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The Second Amendment's Second Sex

Michael R. Ulrich

ABSTRACT. This Essay explores how the Supreme Court's Second Amendment doctrine perpetuates gender hierarchies and a male monopoly on lethal self-defense. It critiques the narrow "true man" framing that ignores women's experiences and advocates for a justice-centered framework that incorporates power and privilege into the gun-rights discourse.

INTRODUCTION

In *The Second Sex*, Simone de Beauvoir explores the subjugation of women throughout history and around the world.[1] Central to women's secondary status, for de Beauvoir, is that men are the standard against which women are constantly considered and compared.[2] Man is, in essence, the default—and woman is the second sex.[3]

This phenomenon has appeared—and continues to appear—in the Supreme Court's framing of Second Amendment rights. In *District of Columbia v. Heller*,

1. *See generally* SIMONE DE BEAUVOIR, THE SECOND SEX (Constance Borde & Sheila Malovany-Chevallier trans., 2009) (1949) (analyzing the myths and inequalities that accompany women's lived experiences in the Western world). I use woman and man here because these are the terms used by de Beauvoir. But as the author notes, the gendered term is reflective of societal standards: "One is not born, but rather becomes, woman. No biological, psychic, or economic destiny defines the figure that the human female takes on in society; it is civilization as a whole that elaborates this intermediary product between the male and the eunuch that is called feminine." *Id.* at 283.

2. *Id.* at 5 ("[M]an defines woman, not in herself, but in relation to himself . . . ."). Historical examples include the biblical story of Eve being made from Adam's bone, Aristotle framing woman as the "lack of qualities," and Saint Thomas describing woman as an "incomplete man." *Id.*

3. *Id.* at 11 ("But males could not have enjoyed this privilege so fully had they not considered it as founded in the absolute and in eternity: they sought to make the fact of their supremacy a right.").

the Court declared, for the first time, that the Second Amendment protected an individual right to keep and bear arms, grounded in the right to self-defense.[4] The Court emphasized the importance of the right to an operable handgun in the home to "stop intruders."[5] This frame reads, superficially, as gender-neutral. But in reality, it codifies the "true man,"[6] armed and ready to thwart wrongdoers. This, in turn, creates a default Second Amendment right centered around a stranger-danger type of self-defense that is more beneficial for men—primarily white men[7]—and more dangerous for women.[8]

Prioritizing this narrower type of self-defense ignores the fact that women are at greatest risk from people they know and in private settings like the home. The result is second-sex expansionism, where a doctrine covertly undergirded by the logic of stranger-danger self-defense allows the Court to invoke the helpless woman to justify expanding the right's scope—all while ignoring the increased danger this imposes upon women through weakened gun laws and a gendered self-defense standard with minimal practical utility. In each of the Supreme Court's recent Second Amendment cases, women and gender stereotypes were operationalized to support the outcomes.[9]

Facially, there is nothing that limits a woman's ability to defend herself from harm simply because she knows her assailant. However, between the heroic

4. *See* 554 U.S. 570, 595, 628-29 (2008).

5. *Id.* at 630. The Court left nearly all other questions unanswered and provided little guidance on how to answer them. *See* Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1067 (2020).

6. Even before the Founding, Sir Matthew Hale discussed the right of the "true man" to kill attackers without having to retreat. *See* Matthew Hale, THE HISTORY OF THE PLEAS OF THE CROWN 481 (London, Solom Emlyn 1736); *see also* C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. RACE, GENDER, & SOC. JUST. 477, 497 (2017) ("[T]he 'true man' doctrine thus embedded within both state castle laws and America's broader public consciousness normative judgments about the traditional role of and expectations for men as guardians of hearth and home.").

7. *See* Michael R. Ulrich, *Public Carry Versus Public Health—The Harms to Come from the Supreme Court's Decision in* Bruen, 387 NEW ENG. J. MED. 1245, 1246 (2022).

8. *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 818 (2023) (describing how "the Court's understanding of who might exercise these [First and Second Amendment] rights is dominated by men, both real and imagined"); *see also* Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as a Male Privilege*, 68 MIA. L. REV. 1099, 1109 (2014) ("It allows proponents to claim concern for women's safety, and even more importantly, to label opponents as 'anti-woman,' without actually challenging entrenched, daily violence against women.").

9. *See, e.g.*, *Heller*, 554 U.S. at 629 (referencing "those without the upper-body strength to lift and aim a long gun" as part of the justification for holding handguns specifically were protected by the Second Amendment); *see infra* notes 116-118 and accompanying text.

white male archetype of Second Amendment exercise[10] and imbalanced gender roles within relationships,[11] women face an uphill battle if they wish to use firearms to combat domestic violence. Courts are less likely to deem justified women's exercise of their Second Amendment rights against their abusers, despite growing legal support for the possession and use of firearms generally. History is fundamental to this incongruity.

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court explicitly rejected the analytical consensus in the lower courts,[12] ushering in a text, history, and tradition test that has extended the right outside the home and into the public sphere.[13] But, as de Beauvoir emphasizes, historical structures and values continue to influence how we view the rights, power, and privilege of women today.[14] The Court's concentration on history places undue significance on an era in which women were relegated to little more than property.[15] It also obscures the extent to which those historical views influence contemporary gender norms. When women fail to conform to historical stereotypes—which characterize men as protectors and women as in need of safeguarding—their actions are more likely to be viewed with antipathy.[16] Veneration of the past only exacerbates the risk of cementing women's subjugated and marginalized status. This makes a gender-conscious lens especially valuable in interrogating how a standard that

10. *See* Jamelle Bouie, *The Iconic Man with a Gun Is a White Man*, N.Y. TIMES (Jan. 22, 2020), https://www.nytimes.com/2020/01/22/opinion/richmond-gun-rights-rally.html [https://perma.cc/C43W-AK3W]; *see also* JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERY-DAY POLITICS OF GUNS IN AN AGE OF DECLINE 97 (2015) ("Guns became symbols of manly self-reliance, responsibility, and independence . . . .").

11. *See, e.g.*, Christensen, *supra* note 6, at 497 ("[T]he 'true man' protected his wife and children who were economically and morally dependent upon him.").

12. 597 U.S. 1, 18-19 (2022); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1927-28 (2024) (Jackson, J., concurring) (describing the *Bruen* Court's dismissal of the standard followed by the courts of appeal in the wake of *Heller*).

13. *Bruen*, 597 U.S. at 24 ("We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

14. *See* DE BEAUVOIR, *supra* note 1, at 439.

15. *See* Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981-83 (2002).

16. *See* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 50 (2023) (describing how women that stray from feminine norms of helplessness and passivity are less likely to be viewed as credible and more likely to be arrested).

centers men — especially white men[17] — limits the ability of women and racial minorities to exercise their right to armed self-defense.[18]

The first opportunity for the Court to apply its new history-centered test came in *United States v. Rahimi*, which considered 18 U.S.C. § 922(g)(8), a federal law prohibiting access to firearms for individuals under a domestic-violence restraining order.[19] Though violating the firearms prohibition is a criminal offense, the initial restriction stems from a civil finding that an individual poses a credible threat to the safety of an intimate partner or child.[20] The case created tension between the Court's fondness for celebrating the Second Amendment's supposed benefits for women and the fact that the presence of a firearm in a domestic-violence incident makes it eleven times more likely that a woman is killed by her abuser.[21]

Since domestic violence against women was hardly seen as a problem historically[22] — let alone a problem warranting government intervention — a strict application of *Bruen* would find the law unconstitutional.[23] Ultimately, though, the Supreme Court upheld § 922(g)(8), concluding that an "individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."[24] *Rahimi*'s perhaps surprising conclusion resulted from a change in the Court's approach: "[T]he

17. Daniel S. Harawa, *Between a Rock and a Gun*, 134 YALE L.J.F. 100, 119 (2024); *see also* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 73 (2022) (explaining how we see violence "on both sides of the gun control equation" when it comes to nonwhite people).

18. Though this Essay is primarily focused on interrogating the Second Amendment through a gender-based lens, an intersectional approach is critical to understanding how women of color experience sexism and racism in ways that compound one another. This is especially pertinent when discussing domestic violence. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (describing the "various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color").

19. 144 S. Ct. 1889, 1894 (2024).

20. 18 U.S.C. § 922(g)(8)(C) (2018). A violation could also result from an order explicitly prohibiting the use or threat of physical force that would reasonably be expected to cause bodily injury to those individuals, but the Court did not address this part of the statute.

21. Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21 TRAUMA & VIOLENCE 527, 534-35 (2020).

22. *See infra* notes 36, 116 and accompanying text.

23. Harawa, *supra* note 17, at 112.

24. *Rahimi*, 144 S. Ct. at 1903.

appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin the Nation's regulatory tradition."[25]

One view of *Rahimi* is as an effort by Chief Justice Roberts to rein in the chaos sewn by *Bruen* and, perhaps, as a reticent recognition of the dangers of limiting policy solutions to this country's gun-violence epidemic to those in place during a time of "muskets and sabers."[26] But a slight tilt of the head could just as easily reveal an opinion that says this Court does not want *this* individual—Mr. Rahimi—to have a firearm, but might hold otherwise with a more favorable challenger. In this light, *Rahimi* does little more than continue the Court's pattern of determining who can exercise their Second Amendment rights and in what ways. Said differently, *Rahimi* is but another case that declares good guys should have guns and bad guys should not. Aside from being detached from reality, this approach continues to have significant implications for women, racial and ethnic minorities, and efforts to mitigate the country's lust for incarceration. Upholding the federal law is a step in the right direction, but, as Justice Jackson aptly stated, "it is becoming increasingly obvious that there are miles to go."[27]

This Essay proceeds in three Parts. Part I compares *Bruen* and *Rahimi* to explore how the Court twists and contorts history on a whim. The Court's departure from *Bruen* just two years later creates more questions than answers, including questions about the state of Second Amendment doctrine moving forward, the Court's commitment to originalism, and the continued use of history to shroud the modern-day plight of the people the Court appropriates for its preferred outcomes. Part II explores how the Court's Second Amendment jurisprudence contemplates a specific type of self-defense—stranger danger—that leaves women and people of color less capable of exercising the right. In the face of the uncertainty that persists in *Rahimi*'s wake and the narrow Second Amendment right as currently constructed, Part III offers a justice-centered framework to analyze gun violence and Second Amendment doctrine. Taking lessons from the reproductive-justice movement, this justice-based lens emphasizes the role of power and privilege to critique the current Second Amendment methodology while broadening the scope of what qualifies as a gun-violence policy. Anticipating that history will continue to feature prominently in the Court's jurisprudence, Part III then briefly proposes a better way to use the past that highlights, rather than ignores, the harm and suffering experienced by marginalized communities.

