EDITORIAL

Civil Commitment, Firearms Restriction, and the U.S. Sixth Circuit *Tyler* Ruling

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Beginning with the passage of the Gun Control Act of 1968, federal restrictions have been placed on the right of individuals with mental illness to possess firearms. This law prohibits anyone "who has been adjudicated as a mental defective" (the terminology of the day) or "who has been committed to a mental institution" from possessing a firearm.[1] The Brady Handgun Violence Prevention Act of 1993 was built on this law and mandated federal background checks on firearms purchasers.[2] It also led to the creation of the National Instant Criminal Background Check System (NICS), which has been maintained by the U.S. Federal Bureau of Investigation since 1998. In addition to those with mental illness, other classes of individuals have been barred from possessing firearms pursuant to 18 U.S.C. § 922(g)(2006): convicted felons, fugitives from justice, habitual drug users, illegal aliens, dishonorably discharged servicemen, persons who have renounced their U.S. citizenship, persons who have been issued partner/child safety-related restraining orders, and domestic violence misdemeanants. In its landmark decision in *District of Columbia v. Heller*,[3] the U.S. Supreme Court recognized for the first time an individual Second Amendment right to possess firearms while also acknowledging the government's legitimate authority to place limitations on this right. The *Heller* Court indicated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," (Ref 4, p 626) and this sentiment was reaffirmed by the U.S. Supreme Court in *McDonald v. Chicago*.[5] These categories of individuals have restrictions placed on their right to possess firearms to protect the public from dangerous behavior, including dangerous behavior directed against oneself (i.e., suicide).

The decision to include those with mental illness as a class of restricted persons in § 922(g) reflects a belief among lawmakers that individuals with mental illness are categorically at an increased risk of committing acts of firearms-related violence against others or themselves, and the current basis for this belief rests in large part on high-profile mass shootings involving perpetrators with a mental health history, most notably, the shootings at Virginia Tech (Virginia), Newtown (Connecticut), Tucson (Arizona), Aurora (Colorado), Isla Vista (California), and the Washington (D.C.) Naval Yard. Studies investigating mental illness and violence have consistently failed to demonstrate a clear linkage between the presence of a psychiatric disorder and a propensity for committing violent acts against others.[6] Indeed, persons with mental illness are more likely to be the victims than the perpetrators of violence.[7] However, there is a substantial body of evidence in the published literature supporting a connection of mental illness with firearms and suicide in the United States (addressed later). In light of this strong connection, the inclusion of the civilly committed in the list of groups banned from possessing firearms appears to be warranted, notwithstanding the concerns raised by elements within the psychiatric community about

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the appropriateness of the firearms ban for those with mental illness.

Ever since restrictions on the right of persons with mental illness to possess firearms have been installed, an effort has been made at the federal level to expand the scope of state participation in the reporting of civil commitments to the NICS to increase the number of individuals with mental illness who are excluded from purchasing and possessing firearms; this is understandable considering that the U.S. Supreme Court has recognized the prevention of suicide to be a compelling government interest.[8] The NICS Improvement Amendments Act of 2007[9] represents the most notable example of the increased attention given by lawmakers to this endeavor in the recent past. In fact, from 2007 until 2014 the number of mental health records reported to the NICS has grown from approximately 400,000 to over 3 million, representing a 700 percent increase.[10] In light of data published by the U.S. Centers for Disease Control and Prevention revealing a yearly increase in the U.S. suicide rate from 1999 through 2014,[11] it is not surprising that lawmakers would put forth an effort to enhance a system designed to minimize the potential for those who have been civilly committed to gain access to the deadliest means of suicide: firearms. There is evidence that firearms restriction can be an effective suicide risk-reduction strategy. However, a recent federal appellate court decision has for the first time called into question the constitutionality of restricting the right of persons, who have been civilly committed, to possess firearms. With its *en banc* ruling in *Tyler v. Hillsdale County Sheriff's Department et al.*,[12] the U.S. Court of Appeals for the Sixth Circuit cast doubt on whether the government can legally continue its current policy of imposing indefinite firearms restrictions on those who have been civilly committed because of mental illness, for the purpose of reducing the suicide risk for this group of citizens who are categorically at increased risk. I assert that the court erred in its *Tyler* ruling by deviating from its own established judicial precedent without sufficient justification and provide below a legal basis for this assertion and a public health–based explanation for why the position adopted by the court in this case serves as a barrier to a concerted national effort to combat the problem of suicide.

