits Mai from possessing a firearm". *Id.*, 1120. Nonetheless, the Ninth Circuit held that "the federal prohibition on Mai's possession of firearms because of his past involuntary commitment withstands Second Amendment scrutiny". *Id.*, 1121.

[79] Beers v. Attorney General United States, 927 F. 3d., 150 (3d. Cir. 2019).

[80] Tyler, 837 F. 3d., 688.

[81] However, Judge Danny Boggs concurred in *Tyler* to note that "the proper level of scrutiny is strict scrutiny, as with other fundamental constitutional rights, and under that standard of review, the district court's opinion cannot stand". *Id.*, 702 (Boggs, J., concurring). He was right. *See* Bruen, 597 U.S. ___, (slip op., 10).

Third and Sixth Circuits, however, analyzed the issue under the two-step *Marzzarella*[82] and *Greeno*[83] frameworks, respectively.[84] Each framework asks first "*whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood*", and second, if history and precedent suggest the activities or individuals are not categorically unprotected by the Second Amendment, whether the "*strength of the government's justification for restricting or regulating the exercise of Second Amendment rights*" is sufficient to justify the restriction in question.[85]

Intermediate scrutiny is appropriate, they contend, because strict scrutiny "*would invert Heller's presumption that prohibitions on the mentally ill are lawful*",[86] and "*because of the inherent risk that the right of self-defense poses to others*".[87] Analyzing under immediate scrutiny, the Sixth Circuit reasoned that the legislative history and empirical evidence offered by the government to show that a categorical firearm ban on the previously involuntarily committed is substantially related to the government's interest was inadequate to show "*why Congress is justified in permanently barring anyone who has been previously committed, particularly in cases like Tyler's, where a number of healthy, peaceable years separate the individual from their troubled history*".[88] Yet in *Mai*, despite applying the same level of scrutiny under remarkably similar facts, the Ninth Circuit reasoned that the same legislative history and empirical evidence support the opposite conclusion. When Mai's petition for a rehearing was denied, Judge Daniel P. Collins noted in his dissent that the Ninth Circuit "*panel's application of intermediate scrutiny is seriously flawed and creates a direct split with the Sixth Circuit*".[89]

The United States Supreme Court has not directly resolved the issue. In May 2020, the Supreme Court granted Bradley Beers' petition for writ of certiorari, but the judgment was vacated as moot.[90] And in April 2021 the Supreme Court denied Duy Mai's petition for a writ of certiorari.[91] The government did not seek review by the Supreme Court in *Tyler*. Therefore, an active and direct circuit split over the issue remains. However, the Court's recent decision in *Bruen* closed the door to means-end and intermediate scrutiny. The Court squarely rejected the two-part tests utilized by the Third, Sixth, and Ninth Circuits to resolve *Beers*, *Tyler*, and *Mai*. The Court wrote:

[82] United States v. Marzzarella, 614 F. 3d. 85, 89 (3d. Cir. 2010).
[83] United States v. Greeno, 679 F. 3d. 510, 518 (6th Cir. 2012).
[84] The Fourth and Tenth Circuits have also adopted the same framework. *See* United States v. Chester (Chester I), 628 F. 3d. 673, 680 (4th Cir. 2010); United States v. Reese, 627 F. 3d. 792, 800-801 (10th Cir. 2010).
[85] Greeno, 679 F. 3d., 518.
[86] Tyler, 837 F. 3d., 691.
[87] *Id*., 692.
[88] *Id*., 695.
[89] Mai v. United States, 974 F. 3d. 1082, 1083 (9th Cir. 2020) (Collins, J., dissenting).
[90] Beers v. Barr, 140 S. Ct. 2758 (2020).
[91] Mai v. United States, 141 S. Ct. 2566 (2021).

"Today, we decline to adopt that two-part approach. Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with Heller, which demands a test rooted in the Second Amendment's text, as informed by history. But Heller and McDonald do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms".[92]

Under the *Bruen* test, there is no possible way the government could "affirmatively prove" that imposing a lifetime ban on firearm possession for the mentally ill "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms". No such tradition existed until the twentieth century. The Sixth Circuit noted as such in *Tyler*.[93]

II. How courts and Congress impose lifetime federal firearm bans on the mentally ill

A. The "dangerousness" myth

On paper, the United States involuntarily commits individuals only when they pose a danger to themselves or others. American courts formulated the dangerousness standard as early as 1845,[94] and it merited a statutory blessing in 1964 when Congress enacted the Ervin Act.[95] Just two years later, the United States Court of Appeals for the District of Columbia Circuit interpreted the Act to require consideration of less restrictive alternatives than mandatory hospitalization.[96] That holding later *"opened the door to notions of outpatient civil commitment".*[97] The United States Supreme Court first appropriated the standard eleven years later in *O'Conner v. Donaldson*,[98] holding that a "*State cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends*".[99]