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25. *Id.* at 1898 (emphasis added).

26. *Id.* at 1898.

27. *Id.* at 1929 (Jackson, J., concurring).

I. HISTORY'S PERILS[28]

Rahimi's facts illustrate the challenges of strictly applying *Bruen*'s historical test.[29] That is, unless you are Chief Justice Roberts. As he saw it, *Bruen*'s chaotic aftermath in the lower courts was merely because "some courts have misunderstood the methodology of [the Court's] recent Second Amendment cases."[30] Apparently the same can be said for Justice Thomas, the author of *Bruen* and the lone dissenter in *Rahimi*.[31] Whether one shares the view of Professor Harawa—that this is nothing more than judicial gaslighting[32]—or sees this as the Court simply etching out the contours of a newly minted test, there is plainly inconsistency between *Bruen* and *Rahimi*. However, this Part will point to the commonalities between *Bruen* and *Rahimi*, such as the "good guys with guns versus bad guys with guns" narrative, which may indicate that the Court was most concerned with *this* specific challenger having a firearm. Moreover, even if *Rahimi* becomes the new standard-bearer, the central role of history will continue to shroud the influence of contemporary gender stereotypes by juxtaposing women's current social standing with the even more conspicuous inequalities of the past.

A. Rahimi*'s Reluctant Embrace of* Bruen

Under *Bruen*, the need for historical analogues seemed especially important for societal problems that have "persisted since the eighteenth century."[33] In these circumstances, *Bruen* held that the absence of similar historical regulations is substantial evidence that the challenged law is unconstitutional.[34] Domestic violence is the focus of § 922(g)(8) and, as one district court noted, "[d]omestic violence, or violence against anyone for that matter, is not just a modern problem."[35] Historically, domestic violence was seen as a private matter where "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget

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28. *See* DE BEAUVOIR, *supra* note 1, at 10 ("The present incorporates the past, and in the past all history was made by males.").

29. *Rahimi*, 144 S. Ct. at 1905 (Sotomayor, J., concurring) ("This case lays bare the perils of the dissent's approach."); *id.* at 32 (Jackson, J., concurring) ("This very case provides a prime example of the pitfalls of *Bruen*'s approach.").

30. *Id.* at 1897 (majority opinion).

31. *See id.* at 1902-03.

32. Harawa, *supra* note 17, at 103.

33. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26 (2022).

34. *Id.*

35. United States v. Perez-Gallan, 640 F. Supp. 3d 697, 710 (W.D. Tex. 2022).

and forgive."[36] The Fifth Circuit echoed this sentiment in its reading of *Bruen*, highlighting that it could no longer consider societal benefits as it had in previous cases upholding § 922(g).[37] Instead, the Fifth Circuit followed the Supreme Court's lead by distinguishing each historical law that the government offered as analogous support.[38]

The Chief Justice, however, believed these "mistaken" interpretations of *Bruen* are no different than "applying the protections of the right only to muskets and sabers."[39] If, as *Bruen* clearly states, the Second Amendment's historically fixed meaning does not apply only to those arms in existence at the Founding,[40] then the laws available for regulation similarly cannot be "trapped in amber."[41] Instead, *Rahimi* holds, "the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition."[42] The majority reiterates that the questions of "[w]hy and how the regulation burdens the right are central to" the Second Amendment inquiry, but that courts must apply a "relevantly similar . . . 'balance struck by the founding generation to modern circumstances.'"[43]

Under this rendition of the historical-analogue inquiry, the majority found that two past legal regimes provided support for restricting firearms for individuals under domestic-violence restraining orders.[44] First, the majority characterized surety laws as a violence-prevention tool that authorized judges to require "individuals suspected of future misbehavior"—including, but not limited to, spousal abuse and misuse of firearms—to post a bond that would be forfeit if they broke the peace.[45] Second, affray laws—or "going armed" laws—prohibited individuals from going armed with dangerous or unusual weapons to terrify the public.[46] The majority held that these laws, taken together, "confirm what

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36. *Perez-Gallan*, 640 F. Supp. 3d at 704-05 (quoting State v. Oliver, 70 N.C. 60, 61-62 (1874)). The district court emphasized that "domestic violence researchers agree that even into the early twentieth century, judges were 'more likely to confiscate a wife beater's liquor than his guns.'" *Id.* at 705 (quoting Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860-1930*, 86 IND. L.J. 1257, 1301 (2017)).

37. United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023).

38. *Id.* at 456-60.

39. United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

40. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28-29 (2022).

41. *See Rahimi*, 144 S. Ct. at 1897.

42. *Id*. at 1898 (emphasis added).

43. *Id*. (citing *Bruen*, 597 U.S. at 29).

44. *Id*. at 1899-1901.

45. *Id*. at 1900 (explaining that if a bond was not posted the individual would be jailed).

46. *Id*. at 1901 (explaining that violations resulted "in forfeiture of the arms . . . and imprisonment." (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149)).

common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[47]

Justice Thomas objected to the majority's contention that surety and affray laws satisfy *Bruen*'s requirements.[48] Indeed, one of the more perplexing aspects of *Rahimi* is its reliance on the very historical laws that the Court downplayed in *Bruen*. The *Bruen* majority—which included Chief Justice Roberts and Justices Alito, Barrett, Gorsuch, and Kavanaugh—said those same historical restrictions did not impose a substantial burden on public carry to support New York's licensing regime, asserting there was no evidence showing authorities even enforced the laws.[49] Justice Thomas continued to minimize the relevance of surety laws, categorizing them as little more than fines on certain behavior and a "far less onerous burden" than § 922(g)(8) since they allowed people to maintain possession.[50] *Bruen* also insisted that surety laws lacked import because they overlapped with criminal statutes, which was again a key component of Justice Thomas's *Rahimi* dissent and of lower courts' decisions striking down § 922(g)(8).[51]

For Justice Thomas, affray laws did not satisfy *Bruen* because they had "a dissimilar burden *and* justification."[52] He notes that these laws were about carrying "dangerous and unusual weapons" that caused a public nuisance, and that the burden was therefore narrower and not related to interpersonal violence.[53] Justice Thomas uses the potential for imprisonment, highlighted by the majority, to distinguish the two laws: "Affray laws were criminal statutes that penalized past behavior, whereas § 922(g)(8) is triggered by a civil restraining order that seeks to prevent future behavior."[54] More pointedly, he cites *Bruen* directly to question how the majority could hold that these laws support a complete ban on firearms when the Court ruled they failed to justify restricting a narrower practice—public carry—just two years prior.[55]

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47. *Id*. at 1901.

48. *Id*. at 1941 (Thomas, J., dissenting).

49. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 50, 57 (2022).

50. *Rahimi*, 144 S. Ct. at 1933 (Thomas, J., dissenting).

51. *Bruen*, 597 U.S. at 59; *see also Rahimi*, 144 S. Ct. at 1940-41 (Thomas, J., dissenting) ("While a breach of a surety demand was punishable by a fine, § 922(g)(8) is punishable by a felony conviction . . . ."); United States v. Rahimi, 61 F.4th 443, 458-59 (5th Cir. 2023) (explaining that "those laws only disarmed an offender after criminal proceedings and conviction").

52. *Rahimi*, 144 S. Ct. at 1941 (Thomas, J., dissenting).

53. *Id*. at 1942.

54. *Id*. at 1943.

55. *Id*.

If one sets aside the analytical eyesore that is *Bruen*, any indignant tone in Justice Thomas's *Rahimi* dissent is understandable. After being tasked with writing for the Court in *Bruen*—the most consequential Second Amendment case since *Heller*—he had his own opinion "Robertsplained" to him.[56] Many Court observers and Second Amendment scholars, Professor Harawa among them, agree with Justice Thomas that *Rahimi* is clearly not a strict application of *Bruen*.[57] Moreover, Thomas's dissent sounds the alarm that a "principle-based approach," which differs significantly from the regulation-based historical test he laid out in *Bruen*, will "hollow out the Second Amendment of any substance."[58] His concern is that the Court's decision in *Rahimi* will enable the government to disarm anyone they deem a danger because "[n]early all firearm regulations can be cast as preventing 'irresponsible' or 'unfit' persons from accessing firearms."[59]

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56. The concurrences on originalism and history, at times reading more like a law review article than a Supreme Court opinion, also could be construed as having an instructional air about conducting originalist inquiries. *See, e.g.*, *id.* at 1904-07 (Sotomayor & Kagan, JJ., concurring); *id.* at 1908-09 (Gorsuch, J., concurring); *id.* at 1924-1926 (Barrett, J., concurring).

57. Harawa, *supra* note 17, at 112. Adam Liptak, *Supreme Court Upholds Law Disarming Domestic Abusers*, N.Y. TIMES (June 21, 2024), https://www.nytimes.com/2024/06/21/us/politics/supreme-court-guns-domestic-violence.html [https://perma.cc/49YL-YUMK]; Dahlia Lithwick & Mark Joseph Stern, *John Roberts Tried to Clean Up Clarence Thomas' Mess. He May Have Invited More Chaos*, SLATE (June 24, 2024, 4:16 PM), https://slate.com/news-and-politics/2024/06/supreme-court-john-roberts-clarence-thomas-guns-mess-second-amendment-chaos.html [https://perma.cc/8364-QBZ8]; Ian Millhiser, *The Supreme Court Refuses to Accept Blame for Its Worst Guns Decision*, VOX (June 21, 2024, 1:25 PM EDT), https://www.vox.com/scotus/356267/supreme-court-us-rahimi-domestic-abuse-guns-second-amendmen [https://perma.cc/V83Y-PV3P]; Elie Mystal, *The Supreme Court Just Got a Gun Ruling Right—for Completely Bonkers Reasons*, NATION (June 21, 2024), https://www.thenation.com/article/archive/rahimi-supreme-court-domestic-violence [https://perma.cc/6RMT-ZV6P]; Jacob D. Charles, *On Guns, the Supreme Court Can't Shoot Straight*, WASH. MONTHLY (June 29, 2024), https://washingtonmonthly.com/2024/06/29/on-guns-the-supreme-court-cant-shoot-straight [https://perma.cc/G53H-DWGB]; Eric Ruben, *SCOTUS's 2nd Amendment Decision Leaves Open Questions for State Courts*, ST. CT. REP. (June 26, 2024), https://statecourtreport.org/our-work/analysis-opinion/scotuss-2nd-amendment-decision-leaves-open-questions-state-courts [https://perma.cc/5MKZ-8QBW].

