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# Scientific Context, Suicide Prevention, and the Second Amendment After *Bruen*

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**Article**

# Scientific Context, Suicide Prevention, and the Second Amendment After *Bruen*

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*The Supreme Court declared in* New York State Rifle & Pistol Ass'n v. Bruen *that modern gun laws must be "consistent with this Nation's historical tradition of firearm regulation" to survive Second Amendment challenges. Scholarship has shown how this test of historical analogy presents difficulties because of how technological, legal, and social change has shaped policy over the centuries. This Article is the first to assess* Bruen *as it applies to suicide-prevention laws, and, in doing so, illuminates another form of change that complicates* Bruen*'s implementation: scientific progress.*

*As this Article shows, early generations of Americans fundamentally misunderstood mental illness and suicide, and that misunderstanding influenced societal approaches to suicide prevention. Theories about the causes of suicide and mental illness ranged from the supernatural to the pseudo-scientific; from demonic possession to erroneous views about blood-borne disease. Americans pursued policies and prevention measures consistent with those explanations, such as posthumous criminal punishment and intentional bleeding. Such approaches are far afield from the more effective ways to prevent suicide that we have developed through modern science like psychotherapy, medication,*

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*and, importantly for gun policy, restricting access to firearms—the most lethal method commonly used in U.S. suicides.*

*The state of mental health science at the Founding renders comparisons of past and present suicide-prevention measures pursuant to* Bruen*'s doctrinal mandate fraught from the get-go. The Article concludes by discussing implications, including suggesting other ways that scientific context informs gun policy that warrant further consideration.*

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## INTRODUCTION

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court announced a novel test for determining whether modern gun laws comport with the Second Amendment: the laws must be comparable to those enacted centuries ago.[1] Dozens of scholarly articles have analyzed *Bruen*'s fallout.[2] In terms of methodology, legal scholarship has shown how the Court's turn to originalism-by-analogy could lead to an anachronistic jurisprudence because of technological, legal, and social change.[3] The burgeoning scholarship, however, has paid little attention to *Bruen*'s intersection with laws aimed at the most common type of firearm death in America: suicide.[4] As this Article demonstrates, assessing *Bruen*'s consequences for suicide-prevention laws illuminates another form of change over time that complicates relying on past practices to validate today's policy choices—scientific progress—which has revolutionized how we approach mental illness and suicide prevention.[5]

*Bruen* instructed courts to strike down gun laws on Second Amendment grounds unless they are "consistent with the

1. 597 U.S. 1, 24 (2022) ("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.").

2. At least six symposia have explored different post-*Bruen* questions. *See* Symposium, *Guns Everywhere: Individual Rights and Communal Harms after* NYSRPA v. Bruen, 7 UCLA CRIM. JUST. L. REV. 83 (2023); Symposium, *Gun Rights and Regulation After* Bruen, 98 N.Y.U. L. REV. 1795 (2023); Symposium, *Public Health, History, and the Future of Gun Regulation After* Bruen, 51 FORDHAM URB. L.J. 1 (2023); Symposium, *History, Tradition & Analogical Reasoning*, 99 NOTRE DAME L. REV. (forthcoming 2024); Symposium, *Aiming for Answers: Balancing Rights, Safety, and Justice in a Post*-Bruen *America*, 108 MINN. L. REV. (forthcoming 2024); Symposium, *Status of the Second Amendment: Who Has the Right to Bear Arms?*, 93 MISS. L.J. (forthcoming 2024). For a quantitative review of *Bruen*'s impact after one year, see Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post*-Bruen*: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20 (2024).

3. *See, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023) (describing *Bruen*'s novel approach to Second Amendment doctrine and the challenges it presents for post-*Bruen* courts).

4. *See infra* Part I.B.1 (discussing firearm suicide data).

5. *See infra* Part I.B.1 (discussing the science behind means restriction as a suicide-reduction strategy); Part I.B.2 (describing firearm policies implementing means restriction).

Nation's historical tradition of firearm regulation."[6] The Court offered high-level guidance for comparing modern and historical policies that was keyed to the nature and persistence of the "general societal problem" addressed by regulations.[7] For example, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century," the *Bruen* majority explained that "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[8] *Bruen* acknowledged that some historical comparisons would not fit that "straightforward" mold, such as when policy confronts "unprecedented societal concerns or dramatic technological changes."[9] In such circumstances, courts needed to deploy a "more nuanced approach,"[10] "reasoning by analogy,"[11] and focusing on "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[12] The Court acknowledged that its prescribed doctrine could be "difficult and leave close questions at the margins."[13]

But the Court may not have appreciated just how difficult it would be to draw constitutional conclusions solely from comparisons between modern-day gun policies and those of the "different world" of the past.[14] The evolution of guns from muskets to AR-15s, for example, has facilitated modern mass shootings that would have been unfathomable in the late 1700s.[15] And the Founding generation viewed women and minorities as politically

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6. *Bruen*, 597 U.S. at 24.

7. *Id.* at 26.

8. *Id.*

9. *Id.* at 27.

10. *Id.*

11. *Id.* at 28.

12. *Id.* at 29.

13. *Id.* at 31 (quoting Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

14. BERNARD BAILYN, SOMETIMES AN ART: NINE ESSAYS ON HISTORY 22 (2015).

15. *See* Darrell A. H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 UC DAVIS L. REV. 2495, 2507 (2022) ("The report demonstrated that the [Theoretical Lethality Index] of weapons increased exponentially in the past 200 years."). Guns at the Founding were overwhelmingly muzzle-loaders that could fire once before necessitating a slow reloading process. Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 205–07 (2021) (discussing firearm technology at the Founding).

and legally unequal, which left those populations unrepresented and unprotected.[16] What historically derived analogical principles should guide courts evaluating modern magazine capacity limits or efforts to disarm domestic abusers? Lower courts have disagreed, resulting in conflicting outcomes.[17] The extent to which technological, social, and legal change complicates *Bruen*'s approach to constitutional adjudication is on display in *United States v. Rahimi*, currently under consideration at the Supreme Court.[18]

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16. *See* State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (unpublished table decision) ("[T]he glaring flaw in any analysis of the United States' historical tradition of firearm regulation in relation to Ohio's gun laws is that no such analysis could account for what the United States' historical tradition of firearm regulation would have been if women and nonwhite people had been able to vote for the representatives who determined these regulations.").

17. *See generally* Ruben et al., *supra* note 2 (measuring success rates in Second Amendment challenges after *Bruen*).

18. United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (mem.). In *Rahimi*, the Fifth Circuit struck down a federal law disarming people under domestic violence restraining orders, finding the law to be an "outlier[] that our ancestors would never have accepted." *Rahimi*, 61 F.4th at 461 (alteration in original) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022)). Yet, as scholars have observed, the domestic abusers amongst "our ancestors" infrequently used firearms due to their technological limitations. Historian Randolph Roth, the leading authority on the history of American homicide, concluded that "[f]amily and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand," which were not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists." Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 113, 117 (Jennifer Tucker et al. eds., 2019). Moreover, "[w]hen the Second Amendment was ratified in 1791, the lives of women bore little resemblance to those they lead today." Natalie Nanasi, *Reconciling Domestic Violence Protections and the Second Amendment*, 58 WAKE FOREST L. REV. (forthcoming 2024) (manuscript at 3) (on file with *Minnesota Law Review*). Women did not gain the federal right to vote until much later, *see* U.S. CONST. amend. XIX, for example, and were subjugated in numerous other ways. *See, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996). To be sure, these dramatic changes do not necessarily mean the domestic violence policy at issue in *Rahimi* is unconstitutional after *Bruen*. *See* Adam Liptak, *Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers*, N.Y. TIMES (Nov. 7, 2023), https://www.nytimes.com/2023/11/07/us/politics/supreme-court-gun-rights-domestic-violence.html [https://perma.cc/6WT5-WXJD]. But such transformations are

Much of the recent Second Amendment literature has (understandably) focused on *Bruen*'s implications for interpersonal gun violence issues like domestic violence, at issue in *Rahimi*, but this Article considers *Bruen* in a different context: firearm suicide. In 2022, 26,993 people died from suicide by firearm, the highest number ever recorded by the United States Centers for Disease Control and Prevention.[19] Though relatively few suicide attempts involve a gun, guns regularly comprise above fifty percent of completed suicides.[20]

Modern researchers have explored the various factors, from biological to social, that are associated with suicide, as well as interventions that could save lives. They have found that many if not most suicides are associated with mental health and substance use disorders,[21] making the treatment of mental illness and substance abuse a key priority for suicide prevention. Today,

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essential context for applying *Bruen* coherently—for example, by proceeding at a high level of generality that draws comparisons to non-domestic violence policies. *Cf. infra* Part III.A (discussing the appropriate level of generality to apply in Second Amendment cases after *Bruen*). Along with Joseph Blocher, Jacob Charles, Darrell A. H. Miller, and Reva Siegel, I filed an amicus brief in *Rahimi* that urged the Court, among other things, to analogize the challenged policy to "historical laws disarming dangerous individuals even if those individuals were dangerous for different reasons or posed dangers to different types of people." Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 22–23, *Rahimi*, 143 S. Ct. 2688 (No. 22-915).

19. *See CDC Provisional Data: Gun Suicides Reach All-Time High in 2022, Gun Homicides Down Slightly from 2021*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Jul. 27, 2023), https://publichealth.jhu.edu/2023/cdc-provisional-data-gun-suicides-reach-all-time-high-in-2022-gun-homicides-down-slightly-from-2021 [https://perma.cc/KXM3-MNVP] [hereinafter JOHNS HOPKINS].

20. *See* PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 42 (2d ed. 2020) (describing statistics concerning firearm suicide); Andrew Conner et al., *Suicide Case-Fatality Rates in the United States, 2007 to 2014*, 171 ANNALS INTERNAL MED. 885, 888 (2019) (estimating that firearms accounted for 4.8% of suicide attempts but 50.6% of suicide deaths).

21. The ratio of suicides associated with mental illness and substance use disorder varies. *See, e.g.,* INST. OF MED. OF THE NAT'L ACADS., REDUCING SUICIDE: A NATIONAL IMPERATIVE, at ix (S.K. Goldsmith et al. eds., 2002) (stating that about 90% of suicides in the United States "appear to be associated with a mental illness"); Julie E. Richards et al., *Patient-Reported Firearm Access Prior to Suicide Death*, JAMA NETWORK OPEN, Jan. 2022, at 1, 1–2 (2022) https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787773 [https://perma.cc/5PVU-NNDP] (finding that within the study sample 64% (151/236) of people who died by suicide had an active mental health or substance use disorder at the time of their death).

unlike at the Founding, psychoactive medications are available to help those suffering from mental illness,[22] yet "[d]ata show that medicine alone is not sufficient for treatment of mental disorders or suicidality."[23] Psychotherapy can also reduce the risk of suicide,[24] but there is a "constellation of barriers deterring use of mental health treatment by people who are either suicidal or who have major risk factors for suicidality,"[25] ranging from stigma to finances to diagnostic difficulties.[26] Against that backdrop, including the fact that many "firearm suicide decedents did not have [mental health or substance use disorder] diagnoses,"[27] prevention mechanisms that do not rely on medical or psychotherapeutic interventions are important. One such mechanism that has immense empirical support is limiting access to the lethal tools commonly used to commit suicide.

As this Article shows, means restriction emerged in the second half of the twentieth century as an approach for reducing suicide that can operate independently of other interventions.[28] Means restriction's potential for lowering suicide rates was first discovered in non-firearm contexts like asphyxiation by domestic gas,[29] but it is especially promising for reducing firearm suicide, the "most common method of suicide for all demographic groups in the United States."[30] The science behind means restriction debunks widely held misconceptions about gun access and suicide and opens the door for effective policy interventions.[31]

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22. INST. OF MED. OF THE NAT'L ACADS., *supra* note 21, at 233–42 (describing mood stabilizers, anti-psychotic medications, antidepressants, and anxiolytic medications).

23. *Id.* at 244.

24. *Id.* at 244–50 (describing different types of psychotherapies and their efficacy).

25. *Id.* at 331.

26. *Id.* at 331–62.

27. Richards et al., *supra* note 21, at 3.

28. *See infra* Part I.B.1.

29. *See infra* notes 92–109.

30. INST. OF MED. OF THE NAT'L ACADS., *supra* note 21, at 280.

31. *See* Andrew Conner et al., *Public Opinion About the Relationship Between Firearm Availability and Suicide: Results from a National Survey*, 168 ANNALS INTERNAL MED. 153 (2018) (reporting that just 15.4% of survey respondents, and 6.3% of those who were gun owners, agreed that "[h]aving a gun in the home increases the risk of suicide" despite data showing a correlation between gun access and suicide risk).

Various firearm laws are informed by research regarding means restriction, including the three discussed in this Article: waiting periods, safe storage requirements, and firearm dispossession when someone presents an extreme risk of self-harm.[32] As with virtually all forms of weapons regulation, after the Supreme Court's 2008 decision in *District of Columbia v. Heller*,[33] these policies have been challenged on Second Amendment grounds.[34] Before June 2022, courts overwhelmingly upheld them under the prevailing methodology, which considered both history and contemporary costs and benefits.[35] Modern research, of course, was critical to the evaluation of costs and benefits.

In June 2022, however, the Supreme Court decided *Bruen* and redirected courts to focus solely on historical comparisons when assessing Second Amendment impingements.[36] As this Article shows, looking to historical suicide policy to rationalize modern suicide-prevention laws runs headlong into an obstacle: given the scientific context at the time, early American society misunderstood mental illness and suicide.[37] Approaches to suicide at the Founding were archaic and misguided by today's scientific standards, which, in turn, inform modern approaches.

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32. *See infra* Part I.B.2. These three do not exhaust the regulatory landscape. The categorical disqualification of firearm possession for those involuntarily committed to a mental hospital has a suicide prevention angle, *see* 18 U.S.C. § 922(g)(4), as do various policies that do not present clear Second Amendment problems like voluntary self-prohibition, *see, e.g.*, IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS 13–25 (2020) (discussing "Donna's Law," which facilitates the ability of people to limit their ability to possess firearms). Other laws may, in practice, act like the three explored in this Article, such as permit-to-purchase laws that impose a de facto waiting period. *See, e.g.*, Md. Shall Issue, Inc. v. Moore, 86 F.4th 1038, 1049 (4th Cir. 2023) (striking down Maryland's permit-to-purchase law, under which an applicant "must wait up to thirty days" to obtain the required permit), *reh'g en banc granted*, No. 21-2017 (L), 2024 WL 124290 (4th Cir. Jan. 11, 2024).

33. 554 U.S. 570 (2008) (holding that the Second Amendment protects a right to keep and bear arms for private purposes like self-defense).

34. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1473 (2018) (describing the state of Second Amendment case law in the first eight years after *Heller*).

35. *See infra* Part I.B.3.

36. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26–31 (2022) (describing the role of historical analogy in evaluating gun laws).

37. *See infra* Part II.

The primary societal lens for suicide when the Second Amendment was enacted in 1791 was not science but religion. That lens, in turn, affected how people and the law addressed suicide: largely through religious ritual and criminalization.[38] The medical and scientific community had less influence, and the influence it did have resulted in unsound approaches. The most prominent doctor in the country in the Founding era, for example, considered mental illness to be a blood-borne disease that could be cured by intentionally bleeding patients, followed by other dangerous interventions like ingesting emetics, opium, and mercury.[39] All the while, suicidal people were frequently locked up in jails or, in the 1800s, asylums.[40] Over time, the societal approach to suicide followed a process of secularization, decriminalization, and ultimately medicalization. For constitutional purposes, *Bruen* freezes the history of suicide in the middle of that process.

The disconnect between today's and the Founding generation's suicide interventions has implications for post-*Bruen* jurisprudence and legal theory. At a basic level, this Article raises questions about *Bruen*'s framing around persisting "general societal problem[s]"[41] and how the Court impliedly "attributes wisdom to the past while denying it to modern lawmakers."[42] Suicide has always existed and has always been viewed as a serious societal problem, but against a backdrop of historical misconceptions it would be absurd to invalidate modern laws because of their absence at the Founding. *Bruen*'s approach of comparing the hows and whys of modern and historical policies is fraught when applied to suicide prevention, given that the reasons for historical policies would be rightly rejected on scientific grounds today.[43]

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38. *See* Part II.A.

39. *See infra* notes 287–324 and accompanying text.

40. *See infra* notes 253, 365–70 and accompanying text.

41. *Bruen*, 597 U.S. at 26.

42. *See* Joseph Blocher, *Safe Storage and Self-Defense from* Heller *to* Bruen, 102 N.C. L. REV. (forthcoming 2024) (manuscript at 25) (on file with *Minnesota Law Review*).

43. *Bruen*, 597 U.S. at 29 ("While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.").