To satisfy due process, dangerousness must be established by a "clear and

[92] Bruen, 597 U. S. ___, (slip op., 10).
[93] *See supra* note 88 and accompanying text.
[94] *See* Matter of Josiah Oakes, 8 Law Rep. 123 (Mass. 1845).
[95] D. C. Code § 21-501-591 (Supp. V. 1966). The Ervin Act controlled involuntary commitments in the District of Columbia.
[96] Lake v. Cameron, 364 F. 2d 657, 660 (D.C. Cir. 1966) ("Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection".).
[97] Substance Abuse and Mental Health Services Administration, Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice, 4 (2019). Available at: https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf (last visited Apr. 19, 2022).
[98] Kenneth Donaldson was involuntarily committed to a Florida hospital for nearly 15 years because of his schizophrenia. He eventually sued in federal court and won. When the hospital appealed, the Supreme Court affirmed the verdict, reasoning that "there is no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom". *See* O'Conner v. Donaldson, 422 U. S. 563, 575 (1975).
[99] *Id*., 576.

convincing" standard — a standard less than that required in criminal proceedings.[100] However, "*determination of the precise burden equal or greater than the clear and convincing standard is a matter of state law*".[101] So the standard set by the Supreme Court is a floor, not a ceiling, and states can self-impose a greater burden.

All states reserve the right to civilly commit individuals upon a finding of dangerousness.[102] However, "danger" is defined differently among the states. In most states, dangerousness means that the respondent poses physical harm to himself or to others.[103] However, several states allow mere predictions of future dangerousness to satisfy the standard.[104] Some of those states require that the possible future danger at least be imminent,[105] and some only require that the possible future danger be substantial.[106] Troublingly, others define dangerousness synonymously with mental illness.[107]

There are two competing schools of thought regarding the dangerousness standard's jurisprudential foundation. The dangerousness requirement is either "*rooted in the state's police power to protect public safety*" or it is rooted in the state's "*parens patriae power: to act in the person's interest*".[108] Regardless of which school is correct, proponents of both can concede that the then-new dangerousness standard intended to tighten commitment criteria. However, "*the statutes have had less impact than expected (and in some cases minimal effect) on overall rates of commitment and on the nature of committed populations*".[109] Since that is the case, only one of three things can be true: (1) the majority of people involuntarily committed before the dangerousness standard was mandated

[100] Addington v. Texas, 441 U. S. 418 (1979) (holding that at least a clear and convincing standard is required to meet due process guarantees for involuntary commitments).
[101] *Id*., 433.
[102] Of course, this presumes that *Bruen* permits some limitations on firearm possession by the mentally ill upon a showing of dangerousness. Whether this is the case exceeds the scope of this article. This article's scope is narrower, arguing that (1) the dangerousness standard is applied too leniently and (2) it is unconstitutional for the *recovered* mentally ill to suffer a lifetime ban on firearm possession.
[103] John Parry, Civil Mental Disability Law, Evidence and Testimony, 476 (2010).
[104] *See, e.g.*, S. D. Codified Laws § 27A-1-1 (6) (2013) ("Danger to others, a reasonable expectation that the person will inflict serious physical injury upon another person in the near future, due to a severe mental illness, as evidenced by the person's treatment history and the person's recent acts or omissions which constitute a danger of serious physical injury for another individual".).
[105] *See, e.g.*, Georgia Code Annotated § 37-3-1 (9.1) (A) (i) (2012) ("Inpatient' means a person who is mentally ill and who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons".).
[106] *See, e.g.*, Utah Code Annotated § 62A-15-631 (10 (b)) (2015) ("Because of the proposed patient's mental illness the proposed patient poses a substantial danger"; *See also* Robert I. Simon, *The Myth of "Imminent" Violence in Psychiatry and the Law*, 75 University of Cincinnati Law Review 631, 632 (2006) (highlighting the "arbitrary time limits" ascribed by clinicians in assessing the imminence of dangerousness.).
[107] *See, e.g.*, Alabama Code § 22-52-10.4 (a) (ii) (2016) ("As a result of the mental illness the respondent poses a real and present threat of substantial harm to self and/or others".).
[108] *Supra* note 79, 5.
[109] Paul S. Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change, 40 (1994).

would likely have been committed even if the dangerousness standard existed, (2) the dangerousness standard does not adequately determine whether an individual is dangerous, or (3) the dangerousness standard, even if effective as applied, is frequently applied incorrectly.