58. *Rahimi*, 144 S. Ct. at 1945 (Thomas, J., dissenting).

59. *Id.* at 1938. According to Justice Thomas, "The Second Amendment stems from English resistance *against* 'dangerous' person laws." *Id.* at 1934. However, his contention that all firearm regulations could be framed as preventing access to the irresponsible or unfit ignores the many gun-safety measures that do not interfere with people's access but instead relate to specifications such as equipment and locations. A more accurate statement would be that they all can be cast as relating to public health, safety, and wellbeing since that is the overarching point behind any restrictions. *See* Ulrich, *supra* note 5, at 1057-58.

In fact, he may be right. *Rahimi* may ultimately stand for the Court's continued support for the "good guys with guns versus bad guys with guns" narrative that so flagrantly permeates the Court's Second Amendment jurisprudence, as opposed to some principled evolution of *Bruen*. The true explanation for the *Bruen* breakup could simply be that Chief Justice Roberts and Justices Alito, Barrett, Gorsuch, and Kavanaugh were troubled by the idea of this particular person having a firearm. Mr. Rahimi would not be atop anyone's list of the model for a sympathetic party. Some Justices' concerns about him became clear at oral argument, with the Chief Justice questioning how the defendant's own attorney could muster any argument that his client was not a dangerous person.[60] It seems that the "good versus bad" framework for determining who gets to exercise their Second Amendment rights almost certainly remains common ground among the *Bruen* majority.

The fissure that left Justice Thomas flying solo this time around may have less to do with the "gaslighting" Professor Harawa suggests, and more to do with Justice Thomas's insistence on using the criminal justice system to restrict Mr. Rahimi's firearm access while the others are satisfied that, at least in this case, the civil process is sufficient.[61] This distinction between criminal and civil proceedings should not, however, be read as indicating a desire — or even willingness — on the majority's part to restrict the role of incarceration in responding to gun violence.[62] *Rahimi*'s narrow scope means that another case, perhaps one that introduces more doubt as to whether the evidence sufficiently proves a "credible threat to the physical safety" of a partner, may find more sympathetic Justices. This should give Justice Thomas some solace that he may not be left in solitude in future cases.[63]

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60. Transcript of Oral Argument at 79, *Rahimi* 144 S. Ct. 1889 (No. 22-915) ("[Y]ou don't have any doubt that your client's a dangerous person do you?"). After the defense attorney asked what dangerous person meant, the Chief Justice quickly retorted "Well, it means someone who's shooting, you know, at people. That's a good start." *Id.* Mr. Rahimi did, after all, go on five public shooting sprees in the two months after being placed under a restraining order for dragging his partner across a parking lot, throwing her in a car, firing his gun as she fled, and threatening to shoot her if she reported the incident. *Rahimi*, 144 S. Ct. at 1894-95.

61. *Rahimi*, 144 S. Ct. at 1947 (Thomas, J., dissenting) (observing that "States have a ready mechanism for disarming anyone who uses a firearm to threaten physical violence: criminal prosecution . . . . Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order — even if he has never been accused or convicted of a crime.").

62. Harawa, *supra* note 17, at 120-21.

63. The majority repeatedly emphasizes *Rahimi* is a facial challenge and the stringent rules that govern. *See Rahimi*, 144 S. Ct. at 1903. Justice Gorsuch does the same in his concurrence. *See id.* at 1907-10 (Gorsuch, J., concurring). The Court left as-applied challenges available, as well as questions about the constitutionality of § 922(g)(8)(C)(ii), which bars possessing a

Though *Rahimi* may be praised as an improvement on *Bruen*,[64] the analytical whiplash between the two cases—on top of the post-*Bruen* mayhem in the lower courts[65]—accentuates the pitfalls of relying on history.[66] As Justice Jackson points out in her concurrence, this methodology is burdensome and has left lower courts "diverging in both approach and outcome as they struggle to conduct the inquiry *Bruen* requires of them."[67] The disagreement within the *Bruen* majority—along with the peculiarity of three avowed originalists feeling compelled to write concurrences reiterating their commitments to concentrating constitutional analyses around history—also casts doubt on the broader claim that one can objectively ascertain a single, true meaning that reflects what the masses thought centuries ago.[68] It is this supermajority's continued devotion to history that should give pause to those concerned about gun violence, domestic violence, and the rights of women and minorities, as well as those eager to celebrate a rare victory at the nation's highest court.

B. The Veil of History[69]

The faulty logic of limiting policy options for contemporary societal issues to those available in the eighteenth century is obvious, especially when it comes to problems, like gun violence, that have been revolutionized by technological

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firearm if the restraining order prohibits the use, attempted use, or threatened use of physical force. *See id.* at 1898-99 (majority opinion).

64. Justice Sotomayor noted that her concurrence is specifically to "highlight why the Court's interpretation of *Bruen*, and not the dissent's, is the right one." *Id.* at 1904 (Sotomayor, J., concurring). Though Justice Jackson makes clear that she disagrees with *Bruen*, she joined the majority as a decision that "fairly applies that precedent." *Id.* at 1926 (Jackson, J., concurring).

65. *Id.* at 1927 (Jackson, J., concurring) ("The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness.").

66. *Id.* at 1926 (describing *Rahimi* as a "tacit admission that lower courts are struggling" to apply *Bruen*'s extreme use of history).

67. *Id.* at 1927.

68. *Id.* at 1909 (Gorsuch, J., concurring) ("Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow."); *id.* at 1912 (Kavanaugh, J., concurring) ("History, not policy, is the proper guide."); *id.* at 1924 (Barrett, J., concurring) (describing originalism's two core principles as "the meaning of constitutional text is fixed at the time of its ratification and that the 'discoverable historical meaning . . . has legal significance and is authoritative in most circumstances.'") (citation omitted)).

69. DE BEAUVOIR, *supra* note 1, at 9 ("Even when her rights are recognized abstractly, long-standing habit keeps them from being concretely manifested in customs.").

advances.[70] Scholars have used *Rahimi* as an opportunity to note that centering the past not only glosses over the drastic difference in weaponry and gun violence, but it also gives overwhelming weight to a time when women, among others, had virtually no rights.[71] Beyond "orient[ing] the inquiry around the expectations and decisions of white, male property owners,"[72] centering the past can cloak existing subjugation. Time spent highlighting and critiquing women's past status is time not spent correcting current gender inequalities. And as Professor Reva Siegel explains, a preoccupation with condemning historical practices can serve to "exonerate practices contested in the present, none of which looks so unremittingly 'evil' by contrast."[73] *Bruen*'s strong-form originalism—which isolates history as the sole arbiter of constitutional determinations—acts as a pillory that fixates our view on a deeply troubled past.[74] Whether in the courts, media, scholarship, or public discourse, this distracts from and inherently minimizes existing gender inequalities.[75]

Meanwhile, the "clarification" offered by *Rahimi* still enables claims of judicial objectivity and restraint through a jurisprudential sleight of hand that keeps people's sights on the country's problematic past. Limiting domestic-violence solutions to those in place during the time of coverture, when women were considered property, is not only an affront to hard-fought progress toward gender equality; it also diverts energy and resources away from continuing the fight to address the contemporary plight and subjugated status of women.[76] It supports the narrative that modern women have equitable access to an expansive Second Amendment, when in reality women's ability to exercise their right to armed self-defense—or any right, for that matter—is still constrained by gender norms.

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70. *See* Garland v. Cargill, 602 U.S. 406, 434 (2024) (Sotomayor, J., dissenting) (discussing modern guns that can fire four hundred to eight hundred rounds per minute).

71. *See* Elizabeth Tobin-Tyler, *Court's Disregard for Women's Health and Safety—Intimate Partner Violence, Firearms, and "History and Tradition,"* 388 NEW ENG. J. MED. 1345, 1346 (2023).

72. Murray, *supra* note 8, at 816.

73. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

74. Murray, *supra* note 8, at 816.

75. *See* Siegel, *supra* note 73, at 1115.

76. The Court has taken similar approaches with race and gender in other doctrines. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 204 (2023) (explaining that University admission policies considering race were no longer necessary to fix historical discrimination because "[t]he time for making distinctions based on race had passed."); Shelby Cnty. v. Holder, 570 U.S. 529, 551-52 (2013) (holding that preclearance requirements in the Voting Rights Act were unnecessary for covered states because "[t]oday the Nation is no longer divided along those lines"); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 258-59 (2022) (downplaying the salience of past inequality for women because unmarried pregnant women no longer faced the same type of derision).

Indeed, courts' supposed deference to history conceals the past's persistent influence on contemporary gender stereotypes that, in turn, impact today's judicial interpretations.

Take, for example, Judge Ho's concurrence in the Fifth Circuit's ruling in *Rahimi*. Despite the alleged centrality of history, Judge Ho parroted the baseless notion that women routinely bring false claims of harm or threats to support his belief that women can, do, and would continue to use domestic-violence restraining orders as a tactical device in divorce proceedings.[77] He agreed with the majority that these orders are issued without any actual threat of danger and questioned whether judges were willing and able to prevent women from manipulative abuse or if they would "enter protective orders automatically."[78] And lest there be any thought that these comments were gender-neutral, Judge Ho quotes another judge who sympathizes with men losing their constitutional rights without justification: "Your job is not to become concerned about all the constitutional rights of the [defendant] you're violating as you grant a restraining order. Throw *him* out on the street, give *him* the clothes on *his* back and tell *him*, 'See ya' around.'"[79] Justice Alito raised similar concerns at oral argument, invoking pervasive and inaccurate "he said/she said" scenarios that have no tie to historical understandings of Second Amendment protections.[80]

This demonstrates that the trouble with centering history in Second Amendment analysis stretches beyond the cavernous gap between muskets and bump-stock-equipped AR-15s. Whether *Rahimi* mitigates some of those harms remains to be seen. In truth, the disingenuous claim that *Rahimi* follows the Court's own commands in *Bruen* should serve as a warning for anyone hoping the Court will stick to *Rahimi*'s "principles-based" approach. Far from ensuring the continuity and clarity that lower courts, defense attorneys, policymakers, and the public desperately need, *Rahimi* exemplifies the Court's willingness to pick and choose their preferred firearm regulations and plaintiffs under the guise of historical restraint. The Court's willingness to prevent Mr. Rahimi from regaining a legal right to carry firearms should not be heralded as a return to sanity when the

77. United States v. Rahimi, 61 F.4th 443, 465 (5th Cir. 2023) (Ho, J., concurring) ("Scholars and judges have expressed alarm that civil protective orders are too often misused as a tactical device in divorce proceedings- and issued without any actual threat of danger.").