By exposing the impact of changed understandings of mental illness and suicide on gun policy, and how that intersects with *Bruen*'s test, this Article also speaks to both how *Bruen* might be applied more coherently and future research needs. In light of the incomparability of today's scientific context and that of the Founding, combined with the fact that guns were not as commonly used to commit suicide at the Founding,[44] for *Bruen* sensibly to be applied to today's firearm suicide-prevention laws courts must zoom out beyond suicide-prevention measures to the sorts of gun-violence interventions that early American generations *did* appreciate.[45] Meanwhile, in addition to social, legal, and technological change, scholars and courts need to consider scientific context when assessing and implementing *Bruen*'s approach, and that raises a host of new research questions.[46]

This Article considers medical understandings of mental illness at the Founding and how they were both incorrect and subordinated to religious beliefs.[47] These aspects of the relevant scientific history are hardly exhaustive. This Article does not, for example, delve into how statistical innovations opened the door to current understandings.[48] The history of science, like the history of suicide, is an immense topic, and this Article only scratches the surface. Hopefully, this Article's analysis will raise new questions and prompt more research.

This Article proceeds in three parts. Part I introduces *Bruen*'s doctrinal innovation, which requires winding the clock back to bygone eras to see if there was a historical tradition of firearm regulation analogous to today's firearms laws; it then discusses both the scientific basis for firearm suicide laws and how *Bruen* unsettles the prior judicial consensus that they were constitutional. Part II discusses the dominant religious paradigm for understanding suicide at the Founding and the correspondingly primitive scientific understanding of mental health and suicide, which led to now-obsolete "solutions," both legally and medically. Part III then sets out implications for Second Amendment doctrine and research, including by highlighting

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44. *See infra* notes 357–58 and accompanying text.

45. *See infra* Part III.A.

46. *See infra* Part III.B.

47. *See infra* Part II.

48. As noted below, *infra* Part III.B, this is a research question I plan to explore in a subsequent article.

two additional areas of progress—neuroscience and statistical science—that inform modern gun policy.

## I. THE SECOND AMENDMENT AND SUICIDE PREVENTION

The Supreme Court transformed Second Amendment doctrine in *New York State Rifle & Pistol Ass'n v. Bruen*, disrupting more than a decade's worth of lower court precedent.[49] The Court's primary innovation was to require the government to demonstrate that challenged regulations are consistent with the Nation's "historical tradition of firearm regulation" in order to survive Second Amendment scrutiny.[50] Much has been written about how *Bruen*'s novel test has led to unpredictable outcomes in the lower courts.[51] *Bruen*'s potential impact on suicide-prevention laws, however, has received less attention.[52] This Part briefly sets forth the *Bruen* test, describes relevant suicide-prevention laws and their scientific basis, and surveys Second Amendment litigation involving those laws. That exposition highlights a gaping unanswered question in Second Amendment scholarship and case law: How did the Founding generation understand and address mental illness and suicide?

### A. FROM *HELLER* TO *BRUEN*

The Supreme Court in *Bruen* struck down a century-old permitting policy in New York for carrying concealed handguns,[53] forcing policymakers in parts of the country with New York–

49. Well over 1,000 Second Amendment challenges were decided between *District of Columbia v. Heller* and *Bruen*. *See* Ruben & Blocher, *supra* note 34, at 1435.

50. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

51. *See, e.g.*, Blocher & Ruben, *supra* note 3, at 99 ("*Bruen*'s novel approach . . . enabled judicial subjectivity, obfuscation, and unpredictability."); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 122–45 (2023) (describing *Bruen*'s implementation in the lower courts).

52. One notable exception is Andrew Willinger & Shannon Frattaroli, *Extreme Risk Protection Orders in the Post-*Bruen *Age: Weighing Evidence, Scholarship, and Rights for a Promising Gun Violence Prevention Tool*, 51 FORDHAM URB. L.J. 157, 187–205 (2023), which considers *Bruen*'s impact on red flag laws.

53. *Bruen*, 597 U.S. at 11–12, 71 (describing and striking down challenged provision).

style laws to reconsider their public carry policies.[54] The most significant aspect of *Bruen*, however, was the Court's announcement of a new approach to deciding Second Amendment cases that affects the constitutionality of all weapons regulations, including those seeking to reduce suicide.[55]

After *District of Columbia v. Heller* established an individual right to keep and bear arms for private purposes like self-defense,[56] lower courts "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny."[57] Under that conventional approach, most challenged gun policies were upheld.[58] But *Bruen* announced that the post-*Heller* test had "one step too many."[59] In particular, the majority took issue with the second step courts applied in Second Amendment cases: evaluating "the regulatory means the government has chosen and the public-benefits end it seeks to achieve."[60] Instead, the *Bruen* majority introduced a new test that drew heavily on originalist considerations:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important

54. *See id.* at 98 (Breyer, J., dissenting) (discussing the Court's tally of "shall issue" versus "may issue" jurisdictions).

55. *See id.* at 26–31 (majority opinion) (setting forth the majority's methodology).

56. District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (referring to self-defense as the "central component" of the Second Amendment right (emphasis omitted)); *see also* McDonald v. City of Chicago, 561 U.S. 742, 767–68 (2010) (reiterating *Heller*'s conclusion about self-defense as the "central component" of the right to keep and bear arms and incorporating that right to apply against state and local governments (emphasis omitted) (quoting *Heller*, 561 U.S. at 599)).

57. *Bruen*, 597 U.S. at 17; *see also* Ruben & Blocher, *supra* note 34, at 1473 (analyzing post-*Heller* Second Amendment case law).

58. *See* Ruben & Blocher, *supra* note 34, at 1473 (discussing success rates). The doctrine applied by the lower courts was borrowed from First Amendment case law. *See* Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65, 69 (2023) ("Taking their cue from the Court's reliance on free speech analogies, lower courts looked first to see whether the activity was covered by the text of the Second Amendment and, if so, applied an appropriate level of scrutiny to determine whether it was protected—an analysis consciously borrowed from First Amendment doctrines.").

59. *Bruen*, 597 U.S. at 19.

60. Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019) (quoting Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)).

> interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[61]

Despite *Bruen*'s statement that the prevailing two-step doctrine had "one step too many,"[62] courts have interpreted the new *Bruen* test to impose two distinct analytical steps.[63] First, courts are to "interpret[] the plain text of the Amendment as historically understood," and second, courts must "determin[e] whether the challenged law is consistent with this Nation's historical tradition of firearms regulation, as 'that delimits the outer bounds of the right to keep and bear arms.'"[64] While both post-*Bruen* steps raise numerous questions, scholarly attention has focused primarily on the second step, the history-and-tradition prong, which is also the primary focus of this Article.

As lower courts have interpreted the second step of the *Bruen* test, "a court must identify the 'societal problem' that the challenged regulation seeks to address and then ask whether past generations experienced that same problem and, if so, whether those generations addressed it in similar or different ways."[65] Of particular relevance to the question of suicide-prevention laws, *Bruen* provided that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century," then a "lack of a distinctly similar historical regulation addressing that problem" weighs against constitutionality; likewise if "earlier generations addressed the societal problem . . . through materially different means," that also weighs against constitutionality.[66] Meanwhile, for "cases implicating unprecedented societal concerns or dramatic technological changes" or "modern regulations that were unimaginable at the founding," *Bruen* signaled that courts could deploy a looser, "more nuanced approach."[67]

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61. *Bruen*, 597 U.S. at 17 (citing Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961)); *see also id.* at 24 (reiterating this test nearly verbatim).

62. *Id.* at 19.

63. *See, e.g.,* United States v. Rahimi, 61 F.4th 443, 453 (5th Cir. 2023) ("*Bruen* articulated two analytical steps . . . .").

64. Antonyuk v. Chiumento, 89 F.4th 271, 300 (2d Cir. 2023) (quoting *Bruen*, 597 U.S. at 19).

65. *Id.* at 301 (quoting *Bruen*, 597 U.S. at 26).

66. *Bruen*, 597 U.S. at 26.

67. *Id.* at 27–28.

The *Bruen* majority acknowledged that deciding Second Amendment cases pursuant to its new test "will often involve reasoning by analogy—a commonplace task for any lawyer or judge."[68] Though the majority declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment" for the purposes of analogical reasoning,[69] the *Bruen* majority derived "at least two metrics" from prior case law: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[70] The Court elaborated, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[71]

*Bruen*'s novel approach invites numerous fundamental questions. Among other things, the Court failed to explain the level of generality at which its test should be applied.[72] In the suicide context, for example, should the "societal problem" or "societal concern" be framed as "suicide" or "gun suicide" or "gun violence"? It would be incongruous to define the problem broadly (e.g., suicide prevention) but then require the government to put forward a narrow regulatory tradition (e.g., regulations *on firearms* aimed at suicide prevention).[73] Societal problems and related regulations should be pitched at the same level of generality. As this Article shows, moreover, there is a related unanswered question even once the level of generality is set: Why should we be limited by past regulatory traditions animated by striking misunderstandings?

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68. *Id.* at 28.

69. *Id.* at 29.

70. *Id.*

71. *Id.* (alteration in original).

72. *See infra* Part III.A (discussing the level of generality problem); s*ee also* Blocher & Ruben, *supra* note 3, at 160–68 (discussing the importance of selecting an appropriate level of generality).

73. *See* Blocher & Ruben, *supra* note 3, at 167–68 (discussing the need for symmetric levels of generality); Joseph Blocher & Reva Siegel, *Gun Rights and Domestic Violence in* Rahimi*—Whose Traditions Does the Second Amendment Protect?*, BALKINIZATION (Oct. 31, 2023), https://balkin.blogspot.com/2023/10/gun-rights-and-domestic-violence-in.html [https://perma.cc/8V2X-N3VN] (discussing how courts have manipulated levels of generality, applying different levels when defining the societal problem versus regulations, when striking down gun laws after *Bruen*).

This Article returns to such level-of-generality issues later.[74] First, the Article describes how modern science has informed gun laws focused on suicide prevention, as well as how such laws have fared in Second Amendment litigation.

## B. SUICIDE-PREVENTION LAWS AND SECOND AMENDMENT CHALLENGES

Gun violence prevention laws do not seek solely to reduce the toll of interpersonal gun violence, like homicides and assaults. They also seek to address the most common form of firearm fatality—suicide—which "all admit . . . is a serious public-health problem, especially among persons in otherwise vulnerable groups."[75] This Section begins with some data on the problem of firearm suicide and why researchers have concluded that tailored restrictions on firearm access could reduce it. The Section then describes several gun laws targeting suicide reduction and how those laws have fared in Second Amendment litigation.

### 1. The Science Behind Means Restriction

More than half of the people who commit suicide in the United States do so with guns, despite the fact that a relatively small number of attempts involve a gun.[76] The reason, in large part, is that firearms are far more lethal than other commonly used methods a suicidal person might use: in other words, attempting suicide with a firearm has a much higher case-fatality rate than other methods.[77] According to provisional data, 26,993

74. *Infra* Part III.A.

75. Washington v. Glucksberg, 521 U.S. 702, 730 (1997).

76. *See* COOK & GOSS, *supra* note 20, at 42 ("Even though relatively few suicide attempts involve a self-inflicted gunshot, guns account for fully half of all completed suicides."); Conner et al., *supra* note 20 (estimating that fewer than 5 percent of suicide attempts involve a firearm, but that just over 50 percent of suicide deaths involve a firearm).

77. Conner et al., *supra* note 20; Matthew Miller et al., *The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43 ANNALS EMERGENCY MED. 723, 723 (2004) ("[F]irearms and hanging accounted for only 10% of [suicide] acts, but 67% of fatalities."); J. Michael Bostwick et al., *Suicide Attempt as a Risk Factor for Completed Suicide: Even More Lethal Than We Knew*, 173 AM. J. PSYCHIATRY 1094, 1098 (2016) (finding that those who attempted firearm suicide were 140 times more likely to kill themselves); Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 AM. J. PUB. HEALTH 1885, 1888 (2000) (finding a firearm fatality rate of 82.5%, compared to 1.5% for drug/poison ingestion,

people in the United States took their lives by self-inflicted gun shots in 2022, the highest number since the Centers for Disease Control and Prevention began recording suicide data in 1968.[78] Moreover, 2022 was not an outlier year; the gun suicide rate—7.65 per 100,000 in 2022—has been on an upward trajectory since 2006,[79] further cementing the United States' status as the country with the highest gun suicide rate in the world.[80]

As one public health researcher has commented, "[i]f every life is important, and if you're trying to save people from dying by gunfire, then you can't ignore nearly two-thirds of the people who are dying."[81] Firearm suicide presents a harm that calls for distinctive interventions when compared with other firearm harms like homicide.[82]

Scientific literature shows that many if not most of people who commit suicide are dealing with some sort of mental illness

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41.5% for poison by gas, 61.4% for suffocation/hanging, 65.9% for drowning/submersion, 1.2% for cutting/piercing, and 34.5% for jumping).

78. JOHNS HOPKINS, *supra* note 19.

79. *Id.*

80. *See* Champe Barton & Daniel Nass, *Exactly How High Are Gun Violence Rates in the U.S., Compared to Other Countries?*, TRACE (Oct. 5, 2021), https://www.thetrace.org/2021/10/why-more-shootings-in-america-gun-violence-data-research [https://perma.cc/G7Y9-QU2S] (noting that the U.S. was the "global leader" in gun suicides).

81. Madeline Drexler, *Guns & Suicide: The Hidden Toll*, HARV. PUB. HEALTH 26 (2013), https://www.hsph.harvard.edu/wp-content/uploads/2016/06/Guns-Suicide-PDF-.pdf [https://perma.cc/8X9Z-PZBU] (quoting Matthew Miller, Co-Director of the Harvard Injury Control Research Center); Jennifer Mascia, *Should Suicides Be Considered 'Gun Violence'?*, TRACE (Dec. 13, 2021), https://www.thetrace.org/2021/12/gun-violence-suicide-rate-data-shooting-deaths [https://perma.cc/9NE6-XR4K] ("[G]un reform advocates argue that gunshot wounds do the same damage regardless of intent, and for that reason suicide cannot be separated from the nation's gun death toll.").

82. To be sure, homicides and suicides are not always distinct: Each year, more than 1,000 people die during murder-suicides. *See* J. Logan et al., *Characteristics of Perpetrators in Homicide-Followed-by-Suicide Incidents: National Violent Death Reporting System—17 US States, 2003–2005*, 168 AM. J. EPIDEMIOLOGY 1056, 1056 (2008) ("Although homicide-suicide incidents are relatively rare events, they account for approximately 1,000–1,500 violent deaths annually or 20–30 violent deaths weekly."). Most murder-suicides involve use of a firearm. *Id.* at 1060 ("The most common weapon used by homicide-suicide perpetrators, regardless of the victims involved, was a firearm."). This Article's analysis may have less relevance for murder-suicide than isolated suicides.

or substance use disorder at the time of their death.[83] Unlike at the Founding, suicide today is understood "as a manifestation of medical and psychological anguish."[84] It is now generally accepted, as the Supreme Court has noted, that "[t]hose who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders."[85] Addressing mental illness is, of course, essential. Over the past century, various forms of psychotherapy have been developed. For example, cognitive behavioral therapy (CBT) is a therapeutic intervention that has proven effective "in treating mental disorders such as depression and post-traumatic stress disorder that increase suicide risk."[86] One cognitive-behavioral intervention, dialectical behavioral therapy (DBT), was developed by Marsha Linehan in 1993 and "is now considered the 'gold-standard' treatment for borderline personality disorder and empirical support has mounted for the efficacy of DBT in reducing suicide attempts."[87] Moreover, medications have been developed that can help some patients. These include mood stabilizers, anti-psychotic medications, and anti-depressant medications.[88] Yet it remains true, as the Supreme Court recognized a quarter century ago, that "depression is difficult to diagnose" and "physicians and medical professionals often fail to respond adequately to seriously ill patients' needs."[89] Moreover, other barriers exist to effective treatment.

83. *See supra* note 21 (discussing studies that range in terms of how many suicides are associated with mental illness or substance use disorder); *see also* Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 101 (1985) (observing the "operative presumption that those who attempt suicide are mentally ill").

84. Compassion in Dying v. Washington, 79 F.3d 790, 854 (9th Cir. 1996) (Beezer, J., dissenting); *see also* Washington v. Glucksberg, 521 U.S. 702, 730 (1997) (citing this language from Judge Beezer's opinion); *infra* Parts II.A–B (discussing understandings of suicide at the Founding).

85. *Glucksberg*, 521 U.S. at 730.

86. INST. OF MED. OF THE NAT'L ACADS., *supra* note 21, at 245–46.

87. Andre J. Plate & Amelia Aldao, *Emotion Regulation in Cognitive-Behavioral Therapy: Bridging the Gap Between Treatment Studies and Laboratory Experiments*, *in* THE SCIENCE OF COGNITIVE BEHAVIORAL THERAPY 107, 110 (Stefan G. Hofmann & Gordon J.G. Asmundson eds., 2017).

88. *See* INST. OF MED. OF THE NAT'L ACADS., *supra* note 21, at 233–42 (reviewing various medications' apparent impacts on suicide risk).

89. *Glucksberg*, 521 U.S. at 731.

Psychotherapy can be expensive.[90] Additionally, "[p]sychiatric drugs can take over a month to take effect, and finding the right combination and doses to best treat an individual can take some months."[91]

Given the challenges of treating mental illness, and the urgency of reducing suicide, medicine and therapy are not—and cannot be—the sole interventions. Moreover, scientists have shown that there are other ways to address suicide that do not rely on medical or psychiatric treatment. Means restriction is one of them.