Giving credence to the third option is that it remains relatively easy for the state to commit an individual to a mental institution. "*The person against whom the involuntary commitment proceedings have been instituted must fight against the unfettered power of the state to retain his or her freedom*".[110] In many cases, the person alleged to be mentally ill is not even offered an opportunity to litigate prior to their commitment.[111]

That was Meme's experience, a 61-year-old mother who spent her days helping others with disabilities.[112] After suffering from severe stress and anxiety, Meme's daughter worried Meme suffered a psychotic break. Meme insisted that was not true. Regardless, Meme's daughter called emergency services and the police demanded Meme go to the hospital. When Meme refused, the police injected her with a sedative and transported her to St. Joseph Hospital in Nashua, New Hampshire. After awaking, Meme demanded she be released. But because Meme's daughter and an emergency room doctor filed a legal petition claiming that Meme was a danger to herself or others because of mental illness, the hospital refused to release Meme. Making matters worse, all psychiatric facilities in the state were full, so Meme could not be transported to a psychiatric facility and, therefore, "*Meme couldn't get a hearing*" to argue that she should not be detained.[113] In all, Meme spent "*20 days locked inside a wing of St. Joseph's emergency department*" before securing a hearing to determine if she truly posed danger to herself or others.[114] Her story is just one of many.[115]

Still, even when the opportunity to litigate pre-commitment arises, it is often a sham.[116] "*The overwhelming number of cases involving mental disability law*

[110] Hayden Carlos, Cameron Pontiff, Trick or Treatment? Confronting the Horrific Intersection of Race, Mental Health, Poverty, and Incarceration in Louisiana (2019), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-race-mental-health-poverty-incarceration-louisiana/ (last visited Apr. 19, 2022).

[111] *See e.g.*, 2 N. J. S. A. 30:4-27.10 (f-h) ("The law permits temporary commitment prior to a hearing on the basis of probable cause that a person is in need of involuntary commitment".); *In re Commitment of M.M.*, 894 A. 2d., 1158 (N. J. App. Div. 2006).

[112] Jason Moon, Woman Detained in Hospital for Weeks Joins Lawsuit Against New Hampshire, https://www.npr.org/2019/10/22/771854639/woman-detained-in-hospital-for-weeks-joins-lawsuit-against-new-hampshire (last visited Apr. 19, 2022).

[113] *Ibid.*

[114] *Ibid.*

[115] *See* Doe v. N. H. Department of Health and Human Services, Commissioner et al., No. 18-CV-1039-JD, D. N., 149 (D. N. H. May 4, 2020) (recounting four instances of patient boarding in New Hampshire resulting in involuntary commitment prior to a hearing).

[116] *See*, *e.g.*, Michael L. Perlin, John Douard, *"Equality, I Spoke That Word/As If a Wedding Vow": Mental Disability Law and How We Treat Marginalized Persons*, 53 New York Law School Law Review, 9 (2008-2009); Michael L. Pervin, *"John Brown Went Off to War": Considering Veterans' Courts as Problem-Solving Courts*, 37 Nova Law Review 445, 445 (2013).

are 'litigated' in pitch darkness. Involuntary civil commitment cases are routinely disposed of in minutes behind closed courtroom doors".[117] During the hearings, the psychiatrist, attorney, and judge work together to reach a desirable outcome,[118] but the psychiatrist ultimately decides whether the respondent will be involuntarily committed.[119]

That judges and lawyers defer to psychiatric professionals makes sense on the surface. After all, the professionals are trained in psychiatric diagnosis and, presumably, have a grasp of mental health law. "*But while that judicial deference to psychiatric testimony is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very product of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. It is this balance — struck by the traditions of the American people—that demands our unqualified deference*".[120] Further, predicting future dangerousness "*has long posed unique challenges to clinicians and many consider the field of risk assessment to continue to be largely unreliable*".[121] Psychiatric professionals even disagree as to what it means to be "dangerous".[122] This is problematic, as "*without clear statutory guidance on the definition of danger, many psychiatrists are necessarily forced to use discretion to rule in a manner consistent with his or her value system, as opposed to applying fact and law in a neutral manner*".[123]

Lawyers often find themselves ethically conflicted by the hearings. They feel obligated to advocate for their clients but are concerned that "*if they fought commitment under these circumstances, they could obtain release for anyone, even for the dangerously mentally ill*".[124] That fear leads many lawyers to "*rarely take an adversary role to obtain release of their clients whom psychiatrists had recommended*