78. *Id.* at 465-66 (Ho, J., concurring). The majority believed the law could be used against "a much wider swath of conduct, not inherently dependent on any actual violence or threat." *Id.* at 459 (majority opinion). Both ignore that the statute requires a finding of a credible threat or an order that expressly prohibits the use or threat of force. 18 U.S.C. § 922(g)(8)(C) (2018).

79. *Rahimi*, 61 F.4th at 466 (Ho, J., concurring) (emphasis added).

80. Transcript of Oral Argument at 21, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915).

outcome could just as easily serve as a signal to Second Amendment expansionists to bring better clients. And when—not if—this does occur, it will be important to watch for whether the Court employs a selective history of racism and female fragility to bolster a ruling that expands the Second Amendment. If so, the Court will almost certainly omit mention of these marginalized populations' current suffering from gun violence and the Court's role in exacerbating their pain.

II. PERPETUATING SUBJUGATION THROUGH STRANGER-DANGER SELF-DEFENSE[81]

Women have been used selectively to help justify expanding the Second Amendment's scope—a dynamic that is eerily similar to what Professor Harawa describes with race.[82] Courts' use of women has helped buttress the "good people with guns versus bad people with guns" narrative, as well as the fetishization of firearms in Second Amendment jurisprudence.[83] Proponents of a broad constitutional right to firearms often resort to fearmongering to justify their position, describing a dangerous world full of armed criminals to argue that women must be empowered, if not encouraged, to possess firearms for self-defense. But women are—and, as *Rahimi* urges us to remember, have always been—at the greatest risk from those they know.[84] Recognizing the Second Amendment's self-defense core as a narrower security against stranger danger reveals the compounding harms to women that arise from Second Amendment expansionism.

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81. DE BEAUVOIR, *supra* note 1, at 12-13. ("Yes, women in general *are* today inferior to men; that is, their situation provides them with fewer possibilities: the question is whether this state of affairs must be perpetuated.").

82. Harawa, *supra* note 17, at 116.

83. The prominence of firearms as *the* protected means for self-defense is not inherently intuitive from a textualist or originalist perspective. There is no mention of firearms or guns in the Second Amendment and historically the inefficiency and ineffectiveness of firearms in the Founding Era meant they were far less likely to be used for self-defense as compared to blunt objects or knives. Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 205 (2021). While some Second Amendment cases have centered on other modes of self-defense, the vast majority of the focus inside and outside the courtroom has unquestionably been centered on firearms. *Id.* at 187-90. This framing creates a circular justification whereby guns become the only viable way to defend against the proliferation of guns and growing gun violence, while ignoring how judicial decisions can and have exacerbated those problems. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 73-74 (Alito, J., concurring) ("[W]hile the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.").

84. *See infra* notes 91-96 and accompanying text.

A Second Amendment jurisprudence that enables firearm proliferation places women at increased risk of harm while doing virtually nothing to help women against known assailants. The Supreme Court has practically guaranteed this perverse outcome by focusing on history while remaining indifferent to the realities and lived experiences of the marginalized groups—often women and Black people—it parades as the beneficiaries of its rulings.[85] As explained below, when women do exercise their right to armed self-defense against their most common threat—that is, known assailants—their actions are far less likely to be seen as justified, and their Second Amendment rights are thereby condemned to second-class status.

A. The Sexism of Second Amendment Expansionism[86]

Heller was the dawn of a new era for the Second Amendment. It vindicated individuals' "right to possess and carry weapons in case of confrontation," grounded in the preexisting right of self-defense.[87] *Heller*'s references to home intruders, burglars, drunken hooligans, and fleeing attackers strongly suggest the types of confrontation the Court envisioned: stranger danger.[88] While a broad animating value such as self-defense has universal relevance, aiming it at strangers narrows the right by imbuing it with the "good versus bad" dichotomy that is more apt to benefit white men.[89] Determinations of who poses a threat incorporate social biases grounded in racism and sexism that have existed since the Founding.[90]

By repeatedly stressing the importance of the Second Amendment to defend against unknown criminals, the Court ignores that for women, the threat is coming from inside the house. Congress explained that § 922(g)(8) was vital because "domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44."[91] From 2010 to 2014, 92.6% of intimate-partner

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85. Harawa, *supra* note 17, at 116.

86. DE BEAUVOIR, *supra* note 1, at 14 ("He can thus convince himself that there is no longer a social hierarchy between the sexes and that on the whole, in spite of their differences, woman is an equal. As he nevertheless recognizes some points of inferiority . . . he attributes them to nature.").

87. *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

88. *See Heller*, 554 U.S. at 629-33.

89. John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 63 (2017).

90. Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 40 (2010).

91. H.R. REP. NO. 395, at 14 (1993).

violence emergency-department visitors were female,[92] while nearly 60% of female homicides in 2021 occurred in a home.[93] Though intimate-partner violence data likely does not capture the full scale of the problem,[94] intimate-partner violence was almost six times more likely to be the precipitating circumstance of homicide for women than for men.[95]

We also know that firearms play a significant role in the violence perpetrated against women. A woman is eleven times more likely to be killed if their abuser has access to a gun,[96] which explains why the vast majority of women killed are killed with firearms.[97] Homicide is also the leading cause of death during pregnancy and the postpartum period,[98] with most deaths linked to firearms and intimate-partner violence and Black women the most frequent victims.[99] The overlapping increases in firearm possession, female homicides, and pregnancy-associated homicides from 2019 to 2020 provide further evidence of positive correlation between the presence of guns and female homicide.[100] Outside the Second Amendment context, the Court has explicitly acknowledged the "deadly

92. Jose Alfara Quezada, Zahid Mustafa, Xiaofei Zhang, Bishoy Zakhary, Matthew Firek, Raul Coimbra & Megan Brenner, *A Nationwide Study of Intimate Partner Violence*, 86 AM. SURGEON 1230, 1231 (2020).

93. Brenda L. Nguyen, Bridget H. Lyons, Kaitlin Forsberg, Rebecca F. Wilson, Grace S. Liu, Carter J. Betz & Janet M. Blair, *Surveillance for Violent Deaths—National Violent Death Reporting System, 48 States, the District of Columbia, and Puerto Rico, 2021*, 73 MORBIDITY & MORTALITY WKLY REP. 1, 15 (2024), https://www.cdc.gov/mmwr/volumes/73/ss/pdfs/ss7305a1-H.pdf [https://perma.cc/2JRN-8HHA] (finding a sixty percent greater rate of violent deaths for women than for men).

94. Ijeoma Nwabuzor Ogbonnaya, Milan A. AbiNader, Shih-Ying Cheng, Tina Jiwatram-Negrón, Meredith Bagwell-Gray, Megan Lindsay Brown & Jill Theresa Messing, *Intimate Partner Violence, Police Engagement, and Perceived Helpfulness of the Legal System: Between- and Within-Group Analyses by Women's Race and Ethnicity*, 14 J. SOC'Y FOR SOC. WORK & RSCH. 211, 219 (2023) (discovering over forty percent of survivors never contacted law enforcement).

95. *See* Nguyen et al., *supra* note 93, at 16.

96. *See* Spencer & Stith, *supra* note 21, at 534-35.

97. *See* Nguyen et al., *supra* note 93, at 15 (demonstrating that, in 2021, firearms were six times more likely to be used than the second-most-common method, sharp instruments).

98. *See* Maeve Wallace, Veronica Gillispie-Bell, Kiara Cruz, Kelly Davis & Dovile Vilda, *Homicide During Pregnancy and the Postpartum Period in the United States, 2018-2019*, 138 OBSTETRICS & GYNECOLOGY 762, 762 (2021).

99. *See* Anna M. Modest, Laura C. Prater & Naima T. Joseph, *Pregnancy-Associated Homicide and Suicide: An Analysis of the National Violent Death Reporting System, 2008-2019*, 140 OBSTETRICS & GYNECOLOGY 565, 569 (2022). Firearms were also the second-most common cause for suicides during this period. *Id.*

100. *See* Maeve E. Wallace, *Trends in Pregnancy-Associated Homicide, United States, 2020*, 112 AM. J. PUB. HEALTH 1333, 1334 (2022).

combination" of domestic violence and firearms,[101] stating that the difference between a battered woman and a dead woman is often the presence of a gun.[102]

But firearm-related intimate-partner violence extends well beyond fatalities. Firearms can be used to intimidate and coerce through warning shots, threats of use, or mere display, enabling coercive control without any evidence of physical abuse.[103] Women are more than twice as likely to be victims of nonfatal firearm abuse,[104] and the lack of physical evidence can make it even more difficult to receive assistance from law enforcement or to legally use a firearm for self-defense.[105] *Rahimi*'s repeated emphasis that the decision was only relevant for an "individual found by a court to pose a credible threat to the physical safety of another" could create difficulty for victims that suffer from emotional and psychological torment, threats, and fear, but carry no visible bruises.[106]

Despite this research, stranger danger remains the dominant narrative employed by the Court to justify expanding the Second Amendment. For example, in *McDonald v. City of Chicago*, the majority specifically referenced arguments that women should have access to firearms because they are especially vulnerable to violent crime.[107] The *Bruen* majority continued the trend by echoing the importance of being armed in public due to the dangers that lie outside the home.[108] In Justice Alito's *Bruen* concurrence, he employed a story of a woman

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101. *See* Voisine v. United States, 579 U.S. 686, 689 (2016).

102. *See* United States v. Castleman, 572 U.S. 157, 160 (2014). Solicitor General Prelogar quoted this case at the start of the oral argument for *Rahimi*. Transcript of Oral Argument at 3, United States v. Rahimi, 144 S. Ct. 1899 (2024) (No. 22-915).