The research supporting means restriction as a method for suicide prevention first arose in the context of reducing suicidal means other than firearms, like domestic gas asphyxiation.[92] Asphyxiation from high carbon monoxide concentrations in domestic gas was the leading cause of suicide in the United Kingdom between the early 1900s and the early 1960s.[93] Suicidal people would close windows and turn on unlit gas jets, or, as American writer Sylvia Plath did in her London flat in 1963, stick their heads into turned-on, unlit ovens.[94] Death by this method was "almost entirely due to carbon monoxide poisoning," with coal-based gas at the time containing about fourteen percent carbon

90. Although price points vary by state and provider, "[t]he average cost of psychotherapy in the U.S. ranges from $100 to $200 per session." Ashley Lauretta, *How Much Does Therapy Cost in 2024?*, FORBES HEALTH (Feb. 7, 2024), https://www.forbes.com/health/mind/how-much-does-therapy-cost [https://perma.cc/SC7J-ZNNU]. Additionally, even patients with insurance "likely have a copay for therapist visits." *Id.* If an insured patient sees an "out of network" therapist, they may have to pay the entire fee out of pocket. *Id.*

91. INST. OF MED. OF THE NAT'L ACADS., *supra* note 21, at 244.

92. *See* Deborah Azrael & Matthew J. Miller, *Reducing Suicide Without Affecting Underlying Mental Health*, *in* THE INTERNATIONAL HANDBOOK OF SUICIDE PREVENTION 637, 637–41 (Rory C. O'Connor & Jane Pirkis eds., 2d ed. 2016) (discussing methods of suicide and their relationship to means restriction).

93. R.D.T. Farmer, *Suicide by Different Methods*, 55 POSTGRADUATE MED. J. 775, 777–78 (1979); *accord* N. Kreitman and S. Platt, *Suicide, Unemployment, and Domestic Gas Detoxification in Britain*, 38 J. EPIDEMIOLOGY & CMTY. HEALTH 1, 1 (1984) (further developing Farmer's findings).

94. ANNE STEVENSON, BITTER FAME: A LIFE OF SYLVIA PLATH 296 (1989) ("The smell of gas was unmistakable. Forcing open the door to the kitchen, they found Sylvia sprawled on the floor, her head on a little folded cloth in the oven. All the gas taps were full on.").

monoxide.[95] After the introduction of oil-based gas, and then natural gas, however, the carbon monoxide content plummeted, rendering gas asphyxiation much less fatal.[96]

Contemporaneous with the drop in carbon monoxide levels in home gas, researchers noticed that suicide rates declined.[97] Norman Kreitman, who studied the connection between carbon monoxide poisoning and suicide, documented an increase in suicide by other means among men and women aged fifteen to twenty-four, but the dramatic decrease in home gas suicides dwarfed those increases.[98] Meanwhile, some age groups, like the elderly, experienced especially pronounced suicide rate declines.[99] Kreitman observed that "the close temporal association between the declining [carbon monoxide] content of domestic gas and the fall in suicides due to this agent while those from other causes have followed a quite different trend, lead to the conclusion that there is a direct causal relationship between the two phenomena."[100]

Kreitman's subsequent work highlighted how the experience in Britain was anomalous when compared to other European countries where carbon monoxide poisoning was not a primary means of suicide.[101] He also observed that unemployment—a social condition usually correlated with increased suicide rates—rose by about fifty percent at the same time suicide rates dropped by thirty-four percent between 1961 and 1971, implying that the impact of the means restriction at issue (reduced access to carbon monoxide) may have been even greater than observed at first glance.[102] The usual research focus at the time was on the relationship between suicide, on the one

95. Kreitman & Platt, *supra* note 93, at 1; Norman Kreitman, *The Coal Gas Story*, 30 BRIT. J. PREVENTIVE & SOC. MED. 86, 87 (1976) [hereinafter *Coal Gas Story*].

96. Kreitman & Platt, *supra* note 93, at 1.

97. *Coal Gas Story*, *supra* note 95, at 88–89.

98. *Id.* at 88.

99. *Id.*

100. *Id.* at 92.

101. Kreitman & Platt, *supra* note 93, at 3 ("It seems, then, that in relation to the other countries of Europe, as analysed by Sainsbury *et al*, or with respect to the group of developed countries examined by Boor, the United Kingdom is conspicuously anomalous . . . ." (footnotes omitted)).

102. *Id.*

hand, and psychiatric morbidity or social factors, on the other.[103] Kreitman concluded that "[i]t would appear that an additional variable—namely, availability of method—may now have to be added."[104]

Subsequently, researchers observed similar effects in different parts of the world following the removal of common suicidal means. One set of studies, for example, evaluated the effects of removing access to highly toxic pesticides on suicide rates in South Asia. Globally, pesticide poisoning, not firearm discharge, is the most common means of suicide.[105] This was true of Sri Lanka, which "had one of the highest suicide rates in the world" in the 1990s.[106] After the Sri Lankan government imposed bans on highly toxic pesticides frequently used for suicide, however, far fewer people died by pesticide ingestion and the overall suicide rate dropped by fifty percent.[107]

When Kreitman conducted his studies, he commented that "[v]irtually nothing is known" about *why* limiting access to suicidal means brings down suicide rates in light of alternative means, but he suggested possible explanations:[108]

> There is no shortage of exits from this life; it would seem that anyone bent on self-destruction must eventually succeed, yet it is also quite possible, given the ambivalence (or multivalence) of many suicides, that a failed attempt serves as a catharsis leading to profound psychological change. For others it may be that the scenario of suicide specifies the use of a particular method, and that if this is not available actual suicide is then less likely.[109]

Subsequent studies started to fill in the gaps. One strand of research has explored the role of impulsiveness through interviews with people who have seriously considered or attempted suicide.[110] Those studies suggest that "the interval between deciding on suicide and actually attempting was 10 [minutes] or

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103. *Id.* at 5.

104. *Id.*

105. José M. Bertolote et al., *Suicide, Suicide Attempts and Pesticides: A Major Hidden Public Health Problem*, 84 BULL. WORLD HEALTH ORG. 260, 260 (2006) (extrapolating from recent analyses that "pesticide ingestion [is] the most common method of suicide on a worldwide basis").

106. Azrael & Miller, *supra* note 92, at 643.

107. *Id.*

108. *Coal Gas Story*, *supra* note 95, at 92.

109. *Id.*

110. *See* Azrael & Miller, *supra* note 92, at 638–39 (compiling and analyzing various surveys and interviews).

less for 24-74% of attempters."[111] For example, a study of 153 nearly lethal suicide attempts among thirteen to thirty-four-year-olds in Houston, Texas, found that twenty-four percent of study participants spent less than five minutes between the decision to attempt and the attempt.[112] Other research has explored whether, after a suicide attempt, the attempter is likely to eventually die by suicide.[113] A systematic review of ninety studies reported that only about seven percent of suicide attempters went on to die by suicide, while about seventy percent of suicide attempters did not reattempt.[114]

The upshot of these studies is that common, highly lethal means of suicide are now understood to be independent predictors of suicide, separate from any underlying psychological or social causes. As Deborah Azrael and Matthew Miller summarize,

> The argument that restricting access to a highly lethal method can save lives rests on three well-established observations. First, many suicidal crises are fleeting. . . .
>
> Second, the method people use in suicidal acts depends, to a vital extent, on the method's ready availability, over and above—and perhaps even independent of—the attempter's assessment of a method's intrinsic lethality. . . .
>
> Third, the prognosis if one survives a suicide attempt is excellent . . . . [F]ewer than 10% of people who attempt suicide and live later go on to die by suicide.[115]

And what is true of gas and pesticide ingestion is also true of firearms, which are not immune from these scientific findings. Case-control studies that compare suicide victims have shown that the risk of suicide is more than four times greater for those living in homes with guns.[116] Studies that compare suicide and

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111. *Id.* at 639.

112. Thomas R. Simon et al., *Characteristics of Impulsive Suicide Attempts and Attempters*, 32 SUICIDE & LIFE-THREATENING BEHAV. 49, 52 (2001).

113. Azrael & Miller, *supra* note 92, at 639.

114. David Owens et al., *Fatal and Non-Fatal Repetition of Self-Harm*, 181 BRIT. J. PSYCHIATRY 193, 195 fig.1 (2002) (reporting a 23% median for non-fatal self-harm in studies lasting longer than four years and an almost 7% median for fatal self-harm in studies lasting longer than nine years).

115. Azrael & Miller, *supra* note 92, at 638–39 (citations omitted).

116. *See, e.g.*, Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis*, 160 ANNALS INTERNAL MED. 101 (2014) (analyzing sixteen studies in a meta-analysis and concluding that "[a]ccess to firearms is associated with risk for completed suicide"); *see also* Arthur L.

gun ownership rates across states and cities have reached similar findings,[117] as have recent cohort studies that follow gun owners and non-gun owners over time.[118] Indeed, the connection between gun ownership rates and firearm suicide rates is so pronounced that the latter is used as a proxy for calculating the former.[119]

Similar to the studies of domestic gas ingestion in Great Britain and pesticide ingestion in South Asia, studies also show that access to a firearm leads to an increased risk of suicide with relatively little comparative decrease in the risk of suicide by

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Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 471 (1992) (indicating an adjusted odds rate of suicide of 5.8 when a gun is kept in the home relative to households with no guns); David A. Brent et al., *Firearms and Adolescent Suicide: A Community Case-Control Study*, 147 AM. J. DISEASES CHILD. 1066, 1066 (1993) (discussing the relationship between firearms and adolescent suicide).

117. *See, e.g.*, Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?*, 178 AM. J. EPIDEMIOLOGY 946, 948 (2013) (analysis of state-level data shows that "[h]igher rates of firearm ownership are strongly associated with higher rates of overall suicide and firearm suicide, but not with nonfirearm suicide"); Matthew Miller et al., *Firearms and Suicide in US Cities*, 21 INJ. PREVENTION e116, e116 (2015) (analysis of city-level data reaching the same conclusion); Augustine J. Kposowa, *Association of Suicide Rates, Gun Ownership, Conservatism and Individual Suicide Risk*, 48 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1467, 1473 (2013) ("[F]irearm availability at the state level is a significant risk factor for individual suicide."); Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA INJ., INFECTION, & CRITICAL CARE 1029, 1031 (2007) ("Overall, people living in high-gun states were 3.8 times more likely to kill themselves with firearms.").

118. *See, e.g.*, David M. Studdert et al., *Handgun Ownership and Suicide in California*, 382 NEW ENG. J. MED. 2220, 2220 (2020) ("Handgun ownership is associated with a greatly elevated and enduring risk of suicide by firearm."); Matthew Miller et al., *Suicide Deaths Among Women in California Living with Handgun Owners vs Those Living with Other Adults in Handgun-Free Homes, 2004-2016*, 79 JAMA PSYCHIATRY 582, 582 (2022) ("[T]he rate of suicide among women was significantly higher after a cohabitant of theirs became a handgun owner compared with the rate observed while they lived in handgun-free homes.").

119. *See* Megan S. Kang & Elizabeth A. Rasich, *Extending the Firearm Suicide Proxy for Household Gun Ownership*, 65 AM. J. PREVENTIVE MED. 916, 917 (2023) (observing that firearm suicide rates are "considered the best available proxy for household gun ownership rates").

other means.[120] The net effect is an increase in the risk of suicide overall (i.e., by all methods combined).

2. Safe Storage, Waiting Periods, and ERPOs

In light of the scientific findings, it is unsurprising that reducing firearm access for people at risk of self-harm, in addition to reducing interpersonal violence, has motivated firearm regulations. Three such policies are safe storage laws, waiting periods, and extreme risk protection orders. This Subsection describes each in turn.

*a. Safe Storage Laws*

Safe storage laws require gun owners to store firearms in a way that makes them inaccessible to others. Some, referred to as "child access prevention" (CAP) laws, are geared toward children. More than 1,100 youths die by suicide or unintentional shootings each year, and in about ninety percent of those suicide deaths, the firearm used is from the youth's home.[121] The American Academy of Pediatrics, the largest professional association of pediatricians in the United States, thus recommends that parents with firearms keep them locked, unloaded, and separate from ammunition,[122] but data suggests fewer than one out of three parents with guns comply with that advice.[123] Researchers have concluded that even a modest uptick in safe storage could substantially reduce firearm suicide rates for youths.[124]

An example of a CAP law is Michigan's, passed in 2023. Michigan's safe storage law includes felony liability if a gun

120. *E.g.*, Catherine W. Barber & Matthew J. Miller, *Reducing a Suicidal Person's Access to Lethal Means of Suicide: A Research Agenda*, 47 AM. J. PREVENTIVE MED. S264, S266 (2014) (surveying prior research and concluding that "[t]he higher suicide risk is driven by a higher risk of firearm suicide, with no difference in non-gun suicides").

121. Michael C. Monuteaux et al., *Association of Increased Safe Household Firearm Storage with Firearm Suicide and Unintentional Death Among US Youths*, 173 JAMA PEDIATRICS 657, 658 (2019) (defining youths as children and adolescents aged 0–19).

122. BRIGHT FUTURES: GUIDELINES FOR HEALTH SUPERVISION OF INFANTS, CHILDREN, AND ADOLESCENTS, AM. ACA. PEDIATRICS 331 (4th ed. 2017).

123. Monuteaux et al., *supra* note 121, at 658 ("[O]nly 3 of 10 adults in households with children report storing all guns unloaded and locked up.").

124. *Id.* at 661 ("[Y]outh firearm suicide rates may decline substantially if at least 20% of households with youth moved from storing guns unlocked to locking all guns . . . .").

owner fails to properly store a gun and that gun is used by a minor to kill or injure themselves or others.[125] The law mandates that gun owners keep firearms in locked containers or unloaded with a trigger lock or cable lock if they are in a home where minors under eighteen could access them.[126] Though the immediate impetus for the legislation was the mass shooting at Oxford High School on November 30, 2021, in which a fifteen-year-old killed four students and wounded seven other people,[127] the bill sponsors made clear it also was aimed at protecting adolescents from committing suicide.[128]

Other safe storage laws are cast more broadly than limiting children's access to firearms. For example, some impose a storage obligation to prevent gun possession by firearm-disqualified adults or impose a general requirement that gun owners store unattended firearms safely. Vermont's 2023 safe storage law, An Act Relating to Implementing Mechanisms to Reduce Suicide and Community Violence, is broader than Michigan's in that it is triggered if un-stored guns are accessed by *either* children or other prohibited people under specified circumstances.[129] The bill was motivated, in part, by the fact that about ninety percent of firearm deaths in Vermont are due to suicide,[130] not homicide, and the "[s]uicide [rate] among Vermont men and boys is 50 percent higher than the national average."[131] More than half the

125. *See* MICH. COMP. LAWS § 28.429(4) (2024).

126. *See id.* § 28.429(2).

127. *See* Jonathan Oosting & Janelle D. James, *Whitmer Signs Gun Safe Storage, Background Checks; House OKs 'Red Flag,'* BRIDGE MICH. (Apr. 13, 2023), https://www.bridgemi.com/michigan-government/whitmer-signs-gun-safe-storage-background-checks-house-oks-red-flag [https://perma.cc/DN8B-DRJP].

128. *See* Joey Cappelletti, *Whitmer Signs Stricter Gun Background Check, Storage Bills*, AP NEWS (Apr. 13, 2023), https://apnews.com/article/gun-legislation-msu-whitmer-safe-storage-4495e4ab951ddf7fb6b16a4a37e58260 [https://perma.cc/H9KR-BKBX] ("Supporters have also said that the safe storage requirements [in the bill] will protect teenagers from using firearms in suicide attempts.").

129. *See* H. 230, Gen. Assemb., 2023–2024 Reg. Sess. § 3 (Vt. 2023) ("A person who stores or keeps a firearm within any premises that are under the person's custody or control, and who knows or reasonably should know that a *child or prohibited person* is likely to gain access to the firearm shall be [subject to criminal penalties]." (emphasis added)).

130. *Id.* § 1(1)–(2).

131. *Id.* § 1(3).

country—at least twenty-six states and the District of Columbia—have adopted a safe storage law.[132]

*b. Waiting Periods*

Waiting periods slow down the acquisition of firearms by a set number of days. One upshot of such a delay is to provide more time to complete a background check, supplementing the three-day period permitted under federal law.[133] But that is not the only goal of waiting periods. As noted above, researchers have found that suicide attempts are often impulsive.[134] Waiting periods address that impulsivity, "creat[ing] a 'cooling off' period that reduces violence by postponing firearm acquisitions until after a visceral state has passed."[135] According to one analysis, "[w]aiting periods . . . lead to a 7–11% reduction in gun suicides (depending on the control variables used in the specification), which is equivalent to 22–35 fewer gun suicides per year for the average state."[136] Other studies have similarly found that waiting periods may reduce firearm suicides.[137]

In 2023, both Colorado and Vermont enacted waiting periods,[138] which now exist in eleven states and the District of

132. *Child Access Prevention & Safe Storage*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/child-access-prevention-and-safe-storage [https://perma.cc/T2GL-BARY].

133. The three-day allowance for completing a background check under federal law results in what is sometimes called the "Charleston Loophole." *See Which States Have Closed or Limited the Charleston Loophole?*, EVERYTOWN FOR GUN SAFETY (Jan. 4, 2024), https://everytownresearch.org/rankings/law/charleston-loophole-closed-or-limited [https://perma.cc/V884-DY7J] ("The Charleston Loophole is a dangerous gap in the federal system that allows gun sales to proceed after three business days, even if the background check has not yet been completed.").

