

likewise ties culpability to moral understanding. Justice Breyer concluded that 45 states, the District of Columbia, and the federal government recognize an insanity defense that takes into consideration the blameworthiness of a defendant, and that blameworthiness is tied to the defendant's understanding and appreciation of the moral wrongfulness of his or her actions.

Discussion

Kabler now joins several U.S. Supreme Court decisions that shape the contours of the insanity defense in the United States. In *Kabler*, the Court resisted setting a national standard for the insanity defense. While the dissent is quite effective in pointing out the historical and case law traditions that argue for a moral incapacity standard consistent with the *Leland* threshold, the majority comes to a different conclusion. Clearly, respecting a state's rights to shape criminal law and procedure is consistent with a long line of previous Court decisions, yet Justice Breyer offers a vivid example that a psychotic man who has the delusional belief that a dog commands him to shoot another man will not have the protection of an insanity claim in Kansas, while the psychotic man who shoots another man who he believes to be a dog will benefit from the Kansas fashioning of the insanity defense. This example may trouble many who approach the insanity defense and understand mental illness from a clinical perspective. It is exceedingly rare that psychosis involves such a distortion of reality that a person actually has the delusion that another man is a dog. But many of us have observed delusional distortions, deific commands, and other psychotic perceptions that direct a person to act in a violent fashion, believing perversely that the act is morally justified. The phenomena of psychosis (i.e., its impact on reason, decision-making, emotion, perception, judgment, restraint, behavior, and rationality itself) all were notably absent in this decision.

The Right to Bear Arms and Persons with Mental Illness

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Forfeited Second-Amendment Rights Due to Mental Illness Cannot Be Restored by Passage of Time or Claims of Rehabilitation

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In *Beers v. Atty Gen. of U.S.*, 927 F.3d 150 (3d Cir. 2019), the U.S. Court of Appeals for the Third Circuit considered whether a defendant's constitutional rights had been violated when a federal district court barred him from owning firearms due to a history of involuntary psychiatric commitment. Federal law 18 U.S.C. § 922(g)(4) (2005) prohibits the possession of a firearm by anyone who has been adjudicated as a "mental defective" or committed to a psychiatric institution. Bradley Beers challenged the constitutionality of this federal statute, as it applied to him, on the claim that a substantial amount of time had passed since his hospitalization and he had been rehabilitated. The Third Circuit affirmed the district court's judgment that Mr. Beers remained a member of the historically barred class of persons prohibited from owning firearms, and, as such, the statute was constitutional as applied.

Facts of the Case

On December 28, 2005, Mr. Beers was involuntarily hospitalized in a psychiatric facility after he told his mother he was suicidal and put a gun to his mouth. His commitment was extended December 29, 2005, and again January 3, 2006, as the examining physician concluded he was suicidal and required hospitalization. After his hospitalization, Mr. Beers attempted to purchase a handgun but was denied after a background check revealed he had a history of an involuntary psychiatric commitment. Mr. Beers had no further treatment for mental illness after 2006. In 2013, he was evaluated by a physician who opined that it was safe for him to handle firearms. Mr. Beers subsequently filed a complaint with the U.S. District Court for the Eastern District of

Pennsylvania claiming that the federal statute prohibiting him from purchasing a firearm was unconstitutional. Mr. Beers argued that though he had once been involuntarily committed to a psychiatric hospital, he had been rehabilitated. While the government moved to dismiss Mr. Beers' complaint, a Pennsylvania court restored his state law right to possess a firearm pursuant to 18 Pa. Cons. Stat. § 6105(f) (2005). It was later determined that the state statute did not satisfy federal requirements, making Mr. Beers subject to prohibition under 18 U.S.C. § 922(g)(4).

Ruling and Reasoning

The Third Circuit Court of Appeals considered whether the passage of time and evidence of rehabilitation were relevant to the inquiry of the constitutionality of 18 U.S.C. § 922(g)(4). The Third Circuit affirmed the district court's judgment that Mr. Beers remained a member of the historically barred class of persons prohibited from owning firearms, thus the statute was constitutional as applied to him.

In its reasoning, the appellate court looked at previous case law in which the constitutionality of the Second Amendment had been challenged. The court first considered *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Court held that the Second Amendment guaranteed an individual, though not unlimited, right to bear arms. The court noted its opinion should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" (*Heller*, p 626) and that such prohibitions remained lawful because they affected classes of persons who have historically been banned from bearing arms.

In coming to their determination, the appellate court utilized the two-part test derived from decisions in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) and *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016), which delineate necessary criteria to challenge a firearm law. In part one, the court determines if the petitioner's circumstances are distinguishable from those of the historically barred class of persons. If the petitioner adequately demonstrates part one, the burden falls on the government to demonstrate that the challenged law satisfies some form of heightened scrutiny. In the case of Mr. Beers, the court determined that his circumstances were not discernible from those of persons in the historically barred class.