103. *See* Avanti Adhia, Vivian H. Lyons, Caitlin A. Moe, Ali Rowhani-Rahbar & Frederick P. Rivara, *Nonfatal Use of Firearms in Intimate Partner Violence: Results of a National Survey*, 147 PREVENTIVE MED. 1, 5 (2021).

104. *Id.* at 5.

105. *See, e.g.*, RACHEL LOUISE SNYDER, NO VISIBLE BRUISES: WHAT WE DON'T KNOW ABOUT DOMESTIC VIOLENCE CAN KILL US 252-53 (2019). In her book, Snyder recounts the story of a woman who was certain she would die as her abusive partner held a gun to her head. *Id.* Though she survived, her abuser "didn't have to lay a hand on her after that. He already had her cowering." *Id.*

106. *Rahimi*, 144 S. Ct. at 1903; SNYDER, *supra* note 105, at 36 (referencing the work of Evan Stark on "coercive control," a dynamic that Snyder describes as allowing "an abuser [to] dominate and control every aspect of a victim's life without ever laying a hand on her."). Stark's research suggests that as many as twenty percent of relationships with domestic violence may have no physical abuse. *Id.* Control can be exerted over money, food, transportation, parenting, clothing, housekeeping, and sexual performance. *Id.* at 36-37.

107. 561 U.S. 742, 790 (2010).

108. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 33 (2022). The majority cites the Seventh Circuit's *Moore v. Madigan*, which also inaccurately references dangers to women in public: "A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when

who was saved from an assault by an armed bystander, before again referring to women's increased risk of attacks.[109] This narrative helps perpetuate the false "good versus bad" dichotomy that began with *Heller*'s emphasis on "law-abiding citizens,"[110] while simultaneously undermining the validity of women using firearms against their abusers. Despite *Bruen*'s hyperfixation on historical laws, Justice Alito made sure to highlight the right of modern citizens to protect themselves against criminals, going so far as to suggest people cannot be required to rely on law enforcement for their protection.[111] Professor Melissa Murray points out that Justice Alito seems to believe the state has failed to protect its citizens and, in response, the Court must strengthen the Second Amendment right to "enable men to take over—indeed, *retake*—the essential state functions."[112] This male-centric call to arms that Professor Murray highlights, combined with the stranger-danger self-defense framing, casts doubt on whether women are truly able to exercise their right to self-defense in the scenarios where it would be most helpful.

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inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress." 702 F.3d 933, 937 (7th Cir. 2012).

109. *Bruen*, 597 U.S. at 75 (2022) (Alito, J., concurring). He references the Independent Women's Law Center's amicus brief, which coincidentally cites Justice Alito himself. *Id.* at 76 (citing Brief for the Independent Women's Law Center as Amicus Curiae Supporting Petitioners at 9, *Bruen*, 597 U.S. 1 (No. 20-843)). That brief claimed, contrary to leading evidence and without citation, that women are most vulnerable outside the home. *Id.* at 9; Nguyen et al., *supra* note 93, at 15. As Professor Khiara Bridges notes, the sincerity of Justice Alito's concern for the welfare of women is questionable given his *Bruen* concurrence was followed the next day by his majority opinion in *Dobbs*, which Bridges describes as "permit[ting] states to force this same woman to bear a child had this assault resulted in a pregnancy." Bridges, *supra* note 17, at 82-83.

110. District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

111. Justice Alito wrote: "The police cannot disarm every person who acquires a gun for use in criminal activity; nor can they provide bodyguard protection for the State's nearly 20 million residents or the 8.8 million people who live in New York City." *Bruen*, 597 U.S. at 74 (Alito, J., concurring).

112. Professor Murray explains: "Justice Alito's point was straightforward: the state was actively thwarting rights whose exercise was in fact made necessary by the state's abdication of its regulatory duties." Murray, *supra* note 8, at 835. The absence of an opinion from Justice Alito in *Rahimi* is curious given his strongly worded opinions in prior Second Amendment cases. *McDonald*, 561 U.S. at 748; *Bruen*, 597 U.S. at 71 (Alito, J., concurring). His desire to produce and protect a robust Second Amendment almost certainly has not diminished. But with the Court's term packed with contentious cases, he may have thought it best not to raise any additional red flags—upside down or otherwise—especially in an election year.

B. Second-Class Self-Defense[113]

The extreme disconnect between the Court's invocation of women and their lived reality reflects historically embedded gender norms.[114] The male monopoly on lethal self-defense has endured, especially in the context of intimate relationships, because the perception of man-as-protector and woman-as-protected persists.[115] However, the point is not to suggest a cause and effect between the Supreme Court's Second Amendment jurisprudence and women's inability to use firearms against their abusers. Rather, second-sex expansionism demonstrates that second-sex status and stranger-danger self-defense work synergistically to perpetuate gender hierarchies and limit women's rights. Though domestic violence was previously hidden behind a veil of traditional family values,[116] gender norms now perpetuate women's secondary status by admonishing them for failing to utilize perceived alternatives and not complying with "proper" self-defense.[117]

Self-defense against domestic violence has been legally perilous for women historically,[118] but the strong support for lethal self-defense, led by the nation's highest court, should have drastically altered the legal landscape. Yet, women's right to armed self-defense has been diluted by the adjudicatory discrepancies for women using violence to defend themselves against their abusers. The case of Marissa Alexander, a Black woman, poignantly illustrates this reality. Alexander was sentenced to twenty years in prison for firing a warning shot into the ceiling when her estranged husband—who had previously beaten her to the point of hospitalization—tried to barricade her in the bathroom in a fit of rage and refused to leave.[119] Alexander was trapped in her own home with an abuser who had previously threatened to kill her, and she used her lawfully owned

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113. *See* DE BEAUVOIR, *supra* note 1, at 439 ("Modern marriage can be understood only in light of the past it perpetuates.").

114. *See id.* at 10 ("Lord-man will materially protect liege-woman[.]").

115. *Id.* at 62 ("[F]rom prehistory's earliest documents, man is always seen as armed.").

116. For instance, marital rape was not made a crime in every state until 1993, and often is still treated with less gravity than other sexual assaults. MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 77 (2019).

117. *See* Reva Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996) ("If a reform movement is at all successful in advancing its justice claims, it will bring pressure to bear on lawmakers to rationalize status-enforcing state action in new and less socially controversial ways.").

118. Coverture essentially converted women to property of their husband meaning he held all of her rights, which, considering men had the right to use violence against women, included women's right to self-defense. Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. Ill. L. Rev. 929, 940 (2016).

119. FRANKS, *supra* note 116, at 98-99.

firearm in a manner that left the man unharmed.[120] Yet she faced two decades behind bars for defending herself. The injustice of Alexander's story is corroborated by empirical evidence showing women are less capable of exercising their right to self-defense without facing criminal liability. One study of cases in Florida — Alexander's home state — between 2005 and 2013 found that cases involving domestic violence had higher conviction rates for women.[121] Another study examining stand-your-ground cases tied to intimate-partner violence found that among those convicted, women tended to face longer sentences than men.[122]

This legal landscape presents a harrowing reality for those in abusive relationships. Fleeing can be difficult for many reasons,[123] yet women have not found the legal support for armed defense against abusers that might be expected in a country that values guns so highly. The incongruence with the Second Amendment's evolution further supports the claim that persistent gender biases and stranger-danger self-defense likely contribute to women's inequitable access to the very constitutional right they are repeatedly exploited to expand.[124] Thus, the judiciary penalizes women because they do not conform to the "true man" archetype of armed self-defense.[125] And unfortunately, *Bruen* and *Rahimi* give little reason to believe this is likely to change.

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120. *Id.* at 99. Florida's stand-your-ground law was meant to empower the use of lethal force without retreat in *any* location. *Id.* at 92-99.

121. Justin Murphy, *Are Stand Your Ground Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005-2013*, 99 SOC. SCI. Q. 439, 439 (2018).

122. Caroline Light, Janae Thomas & Alexa Yakubovich, *Gender and Stand Your Ground Laws: A Critical Appraisal of Existing Research,* 51 J.L. MED. & ETHICS 53, 56 (2023). (citing Denise Crisafi, No Ground to Stand Upon?: Exploring the Legal, Gender, and Racial Implications of Stand Your Ground Laws in Cases of Intimate Partner Violence 183 (2016) (Ph.D. dissertation, University of Central Florida) (on file with University of Central Florida STARS)).

123. *See infra* note 153 and accompanying text.

124. Support can be found in the literature charting the evolution of lethal self-defense and the central role of protecting white men. CAROLINE LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE 78 (2017) ("The limitations on African Americans' and women's access to the rights and protections of full citizenship helped code self-defense as a right of white masculinity."); FRANKS, *supra* note 116, at 89 ("Self-defense laws were written with the primary goal of protecting white men's prerogative to use violence both inside and outside the home."); Franks, *supra* note 8, at 1102 (identifying "the normalization and promotion of (often white) male violence in an increasing number of scenarios" as a primary goal of law); Murray, *supra* note 8, at 855 ("[T]he historical narrative of thwarted gun rights unites the contemporary (white) gun owner with the past victims of racialized terror in their shared denial of Second Amendment rights.").

125. Light, Thomas & Yakubovich, *supra* note 122, at 58, 60. Battered woman syndrome was introduced in the 1970s to try to explain why domestic violence victims' defensive actions against abusers — such as shooting abusers when they are unarmed or incapacitated — might not fit into traditional expectations of self-defense by using concepts such as "learned helplessness." *Id.* at 56.

Rahimi's connection to domestic violence created an opportunity for the Court to acknowledge, grapple with, or ameliorate the impact of gun violence on women, especially in the context of domestic violence. But women are curiously absent from the discussion—just as Professor Harawa so clearly demonstrates with Black people.[126] Despite the appearance of a shift from *Bruen* to *Rahimi*, the Court continues to ignore the realities of this country's gun-violence epidemic by prioritizing the past and glorifying firearms as the best option for combating gun violence. The notion that guns stop gun violence is empirically false.[127] Moreover, highlighting stranger-danger self-defense and second-sex gender norms reveals that an increase in firearms, including among women,[128] will inevitably fail to address firearm-related domestic violence for women or improve women's ability to defend themselves. Viewed through an intersectional lens, this creates the greatest risk for Black women, who already experience intimate-partner violence at higher rates.[129] The coalescence of the gun-violence epidemic and the structural inability of women and racial minorities to exercise their right to self-defense equitably has made legal alternatives increasingly essential. Domestic-violence restraining orders, together with the federal firearm restriction that accompanies them, provide one of those alternatives. While § 922(g)(8) is far from a perfect solution, relying on the criminal justice system to right these wrongs—as recommended by Justice Thomas and lower-court judges[130]—would be a grave mistake given that institution's longstanding struggles with racism and sexism.