[117] Michael L. Perlin, *A Law of Healing*, 68 University of Cincinnati Law Review 407, 425 (2000).
[118] "Despite their differing roles – psychiatrist, attorney or judge – all participants, less the respondent tend to cooperatively reach an outcome that they all agree is desirable". *Supra* note 99, 6.
[119] *Ibid.* "Commitment courts function as extensions of the public mental health system dominated by the tradition of medical paternalism, with almost complete judicial deference to psychiatrists' discretionary recommendations".
[120] Bruen, 597 U. S. ___ (slip op., 17) (quoting Heller, 554 U. S., 635).
[121] Sara Gordon, *The Danger Zone: How the Dangerousness Standard in Civil Commitment Proceedings Harms People with Serious Mental Illness*, 66 Case Western Reserve Law Review 657, 672 (2016); *See also* Michael A. Norko, Madelon V. Baranoski, *The Prediction of Violence: Detection of Dangerousness*, 8 Brief Treatment & Crisis Intervention 73, 80 (2008); Mairead Dolan, Michael Doyle, *Violence Risk Prediction*, 177 British Journal of Psychiatry 303, 303 (2000).
[122] Gordon, *supra* note 123, 673. "One study found that some psychiatrists interpreted a dangerousness standard to require that a patient pose an immediate, clear, or imminent danger to self or others, while others thought the statute required that the patient's condition present a probable, possible, or potential danger. Others thought emergency hospitalization was permitted only for homicidal and suicidal patients, while some believed commitment was permissible when a patient exhibited self-destructive impulses".
[123] *Ibid.*
[124] Virginia Aldigé Hiday, *Are Lawyers Enemies of Psychiatrists? A Survey of Civil Commitment Counsel and Judges*, 140 The American Journal of Psychiatry 323, 326 (1983).

for commitment".[125] Most shocking is that "*only infrequently did they argue that the dangerousness criterion was not met*".[126]

It goes without saying that it is unjust for a respondent, particularly one represented by counsel, to not have a true advocate in their corner. That many lawyers are uncomfortable arguing that their client is not dangerous — for fear that he might be — is firm evidence of the social stigma that detriments the mentally ill daily. Further, it violates fundamental canons of legal advocacy.[127] Imagine if defense attorneys representing criminal defendants refrained from arguing that the expert testimony offered by the prosecuting authority is questionable, for fear that their client's release could endanger society. "*Assumed dangerousness is a far cry from actual dangerousness*".[128] Even more egregious is that a finding of dangerousness is what authorizes the involuntary commitment and sTRIPS the respondent of several civil rights, the right to bear arms being just one.

The dangerousness standard is rarely, if ever, applied properly. The reason is multi-faceted. Judges lack the time to critically consider all facts in a civil commitment hearing[129] and the confidence to reject professional psychiatric opinion.[130] Lawyers likewise lack the confidence to reject professional psychiatric opinion, even when failure to do so is certain to adversely affect client interests.[131] In effect, all legal professionals within the courtroom resign themselves to the opinion of the lone psychiatrist.[132] The courts have become "*rubber stamps of psychiatrists' testimony*".[133] The dangerousness standard is a myth; dangerousness is whatever a psychiatrist says it is. To serve its original goal of safeguarding society from those who are almost certain to cause it harm, a fundamental reimagining of dangerousness as applied in practice is required. In the meantime, judges' deferment to psychiatric testimony can be leveraged if psychiatric professionals realign their definition of dangerousness. This may be the best way to prevent unnecessary civil commitments under the *status quo*.

Although the dangerousness standard is applied poorly in practice and is

[125] *Ibid.* The lawyers "almost never challenged the medical affidavit or argued that the respondent was not mentally ill".
[126] *Ibid.*
[127] "A lawyer shall act with reasonable diligence and promptness in representing a client". Model Rules of Prof'l Conduct R. 1.3. *See also* Model Rules of Prof'l Conduct R. 3.1.
[128] Anemo Hartocollis, Mental Health Issues Put 34,500 on New York's No-Guns List, (2014), https://www.nytimes.com/2014/10/19/nyregion/mental-reports-put-34500-on-new-yorks-no-guns-list.html (last visited Apr. 19, 2022).
[129] Gordon, *supra* note 123, 678 ("Civil commitment proceedings may not be given priority by judges with busy caseloads, who may therefore lack an incentive to carefully scrutinize psychiatrists' recommendations").
[130] *Ibid.* "Most judges have little training in mental health law or psychiatric diagnosis, so this deference to psychiatric forensic testimony in civil commitment proceedings is not surprising".
[131] *Ibid.*
[132] *Ibid.* "Studies suggest that there is a high correlation between psychiatrist's recommendations and judges' decisions in civil commitment proceedings, often as high as 90%".
[133] *Ibid.*

not indicative of true danger to self or others, the *legal* standard — properly understood — is both vital and presumptively constitutional.[134] Unfortunately, misuse of the dangerousness standard has only contributed to and affirmed social stigma of the mentally ill. Requisite to alleviating that stigma is recognizing that previously involuntarily committed people are not threats to society *en masse*, as the Third and Ninth Circuits are wrongly convinced the law demands. By refusing to recognize the recoverability of these individuals, let alone their dignity, the Third and Ninth Circuits undermine ordered liberty and act without constitutional authority. The same argument holds true for felons who no longer pose a risk to society.[135]