134. *See supra* notes 110–12 and accompanying text.

135. Michael Luca et al., *Handgun Waiting Periods Reduce Gun Deaths*, 114 PROC. NAT'L ACAD. SCIS. 12162, 12162 (2017).

136. *Id.* at 12163.

137. *See Effects of Waiting Periods on Suicide*, RAND (Jan. 10, 2023), https://www.rand.org/research/gun-policy/analysis/waiting-periods/suicide [https://perma.cc/N4E8-H9TC] (surveying studies of waiting periods' effect on suicide rates).

138. *See* COLO. REV. STAT. § 18-12-115 (2023); VT. STAT. ANN. tit. 13, § 4019a (2023).

Columbia.[139] Colorado's law imposes a three-day waiting period.[140] As the Colorado General Assembly explained, "[d]elaying immediate access to firearms by establishing a waiting period for receipt of firearms can help prevent impulsive acts of firearm violence, including homicides and suicides."[141] The Vermont legislation likewise imposed a three-day waiting period.[142] Other states impose longer delays on acquisition, ranging up to fourteen days.[143]

*c. Extreme Risk Protection Orders*

Finally, Extreme Risk Protection Order (ERPO) laws, also known as red flag laws, have quickly gained popularity as a tailored way to remove firearms from people who present a risk of harm to themselves or others.[144] ERPOs received bipartisan support in the first major federal gun control law in a quarter century, the Bipartisan Safer Communities Act of 2022 (BSCA), which among other things, provided $750 million in federal funding to support state implementation and establishment of ERPO laws.[145]

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139. *Waiting Periods*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/waiting-periods [https://perma.cc/GW4Q-LTP7].

140. COLO. REV. STAT. § 18-12-115(1)(a)(I) (2023).

141. H.B. 23-1219 74th Gen. Assemb., Reg. Sess. § 1(2)(a) (Colo. 2023). "The law requiring a three-day delay between buying and receiving a firearm — an attempt to curtail impulsive violence and suicide attempts — puts Colorado in line with nine other states, including California, Florida, and Hawaii." Jesse Bedayn, *Colorado Governor Signs 4 Gun Control Bills*, PBS NEWS HOUR (Apr. 28, 2023), https://www.pbs.org/newshour/politics/colorado-governor-signs-4-gun-control-bills [https://perma.cc/QLB4-3VFM].

142. VT. STAT. ANN. Tit. 13, § 4019a(a) (2023) ("A person shall not transfer a firearm to another person until 72 hours after the licensed dealer facilitating the transfer is provided with a unique identification number . . . .").

143. *See Waiting Periods*, *supra* note 139 (compiling various states' waiting periods); *see also infra* notes 169–78 and accompanying text (discussing the ten-day waiting period in California).

144. *See generally* Willinger & Frattaroli, *supra* note 52, at 187–205 (discussing state ERPO laws in light of *Bruen*); Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020) (doing the same in a pre-*Bruen* context).

145. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12003(a)(2)(I)(iv), 136 Stat. 1313, 1325 (2023) (permitting states to use certain federal grants to fund ERPO programs); *id.* Div. B, Tit. 1. The BSCA was signed into law just days after the *Bruen* opinion was filed in June 2022. *See Understanding the Supreme Court's Gun Control Decision in* NYSRPA v. Bruen,

ERPO laws provide a way for designated individuals, such as family members, school administrators, or the police, to petition for the removal of a firearm from a person in crisis.[146] The specifics of these laws vary across states, with seven states allowing only law enforcement to petition for removal orders, while twelve states and the District of Columbia allow others such as family and household members to petition.[147] When such a petition is made, a court can issue an ERPO after a hearing that considers, among other things, the substantiality of the risk of harm to the gun possessor or others.[148] A person who is subject to an ERPO cannot lawfully purchase or possess guns while the order is in place.[149] The newness of ERPO laws and differences in their implementation across states (especially during the COVID-19 pandemic) means that researchers are just beginning to evaluate the effectiveness of ERPOs.[150] The early returns are promising, however, with respect to suicide prevention.[151]

Various aspects of ERPOs explain why they have become popular in recent years. For one thing, they are individualized,

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LEAGUE OF WOMEN VOTERS (July 12, 2022), https://www.lwv.org/blog/understanding-supreme-courts-gun-control-decision-nysrpa-v-bruen [https://perma.cc/6ERR-9M88] ("Two days after SCOTUS's ruling [in *Bruen*], President Biden signed bipartisan gun safety legislation, the *Bipartisan Safer Communities Act*, into law.").

146. *See* Caroline Shen, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683, 688 (2019) ("[ERPOs] are intended to provide community members with a formal legal process through which to prevent gun violence before it occurs.").

147. *See* Rachel Dalafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867, 874 (2021).

148. *Extreme Risk Laws*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/solutions/extreme-risk-laws [https://perma.cc/6MLP-7R2M] (providing an overview of ERPOs' nationwide prevalence and utility).

149. *See* Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 179, 188 ("Those whose guns are removed [due to an ERPO] also become ineligible to hold a permit, which is required to purchase or possess a firearm . . . .").

150. Willinger & Frattaroli, *supra* note 52, at 175–78 (describing the "nascent" stage of ERPO research).

151. *See* Swanson et al., *supra* note 149, at 203 (estimating that one suicide was averted for every ten to eleven gun seizures under Connecticut's ERPO law); Jeffrey W. Swanson et al., *Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law*, 47 J. AM. ACAD. PSYCH. & L. 188, 193 (2019) (estimating that one suicide was averted for every 10.1 gun seizures under Indiana's ERPO law).

targeting specific individuals, which reduces concerns that they would operate in an overbroad way like categorical firearm disqualifiers such as the federal felon-in-possession law.[152] They are also time-limited, usually ranging from one to two years, thereby avoiding a common critique of lifetime prohibitions. And they involve a civil, not criminal, process, thereby presenting less risk of exacerbating the current problem of mass incarceration.

In 2023, Minnesota enacted an ERPO law, and Michigan passed one that will go into effect in 2024.[153] Including Michigan, twenty-one states and the District of Columbia have passed ERPO laws.[154] Under the Minnesota law, an ERPO petition may be filed by a family or household member, a chief law enforcement officer, a city or county attorney, or a guardian.[155] Under the Michigan law, a petition may be filed by a spouse, former spouse, co-parent, significant other, household member, family member, guardian, law enforcement officer, or health care provider.[156]

3. Pre-*Bruen* Challenges to Suicide-Prevention Laws

Suicide-prevention policies like safe storage requirements, waiting periods, and ERPOs aim to make firearms less readily available to high-risk persons and thus have a solid empirical basis as suicide-prevention interventions, but the question after *Bruen* is whether they are historically grounded.[157] Before presenting independent research on the history of suicide-prevention efforts, it is helpful to set the stage with how courts have evaluated Second Amendment challenges to suicide-prevention laws up to this point.

Though it was *Bruen* that announced an exclusively historical test for Second Amendment cases, even before *Bruen* "historical meaning enjoy[ed] a privileged interpretive role in the Second Amendment context."[158] Indeed, lower courts regularly drew on originalism in Second Amendment cases; it simply was

152. *See* 18 U.S.C. § 922(g)(1).

153. MINN. STAT. § 624.7171 (2023); S.B. 83, 102d Leg., Reg. Sess. (Mich. 2023).

154. *See Extreme Risk Laws*, *supra* note 148.

155. MINN. STAT. § 624.7171, subdiv. 4(b) (2023).

156. S.B. 83, 102d Leg., Reg. Sess. § 5(2) (Mich. 2023).

157. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26 (2022); *supra* Part I.A.

158. United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011).

not the *only* modality of constitutional interpretation.[159] In light of that reality, pre-*Bruen* opinions regarding Second Amendment challenges to suicide-prevention laws help to show how the history of suicide and mental illness has influenced Second Amendment litigation.

The most important opinion addressing safe storage requirements before *Bruen* was *Jackson v. City & County of San Francisco*, out of the Ninth Circuit.[160] The challenged San Francisco ordinance provided that "[n]o person shall keep a handgun within a residence owned or controlled by that person unless . . . the handgun is stored in a locked container or disabled with a trigger lock" or "is carried on the person of an individual over the age of 18."[161] The plaintiffs argued that the ordinance was overbroad because it applied even when children were not present, to which the city responded that the policy also sought to prevent adult suicide.[162] Surveying the record, the Ninth Circuit upheld the policy under the pre-*Bruen* approach citing "ample evidence that storing handguns in a locked container reduces the risk of both accidental and intentional handgun-related deaths,

159. *See generally* Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post*-Heller *Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413 (2020) (discussing the relevance of historical analysis and analogy after *Heller* and open questions about the use of history in Second Amendment jurisprudence); *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (identifying and describing six forms of constitutional argument, including historical argument).

160. 746 F.3d 953 (9th Cir. 2014).

161. *Id.* at 958 (alteration in original) (quoting S.F., CAL., POLICE CODE art. 45, § 4512(a), (c) (2015)). The ordinance also contained an exception if a handgun was "under the control of a person who is a peace officer under [California law]." *Id.* at 958 n.1 (quoting S.F., CAL., POLICE CODE art. 45, § 4512(c)(2) (2015)). A violation of the law was punishable by up to six months of imprisonment and a fine of up to $1,000. *Id.* at 958 (quoting S.F., CAL., POLICE CODE art. 45, § 4512(e) (2015)).

162. *Id.* at 966 ("[The plaintiff] contends that [the ordinance] is over-inclusive because it applies even when the risk of unauthorized access by children or others is low, such as when a handgun owner lives alone. We reject this argument, because San Francisco has asserted important interests that are broader than preventing children or unauthorized users from using the firearms, including an interest . . . in reducing the number of handgun-related suicides . . . .").

including suicide,"[163] and only modestly burdens Second Amendment rights.[164] The opinion included no discussion of suicide history.

When the Supreme Court denied certiorari in *Jackson*, Justice Clarence Thomas, joined by Justice Antonin Scalia, dissented.[165] Thomas characterized the Ninth Circuit's decision as "questionable."[166] He expressly refused to "resolve th[e] dispute" about the appropriate methodology to apply in Second Amendment cases,[167] but complained that the Ninth Circuit "recognized that San Francisco's law burdened the core component of the Second Amendment guarantee, yet upheld the law."[168] Like the lower court opinion, Justice Thomas's dissent did not consider suicide history.

The first and most significant opinion regarding waiting periods before *Bruen* was *Silvester v. Harris*, also out of the Ninth Circuit.[169] In *Silvester*, the plaintiffs, who already owned a firearm or had a permit to carry one, challenged California's ten-day waiting period.[170] The challenged law was enacted in 1996 for two reasons: "to allow time for the [California] Department of Justice to do background checks" and "to provide a 'cooling off' period, especially for handgun sales."[171] California defended the waiting period as, among other things, an effective way to reduce suicide, citing three studies about the correlation between

163. *Id.*

164. *See* Blocher, *supra* note 42 (manuscript at 18–20) (discussing the Ninth Circuit's burden analysis).

165. Jackson v. City & County of San Francisco, 576 U.S. 1013, 1013 (2015) (Thomas, J., dissenting from denial of certiorari) (mem.).

166. *Id.*

167. *Id.*

168. *Id.*

169. 843 F.3d 816, 827 (9th Cir. 2016) ("[T]here has been no case law since *Heller* discussing the validity of firearm [waiting period laws], and . . . this is therefore a case of first impression.").

170. *Id.* at 818–19.

171. *Id.* at 824 (quoting CAL. S. COMM. ON CRIM. PRO., CAL. B. ANALYSIS S.B. 671, 1995–96 Reg. Sess. (Cal. 1995)). Some version of the law had been in place, however, since 1923, though the earlier versions, which ranged from one day to fifteen days, appear to have been enacted solely to allow sufficient time for background checks before adoption of an electronic background check system. *Id.* at 823–24.

waiting periods and lower rates of firearm suicide.[172] The Ninth Circuit upheld the law under intermediate scrutiny, crediting studies that "confirmed that firearm purchasers face the greatest risk of suicide immediately after purchase, but the risk declines after one week," and that waiting periods "correlate to reductions in suicides among the elderly."[173] The court concluded that these studies "confirm the common sense understanding that urges to commit violent acts or self harm may dissipate after there has been an opportunity to calm down."[174] The panel did not discuss suicide history, however, instead assuming, without deciding, that the law was not sufficiently longstanding to be presumptively lawful on the basis of history alone.[175]

Chief Judge Sidney Thomas concurred in the judgment but challenged the panel's assumption.[176] Rather, he opined that "waiting periods—which first appeared on the books in California in 1923—constitute a sufficiently longstanding condition or qualification on the commercial sale of arms to be considered presumptively lawful."[177] In this regard, he cited a number of similar laws that "existed in several states since the 1920s."[178] After *Bruen*, however, a regulatory legacy dating back a century may not be old enough; *Bruen* itself struck down a law dating to the 1910s.[179]

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172. Brief in Opposition on Petition for a Writ of Certiorari at *1–2, *2 n.1, *Silvester*, 843 F.3d 816 (No. 17-342) (first citing Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 JAMA 585 (2000); then citing Michael D. Anestis & Joyce C. Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 AM. J. PUB. HEALTH 2049 (2015); and then citing Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 NEW ENG. J. MED. 1583 (1999)).

173. *Silvester*, 843 F.3d at 828.

174. *Id.*

175. *Id.* at 826–27 ("We assume, without deciding, that the regulation is within the scope of the Amendment and is not the type of regulation that must be considered presumptively valid.").

176. *Id.* at 831 (Thomas, J., concurring).

177. *Id.*

178. *Id.* Thomas also argued that the court need not reach intermediate scrutiny because the law falls under the category of "laws imposing conditions and qualifications on the commercial sale of arms" that *Heller* blessed. *Id.* at 830 (quoting District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008)).

179. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 11 (2022).

Before *Bruen*, red flag laws were frequently assailed by commentators as infringing on the Second Amendment,[180] but "the more substantive and pressing concern [was] whether ERPOs violate[d] gun owners' due process rights."[181] Of the few Second Amendment challenges to red flag laws, *Hope v. State*, decided by a Connecticut appellate court, may have included the most in-depth analysis of the issue, which spanned just three paragraphs.[182] The court concluded that the Connecticut law

> does not implicate the second amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms. The statute is an example of the longstanding "presumptively lawful regulatory measures" articulated in *District of Columbia v. Heller*.[183]

The court did not cite any support for its conclusion about red flag laws being "longstanding."[184]

Pre-*Bruen* litigation regarding safe storage laws, waiting periods, and ERPOs thus does little to illuminate suicide history or its relevance to the Second Amendment after *Bruen*. Some judges assumed away the historical inquiry and others looked to twentieth century history that is belittled under *Bruen*'s approach. All courts, meanwhile, upheld these suicide-prevention laws when challenged after considering contemporary costs and benefits. The next Subsection considers how courts and litigants have approached Second Amendment challenges to suicide-prevention laws after *Bruen*.

### 4. Post-*Bruen* Challenges to Suicide-Prevention Laws

Under *Bruen*, the weighing of modern-day costs and benefits through tiered scrutiny can no longer insulate suicide-prevention laws from successful Second Amendment challenges. Rather, the government bears different burdens, including offering

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180. *See, e.g.*, Ivan Pereira, *Lawmaker Introduces 'Anti-Red Flag' Bill in Georgia to Combat Gun Control Proposals*, ABC NEWS (Jan. 15, 2020), https://abcnews.go.com/US/lawmaker-introduces-anti-red-flag-bill-georgia-combat/story?id=68299434 [https://perma.cc/CBC2-KKWK] (discussing the introduction of a law titled "Anti-Red Flag—Second Amendment Conservation Act").

181. Blocher & Charles, *supra* note 144, at 1291.

182. 133 A.3d 519 (Conn. App. Ct. 2016).

183. *Id.* at 524–25 (quoting *Heller*, 554 U.S. at 627 n.26).

184. *Id.* at 524.

a historical tradition comparable to the modern laws.[185] And the tradition must go back to the late 1700s or perhaps the 1800s.[186] This Subsection surveys the early post-*Bruen* litigation and case law on suicide-prevention laws. Safe storage laws have yet to produce any post-*Bruen* opinions as of January 2024,[187] so the analysis focuses on challenges to waiting periods and ERPOs.

On the same day that Colorado's waiting period went into effect, a gun rights organization challenged it as violating the Second Amendment in *Rocky Mountain Gun Owners v. Polis*.[188] Heeding *Bruen*'s mandate, the government made an extensive historical argument in its filings. Yet, though the Government's brief highlighted the modern-day problem of firearm suicide that largely motivated Colorado's enactment and discussed non-suicide-prevention laws it argued were analogous,[189] the briefing made no mention of suicide during the Founding Era or any subsequent historical period. Rather, the entirety of the historical discussion focused on historical regulations aimed at preventing interpersonal violence like homicides.

In addition to arguing about history in its own brief, the Government filed two declarations by eminent scholars about historical regulations.[190] In response, the plaintiffs likewise filed a declaration.[191] But neither the Government's nor the plaintiffs' declarations addressed historical understandings of suicide or historical suicide-prevention efforts. One declaration focused exclusively on the history of firearm homicides and mass murders

185. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

186. *Id.* at 82 (Barrett, J., concurring) (discussing the open question of whether the Second or Fourteenth Amendment should set the temporal focus after *Bruen*).