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126. Harawa, *supra* note 17, at 116-17.

127. John J. Donohue, *The Effect of Permissive Gun Laws on Crime*, 704 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 98-100 (2022); Josie J. Sivaraman, Shabbar I. Ranapurwala, Kathryn E. Moracco & Stephen W. Marshall, *Association of State Firearm Legislation with Female Intimate Partner Homicide*, 56 AM. J. PREVENTIVE MED. 125, 131-32 (2019); Michael Siegel, Molly Pahn, Ziming Xuan, Eric Fleegler & David Hemenway, *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991-2016: A Panel Study*, 34 J. GEN. INTERNAL MED. 2021, 2024-25 (2019).

128. *See* Michelle Klampe, *Gun Manufacturers' Ads Appeal to Women as 'Serious Students' of Firearms to Boost Sales*, OR. ST. UNIV. (Mar. 12, 2024), https://today.oregonstate.edu/news/gun-manufacturers'-ads-appeal-women-'serious-students'-firearms-boost-sales [https://perma.cc/7JMX-BPK8].

129. Bernadine Y. Waller, Jalana Harris & Camille R. Quinn, *Caught in the Crossroad: An Intersectional Examination of African American Women Intimate Partner Violence Survivors' Help Seeking*, 23 TRAUMA, VIOLENCE & ABUSE 1235, 1235 (2022).

130. *See* United States v. Rahimi, 144 S. Ct. 1889, 1947 (2024) (Thomas, J., dissenting); United States v. Rahimi, 61 F.4th 443, 463 (5th Cir. 2023) (Ho, J., concurring).

III. TOWARD A FIREARMS-JUSTICE FRAMEWORK[131]

Women's second-class access to self-defense illuminates the chasm between the theoretical world within which the Supreme Court believes its rulings exist and the world in which impacted people actually live. The mere *declaration* that we are all equal before the law does not make it so. If the sentencing of domestic-violence victims was not persuasive, the distorted notion that a Supreme Court Second Amendment ruling levels the playing field is easily debunked by mentioning just a few of the Black men unjustly shot for allegedly having a firearm: Philando Castile for having a *legal* firearm *in his glovebox*,[132] Tamir Rice for holding a *toy* gun,[133] and John Crawford III for holding a *pellet* gun *that the store was*

131. Using a justice lens was inspired and informed by the Black women who created the reproductive justice movement by having the courage to speak out against the simplicity of focusing on the legal right to abortion. Loretta J. Ross, *Conceptualizing Reproductive Justice Theory: A Manifesto for Activism*, *in* RADICAL REPRODUCTIVE JUSTICE 172 (2017); *see also* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2053 (2021) ("[T]he reproductive justice movement eschewed traditional feminism to take an explicitly intersectional approach, centering the experiences of women of color, the poor, queer communities, and the disabled."). Using a framework created by Black women seems particularly relevant when, as one headline put it, "Black mothers are the real experts on the toll of gun violence." Arionne Nettles, *Black Mothers Are the Real Experts on the Toll of Gun Violence*, N.Y. TIMES (May 6, 2021) https://www.nytimes.com/interactive/2021/05/06/opinion/gun-violence-black-mothers.html [https://perma.cc/K8GY-NVEU]; *see also* DE BEAUVOIR, *supra* note 1, at 12 (1949) ("To prove women's inferiority, antifeminists began to draw not only, as before, on religion, philosophy, and theology but also on science . . . . At most they were willing to grant 'separate but equal status' to the *other* sex. That winning formula is most significant: it is exactly that formula the Jim Crow laws put into practice . . . . This convergence is in no way pure chance: whether it is race, caste, class, or sex reduced to an inferior condition, the justification process is the same.'").

132. Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html [https://perma.cc/L5WX-J4YS]; Natasha Bertrand, *The Philando Castile Shooting Just Threw into Question a Central Belief People Have About the US Policing System*, BUS. INSIDER (July 7, 2016), https://www.businessinsider.com/philando-castile-shooting-police-commands-2016-7 [https://perma.cc/JTL8-5S87].

133. German Lopez, *Cleveland Just Fired the Cop Who Shot and Killed 12-Year-Old Tamir Rice More Than 2 Years Ago*, Vox (May 30, 2017, 1:30 PM EDT), https://www.vox.com/identities/2017/5/30/15713254/cleveland-police-tamir-rice-timothy-loehmann [https://perma.cc/ZQH8-3HW5] ("[W]ithin two seconds of getting out of his patrol car," "officer Timothy Loehmann shot and killed the 12-year-old.").

selling.[134] Outside of the Court's "marbled halls,"[135] power and privilege play an outsize role in shaping if, when, and how someone can exercise their rights.[136] For example, women who are victims of domestic violence are penalized for defending themselves because they are presumed to have the power and privilege to leave.[137] A firearms-justice framework takes a population-level perspective to shine a light on the systemic barriers limiting women's ability to choose whether to leave. Further, this framework confirms that the existence of a Second Amendment right does nothing to negate the social, political, and economic inequalities that determine who is able to exercise that right fully.[138] This contrasts with the Court's analytical approach, which typically focuses narrowly on the individual

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134. Keith BieryGolick, *The Killing of John Crawford at Walmart: Officer Says He 'Wouldn't Have Changed a Thing*,' CIN. ENQUIRER (Feb. 14, 2019, 9:32 AM ET), https://www.cincinnati.com/story/news/2019/02/12/killing-john-crawford-walmart-officer-wouldnt-have-changed-thing/2787871002 [https://perma.cc/9FSK-8AZ6]. Compare this to Dmitriy Andreychenko who *entered* a Walmart with a rifle, frightened customers, and was "taken into custody without incident." Neil Vigdor, *Armed Man Who Caused Panic at Missouri Walmart Said It Was 2nd Amendment Test, Authorities Say*, N.Y. TIMES (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/us/missouri-walmart-terrorist-threat.html [https://perma.cc/3CMD-JKE9].

135. Peruta v. California, 137 S. Ct. 1995, 1999-2000 (2017) (Thomas, J., dissenting), *cert. denied sub nom.*, Peruta v. Cnty. of San Diego, 824 F.3d 919 (9th Cir. 2016) ("For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous.").

136. *Cf.* Loretta J. Ross, *Reproductive Justice as Intersectional Feminist Activism*, 19 SOULS 286, 292 (2017) ("Reproductive justice as a conceptual frame interrogates the ongoing biological and non-biological power relationships between people of color and variations of 'white people,' centering in its foundational analysis a critique of the ideology of white supremacy as it temporally affects reproduction.").

137. As Professor Dorothy Roberts notes, if the goal is truly freedom of choice then "[t]he reproductive freedom of poor women of color, for example, is limited significantly not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship." Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1410, 1461 (1991).

138. Murray, *supra* note 131, at 2053. The reproductive-justice movement centered the voices of women of color to incorporate intersecting issues that influence a woman's ability to choose not to have children, to have children, and/or "to parent children in safe and healthy environments." Ross, *supra* note 131, at 171-72. Similarly, it is important to center those suffering disproportionately from gun violence to determine what they need to exercise their Second-Amendment rights when justified, ensure people are held accountable for misusing firearms, and ensure the liberty to determine if, when, and how to be exposed to guns and gun violence. *See also* Ulrich, *supra* note 5, at 1057 (describing a "public health law lens" that "encourages stakeholders to systematically evaluate the nature of the epidemic in considering population-based measures to address it").

challenger and whether their asserted right falls within the Second Amendment's scope.[139]

Individuals do not exercise their rights in a vacuum. Women's inability to exercise Second Amendment rights and the systemic factors that limit their purported freedom to leave severely constrain their ability to protect themselves from their greatest threats. It is in these circumstances, when people are unable to protect themselves from the risks and threats of others, that the government has greater authority to act. As a result, this population-level, public-health-informed justice view should also expand how we think of historical laws and the information they provide today. If we are stuck sifting through historical restrictions, it would be far more logical to broaden the scope of relevant laws to include those that, while unrelated to firearms, relate to the government's infringement on constitutional rights in the name of protecting others from harm.

A. Against the Status Quo[140]

Professor Harawa has expertly highlighted that race is a critical factor in determining the extent to which Second Amendment rights are fully available.[141] Perversely, the lenses of both race and gender reveal that the people most imperiled by expansive Second Amendment interpretations are also those most at risk of being prosecuted for attempts to exercise the very same self-defense principles underlying those rights.[142] Women in abusive relationships should have an enhanced claim to self-defense, yet judges and juries are often unsympathetic. State statutes allowing reduced sentences for crimes arising from domestic violence have not made compassion easier to find. For example, in an early attempt to apply New York's Domestic Violence Survivors Justice Act, a judge found that,

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139. United States v. Rahimi, 144 S. Ct. 1889, 1894-97 (2024); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 15-18 (2022).

140. DE BEAUVOIR, *supra* note 1, at 14 ("[T]here are deep analogies between the situation of women and blacks: both are liberated today from the same paternalism, and the former master caste wants to keep them 'in their place' . . . ."); Ross, *supra* note 136, at 292 ("Reproductive justice provokes and interrupts the *status quo* and imagines better futures through radical forms of resistance and critique.").

141. Harawa, *supra* note 17, at 119.

142. *See* Michael R. Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1433 (2022) (describing how a proliferation of firearms could "perpetuate the inequitable division between populations whose gun rights are protected and communities who bear the brunt of gun violence"); *see also* Hunter M. Boehme, Deanna Cann & Deena A. Isom, *Citizens' Perceptions of Over- and Under-Policing: A Look at Race, Ethnicity, and Community Characteristics*, 68 CRIME & DELINQ. 123, 126-27 (2022) (explaining the impact of "life-long targeting, harassing, and criminalization of Black and Latino adolescent boys" combined with police withholding protection and "leaving residents to fend for themselves").

though there was evidence of abuse, the abuse was not "substantial," nor was it "a significant contributing factor" to the victim's killing of her abuser.[143] Under the new state law, the defendant could have been given as little as probation but received an eight-year sentence.[144] For her, as for others, increased access to firearms, even with domestic-violence sentencing flexibility, is insufficient to address the harms women suffer from firearms.