During the founding era, even felons were not stripped of the right to bear arms "*simply because of their status as felons*", but because of demonstrable danger.[136] In her dissent in *Kanter v. Barr*, Judge, now-Justice, Amy Coney Barrett went as far to say that legislatures *only* have authority to prohibit "*people who are dangerous*" from possessing guns.[137] Likewise, the mentally ill were not stripped of the right to bear arms simply because of their status as mentally ill (recovered or otherwise). Only those who were truly and provably dangerous could suffer disability of the right. Although in the minority on the Seventh Circuit in 2019, Justice Barrett's position, inspired by a Scalian originalism,[138] could reflect the majority of the Supreme Court in 2022 and beyond.

In short, the Second Amendment recognizes an intrinsic individual right to bear arms for the purpose of self-defence. That right is subject to limitations rooted in a key finding of dangerousness. The mentally ill and violent felons were traditionally dubbed dangerous. That list now includes the mentally ill and all felons (both violent and nonviolent). But the list should include *only* dangerous mentally ill persons and violent felons. To solve the problem, courts must properly apply the dangerousness standard during civil commitment hearings. However, because of the extreme deference currently (and wrongly) granted to psychiatric professionals in civil commitment

[134] *Supra* note 104.

[135] *See* Catherine Dowie, *Impact of Involuntary Commitments and Mental Illness on Second Amendment Rights*, 13 Journal of Health & Biomedical Law 275, 284 (2018); *See also* Tyler, 847 F.3d. at 708 (Sutton, J., concurring) ("This on/off switch for Second Amendment rights is not limited to the context of mental illness; convicted felons, even non-violent offenders, at best have limited options to demonstrate rehabilitation and restore their rights to own firearms for lawful purposes. Felons in all states do, however, have the ability under federal law to re-establish their Second Amendment rights, unlike Tyler and other individuals who have had their rights denied on the basis of mental illness").

[136] Kanter v. Barr, 919 F. 3d. 437, 451 (7th Cir. 2019).

[137] *Ibid.*

[138] *See generally* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 North Dakota Law Review, 1945 (2017). *But see* Vermeule, *supra* note 63, 22-23, noting that "Originalism lacks the internal theoretical resources required even to identify meaning without normative argument at the point of application, most obviously and explicitly in hard cases, but necessarily in all cases", and that Originalists wrongly assert that "the law can be identified independent of morality".

hearings, there must first be a reform from without, rather than within, the legal system. The APA must take a hard stance and encourage all psychiatric professionals to define dangerousness in accord with the legal definition's intent — *actual dangerousness*. A solution for non-violent felons is beyond the scope of this Article.[139] Not all mentally ill persons are dangerous. It is time for the law to move past stigma and properly apply the dangerousness standard. To do so is in accord with the classical legal tradition and fosters juridical reasoning that promotes the common good.[140]

B. The problem with Congress

Even if the judiciary addresses the injustice of conducting involuntary commitment proceedings without a true neutral party on the bench and without a zealous legal advocate for the respondent, it safeguards only the allegedly mentally ill and does not absolve people who were previously involuntarily committed. In other words, it addresses the issue at the front-end but not the back-end. For those previously committed under a loosely applied dangerousness standard, Congress is the only answer.

As discussed previously, Congress enacted 18 U. S. C. § 925 (c) which, in part, provided a statutory framework for relief from disability of the right to bear arms. The section grants the Attorney General authority to review petitions for relief. However, the Attorney General delegated that authority to the ATF[141] and, as that delegation remains in effect, the Attorney General lacks authority and duty to act upon applications for restoration of firearm rights.[142] Congress promptly directed the ATF not to investigate or act upon petitions for relief filed under the statute, rendering it useless. Consequently, the federal firearm disability relief program is nominal only.

Making matters worse, the ATF's refusal to process petitions for relief, per Congressional order, are not subject to judicial review. "*Inaction by the ATF does not amount to a 'denial' within the meaning of § 925 (c). An actual decision by ATF on an application is a prerequisite for judicial review*".[143] The courts cannot solve this problem, nor can the ATF.[144] Only Congress can address the matter.