Legal Discussion of the *Tyler* Decision

Following the *Heller* decision, a voluminous amount of commentary has been published in law reviews, public policy forums, and mental health journals that pertain to firearms rights and restrictions. Furthermore, in the wake of *Heller*, there have been several challenges to the federal firearms restrictions outlined in § 922(g) that have provided an opportunity for discussion of this federal statute in judicial decisions and dicta. In the various federal district and appellate court rulings on these challenges, a considerable amount of attention has been paid to the question of what specific level of scrutiny (rational basis, intermediate, or strict) should be adopted when evaluating firearms restriction laws. An analysis of this question is beyond the scope of this essay and is not directly relevant to my critique of the *Tyler* decision. What is of relevance is a review of the U.S. Sixth Circuit's rulings in cases that involved challenges to § 922(g) occurring post-*Heller* and pre-*Tyler*.

The court did not issue any decisions on firearms restrictions for those who have been civilly committed from the time of *Heller* until its ruling in *Tyler*. However, during this time, the court did rule on cases dealing with challenges to firearms prohibitions for another group of citizens restricted under § 922(g): convicted felons. These cases are: *United States v. Frazier*,[13] *United States v. Carey*,[14] and *United States v. Khami.*[15] All three cases involved individuals convicted of nonviolent felony offenses who were then subjected to firearms restrictions pursuant to § 922(g)(1).[16] In all three cases, the Sixth Circuit affirmed that the government's prohibition on felons possessing firearms is constitutional, and in all three cases, the court cited the *Heller* Court's dictum that "nothing in [the *Heller*] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" (Ref 4, p 626). In none of these decisions did the court stipulate that firearms bans for felons must include a process for felons to obtain relief from the disability (i.e., the loss of the right to possess firearms) imposed by the federal law. Furthermore, the court did not require the government to show that a citizen convicted of a felony (including a nonviolent felony offense) poses a risk to others or himself if allowed to possess a firearm.

In its *Tyler* ruling, the U.S. Sixth Circuit called into question whether the government's authority to restrict firearms possession permanently for persons who have been civilly committed because of mental illness is constitutional. The court raised this doubt in response to the fact that the federal relief-from-disabilities program outlined in 18 U.S.C. § 925(c)(1994),[17] which was established to provide a pathway for individuals who have lost their right to possess firearms to regain this right, has been defunded, and several states do not have their own relief programs, thereby resulting in a *de facto* lifetime firearms ban for many of those who have been civilly committed. The U.S. Sixth Circuit indicated that in order for § 922(g)(4)[1] to pass constitutional muster, the government must either provide evidence explaining the necessity of a lifetime firearms ban for those who have been civilly committed or provide evidence that an individual who has been civilly committed would pose a risk to himself or others if he were allowed to possess a firearm. It is notable that, in its decisions supporting the constitutionality of the felon firearms ban, the court did not issue any such requirements. Why should the standard be different for the civilly committed and convicted felons? Both groups are restricted by the same federal law (§ 922(g)), both groups currently lack access to a federal relief-from-disabilities program, and both groups are specifically named in the U.S. Supreme Court's admonishment that its *Heller* ruling should not cast doubt on the government's authority to prohibit firearms possession by certain classes of citizens. There have been no U.S. Supreme Court rulings or decisions by other U.S. federal appellate courts pertaining to the constitutionality of § 922(g), post-*Heller*, which would explain a need for the U.S. Sixth Circuit to differentiate the civilly committed from felons. Furthermore, there is a lack of empirical evidence showing that an individual with a remote history of a nonviolent felony conviction is more likely to engage in dangerous or suicidal behavior with firearms than is someone previously civilly committed that would justify the government's need to meet a higher burden when prohibiting firearms possession via § 922(g)(4),[1] compared with § 922(g)(1).[16]