187. *See* Ruben et al., *supra* note 2. I am unaware of any safe storage opinions between the end of the Ruben, Smart & Rowhani-Rahbar study and January 2024.

188. *See* COLO. REV. STAT. § 18-12-115 (becoming effective on October 1, 2023); Complaint, Rocky Mountain Gun Owners v. Polis, No. 23-CV-02563, 2023 WL 8446495 (D. Colo. Nov. 13, 2023) (filed October 1, 2023).

189. *See, e.g.*, The Governor's Opposition to Plaintiffs' Motion for Preliminary Injunction at 1–3, 11, 19, *Rocky Mountain*, 2023 WL 8446495.

190. *See* Declaration of Robert Spitzer, *Rocky Mountain*, 2023 WL 8446495 [hereinafter Spitzer Decl.]; Declaration of Randolph Roth, *Rocky Mountain*, 2023 WL 8446495 [hereinafter Roth Decl.].

191. Declaration of Clayton Cramer, *Rocky Mountain*, 2023 WL 8446495 [hereinafter Cramer Decl.].

without mentioning suicide.[192] That analysis, of course, is relevant under *Bruen*'s test to the extent that waiting periods also seek to reduce impulsive acts of interpersonal violence. That declaration also considered historical technological limitations that, though framed as affecting firearm homicide rates, would logically affect impulsive acts of self-harm, too.[193] Another declaration mentioned both suicide and homicide prevention as modern-day policy rationales for waiting periods, but it did not discuss suicide in its historical analysis, which focused primarily on gun laws relating to intoxication and licensing.[194] Again, that analysis is relevant to the extent the government can make analogies to historical intoxication restrictions and licensing policies that imposed de facto waiting periods. The declaration submitted by the plaintiffs attempted to rebut the Government's evidence and did not reference suicide in its historical discussion.[195]

Unsurprisingly, considering the record, the district court in *Rocky Mountain Gun Owners* did not consider suicide history when denying a motion for a preliminary injunction.[196] Rather, the court based its ruling on other considerations. First, the court found that, as a textual matter, "the receipt of a paid-for firearm without delay—is not covered" by the text of the Second Amendment.[197] In the alternative, the court concluded that Colorado's waiting period was sufficiently analogous to the non-suicide-related regulatory tradition put forth by the Government to survive scrutiny under *Bruen*.[198] The court credited the

192. *See* Roth Decl., *supra* note 190.

193. *Id.* ¶ 16 (explaining that "muzzle-loading firearms could not be used impulsively unless they were already loaded for some other purpose," and that practicality required that "most owners stored their guns empty, cleaned them regularly, and loaded them anew before every use"); *id.* ¶ 17 ("The infrequent use of guns in homicides in colonial America reflected these limitations.").

194. *See* Spitzer Decl., *supra* note 190.

195. *See* Cramer Decl., *supra* note 191.

196. *See* Rocky Mountain Gun Owners v. Polis, No. 23-CV-02563, 2023 WL 8446495 (D. Colo. Nov. 13, 2023).

197. *Id.* at *8; *see id.* ("Even if purchasing a firearm could be read into the terms 'keep' or 'bear,' receipt of a firearm *without any delay* could not be, as the Founders would not have expected instant, widespread availability of the firearm of their choice."); *id.* at *10–11 (using language from *Heller* regarding the presumptive lawfulness of "laws imposing conditions and qualifications on the commercial sale of arms" to "reinforce[]" the finding about plain text (quoting *Heller*, 554 U.S. at 626–27, 627 n.26)).

198. *Id.* at *13–18.

Government's showing that impulsive shootings were uncommon at the Founding, relying on evidence of criminal gun use at the time.[199] And the court observed that, as a practical matter, Americans at the Founding had to wait between purchase and acquisition of a firearm because of the production process.[200] Thus, the court rejected the plaintiffs' effort to treat the case as one addressing a persistent societal problem for which "complete absence of similar Founding-era regulations addressing a problem that was familiar to the Founders means the [ ]Act is 'inconsistent with the Second Amendment.'"[201] Applying a looser analogical approach, the court found, among other things, that historical intoxication laws, like modern waiting periods, sought "to prevent individuals in a temporary impulsive state from irresponsibly using a firearm."[202] The case is currently on appeal to the Tenth Circuit.[203]

After *Bruen*, several state opinions from New York have addressed the constitutionality of ERPOs.[204] Since New York is the only state that regularly appears to submit trial court opinions to Westlaw,[205] it is difficult to know if similar litigation is happening in other states.[206] Andrew Willinger and Shannon Frattaroli recently surveyed the New York opinions and concluded that they "are all, ultimately, based on a due process — not a Second Amendment — analysis,"[207] similar to the pre-*Bruen*

199. *Id.* at *14 ("Professor Roth persuasively opined that '[p]ublic officials today are confronting a criminological problem that did not exist in the Founding Era, nor during the first century of the nation's existence.'" (alteration in original) (quoting Roth Decl., *supra* note 190, ¶ 48)).

200. *Id.*

201. *Id.* at *13 (quoting Motion for Temporary Restraining Order and Preliminary Injunction, *Rocky Mountain*, 2023 WL 8446495, at 9).

202. *Id.* at *18.

203. *See* Notice of Appeal, *Rocky Mountain*, 2023 WL 8446495 (filed Dec. 4, 2023).

204. *See* Willinger & Frattaroli, *supra* note 52, at 196–99 (discussing litigation).

205. *See* Ruben et al., *supra* note 2, at 25–26 (stating that, for the year following *Bruen*, the only state trial-court opinions in Second Amendment cases in the Westlaw library are from New York).

206. One appellate opinion exists concerning New Jersey's ERPO. *See In Re* P.L., No. A-2813-21, 2023 WL 4074022 (N.J. Super. Ct. June 20, 2023).

207. Willinger & Frattaroli, *supra* note 52, at 202; *see also id.* at 207 ("Interestingly, no court has yet analyzed an ERPO challenge directly under the *Bruen* test — in other words, asked whether a state ERPO law is justified because analogous laws exist from the relevant historical time period.").

case law.[208] Courts have emphasized the importance of the Second Amendment (relying on *Bruen*) and the corresponding need for robust process.[209] The only opinion that meaningfully delved into suicide history was *Hines v. Doe*.[210] In *Hines*, a litigant's spouse contacted law enforcement after he attempted suicide and, subsequently, his firearms were removed pursuant to an ERPO.[211] The judge consulted history to determine whether the litigant could "be disarmed solely because he attempted suicide."[212] The judge noted the historical criminalization of suicide as "self-murder" and the historical privileging of a person who intervened in-the-moment to stop a suicide,[213] relying heavily on the Supreme Court's analysis in *Washington v. Glucksberg*, a case about whether the Fourteenth Amendment protects a right to assisted suicide.[214] Based on that history, the court concluded that the government "may seize the weapons of a person about to commit suicide without violating the Second Amendment," but only for so long as the person "still presents a risk of suicide."[215] Determining whether a person currently presents a risk of suicide calls for a "fact intensive" inquiry into "probability and imminence."[216] The judge engaged in a colloquy with the litigant in which the judge advised the litigant that if he died by suicide it would "inflict . . . inextinguishable pain upon his wife," after which the judge perceived "a discernible alteration in [the man's] countenance."[217] In particular, the litigant exhibited, in the judge's words, "an expression that the court believes was a recognition that while suicide would allow him to escape his pain, it

208. *See supra* note 181 and accompanying text.

209. Willinger & Frattaroli, *supra* note 52, at 203 ("The New York cases suggest that *Bruen*'s only real contribution in this area is to remind courts about the importance of Second Amendment rights in the context of any gun-related deprivation and, potentially, to reinforce or strengthen a due process challenge.").

210. 184 N.Y.S.3d 578 (N.Y. Sup. Ct. 2023).

211. *Id.* at 580.

212. *Id.* at 582.

213. *Id.* at 583–84 (quoting N.Y. PENAL LAW § 35.10(4) for the proposition that the law permitted "[a] person acting under a reasonable belief that another person is about to commit suicide [to] use physical force upon that person to thwart the [suicide]" (alteration in original)).

214. *See* Washington v. Glucksberg, 521 U.S. 702, 710–16 (1997).

215. *Hines*, 184 N.Y.S.3d at 584.

216. *Id.*

217. *Id.* at 586.

would be in exchange for imposing terrible and prolonged heartache upon his wife."[218] The judge decided that the litigant was no longer suicidal and thus could not be disarmed consistent with the Second Amendment.[219]

After *Bruen*, courts have incorporated more history into their Second Amendment analysis of suicide-prevention laws than before *Bruen*. In *Hines*, the court considered the historical criminalization of suicide and the historical permissibility of intervening to stop in-progress suicide attempts but did not consider what *Bruen* refers to as the "why" of those historical approaches. And in *Rocky Mountain Gun Owners*, the court did not consider suicide history at all, instead drawing analogies to non-suicide history. The next Part fills some of the gaps by exploring the historical understanding of mental illness and suicide, and how it influenced contemporaneous approaches to suicide prevention.

## II. SUICIDE AND MENTAL ILLNESS IN ANGLO-AMERICAN HISTORY

Suicide has "concerned all cultures" for millennia.[220] America is no different; indeed, the first newspaper printed in America—on September 25, 1690—recounted a suicide on the front page, thus beginning a pattern of frequent newspaper complaints about how regular suicide was becoming.[221]

The history of suicide can be viewed through myriad lenses, each of which provides insights into how self-harm has been understood by society and thereby influenced policy. Thousands of

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218. *Id.*

219. *Id.* ("[B]ased upon the evidence before it, the court does not believe that Doe represents a clear and present danger to himself. Therefore, it is ordered that . . . the temporary order of protection is dissolved, and . . . that petitioner turnover to [Doe] his rifle and three shotguns . . . .").

220. Marzen et al., *supra* note 83, at 17.

221. RICHARD BELL, WE SHALL BE NO MORE: SUICIDE AND SELF-GOVERNMENT IN THE NEWLY UNITED STATES 16 (2012) (citing PUBLICK OCCURENCES, Sept. 25, 1690). Bell notes that American interest in suicide at the Founding is also reflected in the fact that one-third of all American novels published between 1789 and 1810 built plots around suicides. *Id.* at 60. The very first American novel, William Hill Brown's *The Power of Sympathy*, featured three characters contemplating suicide. *Id.* at 59. Overlooked in much newspaper coverage at the time was the frightening frequency of suicide among African Americans amidst the scourge of slavery. *See id.* at 201–46 (describing suicide in enslaved African American communities and its lack of newspaper coverage at the time).

analyses of suicide have been published over the past several centuries from different intellectual perspectives, often with little interdisciplinarity.[222] It would be impossible for a single article to fully contextualize the history of suicide.[223] This Article focuses on three strands of inquiry: why the Founding generation criminalized suicide, why the medical-scientific interventions at the Founding looked nothing like today's, and why some early interventions for in-progress suicide attempts were ineffective.

The analysis shows that the criminalization of suicide at the Founding cannot be divorced from the dominant religious paradigm through which mental illness and suicide were understood. Meanwhile, the scientific understanding of mental illness at the Founding was rudimentary—in fact, it was not even considered *mental* illness, but rather solely a manifestation of *somatic* illness. Medical understandings became more sophisticated into the 1800s but remained nowhere near where they are today. And other civic interventions—like the efforts of humane societies—were short-lived and ineffectual.

The focus on these historical perspectives is deliberate. As described above, today's societal approaches to suicide are intricately intertwined with secular medical and scientific findings.[224] Historical treatment of suicide, in contrast, is driven primarily by religious and moral considerations. This Part thus describes both perspectives as a historical matter, demonstrating not only how drastically times have changed but also how today's approaches were simply out of reach at the Founding.

### A. RELIGION AND CRIMINALIZATION

Before the rise of secular, scientific understandings, premodern societies often viewed suicide and mental illness through the lens of religion. They expressed concern that mental illness was a result of demonic possession and that evil spirits would be

222. *See* JOHN C. WEAVER, A SADLY TROUBLED HISTORY: THE MEANINGS OF SUICIDE IN THE MODERN AGE 11 (2009) (observing the "isolationism of disciplines dedicated to the investigation of suicide"); *id.* at 19 (describing the quantity of suicide studies).

223. *Cf. id.* at xiv ("To write at length about suicide is a foolhardy undertaking, I now realize, because the topic has received plenty of attention for over a century and a half.").

224. *Supra* Part I.B.1.

released upon an individual's self-destruction.[225] That general view was incorporated into early Christian teachings that "greatly dominated Western attitudes" and connected melancholy and suicide with the workings of the devil.[226] As one historian wrote, "[i]t was Satan, condemned to despair for eternity, who filled humans with desperation by distancing them from divine grace."[227] Influential Christian scholars such as Martin Luther thus linked their opposition to suicide to their opposition to the devil.[228] Though some cultures took different approaches, even sanctioning suicide,[229] American suicide history is related to the strong moral opposition to suicide that itself was rooted in the dominant Christian teachings of the time.

The first American newspaper article reporting a suicide, in 1690, provided a then-familiar explanation: "The Devil took Advantage of the Melancholly which he thereupon fell into . . . ."[230] Anecdotes relay people in the colonial era driving a stake through the heart of corpses after suicides to prevent the escape of evil spirits.[231] In 1767, Samuel Phillips, the founder of Phillips

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225. Daniel M. Crone, *Historical Attitudes Toward Suicide*, 35 DUQ. L. REV. 7, 7 (1996) ("Most of the ancient societies seemed to regard suicide with a horror that was often associated with fear of the evil spirits that suicide was believed to set loose."); *see* A.M. Foerschner, *The History of Mental Illness: From Skull Drills to Happy Pills*, INQUIRIES J. (2010), http://www.inquiriesjournal.com/articles/1673/the-history-of-mental-illness-from-skull-drills-to-happy-pills [https://perma.cc/2LUH-F3V8] ("Early man widely believed that mental illness was the result of supernatural phenomena such as spiritual or demonic possession, sorcery, the evil eye, or an angry deity and so responded with equally mystical, and sometimes brutal, treatments.").

226. Marzen et al., *supra* note 83, at 29.

227. MARZIO BARBAGLI, FAREWELL TO THE WORLD: A HISTORY OF SUICIDE 53 (Lucina Byatt trans., Polity Press 2015) (1938); *see also* JENNIFER MICHAEL HECHT, STAY: A HISTORY OF SUICIDE AND THE PHILOSOPHIES AGAINST IT 45–62 (2013) (discussing how, in medieval Christianity, suicide became viewed as connected to "the devil's temptations").

228. HECHT, *supra* note 227, at 60 ("In 1544, writing about a woman who had killed herself, Luther speculated that she had been possessed and that she might be considered a victim of the devil . . . .").

229. *See, e.g.*, Marzen et al., *supra* note 83, at 17 (discussing ancient Chinese and Indian approval of the suicide of widows).

230. PUBLICK OCCURENCES, Sept. 25, 1690, at 1 (spelling and capitalization in original).

231. BELL, *supra* note 221, at 19 (recounting how in the colonial era people would sometimes "driv[e] a stake through the heart of the corpse to prevent the escape of evil spirits," which "reflected the Puritan conviction that suicide was no ordinary species of homicide but a diabolical offense akin to witchcraft").

Academy in Andover, Massachusetts, explained that "[t]his first rebel [the Devil], is most highly gratify'd, when he can prevail with any Person to destroy his own life."[232] Ministers at the time regularly referred to suicide as a mortal sin or a "turn[ing] away from God."[233]

Given the intersection of morality and criminal law,[234] it is unsurprising that suicide was deemed not only an immoral act against God, but also a crime. In fact, the history of the criminalization of suicide makes that religious connection clear. In 673, in what is now England, an ecclesiastical prohibition on suicide was adopted at the Council of Hereford, a prohibition that was enforced through criminal laws.[235] That prohibition persisted through the centuries in England. In one of the oldest treatises on English Common Law, *On the Laws and Customs of England*, Henry de Bracton wrote in the thirteenth century that "[j]ust as a man may commit felony by slaying another so may he do so by slaying himself."[236] A penalty for committing suicide at the time was the forfeiture of property, real or personal, depending on the circumstances.[237] With time, the punishment for committing suicide ceased to be the forfeiture of real property, but the deceased (or, in practice, their estate) still forfeited

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232. *Id.* at 17 (emphasis omitted).

233. *Id.* at 18.

234. *Cf.* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (observing how criminal law declares "a formal and solemn pronouncement of the moral condemnation of the community"); United States v. Cordoba-Hincapie, 825 F. Supp. 485, 491 (E.D.N.Y. 1993) (Weinstein, J.) ("It was inevitable that the development of the criminal law, based as it is upon general and evolving societal mores, would track the development of prevailing views about moral wrongdoing.").

235. *See* Washington v. Glucksberg, 521 U.S. 702, 711 n.9 (1997) (citing GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 257 (1957)).

236. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 423 (George E. Woodbine ed., Samuel E. Thorne trans., 1968).

237. As the Supreme Court put it in *Glucksberg*:

> The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the King; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . [only] his movable goods [were] confiscated."