Likewise, only Congress can bless rights restorers with federal reciprocity

[139] *See generally* Tara Adkins McGuire, *Disarmed, Disenfranchised, and Disadvantaged: The Individualized Assessment Approach as an Alternative to Kentucky's Felon Firearm Disability and Other Arbitrary Collateral Sanctions Against the Non-Violent Felon Class*, 53 University of Louisville Law Review 89, 89 (2014).
[140] *See generally*, Vermeule, *supra* note 63.
[141] *See* 28 C. F. R. § 0.130 (a) (1); 27 C. F. R. § 478.144 (b) ("an application for such relief shall be filed with the Director of ATF".).
[142] Black v. Snow, 272 F. Supp. 2d., 21 (D. D. C. 2003), affirmed Black v. Ashcroft, 110 Fed. Appx., 130 (D. C. Cir. 2004).
[143] United States v. Bean, 537 U. S. 71, 75 (2002).
[144] The ATF's annual appropriation still prohibits expending funds to investigate or act upon applications for relief from federal firearms disabilities. *See* ATF, Is There a Way for a Prohibited Person to Restore Their Right to Receive or Possess Firearms and Ammunition? (2019), https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-their-right-receive-or-possess-firearms-and (last visited Apr. 20, 2022).

from relief granted at the state level. In 2007, Congress provided an avenue to secure its blessing in the NICS Improvement Amendments Act (NCIA).[145] In relevant part, the Act granted reciprocity of state relief of firearm disabilities to the mentally ill if the state program met certain requirements. Among those requirements are providing provisions for (1) application for relief from the federal prohibition, (2) *de novo* judicial review of denials, and (3) mandated updates to state and federal records by removing the person's name from federal firearms prohibition databases if relief is granted.[146]

The Act did much good, such as boosting the NICS Index from recording barely 400,000 state-submitted mental health records in 2008 to over 7.3 million in December 2016.[147] But the Act's attempt to address reciprocity had very little practical impact. *Tyler*, *Beers*, and *Mai*, all decided after the Act's passage, belie any conclusion to the contrary. Numerous states to date still lack restoration of federal disability programs, and several other state programs fail to satisfy federal demands.[148] The inconsistency contributes to bizarre legal outcomes.

Perhaps the most bizarre is *Keyes v. Lynch*, where two Pennsylvania men – both state employees required to carry firearms for work – whom had been previously involuntarily committed sought relief from their firearm disabilities.[149] They were granted relief under Pennsylvania state law, but because Pennsylvania's firearm rights restoration program failed to meet federal demands, the federal district court determined that their federal firearm disabilities remained. However, both men reserved the right to possess firearms in their official capacities as law enforcement officers under an exception found in 18 U. S. C. § 925 (a) (1). Nonetheless, because Pennsylvania did not have a federally approved rights restoration program, the men remain prohibited from possessing firearms as private citizens. The conclusion defies reason, but only Congress has the authority to fix it.

III. How to guarantee (and restore) the right to bear arms to the recovered mentally ill

Seeking federal relief from firearm disabilities is a privilege granted only to a few. The problem is two-pronged, and to begin to fix it requires

[145] 121 S. 2559, Pub. L. 110-180 (codified as 18 U. S. C. § 921, 922, 924, and 925 and 42 U. S. C. § 14601 and 3755).
[146] Bureau of Alcohol, Tobacco, Firearms, and Explosives: Certification of Qualifying State Relief from Disabilities Program (2016), https://www.atf.gov/file/11731/download (last visited Apr. 20, 2022).
[147] Liza H. Hold, Donna Vanderpool, *Legal Regulation of Restoration of Firearms Rights After Mental Health Prohibition*, 46 Journal of the American Academy of Psychiatry and the Law 298, 298 (2018). Available at: http://jaapl.org/content/jaapl/46/3/298.full.pdf (last visited May 25, 2022).
[148] *See* Margaret Colgate Love, 50-State Comparison: Loss & Restoration of Civil/Firearms Rights (2021), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/ (last visited Apr. 19, 2022).
[149] *See* 195 F. Supp. 3d., 702 (2017).

successfully implementing two independent solutions. First, the APA must take a stand against broadly defined dangerousness and encourage psychiatrists to consider dangerousness narrowly when serving as an expert witness during a civil commitment hearing.[150] Second, Congress must either appropriate funding for the ATF to investigate and act upon petitions for federal relief from firearm disabilities *or* lax the requirements imposed upon the states so that states opting to implement a rights restoration program can easily satisfy federal demands, alleviating the problem of reciprocity.