In its attempt to explain the different standard for felons and the civilly committed, the Sixth Circuit made the claim in *Tyler* that civil commitment occurring several years ago does not equate to current mental illness and questioned whether a civil commitment adjudication is an accurate proxy for the "mentally ill" referenced in *Heller*. It is beyond dispute that individuals have been civilly committed in the past on account of acute mental illness who are now in remission and no longer dangerous to themselves or others. However, there is evidence to support the use of civil commitment adjudication as an appropriate surrogate for those with mental illness, as one published meta-analysis revealed that the suicide risk for those who had been involuntarily committed is 39 times that which was expected.[18] Furthermore, the court did not offer a solution to the matter of how best to identify those with a psychiatric condition who are suitable for the firearms ban under § 922(g)(4). Instead of relying on prior civil commitment adjudication, would the court prefer psychiatrists and other mental health professionals to be the ultimate arbiters of such a determination, and if so, how often would someone with a psychiatric condition have to be evaluated by a mental health professional to assess the current acuity of a disorder? Given the remitting–relapsing nature of many psychiatric disorders, it is not difficult to envision a "revolving door" phenomenon characterized by an individual's repeatedly being placed on and then taken off the NICS firearms ban list, depending upon how a mental health professional happens to rate the severity of his mental illness at a particular time. Another potential proxy for the "mentally ill" mentioned in *Heller* could be those individuals who have attempted suicide. However, this presents its own set of challenges. How does one clearly differentiate between a suicide attempt and nonsuicidal self-injurious behavior or determine with certainty whether a drug overdose by an individual who has both a substance use disorder and a psychiatric illness constitutes an attempt to end one's life? Would the determination of whether someone attempted suicide be made clinically or by a court? It is difficult to comprehend how these (or any other) methods are superior to a reliance on prior civil commitment adjudication as a means of determining those who have mental illness and thus are subject to the firearms ban authorized by § 922(g)(4). Civil commitment adjudication appears to be an appropriate proxy for the persons with mental illness referenced in *Heller*, and none of the other U.S. appellate courts has sustained a plaintiff's Second Amendment challenge to the firearms restrictions contained in § 922(g) post-*Heller*. The U.S. Sixth Circuit erred in calling into question the constitutionality of

§ 922(g)(4) in its *Tyler* decision, based on the preceding facts and a lack of justification in differentiating the civilly committed from convicted felons with respect to imposing federal firearms restrictions.

Public Health Implications

The impact of suicide on American society is substantial and difficult to overstate. According to data published by the U.S. Centers for Disease Control and Prevention (CDC), the age-adjusted U.S. suicide rate in 2014 was 13.0 per 100,000 population, compared with 10.5 in 1999.[11] The rate has climbed every year from 1999 to 2014, resulting in a 24 percent overall increase in the age-adjusted U.S. suicide rate over that same period. It is the tenth leading cause of death for all ages.[19] Suicide results in $51 billion in combined medical and work loss costs according to the CDC, to say nothing of the personal toll suicide takes on families and loved ones. The linkage between suicide and firearms is incontrovertible. In 2013 there were 42,149 completed suicides in the United States, and of those suicide deaths, 21,175 were caused by firearms, representing 51 percent of all completed suicides.[20] There are multiple studies, including case-control studies and population-based cohort/ecological studies, published in the medical literature demonstrating that access to firearms is associated with risk for completed suicide in the United States.[21–26] Furthermore, research has revealed that more than 90 percent of suicide attempts by firearms are lethal, the highest percentage for any suicide method.[27]