The suggestion that domestic-violence victims should seek alternatives to lethal force directly contradicts the premise underlying self-defense, as codified in the castle doctrine, stand-your-ground laws, and the *Bruen* decision. These pillars of self-defense are intended precisely to assert that although you *can* try alternatives, the law should not *require* that you try them before defending yourself.[145] This lends credence to the claim that the Second Amendment is a masculine right meant to ensconce a true man's ability to use lethal force to protect himself, his property, and even his honor.[146] Women are expected to flee, but legally requiring men to do so would force them to tarnish their own masculinity.[147] As Professor Mary Anne Franks observes, even in the paradigmatic scenario of rape, "women are not encouraged to fight back against rapes by husbands, boyfriends, friends or acquaintances; instead, they are taught to anticipate and minimize the chances for sexual assault by constraining their mobility, clothing choices, conduct, and recreational activity."[148] While men are often

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143. Patrick Lakamp, *'Epitome of a Domestic Violence Victim' or Not, She's Still Going to Prison*, BUFF. NEWS (Sept. 8, 2019), https://buffalonews.com/news/local/epitome-of-a-domestic-violence-victim-or-not-shes-still-going-to-prison/article_53129e5d-5ae5-5845-a58b-d1325352982f.html [https://perma.cc/6MG8-BMY4]. Witnesses testified that they saw the victim dragged by her hair, beaten, and choked, and that before she killed her abuser, he punched her in the face, which later left her with a swollen eye. *Id.*

144. *Id.* In another case, a judge denied that the statute applied at all, including because the alleged abuser (whom the defendant killed) did not fit the profile of an abuser and Addimando had opportunities to leave. People v. Addimando, 120 N.Y.S.3d 596, 618-21 (Cnty. Ct. 2020); *see also* Rachel Louise Snyder, *When Can a Woman Who Kills Her Abuser Claim Self-Defense?*, NEW YORKER (Dec. 20, 2019), https://www.newyorker.com/news/dispatch/when-can-a-woman-who-kills-her-abuser-claim-self-defense [https://perma.cc/RK6U-S44D] (describing Addimando's experience as "among the most extreme violence I have ever come across in a decade of reporting on domestic violence").

145. Justice Alito's concurrence in *Bruen* makes note that in 1791 people could not rely on the government to ensure their safety, and today many Americans still needed guns for self-reliant protection. *Bruen*, 597 U.S. at 78, 74 (Alito, J., concurring).

146. LIGHT, *supra* note 124, at 57 ("Dating back to 1806 . . . debates over self-defense implicitly centered on the urgent need to protect white masculine honor."). Murray, *supra* note 112, at 818 ("Both the *Bruen* majority and Justice Alito, in a concurring opinion, discuss the exercise of gun rights in ways that clearly contemplate men as the rights bearers in question.").

147. Franks, *supra* note 8, at 1123.

148. *Id.* at 1109-10.

valorized for standing their ground in the face of danger, judges and juries often hold biases against women subjected to domestic violence because they view those women as contributing to their own harm by maintaining contact with their abusers.[149]

A justice-based view also forces us to consider why women who stand their ground in the face of domestic violence do not pursue alternatives. Factors such as finances, housing, childcare, transportation, and healthcare shape what options, if any, are truly available for women to choose.[150] Other considerations, such as the safety of women and their children,[151] are also a constant and significant determinant of not just *what* options are available but also *when* they are available.[152] Leaving is not a decision but a process. As Rachel Louise Snyder explains, "[W]e mistake what we see from the outside as her choosing to stay with an abuser, when in fact it's we who don't recognize what a victim who is slowly and carefully leaving actually looks like."[153] Interrogating the underlying causes that make women's self-defense against abusers so elusive further underscores the inadequacy of an expansive Second Amendment to solve the very problems it creates for women.

Understanding these factors reveals that the government's actions and inactions play a significant role in shaping the options available to a woman. Instead of punishing women for being what Professor Leigh Goodmark calls "imperfect victims"[154]—failing to fit into the criminal legal system's preferred "stereotypes"[155]—the government should be implementing policies that make it easier

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149. *Id.* at 1121.

150. Julia K. Campbell, Emily F. Rothman, Faizah Shareef & Michael B. Siegel, *The Relative Risk of Intimate Partner and Other Homicide Victimization by State-Level Gender Inequity in the United States, 2000-2017*, 6 VIOLENCE & GENDER 211, 217 (2019) (providing data linking gender inequity to female, intimate-partner homicide); Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. RACE, GENDER & SOC. JUST. 339, 341 (2014).

151. *See* Brief of the Domestic Violence Legal Empowerment & Appeals Project, the National Family Violence Law Center at GW Law, the National Education Association, the Family Violence Appellate Project, the Child Welfare League of America, the Field Center for Children's Policy, Practice & Research, Kathryn J. Spearman & the Women's Bar Association of the District of Columbia as Amici in Support of Petitioner at 5-6, 10, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915).

152. Brief of Amici Curiae National Indigenous Women's Resource Center, et al., in Support of Petitioner at 7, *Rahimi*, 144 S. Ct. 1889 (No. 22-915) ("Survivors are most vulnerable when their abuser learns they are planning to or trying to leave the relationship, and receipt of a protective order is a clear signal the victim is on their way out.").

153. SNYDER, *supra* note 105, at 11.

154. GOODMARK, *supra* note 16, at 9.

155. *Id.*

for women to make the choices they want in response to domestic violence. Equitable pay, free childcare, affordable housing, universal health care, paid leave, and a culture that believes women would go a long way in providing better opportunities for women to choose what is in their best interest. With racial disparities in these categories, it should come as no surprise that women of color are disproportionately seen as "imperfect victims."[156] Consequently, criminalization has actually increased the rates of arrest, prosecution, conviction, and incarceration of the victims, with women of color experiencing disparately higher rates of incarceration.[157]

Further, the factors that can prevent women from leaving might encourage them to use civil tactics in order to maintain access to an abusive partner's financial support, the partner's healthcare through their employment, or free childcare. Women's fear may also be tied directly to the firearm as opposed to the individual, due to fluctuations in temperament caused by the partner's mental-health conditions and treatment regimens, which themselves depend on external factors such as insurance coverage and preapproval. Women can also experience concerns about a partner's suicidality or the risks that accompany engaging law enforcement and criminal processes, especially if a Black man is involved.

Better recognition of the context surrounding the "choices" made—and not made—with regard to both domestic violence and gun violence should make it apparent that domestic-violence restraining orders and firearm restrictions are merely part of the solutions needed. Unlike Professor Harawa, I do not see *Rahimi* as "endors[ing] the use of the criminal legal system, with all of its built-in biases, as a tool to regulate firearms."[158] Though a criminal defendant ultimately lost, the majority upheld a civil remedy. Justice Thomas's dissent, meanwhile, specifically references the use of "criminal prosecution" for disarming people,[159] implying its superior constitutionality because its procedures safeguard fairness. The implication that criminal proceedings ensure impartiality belies the consistent injustices that have been described here and by Professor Harawa. Indeed, these data, along with the relatively minimal increase in criminal-defense success after *Bruen*, demand more than hoping the addition of historical arguments to the criminal-defense toolbox will mitigate this country's mass-incarceration problem.[160]

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156. *Id.*

157. GOODMARK, *supra* note 16, at 2.

158. Harawa, *supra* note 17, at 121; United States v. Rahimi, 144 S. Ct. 1889, 1947 (2024) (Thomas, J., dissenting).

159. *Rahimi*, 144 S. Ct. at 1947 (Thomas, J., dissenting).

160. Harawa, *supra* note 17, at 108.

To be sure, § 922(g)(8) is far from perfect. For example, it does nothing to alter community threats and violence that may lead someone to continue to arm themselves. Nevertheless, it is still one step removed from criminalization that can instantly result in incarceration. In fact, it can prevent at least some individuals from rotting in prison awaiting trial because they are too poor to afford bail.[161] It is perplexing that Justice Thomas decries a law for firearm removal while supporting a criminal approach that Judge Ho found more appealing because "the government can detain and disarm, not just after conviction, but also before trial."[162] Professor Harawa's description of the discriminatory impact of § 922(g)(8) is absolutely troubling; however, striking down a civil mechanism for firearm removal does nothing to remedy the injustices in the criminal system that Judge Ho and Justice Thomas are so eager to rely upon. Unfortunately, if Mr. Rahimi had been successful in "exploiting *Bruen*'s methodology,"[163] there is little reason to think we would have seen any reduction in criminalization of communities of color generally or Black men in particular.

If the goal is to diminish gun violence, protect victims of domestic violence, and reduce the country's reliance on mass incarceration, civil remedies such as § 922(g)(8) are important and still better than the arrest, detain, and imprison approach suggested by Justice Thomas and Judge Ho. Similarly, more guns will not serve as a solution to the disparities in gun violence, domestic violence, or the injustices in our legal system. The point is to change the structures and systems that force women and people of color into a "catch-22," where they can either continue to suffer while the legal system turns a blind eye or can arm themselves and hope they are not criminalized for exercising the same rights available to others. A firearms-justice framework, therefore, provides a lens through which to explore alternative solutions beyond retroactive criminalization and academic constitutional debates. Through a justice-based lens, gun policies can be found in criminal-justice reform, Medicaid expansion, minimum-wage increases, green-space improvements, urban-blight reductions, climate-change mitigation, and democratic reforms such as protecting and expanding voting rights and eliminating gerrymandering.

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161. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/C9T9-AZSQ] (describing the suffering and attempted suicide of Kalief Browder, who was held for around three years for allegedly stealing a backpack before being released without having a trial).

162. United States v. Rahimi, 61 F.4th 443, 464 (5th Cir. 2023) (Ho, J., concurring).

163. Harawa, *supra* note 17, at 115-16.

B. A Better Bruen, *If We Must*[164]

A justice-based lens clarifies that obstacles prevent women from having the power and privilege to choose if, when, and how to leave abusive relationships or to exercise their right to armed self-defense. Moreover, by taking a population-level perspective—similar to a public-health approach[165]—it becomes clear that women are unable to address the systemic barriers and enduring gender norms on their own. It is precisely in these situations—where citizens are at risk of harm from others and are unable to protect themselves—that states have greater authority to exercise their police powers to protect public health, safety, and welfare. The Court's preoccupation with the challenger in the courtroom allows it to frame the case as a conflict between an individual who simply wants the ability to exercise armed self-defense and an oppressive government. Since women are at greater risk if their violent partner has access to a firearm, it is more appropriate to view this as a conflict between the rights of the abuser and those of the victim. The constitutional question, then, should be not only about the scope of the Second Amendment's protections but also about the scope of the state's ability to protect its citizens.