A. The American Psychological Association must take a stand

An incredible amount of information about involuntary commitments to psychiatric facilities in the USA remains unknown to the public.[151] In fact, the most comprehensive, recent data available was compiled in 2014 — nearly a decade ago. That data shows that 591,402 emergency involuntary commitments were recorded in 2014 alone.[152] However, recent "*estimates suggest more than one million involuntary psychiatric detentions take place each year in the United States*".[153]

Negligently broad application of the dangerousness standard contributes to countless unjustified civil commitments. To mend that social ill, the courts must exercise prudent judicial restraint. Reducing the number of civil commitments predicated on a finding of dangerousness will naturally reduce the raw number of civil commitments. That is a good thing to ensure the mentally ill have adequate legal protection of their individual liberties, as less will have been declared dangerous.

Granted, establishing a clear standard for dangerousness is a difficult task. Consider how many factors must be considered in such a finding: the degree of harm the respondent can cause and whether that harm afflicts person or property; if to persons, whether physical or mental; the likelihood that the respondent will actually commit harm, and the frequency of it; and how imminent the threat of harm to self or others is. Drawing an accurate conclusion on all of these factors requires much more than a nominal twenty-minute hearing and the counsel of a reluctant legal advocate. It is tempting to recommend courts properly apply the dangerousness standard as intended. However, that is the status quo, and it has not worked.[154] The courts need

[150] The preferred solution is for the courts to recognize that broad dangerousness fails to satisfy constitutional muster, but decades of inaction require an alternative. *See infra* note, 158.
[151] Nathaniel Morris, Detention Without Data: Public Tracking of Civil Commitment, https://ps.psychiatryonline.org/doi/10.1176/appi.ps.202000212 (last visited Apr. 20, 2022).
[152] Gi Lee, David Cohen, Incidences of Involuntary Psychiatric Detentions in 25 U.S. States, https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201900477 (last visited Apr. 20, 2022).
[153] Nathaniel Morris, We Need to Rethink Involuntary Hospitalization During This Pandemic, https://blogs.scientificamerican.com/observations/we-need-to-rethink-involuntary-hospitalization-during-this-pandemic/ (last visited Apr. 20, 2022).
[154] Scholars have called for the courts to self-rectify the dangerousness standard for at least 43 years. *See* U. S. Department of Health, Education, and Welfare: Center for Studies of Crime and Delinquency, Dangerous Behavior: A Problem in Law and Mental Health, 55 (1978) ("It is hoped

convincing to change the standard, and, as of now, civil commitment courts nearly always heed the advice of psychiatric professionals.

It is tempting to recommend courts properly apply the dangerousness standard as intended. However, that is the status quo, and it has not worked.[155] The courts need convincing to change the standard, and, as of now, civil commitment courts nearly always heed the advice of psychiatric professionals.

It is time for the American Psychological Association to take a hard stand on the dangerousness standard. Classifying virtually all involuntarily committed individuals as legally dangerous affirms the already averse public perception of the mentally ill, only fueling the rampant stigma the APA seeks to dilute. Instead, the APA should strive to reduce commitments based upon a finding of dangerousness. This will make a huge difference because psychiatric professionals will generally heed the APA's counsel. Moreover, it seems unlikely the APA will stray away from a challenge for a noble purpose such as this one, considering it has openly opposed the civil commitment of convicted sex offenders in the past.[156]

To that end, the APA should include 'returning to a narrow dangerousness standard in civil commitment courts' among its 2023 Advocacy Priorities.[157] The APA could also include weekly updates on its progress in the APA Advocacy Washington Update newsletter, a publication centred on passing psychology-informed federal policy and legislation.

If the APA makes this move, it may encourage the National Alliance on Mental Illness to favour a narrow definition for dangerousness. The Alliance seeks to "*diminish the need for involuntary commitment*" but, oddly, urges courts to define dangerousness "*more broadly*".[158] The two goals are contradictory. Instead, both the Alliance and the APA should advocate for an appropriate, narrow definition of dangerousness — actual danger.

Psychiatric professionals informed by the APA and the Alliance will likely follow suit, carrying with them to civil commitment hearings, where their expert opinion is heavily weighed, a predisposition to define dangerousness

that the courts and legislatures will respond with more carefully articulated definitions in order to further limit the subjectivity and judicial discretion that has characterized this area of the law".).

[155] Scholars have called for the courts to self-rectify the dangerousness standard for at least 43 years. *See* U. S. Department of Health, Education, and Welfare: Center for Studies of Crime and Delinquency, Dangerous Behavior: A Problem in Law and Mental Health, 55 (1978) ("It is hoped that the courts and legislatures will respond with more carefully articulated definitions in order to further limit the subjectivity and judicial discretion that has characterized this area of the law".).

[156] *See generally* American Psychiatric Association, Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association (1999).

[157] American Psychiatric Association, Advocacy Priorities for 2022 (2022), https://www.apaservices.org/advocacy/advocacy-priorities.pdf?_ga=2.81744798.869477837.1614743845-1539972877.1614743845 (last visited May 12, 2022).