It is estimated that approximately 90 percent of those who die by suicide have a mental illness.[28] Given that the overwhelming majority of suicide victims have mental illness and considering the significant increase in the national suicide rate over the past several years, it should come as no surprise that the Surgeon General and the National Action Alliance for Suicide Prevention partnered in 2012 to launch a national strategy for suicide prevention. The report associated with this project highlights the importance of restricting access to firearms as a means of reducing the risk of suicide in the United States.[29] It is sensible to include such a component in a national suicide prevention plan; in fact, it is difficult to envision a plan that does not address firearms access being successful in reducing suicide, considering that approximately 50 percent of all completed suicides in the U.S. involve firearms. Published studies have revealed that localities, both within the United States and outside the country, that placed restrictions on access to firearms experienced a decrease in the firearms suicide rate and overall suicide rate.[30–33]

Based on the U.S. Supreme Court's interpretation of the Second Amendment in *District of Columbia v. Heller* and *McDonald v. Chicago*, a policy restricting all U.S. citizens' access to firearms for the purpose of reducing violence and suicide is unlikely to be enacted, at least in the foreseeable future. To accomplish the goal of reducing firearms-related suicide, it will be necessary to rely on a national policy of restricting access to firearms for specific classes of individuals identified as being at increased risk, including those with mental illness. Possible avenues for doing so include implementation and use of risk-based gun removal laws and gun violence restraining orders (GVROs) as well as permit-to-purchase (PTP) licensing. A recent study investigating the impact of Connecticut's risk-based gun removal law found that every 10 to 20 firearms seizures resulted in one suicide averted.[34] The Gun Control Act and its progeny also provides an avenue to restrict firearms access for those at risk of suicide. There is evidence that the Brady Handgun Violence Prevention Act has been associated with a reduction in the firearms suicide rate for individuals 55 years of age and older,[35] and this study was based on data collected before passage of the NICS Improvement Amendments Act of 2007, legislation which led to an increase in the number of mental health records reported to the NICS following its implementation. To achieve a more robust impact on the suicide rate, mental health proponents and lawmakers should work to build on this foundation and expand the scope of mental health reporting to the NICS by advocating for states to be further incentivized to participate in the reporting of mental health records, including orders for outpatient commitment/assisted outpatient treatment to the NICS, as several states currently do not report outpatient commitment records to the NICS, as well as encouraging treatment providers to pursue civil commitment, not just for patients who are acutely at risk of suicide (using inpatient commitment) but also for those who are at future risk (using outpatient commitment), for the purpose of applying the federal firearms ban to a greater number of individuals who are more likely to kill themselves.

I acknowledge that this last point, encouraging treatment providers to pursue civil commitment (no-

tably outpatient commitment) for patients at future risk of suicide so as to increase the number of mental health cases reported to the NICS, thereby maximizing the number of individuals with mental illness who are subjected to the federal firearms ban, is one that many psychiatrists will view with skepticism. Psychiatrists and others have raised the legitimate concern that the inclusion of those with mental illness in the list of groups banned from possessing firearms does little to address the problem of gun homicide and serves only to fuel the baseless notion that those with mental illness are dangerous to others and thus in need of social control. The stigma associated with this belief is real and not without consequence, and providers may be uncomfortable engaging in a tactic (pursuing civil commitment) that results in more persons with psychiatric illness forfeiting their right to possess firearms. Although the idea that individuals with mental illness are prone to violence against others is a fiction deserving of full repudiation, it is an undeniable truth that the majority (~90%) of those who commit suicide have a psychiatric disorder and that half of all suicides in the United States are caused by firearms. Given this reality, psychiatrists should embrace the tools available in their armamentarium for combating suicide that target the intersection of mental illness and firearms, including the pursuit of civil commitment as a means of restricting access to firearms for persons with mental illness.

The U.S. Supreme Court offered judicial support to the government's policy of restricting access to firearms for those with mental illness under the auspices of § 922(g)(4) with its *Heller* decision. This policy serves as an important component of a broader national suicide prevention plan, one to be supported by the psychiatric community. The U.S. Sixth Circuit's recent *Tyler* decision undermines *Heller* and undercuts an established federal convention designed to reduce the potential for those with mental illness to gain access to the deadliest means of suicide.

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