Despite *Rahimi*'s facts shining a spotlight on *Bruen*'s many flaws, there was little hope this Court would overturn or drastically alter its holding. History was still the star of the show. If we are stuck with history, incorporating a population perspective demonstrates that the Court's current use of history misses the mark by unnecessarily narrowing the relevant history to ancient gun laws. As firearms-justice dovetails with public health, it becomes apparent that historical laws unrelated to firearms—for example, laws authorizing government-imposed quarantines—provide more logical analogues.

History does indeed give some insight, but it need not come from altering what surety laws tell us from one case to another. For example, the opinions striking down § 922(g)(8) were quite troubled by the weight given to a civil, rather than criminal, proceeding.[166] Judge Ho distinguishes between the authority to restrict constitutional rights for criminals as opposed to "innocent, law-abiding citizens" with the example that "the government cannot deprive innocent citizens of their liberty of movement."[167] Unfortunately for Judge Ho, his example actually refutes the very point he is trying to make. Government-

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164. DE BEAUVOIR, *supra* note 1, at 16 ("Even the way of asking the questions, of adopting perspectives, presupposes hierarchies of interests . . . Instead of trying to conceal those principles that are more or less explicitly implied, we would be better off stating them from the start.").

165. Ulrich, *supra* note 5, at 1095.

166. *Rahimi*, 61 F.4th at 455.

167. *Id.* at 463 (Ho, J., concurring).

mandated quarantines not only restrict the right to move freely; they do so after a civil proceeding in which an individual's fundamental rights may be limited despite committing no crime and injuring no one.[168] Quarantines, which predate the Founding, are based on the potential risk a person poses to another.[169] Therefore, quarantine laws provide a historical analogue supporting § 922(g)(8) that satisfies both the "how" and the "why" aspects of *Bruen*. Moreover, invoking quarantine helps reveal the relevance of legislative responses to public threats.

In *Bruen*, the Court includes a caveat to its dictate to search for historical analogues for "cases implicating unprecedented societal concerns or dramatic technological changes [that] may require a more nuanced approach."[170] It seems inarguable that the possibility of shooting thirty-six people in thirty seconds would have been "unimaginable at the founding," as would efforts to combat racial and gender disparities in gun violence.[171] Between the Founding and Reconstruction, contagious diseases posed a much graver danger than guns to the public and the country as a whole, such that historical laws restricting individual rights are much more likely to be justified based on infectious disease than on gun violence.[172] This approach also satisfies the principles-based reasoning in *Rahimi* while supporting the importance of considering both the government's means and ends.[173]

If the country and courts are indeed stuck with *Bruen*, the case's historical shackles could still be better aligned with the realities of government authority.

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168. Rachel Martin & Michael R. Ulrich, *Firearm Contagion: A New Look at History*, 51 FORDHAM URB. L.J. 279, 291 (2023).

169. *Id.* at 291.

170. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 27 (2022).

171. *Id.* at 28; *see also* Vanessa Romo, *Dayton Police Killed Shooter Within 30 Seconds of 1st Shot, Police Chief Says*, NPR (Aug. 4, 2019, 8:25 PM ET), https://www.npr.org/2019/08/04/748111546/dayton-police-killed-shooter-within-30-seconds-of-first-shot [https://perma.cc/YG3U-5LJR]; Martin & Ulrich, *supra* note 168, at 293 (explaining that because it is restricted to historical analogues in the eighteenth and nineteenth centuries, post-*Bruen* Second Amendment jurisprudence is ill-suited for addressing the gender and racial dimensions of gun violence).

172. Martin & Ulrich, *supra* note 168, at 291-92.

173. United States v. Rahimi, 144 S. Ct. 1889, 1906 (2024) (Sotomayor, J., concurring). Justice Sotomayor writes: "I remain troubled by *Bruen*'s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today. In my view, the Second Amendment allows legislators 'to take account of the serious problems posed by gun violence,' not merely by asking what their predecessors at the time of the founding or Reconstruction thought, but by listening to their constituents and crafting new and appropriately tailored solutions." *Id.* (citation omitted). Justice Sotomayor made clear that she strongly supports a methodology that permits courts to consider the state's interest, the effectiveness of the law in achieving that interest, and any less restrictive alternatives, if appropriate. *Id.* at 1906 n.1.

Legislatures are permitted to act in response to the public's needs, not—contrary to the *Bruen* Court's implication—to etch out the boundaries of a constitutional right.[174] *Bruen*'s restraints, therefore, are perplexing because legislatures from the Founding to Reconstruction would not have been authorized to pass laws for gun-violence problems that did not exist.[175] The historical gun laws *are* trapped in amber, and it seems impossible to suggest those few laws can be stretched and strained to account for safety measures aimed at mass shootings, firearm-related suicides, large-capacity magazines, hollow-point bullets, bump stocks, or racial and gender disparities.[176] Conversely, historical laws unrelated to firearms can inform our understanding of the government's authority to infringe on individual rights and, therefore, provide on-point analogues for Second Amendment analysis.[177] *Rahimi*'s description of surety laws as a historical tool to prevent "future misbehavior," including "all forms of violence," provides precedential support for using history beyond the laws *solely* focused on gun violence.[178]

Rahimi may not provide clarity on how Second Amendment challenges will be analyzed, but it signals a flexibility that was imperceptible from *Bruen*'s rigid and strident tone. The departure of five of *Bruen*'s signatories to a majority opinion that suggests history is instructive only for guiding "principles" is an opportunity to find a better path forward. To be clear, public defenders have a duty to advocate fervently for their clients, and defendants are understandably concerned with getting out or staying out of prison. Neither have the luxury of taking a long view. Still, there is a risk of missing the forest for the trees. Supporting broad Second Amendment protections based on antiquated laws from the era of slavery and coverture may help a defendant win, but it will not end racist and sexist enforcement discretion or eliminate the judicial biases that plague the legal

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174. Ulrich, *supra* note 5, at 1070-72.

175. Martin & Ulrich, *supra* note 168, at 284; *see also Rahimi*, 144 S. Ct. at 1905 (Sotomayor, J., concurring) (criticizing Justice Thomas's interpretation as requiring that legislatures be limited "by a distant generation's failure to consider that such a law might be necessary," including circumstances "when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate").

176. *Rahimi*, 144 S. Ct. at 1905 (Sotomayor, J., concurring) ("History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy."); Martin & Ulrich, *supra* note 168, at 281 ("The logistical reality of long-guns and muskets in 1791 meant suicides and mass shootings—which occurred at least 690 times in 2021—were not a threat and, therefore, simply could not have been a legislative priority for elected officials.").

177. Martin & Ulrich, *supra* note 168, at 294.

178. *Rahimi*, 144 S. Ct. at 1900.

system.[179] We must be wary of perpetuating an unjust system simply because it improves on past prejudices.[180] Vigorous advocacy to keep clients out of prison and just constitutional analysis need not be mutually exclusive. Hopefully, the extent of agreement between this Essay and Professor Harawa's proves this point.

CONCLUSION

Simone de Beauvoir noticed the parallels between the challenges imposed on women and people of color, remarking how "they praise, more or less sincerely, the virtues of the 'good black,' . . . and the woman who is a 'true woman'—frivolous, infantile, irresponsible, the woman subjugated to the man. In both cases, the ruling caste bases its argument on the state of affairs it created itself."[181] These similarities persist in the context of gun violence, criminalization, and constitutional interpretation. The default stranger-danger self-defense Second Amendment right, as currently construed, is one that benefits white men while exacerbating the harms inflicted disproportionately on women and racial minorities. This fits neatly within what Professor Murray has dubbed the Roberts Court's "Jurisprudence of Masculinity."[182] As she insightfully explains, this trend "goes beyond prioritizing men and their rights in the constitutional order" and attempts to normalize constitutional analysis that "operates by fundamentally recasting core assumptions in constitutional law in ways that privilege and prioritize men."[183]

Rahimi's lack of clarity ensures that another Second Amendment case will be before the Court sooner rather than later. Seeking justice will again create the dilemma of whether to work within the historically centered analysis of bygone gun laws or urge the Court to chart out a new path. We must be cautious of the consequences that can follow from letting the Court dictate the terms of equality in the context of Second Amendment rights.[184] Both this Essay and Professor Harawa's illustrate that simply ruling that all people have access to this

179. Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al., N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).

180. Siegel, *supra* note 15, at 1116 (warning that legal developments can result in discrimination and oppression taking new forms instead of dismantling the social and legal hierarchies).

181. DE BEAUVOIR, *supra* note 1, at 12.

182. Murray, *supra* note 8, at 800.

183. *Id.* at 827.

184. Professor Murray demonstrates how the Court's "narrow framing" of the abortion debate around physicians, state police power, and privacy framed "the response to, and defense of, the abortion right in the decades that followed." Murray, *supra* note 131, at 2049.

constitutional right does nothing to address the social, legal, and political systems that make equal access impossible. Lest the harm of domestic violence be used to suggest that the inequities described throughout this Essay justify efforts to improve gun access for women, the justice-based view shows this would be a fool's errand. "Equal" access to Second Amendment protections is insufficient to address the disparities that women — especially women of color — suffer. In other words, this is not an issue of equality, but one of justice.[185]

Associate Professor, Boston University School of Public Health & Boston University School of Law; Solomon Center Distinguished Visiting Scholar, Yale Law School. *Many thanks to Daniel Harawa, whose work I rely upon and greatly admire, for participating in this Exchange. Additional thanks to Julia Geskey and Rachele Lajoie for their helpful research assistance. I am indebted to the editors of the* Yale Law Journal *for their phenomenal work on this Essay.*

185. *See* Brittney Cooper, *Feminism's Ugly Internal Clash: Why Its Future Is Not Up to White Women*, SALON (Sept. 24, 2014), https://www.salon.com/2014/09/24/feminisms_ugly_internal_clash_why_its_future_is_not_up_to_white_women [https://perma.cc/627A-2LC6].