The court cited *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011), in which the petitioner challenged the federal statute banning felons from firearm possession. The court heard the case, after felon dispossession was found to be presumptively lawful in *Heller*, because the statute could be challenged as it applied to individuals. The court required that the petitioner prove he was not a member of the historically barred class by either demonstrating that he had been convicted of a minor, nonviolent crime or that a significant amount of time had passed since the crime and he had been rehabilitated and "pose[d] no continuing threat to society" (*Barton*, p 176). In *Binderup* five years later, the court heard another as-applied challenge to the federal statute banning felons from owning firearms. The court overruled the decision in *Barton*, in that it decided that neither the passage of time nor evidence of rehabilitation could restore previously forfeited Second Amendment rights. The court concluded this was applicable to the reasoning in the case of Mr. Beers.

Discussion

The Second Amendment dates back to the 18th century, and laws banning the person with mental illness from owning firearms seemingly did not emerge until the 20th century (Larson CFW: Four exceptions in search of a theory: *District of Columbia v. Heller* and *Judicial Ipse Dixit*. *Hastings L.J.* 60:1371–1386, 2009). One explanation posed is that 18th-century peace officers were authorized to "lock up lunatics who were dangerous," making such laws unnecessary (Larson, p 1377, quoting Henry Care, *English Liberties, or the Free Born Subject's Inheritance*, 6th Ed. (1774)). If it was easy to "lock up" individuals exhibiting dangerous mental impairments, then it was certainly less intrusive to separate these individuals from their firearms.

Commitment laws have developed in the direction of balancing patient and public safety with protecting individuals with mental illness from overzealous deprivation of liberties. In doing so, the question of allowing mentally ill persons to own firearms has become a legitimate and relevant question and has brought increased scrutiny to law that has indirectly subjected some individuals with mental illness to undue stigma and permanent deprivation of Second Amendment rights. The reasoning behind disarming individuals adjudicated as mentally ill is identical to that concerning felons, i.e., to separate those deemed

a danger to themselves or others from guns. Of course, these two classes of persons are not the same from a risk-assessment perspective.

The Third Circuit said that there is no historical justification for restoration of Second Amendment rights. Whether one forfeits the Second Amendment right because of a felony conviction or because one has been deemed a danger to himself or others and involuntarily hospitalized, the forfeiture cannot be overturned by “rehabilitation.” It also noted that “federal courts are ill-equipped to determine whether any particular individual who was previously deemed mentally ill should have his or her firearm rights restored” (*Beers*, p 159).

The *Beers* decision concludes that the irrelevance of rehabilitation for felons regarding forfeiture of Second Amendment rights is equally applied to those adjudicated as mentally ill. This conclusion supports the very stigmatization so many have worked to reverse. Interestingly, the court found it necessary to comment on the topic of further stigmatization. In response to that concern, the court in *Beers* noted, “Nothing in our opinion should be read as perpetuating the stigma surrounding mental illness . . . Historically our forbearers saw a danger in providing mentally ill individuals the right to possess guns” (*Beers*, p 159).

The Third Circuit’s ruling that a history of commitment to a psychiatric hospitalization indefinitely disqualifies the person from owning a firearm under existing federal law contradicts efforts in psychiatry to address the topics of dangerousness, mental illness, and firearms. The American Psychiatric Association’s official position statement on firearm access states, “. . . the process for restoring an individual’s right to purchase or possess a firearm following a disqualification related to mental disorder should be based on adequate clinical assessment, with decision-making responsibility ultimately resting with an administrative authority or court” (Pinals DA, *et al.*: American Psychiatric Association: Position statement on firearm access, acts of violence and the relationship to mental illness and mental health services. *Behav Sci & L* 33:195–8, 2015).

A measure for regulating gun violence that strives to respect the Second Amendment is the “extreme risk protection order” (ERPO), sometimes referred to as a “red flag” law, currently adopted by 17 states and the District of Columbia (Blocher J, Jacob C: Firearms, extreme risk, and legal design: ‘red flag’

laws and due process. *Va L Rev* 106:8–9, 2020). The ERPO allows courts to quickly and temporarily remove firearms from individuals who pose a substantial threat to themselves or others. The ERPO laws allow a more tailored approach to restricting firearm access in that they are not based solely on broad categories of people and are time-limited. Eligibility for initiation of an ERPO varies by state. Opponents to the ERPO laws commonly argue that removing someone’s firearms preemptively, without the person having committed a crime or risky act, violates due process (Blocher, p 15). While there are many factors to consider, this permits restructuring firearm restrictions in those experiencing symptoms of mental illness, whether these symptoms are transient or are more refractory, while addressing public safety. In addition, this approach does not create a category or class of individuals on the basis of mental illness who then are permanently separated from their Second Amendment rights.

Mental Illness Without Dangerousness in Conditional Release

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A Defendant’s Mental Illness Does Not Need to Be Cured to Be Considered No Longer a Danger to Self or Others in the Presence of Medication Adherence and Adequate Community Treatment and Supervision

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In the case of *In re Capser*, 448 P.3d 1084 (Mont. 2019), the Supreme Court of Montana reversed the