*Glucksberg*, 521 U.S. at 711 (alteration in original) (quoting 2 BRACTON, *supra* note 236, at 423–24).

personal property.[238] And because suicide was a felony, attempting it also was a crime that could result in the death penalty—"condemning a man to death for the crime of having condemned himself to death."[239]

Into the 1700s, "the leading legal jurists . . . continued to reiterate the religious wrongfulness of suicide" alongside the criminal sanctions accompanying it.[240] Matthew Hale explained that

> No man hath the absolute interest of himself but: 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. 2. The king hath an interest in him, and therefore the inquisition in case of self-murder is *felonicè & voluntariè seipsum interfecit and murderavit contra pacem domini regis* [feloniously and voluntarily killed and murdered himself against the peace of the lord king].[241]

As William Blackstone put it, suicide was

> [A] double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself.[242]

As a corollary to criminalizing suicide, the criminal law also criminalized aiding and abetting suicide.[243]

The religious-moral opprobrium and corresponding criminalization of suicide was adopted in the American colonies. A Massachusetts statute in 1661 criminalized the "damnable Practice" of suicide that showed "how far Satan doth prevail."[244] Those adjudicated to have committed suicide in sound mind "shall be buried in some Common high-way . . . and a Cart-load

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238. *See* Marzen et al., *supra* note 83, at 59.

239. A. ALVAREZ, THE SAVAGE GOD: A STUDY OF SUICIDE 46 (First American ed., Random House 1972) (1971); *see also id.* (recounting an anecdote of a man hanged in London for attempting suicide).

240. Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Civil Right*, 46 S.U. L. REV. 150, 164 (2018).

241. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN 411–12 (1736).

242. 4 WILLIAM BLACKSTONE, COMMENTARIES 189.

243. Later, when suicide itself was decriminalized, assisting suicide became a separate substantive offense. *See* Washington v. Glucksberg, 521 U.S. 702, 774 n.13 (1997) (Souter, J., concurring in judgment) (describing how New York made assisting suicide a crime after suicide was decriminalized because the state could no longer rely on a theory rooted in accomplice liability).

244. *See* BELL, *supra* note 221, at 18.

of Stones laid upon the Grave as a Brand of Infamy."[245] Massachusetts was not alone; colonial legislatures in New Hampshire, Rhode Island, New Jersey, Maryland, Virginia, South Carolina, and North Carolina also followed the English practice of punishing willful suicide, or *felo-de-se*, with a dishonorable burial, such as in a potter's field, as well as forfeiture of goods.[246] And the strong religious underpinnings of criminalization remained. One of the earliest American pamphlets on suicide, *The Guilt, Folly, and Sources of Suicide*, published in 1805 by Samuel Miller, a Presbyterian pastor, set out to show as the "first object . . . that Suicide is really a crime."[247] As Miller explained, "suicide is a sin against God—against human nature—against our fellow men—against all the dictates of enlightened reason—and against all our interests and hopes beyond the grave."[248] Suicide leads to damnation in the "prison of eternal despair, where the worm dieth not, and the fire is not quenched."[249]

The historical process for investigating and punishing suicides is bizarre by today's standards and practices. Because "[t]he United States Constitution provides people with the rights to be present for, to testify in, and to participate in their own defense," the state does not initiate prosecutions against deceased persons.[250] But at the Founding, in the case of a suspected

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245. *Id.* (alteration in original).

246. *Id.* at 19; *see also Glucksberg*, 521 U.S. at 712–13 (discussing the early Rhode Island law).

247. SAMUEL MILLER, THE GUILT, FOLLY, AND SOURCES OF SUICIDE: TWO DISCOURSES 15 (1805).

248. *Id.*

249. *Id.* at 38 (emphasis omitted).

250. Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1539 (2020) (footnotes omitted). "Indeed, in the federal system, when criminally convicted persons die before having an opportunity to [be heard on] appeal, the conviction is vacated." *Id.* at 1539 n.521 (citing Durham v. United States, 401 U.S. 481, 483 (1971) (Blackmun, J., dissenting) (per curiam) ("[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.")); *see also* Lori R. Dickerman, *Disposition of a Federal Criminal Case When Defendant Dies Pending Appeal*, 13 U. MICH. J.L. REFORM 143, 143–44 (1979) (discussing the rule that "when a defendant in a federal criminal case died pending appellate review of his conviction, all proceedings against him, including the indictment, abated," and positing that "[t]he rationale for the rule derived from the belief that the goals of the criminal law—incapacitation, rehabilitation, retribution, and deterrence—would not be furthered by upholding the deceased's conviction" (footnote omitted)).

suicide, a coroner, accompanied by an inquest jury, investigated the deceased's death and the jury issued a posthumous verdict regarding whether a suicide had taken place; if so, the punishment included forfeiture of goods.[251] If the inquest jury determined that the deceased was insane at the time of the act, however, there would be no forfeiture.[252] All the while, the early criminal justice system was deployed in another way: to detain the seriously mentally ill. As Carlton Larson has recounted, "in eighteenth-century America, justices of the peace were authorized to 'lock up' 'lunatics' who were [too] 'dangerous to be permitted to go abroad.'"[253]

Over time, "jurors attributed increasing numbers of likely suicides to accident, misfortune, misadventure, or, most commonly of all, mental derangement (*non compos mentis*)."[254] Thus, "no more than 20 percent of inquest verdicts after 1780" were for *felo-de-se*, compared with "more than 80 percent of decisions before 1720."[255] Richard Bell, who wrote a thorough account of suicide at the Founding, attributed much of "this tidal shift in judgment" to "petty officials and reluctant volunteers . . . simply submitting to rising pressure from increasingly acquisitive neighbors eager to assume ownership of their loved ones' property."[256] The Supreme Court in *Glucksberg* more charitably credited the "growing consensus that it was unfair to punish the suicide's family for his wrongdoing."[257] The move away from forfeiture for suicides accelerated after the Revolution when four states outlawed forfeiture of property as a punishment for suicide.[258]

Yet even as "[s]tates moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public

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251. MILLER, *supra* note 247, at 68–69 (describing the jury's role and common law punishments in a case of suspected suicide).

252. *Id.* at 68 (encouraging jurors not to illegitimately declare a decedent's "lunacy").

253. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1377 (2009) (quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 329 (6th ed. 1774)).

254. BELL, *supra* note 221, at 20 (emphasis added).

255. *Id.*

256. *Id.*

257. Washington v. Glucksberg, 521 U.S. 702, 713 (1997).

258. BELL, *supra* note 221, at 20 (describing the law in New Jersey, Maryland, Virginia, and North Carolina).

wrong."[259] With time, leading commentators, influenced by enlightenment thinking, stopped referring to suicide as a sin,[260] and religion became relevant in a more familiar way. As historian John Carrier Weaver notes, "organized religion's enduring appeal for many intellectuals who wrote about suicide meant that spiritual considerations still infused leading scholarly attempts to make sense of the deed and to prevent it."[261] Intellectuals recommended "the consolations that clergy and faith might bring to people in despair" through the 1800s.[262] After 1900, general practitioners and psychologists "decisively challeng[ed] the clergy's healing services."[263]

This is not to say that religion fell away in the context of mental illness. Modern studies have shown the potential benefits of spirituality, including its important role in providing holistic, individualized mental healthcare.[264] Rather, the point is to highlight a story of change over time. "By the mid-nineteenth century, in Europe and the United States, secular perspectives had more or less displaced theological condemnation,"[265] and that process influenced the legal treatment of suicide. The secular perspectives were informed by science. As with other categories of history, however, the history of medical science is not static, something made clear in the next Section's discussion of early scientific understandings of mental illness and suicide.

### B. MEDICAL UNDERSTANDINGS

Founding-era doctors and researchers touted the strides medical science had made in the age of enlightenment. Benjamin Rush, for example, a prominent doctor and a signer of the

259. *Glucksberg*, 521 U.S. at 714.

260. WEAVER, *supra* note 222, at 23 ("[M]ost nineteenth-century commentators did not indict suicide as a sin.").

261. *Id.*

262. *Id.* at 60.

263. *Id.*

264. *See generally* Giancarlo Lucchetti et al., *Spirituality, Religiousness, and Mental Health: A Review of the Current Scientific Evidence*, 9 WORLD J. CLINICAL CASES 7620 (2021) (advocating for clinical awareness of patients' spiritual values).

265. WEAVER, *supra* note 222, at 23; *see also* Chang, *supra* note 240, at 168 (observing that once "the association between mental health treatment and suicide became more substantiated, the criminality of suicide became less defensible").

Declaration of Independence,[266] wrote in 1795 about how "medical practitioners have done more:—their knowledge, their zeal, and philanthropy, have penetrated the deep and gloomy abyss of death, and acquired fresh honours in his cold embraces."[267] Doctors like Rush expressed their hope that those suffering from mental illness "may find sympathy" and "relief from the kindness[] of every person."[268] The effort to medicalize mental illness was admirable against the backdrop of the moralizing described in the last Section.[269] And yet medical theories about causes of and solutions for mental illness and suicide were rooted in ideas that now seem hard to fathom—indeed, they did more harm than good.[270]

From the fifth century to not long before the Second Amendment's enactment, the dominant theory of physical and psychological disease was the "humoral theory," which maintained that "health was a function of the proper balance of four humors: blood, black bile, yellow bile, and phlegm (the classical humors or cardinal humors)."[271] Under this conception, depression, or as it was then known, "melancholy," was a result of an excess of black bile.[272] The medical understanding of depression under the humoral theory, as well as its solutions, was set forth in English

266. STEPHEN FRIED, RUSH: REVOLUTION, MADNESS, AND THE VISIONARY DOCTOR WHO BECAME A FOUNDING FATHER 162–63 (2018).

267. BELL, *supra* note 221, at 89 (emphasis omitted).

268. BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS, UPON THE DISEASES OF THE MIND 367 (1812).

269. *See supra* Part II.A. To be sure, this does not mean that medicine at the time was neatly separated from religion. As sociologist Paul Starr has observed, "[i]n the seventeenth and eighteenth centuries, it was common for the clergy to combine medical and religious services to their congregations (an 'angelical conjunction' Cotton Mather called it)." PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 39 (1982).

270. *Cf.* STARR, *supra* note 269, at 55 ("[T]he unbiased opinion of most medical men of sound judgment and long experience [was that] the amount of death and disaster in the world would be less, if all disease were left to itself.") (quoting JACOB BIGELOW, BRIEF EXPOSITIONS OF RATIONAL MEDICINE 41 (1858)).

271. *Humoral Theory*, AM. PSYCH. ASS'N: APA DICTIONARY OF PSYCHOLOGY (Apr. 19, 2018), https://dictionary.apa.org/humoral-theory [https://perma.cc/NF6V-MLMV].

272. George Dunea, Book Review, BRIT. MED. J., Aug. 18, 2007, at 351, 351 (reviewing ROBERT BURTON, THE ANATOMY OF MELANCHOLY (1621)); *see also Humoral Theory*, *supra* note 271 (noting that black bile was associated with melancholy).

scholar Robert Burton's famous 1621 book, *The Anatomy of Melancholy*.[273]

*The Anatomy of Melancholy* "explored at length the purported causes, symptoms, and cure of melancholy, and questioned the accepted position that those who commit suicide are eternally damned."[274] Burton attributed melancholy to a range of causes, both "supernatural" (including "God," "Devils," "Witches," and "Stars") and "natural" (including "our temperature . . . which we receive from our parents," "diet, retention and evacuation," "bad air," "solitariness," "immoderate exercise," "passions and perturbations of the mind," "imagination," "shame and disgrace," and "overmuch study").[275] Whatever the cause, the somatic effect was the "corruption of humours, which produce this [melancholy] and many other diseases."[276] Turning to solutions, Burton criticized "diabolical means" of addressing melancholy, like "spells" that are "commonly practised by the Devil and his Ministers, Sorcerers, Witches, Magicians, &c."[277] In contrast, the first recommended solution was prayer to God.[278] Subsequent solutions included interventions to supposedly rebalance the humors. "Purges" could be accomplished by consuming substances that caused either vomiting ("upward" purges) or diarrhea ("downward" purges).[279] In addition to purging, Burton recommended intentionally bleeding patients either by cutting or applying leeches.[280] Indeed, bloodletting was the first recommended medical intervention "[w]here the melancholy blood possesseth the whole body with the Brain"[281]:

> If the party's strength will not admit much evacuation in this kind at once, it must be assayed again and again : if it may not be conveniently taken from the arm, it must be taken from the knees and ancles, especially to such men or women whose hemrods or months have been

273. ROBERT BURTON, THE ANATOMY OF MELANCHOLY (Floyd Dell & Paul Jordan-Smith eds., New York Farrar & Rinehart 1927) (1621).

274. Marzen et al., *supra* note 83, at 31.

275. BURTON, *supra* note 273, at 157–282.

276. *Id.* at 210.

277. *Id.* at 381.

278. Burton considered whether "Shrines, Reliques, consecrated things, holy water, medals, benedictions, those divine amulets, holy exorcisms, and the sign of the Cross" could be helpful, but he ultimately recommended that a person "seek to God alone." *Id.* at 386, 388.

279. *Id.* at 574–80.

280. *Id.* at 584–85.

281. *Id.* at 600.

> stopped. If the malady continue, it is not amiss to evacuate in a part, in the forehead, & to virgins in the ancles, which are melancholy for love-matters ; so to widows that are much grieved and troubled with sorrow and cares : for bad blood flows in the heart, and so crucifies the mind. The hemrods are to be opened with an instrument, or horse-leeches, &c.[282]

By the 1700s, the humoral theory of medicine was becoming discredited,[283] but new theories and solutions reflected continuity with the humoral theory in fundamental ways. The state of medical science as relates to mental illness in the early days of the United States is captured by the writing of Rush, who became known as "the father of American psychiatry."[284] Indeed, Rush's image was adopted as the logo for the organization that would become the American Psychiatric Association.[285] Of particular relevance, Rush wrote the first American textbook on mental illness, *Medical Inquiries and Observations, upon the Diseases of the Mind*, in 1812.[286]

Rush's explanations of the causes of and solutions for mental illness, which Rush termed "derangement"[287] or "madness,"[288] often echoed the humoral theory that Rush rejected. Though discounting the humors, Rush "prove[d]" that derangement derives from "the blood-vessels of the brain."[289] As Rush explained, "madness . . . depends upon the same kind of morbid and irregular actions that constitutes other arterial diseases"[290] but affects "that part of the brain which is the seat of the mind."[291] Rush attributed all forms of "derangement" to blood

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282. *Id.* at 601 (spelling and punctuation in original).

283. Indeed, according to one review, "the 1000 year old humoral theory of disease . . . was beginning to be discredited" even when Burton wrote his tome on melancholy. Dunea, *supra* note 272, at 351.

284. *Dr. Benjamin Rush, "Father of American Psychiatry,"* PENN MED., https://www.uphs.upenn.edu/paharc/features/brush.html [https://perma.cc/7S88-3Z6K].

285. FRIED, *supra* note 266, at 502.

286. *See* RUSH, *supra* note 268; *see also* FRIED, *supra* note 266, at 451 (observing that *Medical Inquiries and Observations, upon the Diseases of the Mind* was "the first American book specifically on mental illness and addiction").

287. RUSH, *supra* note 268, at 11 ("I shall employ the term derangement to signify the diseases of all the faculties of the mind.").

288. *Id.* at 13 (observing that "intellectual derangement . . . has been called madness").

289. *Id.* at 17, 26–27.

290. *Id.* at 17.

291. *Id.* at 18.

vessels.[292] Rush explained his conclusion about mental illness being located in the blood vessels of the brain by referring to, among other things, "pain in the head";[293] similarity to "several of the forms of fever" associated with blood disease;[294] the "appearances of the brain after death from madness," which ranged from "the absence of every sign of disease" to "inflammation" and "softness";[295] and "the remedies which most speedily and certainly cure it."[296] To be sure, Rush also believed that mental illness "extends to the nerves"[297] but maintained that interventions should focus on the blood vessels.

Though the immediate, somatic cause of mental illness was a disease of the blood vessels, Rush attributed that disease to "causes" like "[i]ntense study" (especially of "the mechanical arts" like "discovering perpetual motion," "converting the base metals into gold," and "prolonging life to the antediluvian age")[298] and "[t]he frequent and rapid transition of the mind from one subject to another."[299] Moreover, he asserted that people could be more or less predisposed to mental illness,[300] such as those with "dark coloured hair" and "light coloured eyes."[301]

After describing the causes of "derangement," Rush explained how "the science of medicine has furnished a remedy."[302] In fact, Rush described various remedies, many of which mirror the solutions that were embraced under the humoral theory. Bloodletting was the first remedy prescribed, which results in "relief . . . by the loss of blood from the hæmorrhoidal vessels,

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292. *Id.* at 26–27.

293. *Id.* at 19.

294. *Id.* at 21.

295. *Id.* at 22–24.

296. *Id.* at 26.

297. *Id.* at 27.

298. *Id.* at 36–37.

299. *Id.* at 37.

300. *Id.* at 47.

301. *Id.* at 54–55. To be fair, not all of Rush's conjectures about predisposition to mental illness would be rejected out-of-hand today. He also opined that heredity could predispose someone to mental illness, *id.* at 47–55, which is still believed to be true. *See, e.g.*, *Looking at My Genes: What Can They Tell Me About My Mental Health?*, U.S. DEPT. OF HEALTH & HUM. SERVS (2020), https://www.nimh.nih.gov/health/publications/looking-at-my-genes [https://perma.cc/X489-9J7U] ("[A] growing body of research has found that certain genes and gene variations are associated with mental disorders.").