[158] The National Alliance on Mental Health, Public Policy Platform of The National Alliance on Mental Health, 63-64 (12th ed. 2016).

narrowly. In turn, the likelihood that a person will be civilly committed upon a finding of dangerousness should reduce. That is the most practical solution in the interim while waiting for the courts to independently adopt a narrow dangerousness definition (or for the entire regime to be found unconstitutional in light of *Bruen*). This small step will greatly reduce the raw number of people who suffer federal firearm disabilities.

B. Congressional problems require congressional solutions

Although, even if the APA takes a stand, it will not benefit the millions of Americans who have already been involuntarily committed at some point in their lives. Congress must take action to provide a federally approved process to remove their firearm disabilities. Considering *McDonald's* holding, which recognized that the Second Amendment right to bear arms encompasses an individual right to self-defence that is fundamental to our scheme of ordered liberty, it is shocking that there is not a workable mechanism to restore firearm rights.

The Second Amendment benefits from having no provision that limits its qualifications to the individual states. This is in stark contrast to voting rights. The Constitution provides that state, not federal, law determine qualifications for voting in federal elections.[159] However, the Constitution does not mandate Congress to pass the buck to the states on the issue of firearm rights restoration. Congress has sole authority to fix the problem it has created. Even the Ninth Circuit noted as such.[160]

Congress must appropriate funding to the ATF to investigate and act upon petitions for federal relief or recognize relief granted at the state level. Arguably, Congress has a duty to do the former, as the Constitution does not delegate that authority to the States discretion. It is, of course, lawful for Congress to determine that delegation to the States is appropriate, so the latter is a plausible solution but is less advantageous because numerous people previously involuntarily committed will still suffer a lifetime disability if their state of residence refuses to adopt a rights restoration program.

Implementing the former is also easier for Congress, as a rights restoration framework is already on the books.[161] Congress need not dedicate time to drafting, editing, reviewing, debating, and voting on a statutory framework, as it would if Congress decided to fundamentally rework the NCIA to lax federal requirements for recognizing state firearm right restoration programs. Congress merely needs to appropriate funds to the ATF to implement a program it has already deemed appropriate. And to do so is right and just, as it is quite literally the only way all persons previously involuntarily

[159] U. S. Constitution, Article 1, § 2, cl. 1; XVII Amendment; Article II, § 1, cl. 2; Article I, § 4, cl. 1.
[160] "Unless Congress chooses in the future to fund the federal program, any application by Plaintiff for relief pursuant to § 925 (c) would be futile". Mai, 1106 F. 3d., 1111 (noting *Bean*, 537 U. S., 76 held that "while funding is withheld, judicial review is also unavailable".).
[161] 18 U. S. C., § 925 (c).

committed can be on equal footing in terms of securing relief from their disability.

Conclusion

The Second Amendment guarantees an individual right to bear arms for purposes of self-defence, and that right is fundamental.[162] Historically, a person's right to bear arms was untouched when she was found to be mentally ill.[163] Even more, when other lesser rights were revoked for the person's well-being, they were promptly restored under the common law upon recovery.[164] Yet in 2022, Congress punishes a person who suffers a period of involuntary commitment at any point in their life and for any duration with a lifetime ban on firearm possession.[165] This violates the Republic's scheme of ordered liberty and undermines the common good.[166] Further, State courts' unwillingness to reconsider the dangerousness standard in light of modern findings related to mental illness grossly offends the fundamental rights of the previously involuntarily committed, as does Congress' continued refusal to appropriate funds to the ATF for the federal firearm rights restoration program. Even worse, Congress' reluctance to act is rooted in outdated and offensive stigmatization. As a consequence, innumerable Americans suffer an unconstitutional disability on their right to bear arms.

This problem's solution must be two-pronged. First, the APA must support a narrow definition of dangerousness to influence the psychiatrists who participate as expert witnesses in civil commitment hearings, greatly reduce the number of involuntary commitments based on a finding of dangerousness, and prevent countless respondents from suffering an effective lifetime prohibition on firearm possession. Second, Congress must appropriate funds for the ATF to act upon petitions for federal relief, finally progressing previously involuntarily committed people who seek to restore their right to bear arms out of juridical limbo. Without some combination of both, courts and Congress will continue to trample the fundamental right to bear arms of a historically ostracized class — the mentally ill.

[162] Heller, 554 U. S., 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms".); McDonald, 561 U. S., 778 ("It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty".); *See* Bruen, 597 U. S. ___ (slip op., 62) ("The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees" (quoting McDonald, 561 U. S., 780).
[163] *Supra* notes 53 and 54.
[164] *See supra* pages 7-9.
[165] *See supra* note 1.
[166] *See supra* note 24.