302. RUSH, *supra* note 268, at 97.

and by other accidental hæmorrhages."[303] "After bleeding, if it be required," doctors should move on to the other treatments like purges to "bring away black bile, and sometimes worms."[304] In addition, Rush recommended ingesting "aloes, jalap, and calomel," each of which is now known to be toxic,[305] to promote diarrhea.[306] He incorrectly attributed the resulting bloody stool to mental illness and not the toxic substances he prescribed.[307] Rush also recommended emetics to promote vomiting and thereby "remove morbid excitement from the brain, and thus restore the mind to its healthy state."[308] In addition to bloodletting, purges, and emetics, patients were to consume "little nourishment"[309] and drink warm sherry wine and diluted porter.[310] In the alternative, people suffering from mental illness should take opium, a "noble medicine" that "has many advantages over ardent spirits," like operating faster and "not pollut[ing] the breath."[311] Rush recommended warm baths, cold baths, and exercise,[312] which are straightforward enough; increased salivation is less so. Salivation could be caused by ingesting mercury to "abstract[] morbid excitement from the brain to the mouth" and thereby "chang[e] the cause of our patient's complaints, and fix[] them wholly upon his sore mouth," ultimately "restor[ing] the mind to its native seat in the brain."[313] Doctors should not converse with patients about their melancholy because that would only worsen the condition.[314]

In addition to discussing melancholy, Rush also included a chapter on "Derangement of the Passions," being love, grief, fear, anger, joy, envy, malice, and hatred, all of which can cause

303. *Id.* at 99.

304. *Id.* at 100.

305. *See, e.g.*, Xiaoqing Guo & Nan Mei, Aloe Vera*: A Review of Toxicity and Adverse Clinical Effects*, 34 J. ENV'T SCI. & HEALTH 77 (2016) (discussing the toxicity of aloe vera); Guenter B. Risse, *Calomel and the American Medical Sects During the Nineteenth Century*, 48 MAYO CLINIC PROC. 57 (1973) (discussing Rush's recommendations regarding jalap and calomel).

306. RUSH, *supra* note 266, at 100.

307. Risse, *supra* note 305, at 58–59.

308. RUSH, *supra* note 266, at 100.

309. *Id.* at 100.

310. *Id.* at 101.

311. *Id.* at 102–03.

312. *Id.* at 103–04.

313. *Id.* at 105.

314. *Id.* at 117.

somatic disease.[315] "The symptoms of love, when it creates disease, are, sighing, wakefulness, perpetual talking, or silence, upon the subject of the object beloved, and a predilection to solitude."[316] The disease affects women and men differently—"[i]t always renders a woman awkward, but it polishes the manners of men."[317] The disease arises acutely with "unsuccessful love," and the first-listed antidote is familiar: bleeding.[318] When it comes to disease caused by grief, the first remedy is opium "in liberal doses;"[319] bleeding and purging are listed third.[320] Joy, too, can become a disease, as can laughter, which Rush describes as "a convulsive disease, [which] sometimes induces a rupture of a blood-vessel in the lungs, spleen, or brain."[321]

In Rush's 367-page book, there are only a few sentences that could possibly be viewed as advocating means restriction. When discussing hypochondria, Rush observes "a disposition to inflict pain upon their bodies by means of wounds, in order to suspend anguish of mind. This should be prevented by removing all the instruments out of their way that are usually employed for that purpose."[322] Medical providers should then resort to interventions that "have proved to be successful," like bloodletting and "an unexpected sense of pain."[323] Rush observed that "[i]t has been said that persons who make unsuccessful attempts to destroy themselves, seldom repeat them. If this remark be true, I suspect it is only in those cases in which the attempt . . . has been accompanied with pain."[324]

Rush likely was the most prominent American doctor exploring the causes and solutions to mental illness, but he was not the only one. For example, Thomas Gale published a book in 1802 called *Electricity, or the Ethereal Fire, Considered*, which espoused "medical electricity" for curing a wide variety of

315. *Id.* at 314–46.

316. *Id.* at 315.

317. *Id.*

318. *See id.* Rush goes on to list other "remedies" including finding a new lover and "dwell[ing] upon all the bad qualities, and defects" of the former partner. *Id.* at 316.

319. *Id.* at 319–20.

320. *Id.* at 321.

321. *Id.* at 338–40.

322. *Id.* at 127–28.

323. *Id.* at 128.

324. *Id.* at 130–31.

ailments, including mental illness.[325] Gale complained that bleeding only offered "temporary relief," but "strong electric shock" can more effectively "restore an equilibrium in the circulations."[326] Gale "found, by experience, that gentle shocks through every part of the system upon the nerves, and through the stomach, and down the back of the head, upon the top of the head, through the brain to the feet, have assisted in restoring a person to the use of reason."[327] He recounted the story of a woman who became "gloomy and melancholy" while caring for her child.[328] To cure her condition—likely postpartum depression—Gale "got her to the machine, when [he] passed some very light shocks in all the before mentioned directions."[329] He then "alternated light shocks, with wine, diluted brandy, &c." and "soon . . . all that gloominess of mind was dispelled."[330]

In the mid-1800s, some prominent researchers cast doubt on the efficacy of bloodletting for curing medical ailments.[331] Pierre Charles Alexandre Louis, a French doctor "considered the founder of modern epidemiology," was in the forefront of that effort.[332] Louis's *Research on the Effects of Bloodletting in Some Inflammatory Diseases* was published in French in 1828 but then expanded into a book, translated into English, and published in the United States in 1836.[333] In it, Louis compared the results of seventy-seven patients who had been bled at different times in order to treat pneumonia.[334] He found that those who were bled later in the disease had a higher survival rate than those who

325. T. GALE, ELECTRICITY, OR THE ETHEREAL FIRE, CONSIDERED 70–71 (1802).

326. *Id.* at 124.

327. *Id.* at 125.

328. *Id.* at 126.

329. *Id.* at 127.

330. *Id.*

331. *See* STARR, *supra* note 269, at 56 (noting that by the 1850s "Rush was repudiated").

332. THEODORE H. TULCHINSKY & ELENA A. VARAVIKOVA, THE NEW PUBLIC HEALTH 12 (3d ed. 2014).

333. P. CH. A. LOUIS, RESEARCHES ON THE EFFECTS OF BLOODLETTING IN SOME INFLAMMATORY DISEASES, AND ON THE INFLUENCE OF TARTARIZED ANTIMONY AND VESICATION IN PNEUMONITIS (1836); *see* Alfredo Morabia, *Pierre-Charles-Alexandre Louis and the Evaluation of Bloodletting*, 99 J. ROYAL SOC'Y MED. 158, 158–59, 160 n.5 (2006) (discussing Louis's experiments with bloodletting).

334. *See* Morabia, *supra* note 333, at 158.

were bled early in the disease, a finding he concluded was "startling and apparently absurd."[335] Though Louis did not discount entirely the usefulness of bloodletting, he concluded that its salutary effects were limited.[336] Such research eventually convinced the medical community that bloodletting was ineffective.

In opposition to Rush's theory, some doctors looked to other anatomical causes besides blood disease for mental illness. Jean-Etienne-Dominique Esquirol (1772–1840), another influential French doctor, "championed a theory that lodged 'mental life solely in the nervous system,'"[337] and many in the medical community similarly came to view mental illness as related to a breakdown of the nervous system (hence, "nervous breakdown").[338] To be sure, *some* forms of mental illness, like epilepsy and dementia, have connections to neurological disorders.[339] But throughout the 1800s, the list of perceived neurological disorders was quite different than doctors accept today. For example, a common diagnosis beginning in 1886 was "neurasthenia," whose "[c]ommon mental symptoms were insomnia, lack of concentration, depression, fears and irritability."[340]

Only beginning in the late 1800s and into the 1900s—likely too late for *Bruen*'s purposes—did researchers like Sigmund Freud begin to acknowledge the psychological determinants of suicidal behavior.[341] Of course, scientific progress did not stop

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335. LOUIS, *supra* note 333, at 9.

336. *Id.* at 13 ("Thus, the study of the general and local symptoms, the mortality and variations in the mean duration of pneumonitis, according to the period at which bloodletting was instituted ; all establish narrow limits to the utility of this mode of treatment.").

337. WEAVER, *supra* note 222, at 35 (quoting JAN GOLDSTEIN, CONSOLE AND CLASSIFY: THE FRENCH PSYCHIATRIC PROFESSION IN THE NINETEENTH CENTURY 156 (1987)).

338. *See From Nerves to Neuroses*, SCI. MUSEUM (June 12, 2019), https://www.sciencemuseum.org.uk/objects-and-stories/medicine/nerves-neuroses [https://perma.cc/3PSG-MY8F] (discussing the popularization of the term "nervous breakdown" to describe a medical disorder).

339. *See id.* (discussing how German neurologists of the early 1900s came to "distinguish[] neurological diseases from neuroses").

340. Ruth E. Taylor, *Death of Neurasthenia and Its Psychological Reincarnation: A Study of Neurasthenia at the National Hospital for the Relief and Cure of the Paralysed and Epileptic, Queen Square, London, 1870–1932*, 179 BRIT. J. PSYCHIATRY 550, 550 (2001).

341. *Id.* For one example, see Sigmund Freud, *On the Grounds for Detaching a Particular Syndrome from Neurasthenia Under the Description 'Anxiety*

there. American researchers "would take the lead" from their French counterparts in suicide studies in the mid-1900s.[342] As John Carrier Weaver has described, "[c]ontemporary political, academic, and medical research currents in the United States furthered an abundance of innovative studies" with the assistance of a "surge of statistical manuals."[343] As a result of increasing scientific innovation, the new medicines, therapies, and interventions, discussed above, were established.[344] Of course, scientific progress will continue, disrupting today's understandings and surfacing new ones.

### C. ON-THE-SPOT SUICIDE INTERVENTIONS

As recounted in the prior Sections, Americans at the Founding morally condemned and criminalized suicide in ways we do not today. They also pursued medical interventions on the basis of archaic theories about mental illness. The history helps to explain why we should not expect means restriction at the Founding: the scientific know-how that informs today's policies, and the secular paradigm that animates today's policymaking, did not exist. This Section will highlight one additional aspect of suicide prevention history that comes closer to means restriction, though it was pursued for nonscientific reasons and ultimately scrapped. In particular, humane societies in early America sought to interrupt suicides as they were happening.

Early American press reporting left an impression of a sharp increase in suicides, which, in turn, alarmed many "Americans of status and standing."[345] Those Americans, including Rush, interpreted the apparent jump in suicides as a troublesome reflection of the disintegration of the American community.[346] At the time, there was a broad "interest in private benevolence," with "as many as two thousand new charities" established in New

*Neurosis'* (1894), *reprinted in* 3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 90 (James Strachey ed. & trans., 1962).

342. WEAVER, *supra* note 222, at 23, 62.

343. *Id.* at 62–63.

344. *See supra* Part I.B.1.

345. BELL, *supra* note 221, at 12.

346. *Cf. id.* ("[M]ore and more Americans of status and standing now perceived a strong and binding link between the alarming frequency of suicides described in the early national press and the individualistic and disintegrative impulses of this budding capitalist society.").

England alone between 1770 and 1820.[347] One type of charity that emerged, modeled after European foundations with the same name, was the humane society.[348] Humane societies mobilized to save lives, including by intervening in suicide attempts.[349] Historian Richard Bell has suggested that the intentions of those in humane societies were not purely benevolent; they also were "a means to reassert [elites'] position atop the social pyramid" at a time when "many of the customary ties of deference [were] under strain."[350]

The humane societies were located primarily in seaports and focused much of their effort on resuscitating drowning victims.[351] They would place medicine boxes with emetics and smelling salts near waterways, along with "custom-designed grappling devices" to remove bodies from the water.[352] And they would advertise various revival techniques like "re-warming to combat hypothermia and chest compressions and tracheotomies to restore respiration."[353] Intended beneficiaries of these efforts included seamen who fell into the water as well as others attempting suicide.

The focus on drowning reflected the fact that it was a major means of committing suicide at the time, along with asphyxiation by hanging and poisoning.[354] Humane societies also advertised ways to disrupt these other paths to self-destruction, such as by making people vomit after ingesting poison.[355] Other methods were less sound but reflected the contemporaneous state of medicine, such as bleeding a person who had attempted suicide by hanging.[356] The government did not systematically collect data on the prevalence of different means of suicide until the mid- to late-1800s, but these three means of committing suicide—drowning, poison, and hanging—accounted for about half

347. *Id.* at 83.

348. *See id.* at 82–83 (discussing the emergence of humane societies).

349. *Id.* at 82.

350. *Id.* at 91.

351. *Id.* at 84–85.

352. *See id.* at 87 (describing the use of the devices on bridges, wharves, and ferries).

353. *Id.* at 86.

354. *Id.* at 94.

355. *Id.*

356. *Id.*

of all suicides according to press coverage.[357] Indeed, even in the mid-1800s, after handgun technology improved, evidence suggests that firearms still did not account for nearly the proportion of suicides that they do today.[358]

Though means restriction was not the primary focus of humane societies, at least one advertisement urged pharmacists to take care when prescribing arsenic. In particular, in March 1800, Boston's *Columbian Centinel* published a column repeating "observations" from the Royal Humane Society in London ranging from how to avoid lightning to resuscitating still-born babies.[359] One of the column's "cautions" advised druggists to "limit the sale of arsenic to buyers accompanied by 'two or more creditable persons' who could 'testify to the vender [sic] the purpose for which its use is designed.'"[360] Bell found "[n]o record . . . to indicate whether or not Boston pharmacists paid this notice any heed."[361]

The efforts of the humane societies do not appear to have had a meaningful impact on suicide prevention.[362] Overall, "[m]ost failed suicides . . . were not thwarted; they were botched. They did not fail because of a stranger's or a neighbor's intervention but because the methods chosen were not sufficiently

357. *Id.* ("According to newspaper coverage, about half of the reported suicides in early national America were attempted or completed by drowning, asphyxiation, or poisoning.").

358. An 1845 review of suicides reported in a New York City newspaper during the course of a year counted 64 suicides by hanging, compared to 26 by firearm. *See* E.K. Hunt, *Statistics of Suicide in the United States*, 1 AM. J. INSANITY 225, 229 (1845). The first U.S. census to report suicide by method was in 1860. BELL, *supra* note 221, at 252. That census reported that 112 people died from suicide by firearm, compared to 306 by hanging and 137 by poison. SECRETARY OF THE INTERIOR, STATISTICS OF THE UNITED STATES (INCLUDING MORTALITY, PROPERTY, &C.,) IN 1860; COMPILED FROM THE ORIGINAL RETURNS AND BEING THE FINAL EXHIBIT OF THE EIGHTH CENSUS 253 (1866).

359. COLUMBIAN CENTINEL, Mar. 22, 1800, at 1, 1–2.

360. BELL, *supra* note 221, at 94–95 (alteration in original) (quoting COLUMBIAN CENTINEL, *supra* note 359, at 1.).

361. *Id.* at 287 n.23.

362. Three decades' worth of records documenting people saved by the Humane Society of the Commonwealth of Massachusetts "described exactly seven as unmistakably suicidal," six of them by drowning, though the actual number of disrupted suicide attempts is likely higher given ambiguity in the records. *Id.* at 98–99.

lethal."[363] Meanwhile, the humane societies' methods were insufficient to intervene in firearm suicides.[364]

In the first decades of the 1800s, humane societies pivoted from trying to intervene during suicide attempts to raising money to fund hospitals to treat the seriously mentally ill. As such, "society leaders signaled that they had reluctantly reached the conclusion that, at least as far as suicide prevention was concerned, a critical-care program that relied upon chance encounters and the bravery and vigilance of random strangers was vastly inferior to the emerging alternative."[365] The first mental hospital in New England, the Asylum for the Insane in Charleston, Massachusetts (today, Somerville, Massachusetts), began treating patients in 1818 and was subsequently renamed the McLean Asylum for the Insane in honor of John McLean, a major benefactor.[366] In the following half-century, similar psychiatric hospitals were set up across the country.[367] Consistent with the state of medicine,[368] the methods deployed in psychiatric hospitals were crude by today's standards.[369] By the 1820s, humane societies stopped meeting and withdrew from public view.[370]

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363. *Id.* at 96.

364. *Id.* at 99 ("[T]he Boston society's lifesaving protocols were no match for a close-range pistol shot or a jump from a high roof, and so their logs never mentioned all the New Englanders who committed suicide by such lethal means.").

365. *Id.* at 110.

366. GERALD N. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875, at 51–54 (1973) (describing the founding of early private mental hospitals). The institution became part of Harvard Medical School and still operates as a psychiatric hospital, though it was relocated to Belmont, Massachusetts. *History & Progress*, MASS GEN. BRIGHAM MCLEAN, https://www.mcleanhospital.org/about/history-progress [https://perma.cc/DKX2-Q8NQ].

367. *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 130 (1971) (noting the growth of asylums in the 1820s through the 1860s).

368. *See supra* Part II.B.

369. *See* BELL, *supra* note 221, at 112–14 (observing that, according to reports, the McLean hospital placed leather mitts on patients into the 1800s, and when they were banned, deployed mittens and wristbands).

370. *See id.* at 110 (discussing how two Massachusetts humane societies receded from public view).

## III. IMPLICATIONS OF CHANGING SCIENTIFIC CONTEXT

*Bruen*'s test for assessing the constitutionality of modern firearms laws makes it crucial that scholars, litigants, and courts appreciate the context in which historical regulations and practices arose. *Bruen* requires identifying the "societal problem" addressed by regulation, its persistence or lack thereof, and the similarity of historical and modern regulatory efforts to address it. When it comes to the societal problem of suicide, it is hard not to conclude that it always has existed but that the historical approaches "materially differ[ed]," to use *Bruen*'s words,[371] from modern ones. *Bruen* signals that this disconnect weighs against constitutionality, but that bias only makes sense if the historical understanding was not scientifically wrongheaded. Where, as in the case of suicide, the Founding generation made mistakes, their mistaken solutions should not bind us today.[372] Armed with today's knowledge, after all, that generation might have adopted today's solutions.

This critique of *Bruen* might be grounds to reject the opinion's framing around persistent societal problems altogether, but this Part's primary goal is not to critique *Bruen* but to work within it. The discussion in the prior Parts has implications for the implementation of *Bruen* and future research. This Part raises two: the need to proceed at a high level of generality and the need to consider other relevant aspects of scientific progress.[373]

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

372. *Cf.* Darrell Miller, *Gunpowder, Plague, and Tradition*, Duke Ctr. Firearms L. (Apr. 2, 2020), https://firearmslaw.duke.edu/2020/04/gunpowder-plague-and-tradition [https://perma.cc/QR5B-ZG6G] ("[W]hat does a jurisprudence of text, history, and tradition do with practices, customs, or laws, that may have contemporary justification, but whose antecedents rely on what we now understand to be patently nonsensical or offensive rationales?").

373. These two implications are by no means exhaustive. For example, future litigants may seek to argue that, under *Bruen*, the harsh historical treatment of suicide and the mentally ill—criminalization and detention—should insulate today's more modest regulations. Such a move would raise interesting questions about whether and how a greater-includes-the-lesser argument can be made after *Bruen*.

### A. HIGH LEVEL OF GENERALITY

In the two years since *Bruen* transformed Second Amendment methodology, one of the most crucial open issues is the level of generality at which courts are to compare modern and historical practices to determine constitutionality. The exposition in this Article adds support for operating at a high level of generality to accommodate changed scientific circumstances.

The *Bruen* majority prescribed an analogical exercise for Second Amendment cases that is not supposed to operate as "a regulatory straightjacket," or require "a historical *twin*" or "dead ringer."[374] Yet the opinion did not specify how many levels of generality up litigants and courts are to go when comparing the past and present. For example, when assessing a firearm restriction passed to reduce suicide, does the historical analogy need to be another *firearm* restriction focused on suicide prevention? A *weapons* restriction focused on suicide prevention? A restriction concerned with the mentally ill? Or a restriction focused on violence reduction more generally? In part, the answers to these questions depend on the level of generality used to define the societal problem being addressed in the first place.[375]

Questions about levels of generality arise in constitutional law more broadly,[376] but they are especially acute for the Second Amendment because *Bruen* mandates a historical-analogical test as the sole means of adjudicating Second Amendment impingements. When Justice Elena Kagan asked Elizabeth Prelogar, the U.S. Solicitor General, at oral argument in *Rahimi* whether the Court should provide "any useful guidance . . . about the methodology that *Bruen* requires," Prelogar responded that the Justices "should make clear the courts should come up a level of generality and not nit-pick . . . the historical analogues."[377] She pointed out that operating at a higher level of generality would help to identify "enduring principles,"[378] which is all the

374. *Bruen*, 597 U.S. at 30.

375. *See supra* notes 65–67 and accompanying text (discussing the importance of identifying the "societal problem" addressed by a firearm regulation after *Bruen*); *see also supra* note 73 and accompanying text (discussing the need for symmetric levels of generality).

376. *See* Blocher & Ruben, *supra* note 3, at 162–67 (discussing the broader levels of generality debate).

377. Transcript of Oral Argument at 38–40, United States v. Rahimi, 143. S. Ct. 2688 (2023) (No. 22-915) (granting certiorari).

378. *Id.* at 40.

more necessary given the need to account for vastly changed circumstances.

Past scholarship has pointed out the way that a low level of generality could lead to anachronism because of social, legal, and technological change;[379] changed understandings of medical science present another gloss on the risk of anachronism. When technological change is at play in the Second Amendment analysis, it is often possible to argue that the modern problem simply did not exist or was not as prominent in 1791—mass shootings, for example—and therefore a court is warranted to apply a looser approach.[380] When it comes to social and legal change, it often is possible to argue that even if a problem existed—domestic violence, for example—it was not *perceived* to have been as much of a problem as it is today, which likewise warrants a looser approach.[381] Historical scientific misunderstandings also should inform how courts consider *Bruen*'s analogical approach when they facilitated troublingly flawed approaches that we today, and perhaps the Founders if they possessed modern knowledge, would reject out-of-hand. Selecting a low level of generality that requires analogizing to such approaches runs contrary to the notion that the "the Founders created a Constitution—and a Second Amendment—'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'"[382]

The district court's approach in *Rocky Mountain Gun Owners* demonstrates how a higher level of generality might look.[383]

379. *See* Blocher & Ruben, *supra* note 3, at 150–51, 163–67 (discussing the risk of anachronism).

380. *See supra* notes 67–71 and accompanying text (discussing how *Bruen* prescribes a looser approach for "unprecedented societal concerns or dramatic technological changes"). Litigants may apply a similar argument for suicide given that firearms were a less common means of suicide at the Founding. This, however, would not avoid comparisons to the approaches to suicide by other, more common, means. It may be that modern firearms—because of their lethality—have created a distinctive suicide problem incomparable to the one that historically existed. Exploring that possibility is beyond the goals of this Article.

381. *See* Blocher & Ruben, *supra* note 3, at 163–67 (analyzing the benefits and applicability of a high level of generality in such a context).

382. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27–28 (2022) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted)).

383. Rocky Mountain Gun Owners v. Polis, No. 23-CV-02563, 2023 WL 8446495 (D. Colo. Nov. 13, 2023); *see also supra* notes 188–203 and accompanying text (discussing the case).

Rather than focusing on historical suicide prevention efforts when ruling on a modern waiting period requirement, the court considered historical intoxication laws that, in the court's view, sought "to prevent individuals in a temporary impulsive state from irresponsibly using a firearm."[384] The case is currently on appeal, and an issue will likely be whether intoxication laws are "analogous enough to pass constitutional muster."[385] The fact that today's approaches to suicide prevention are informed by scientific knowledge beyond the Founding generation's ken is more reason to pitch the *Bruen* analysis at such a high level of generality.

### B. SCIENTIFIC CONTEXT WARRANTING FURTHER RESEARCH

After *Bruen*, courts cannot consider modern science in the context of applying heightened scrutiny, but that does not mean that science is irrelevant. Science remains relevant because of *Bruen*'s requirement that courts compare modern and historical laws with respect to their "whys" and "hows."[386] The "whys" of modern laws simply cannot be divorced from the science that informs them.[387] But that, in turn, opens the door to a second way that science matters. In particular, a good-faith comparison of why policymakers passed modern and historical laws requires comparing contexts, and if today's laws are informed by science, it becomes highly relevant to consider the scientific context at the time historical laws were enacted.[388] This Article considers scientific context with respect to suicide-prevention laws, but there are many additional ways that science informs firearm

384. *Rocky Mountain*, 2023 WL 8446495, at *18.

385. *Bruen*, 597 U.S. at 30.

386. *See supra* notes 57–71 and accompanying text (discussing *Bruen*'s test).

387. *See* Blocher & Ruben, *supra* note 3, at 170 ("Quite simply, there is no way to compare the 'why' and 'how' of modern and historical gun laws without evidence. History alone cannot show the 'burden' that modern gun laws place on 'armed self-defense,' nor why such laws are 'justified.'").

388. The opposite, of course, is true, too. If historical laws were passed in part on the basis of racial prejudice, for example, courts have to grapple with how to compare such laws to modern ones passed for very different reasons. *See* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022) (exploring the implications for modern gun laws of the role of racism in passing or enforcing some historical gun regulations); Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30 (2023) (same).

policy that warrant similar consideration, including neuroscience and statistical science.

It is "commonsense"[389] that those under twenty-one years of age are at a heightened risk of misusing firearms, which is reflected in the rates at which different age groups commit violent crimes.[390] Modern science provides one explanation: brain maturity. Different parts of the brain mature at different times, with the limbic system, associated with basic emotions like fear and anger that arise in response to perceived danger, developing earlier than other parts.[391] The prefrontal cortex, which helps regulate aspects of the limbic system, is "one of the last brain regions to mature"[392] and continues to mature well after adolescence.[393] And that has an impact on executive functions such as risk assessment and impulse control.[394] This thumbnail sketch

389. Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 211 n.21 (5th Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

390. Violent crime rates among eighteen-to-twenty-year-olds greatly exceed their relative population. *Compare Law Enforcement & Juvenile Crime*, OFF. OF JUVENILE JUST. & DELINQ. PREVENTION (2020), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table%20in=2 [https://perma.cc/D3AR-RKH3] (showing that in 2020, eighteen-to-twenty-year-olds accounted for about 15% (1,820/12,440) of murder and nonnegligent manslaughter arrests), *with National Population by Characteristics: 2020-2023: Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2020 to July 1, 2022*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html [https://perma.cc/NRE3-6RQR] (estimating the population of eighteen-to-twenty-year-olds as about 4% of the total U.S. population (13,821,466/331,449,520)).

391. *See* Ahmad R. Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43, 43 (2000) (discussing the relationship between the limbic system and various emotions).

392. B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCH. 241, 243 (2000).

393. Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCI. 309, 309 (2003); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819, 8826 (2001).

394. Facundo Manes et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624, 637 (2002) (finding that patients with severe prefrontal cortex damage "made less rational decisions" and engaged in riskier behavior in an experimental setting); Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198–99 (2000) (discussing the impact of prefrontal cortex damage on impulsivity).

barely scratches the surface of how science has advanced our understanding of the human brain, which in turn provides an empirical grounding for policies setting age cutoffs for risky behavior like gun carrying.

In the years before *Bruen*, such scientific evidence was introduced in Second Amendment litigation regarding firearm age limits, which courts universally upheld.[395] As the Fifth Circuit observed in an opinion upholding a federal ban on gun sales to persons under twenty-one,[396] "modern scientific research supports the commonsense notion that 18–to–20-year-olds tend to be more impulsive than young adults aged 21 and over."[397] Likewise, the Seventh Circuit relied on science when upholding an Illinois requirement that parents or guardians consent before eighteen-to-twenty-year-olds could receive a Firearm Owner's Identification Card, which is generally required in Illinois to possess and acquire firearms.[398] As the court explained, "[t]he evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable."[399] *Bruen*'s mandate affects reliance on this science in age-restriction cases just as it affects reliance on science in cases concerning suicide-prevention laws. In the year after *Bruen*, five cases addressed various age restrictions, with three of the challenges succeeding.[400]

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395. *See* Ruben & Blocher, *supra* note 34, at xxiv app. C, https://dlj.law.duke.edu/wp-content/uploads/sites/2/2018/04/Ruben-and-Blocher-App-C-1.pdf [https://perma.cc/H33J-FSVG] (reporting that all challenged prohibitions on firearm possession for minors were upheld).

396. *See* 18 U.S.C. § 922(b)(1), (c)(1) (prohibiting firearm sales to minors).

397. Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 211 n.21 (5th Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

398. Horsley v. Trame, 808 F.3d 1126, 1128, 1133–34 (7th Cir. 2015) (citing several data points and scholarly articles).

399. *Id.* at 1133 (quoting Ruben C. Gur, *Declaration of Ruben C. Gur, Ph.D*, CAP. PUNISHMENT IN CONTEXT (2002), https://capitalpunishmentincontext.org/files/resources/juveniles/guraffidavit.pdf [https://perma.cc/86FE-4TUC]).

400. *See* Ruben et al., *supra* note 2, at 37. More recently, the Third Circuit struck down Pennsylvania's effective bar on the carriage of firearms by eighteen-to-twenty-year-olds during a state of emergency. Lara v. Comm'r Pa. State Police, 91 F.4th 122 (3d Cir. 2024).

Thus, another aspect of scientific progress that deserves attention is the arc of neuroscience from the Founding era to today. Part of that analysis will be technological—modern brain-imaging technology has accelerated the pace of new discoveries about brain development that, previously, were based on post-mortem examinations.[401] Another part of the analysis will be how early Americans understood the impulsivity of youth and how that understanding informed policy. To be sure, there are various historical reasons to question whether eighteen-to-twenty-year-olds had Second Amendment rights at the Founding at all, and if they did, whether modern age restrictions are sufficiently similar to historical ones to pass post-*Bruen* constitutional muster.[402] But, just as early misunderstandings of mental illness led to misguided and ineffective approaches to suicide, scholarship should consider if the same is true for policies directed at preventing youth violence.[403]

Similarly, an additional aspect of scientific progress that I am currently researching is the emergence and refinement of statistical methods. Studying suicide highlights not only the relevance of medical science, but also the importance of considering the emergence of aggregate data collection and analysis. When Rush studied mental illness in the Founding era, he relied largely on anecdotes from his practice and that of others.[404] He surveyed the medical literature, but that literature was also based primarily on inferences drawn from anecdotes. Bell observed that "[a]s doctors, scientists, and statisticians slowly assumed responsibility for collecting suicide data, much of the debate about the meaning of self-destruction slowly migrated from the nation's pulpits and public prints to newly founded scientific

401. *See* David Dobbs, *Beautiful Brains*, NAT'L GEOGRAPHIC, Oct. 2011, at 36 (discussing the development of imaging technology in the twentieth century that preceded an "explosion of scientific papers and popular articles").

402. *See generally* Megan Walsh & Saul Cornell, *Age Restrictions and the Right to Keep and Bear Arms, 1791–1868*, 108 MINN. L. REV. 3049 (2024) (discussing limitations imposed on eighteen-to-twenty-year-olds at the Founding).

403. *Cf.* Dobbs, *supra* note 401 ("G. Stanley Hall, who formalized adolescent studies with his 1904 *Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education*, believed this period of 'storm and stress' replicated earlier, less civilized stages of human development. Freud saw adolescence as an expression of torturous psychosexual conflict; Erik Erikson, as the most tumultuous of life's several identity crises.").

404. FRIED, *supra* note 266, at 469 (noting that Rush "shared a career's worth of patient anecdotes and insights").

and psychiatric serials, most notably the *Journal of Insanity*, founded in 1844."[405] This reflects the fact that at the same time that medical science evolved, so too did statistical science or "the science of collecting, analyzing, presenting, and interpreting data."[406] Though basic data collection and rudimentary analysis happened as early as the Babylonian census in 3800 BCE,[407] it progressed through the 1800s and 1900s as statistical methods improved, and it accelerated even more dramatically with the advent of modern computing.[408]

Our improved capacity to collect and analyze data is in the background of the analysis in this Article because the modern scientific understanding of suicide and its potential solutions would have been impossible without it. The significance of statistical science extends much further, informing vast areas of public policy in ways that would have been impossible at the Founding. Considering the advancement of statistical science in the context of *Bruen*'s methodology thus could surface new insights to improve Second Amendment jurisprudence.

## CONCLUSION

Firearm policy directed at reducing suicide is an underexplored area of Second Amendment scholarship, and as this Article shows, it reveals an overlooked frailty of *Bruen*'s methodology. *Bruen* keys the Second Amendment analysis to determinations about the continuity or discontinuity of regulatory approaches to "general societal problem[s]."[409] That methodological framing is fraught for societal problems like mental illness and suicide that have benefited from tremendous scientific progress over the centuries. At minimum, judicial doctrine should account for the acute risks of anachronism in such contexts when deciding on the level of generality at which to apply *Bruen*'s mandate.

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405. BELL, *supra* note 221, at 252.

406. *Statistics*, ENCYCLOPEDIA BRITANNICA (Jan. 24, 2024), https://www.britannica.com/science/statistics [https://perma.cc/3Y8T-ZQ47].

407. *Milestones and Moments in Global Census History*, POPULATION REFERENCE BUREAU, https://www.prb.org/resources/milestones-and-moments-in-global-census-history [https://perma.cc/SRV5-49YX].

408. *See* DAN MAYER, ESSENTIAL EVIDENCE-BASED MEDICINE 4–8 (2d ed., 2010) (providing an overview of the birth of modern statistics).

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

Justice Robert H. Jackson famously said that "if the [Supreme] Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[410] Roberts, of course, was using "suicide" metaphorically. Yet his sentiment has literal applicability if the Second Amendment prevents modern-day policymakers from implementing modest, empirically grounded firearm restrictions that can lower suicide rates. Such an outcome is risked under *Bruen*'s methodology if courts fail to account for the scientific progress that has led to today's approaches. More generally, changes in our scientific understanding, just like legal, social, and technological changes, present fertile ground for future research and scholarship to contextualize "this Nation's historical tradition of firearm regulation."[411]

410. Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

411. *Bruen*, 597 U.S. at 17.