2022

Implicitly Inconsistent: The Persistent and Fatal Lack of Second Amendment Rights for Black Americans in Self-Defense Claims and the Importance of Telling the Counter-Story

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COMMENT

IMPLICITLY INCONSISTENT: THE PERSISTENT AND FATAL LACK OF SECOND AMENDMENT RIGHTS FOR BLACK AMERICANS IN SELF-DEFENSE CLAIMS AND THE IMPORTANCE OF TELLING THE COUNTER-STORY

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"It's bigger than [B]lack and white. It's a problem with the whole way of life. It can't change overnight. But we gotta start somewhere."

LIL BABY, THE BIGGER PICTURE (Quality Control Music 2020).

Gun control legislation in the United States began in the 1700s, when white people prohibited the purchase or use of guns by Black people. While the Civil Rights Act of 1866 overrode a majority of the restrictive "Black Codes," high prices for weapons and ammunition implicitly regulated who could purchase a firearm, specifically targeting those with a lower income. Black people with guns were deemed dangerous and several states implemented white patrol groups that would seek out Black gun owners for punishment and torture. These regulations did not go unnoticed. Many Black people, notably The Black Panthers in the 1960s, retaliated and demanded equal rights and access to guns.

For decades, state and federal legislation has established what appears to be equitable regulation to curb gun violence—deploying officers to generally "high crime" areas and imposing "spot checks" in public transit areas and streets. However, these regulations inevitably contribute to the

* J.D. Candidate, 2023, University of Maryland Francis King Carey School of Law. The author would like to thank the editorial staff of *Maryland Law Review* for their advice and feedback in preparing this piece for publication. She thanks her Maryland Carey faculty mentors for their dedication to teaching and for sharing new areas of the law with her. She would also like to thank Judge Douglas Nazarian of the Maryland Court of Special Appeals for always being the voice of reason. Finally, the author would like to dedicate this Comment to her family and friends, most notably her parents, Donna and Dean, and her sister, Caroline, for always supporting her and pushing her to work hard and do good. And to Preston: Thank you for always believing in me.

extreme policing and incarceration of Black people because they are specifically targeted by the police, fueled by the societal belief that Black neighborhoods and Black people are inherently "dangerous" and therefore more responsible for gun violence.

This Comment applies a Critical Race Theory ("CRT") lens to present and historic gun-control legislation and the direct consequences of this legislation within the legal system. More specifically, this Comment will consider the history and creation of the Second Amendment for and by white people in perpetuating differential racialization of Black people to establish the illusion of the "dangerous" Black man versus the "heroic" white man. Further, this Comment will conduct a small case study of the exercise of self-defense and compare the current status of gun rights to the initial foundation of the Second Amendment. This Comment will draw a comparison between the history of gun rights and the current interpretation of gun rights in America. Finally, this Comment will propose a method that will help to mitigate racial bias in judicial courts by educating potential jury members about the racist history of the Second Amendment and the historically ingrained racial biases that people, particularly white individuals, inherently harbor.

INTRODUCTION

Americans are terrified of gun violence, and rightly so.[1] In 2020 alone, 45,222 people died from gun-related injuries and violence in The United States.[2] However, as violent crime rates rise[3] in the United States, it is no surprise that people are turning to more drastic means of protection, straying further from non-automatic weapons, like knives or pepper spray.[4] Forty-

1. *See* Sophie Bethune & Elizabeth Lewan, *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events*, AM. PYSCH. ASS'N. (Aug. 15, 2019), https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting; Reis Thebault, Joe Fox & Andrew Ba Tran, *2020 Was the Deadliest Gun Violence Year in Decades. So far, 2021 is Worse.*, WASH. POST (Jun. 14, 2021), https://www.washingtonpost.com/nation/2021/06/14/2021-gun-violence/.

2. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/.

3. *See* Amna Nawaz & Tess Conciatori, *What's Behind Rising Violent Crimes in the U.S., and How They Can Be Reduced*, PBS NEWS HOUR (Jan. 27, 2022, 6:40 PM), https://www.pbs.org/newshour/show/whats-behind-rising-violent-crimes-in-the-u-s-and-how-they-can-be-reducedspike-in-violence/ (discussing the recent trends in homicide rates).

4. *See* Daniel Nass, *Gun Background Checks Reached New Record During Coronavirus Surge*, TRACE (Apr. 1, 2020), https://www.thetrace.org/2020/04/coronavirus-gun-background-check-record-nics/ ("[T]he National Instant Criminal Background Check System (NICS) conducted 3.7 million screenings in March, the highest number recorded since its inception in 1998."); *see also*

percent of American adults own a gun or live with someone who does, and sixty-seven-percent point to the desire for protection and home security as their primary reason for choosing to own a gun.[5] Rising instances of hate crimes in the U.S. have resulted in Americans of color rushing to purchase guns and applying for concealed carry licenses.[6] Despite extreme social pushback and outcry against gun violence,[7] the Supreme Court continues to affirm[8] the right to own a gun as grounded in the Second Amendment, observing the "right to bear arms for the defense of himself and family and his homestead."[9]

Bruce, a Black American man, purchased his first firearm in response to the increasing racial violence and fatal shooting of Ahmaud Arbery.[10] He had never owned a gun before, but felt it was time to purchase a gun for his own protection.[11] Similarly, Clyde, an Asian American man, purchased a gun after stories of assault and verbal attacks made him fearful of becoming the target of a hate crime.[12] These stories track the rise in firearms sales by minority Americans, which has increased nearly sixty-percent during the first six months of 2020 compared to 2019.[13] There is no doubt that Black Americans and other people of color live in fear and seek self-defense and protection in the form of automatic weapons.[14]

Melinda Wenner Moyer, *Will a Gun Keep Your Family Safe? Here's What the Evidence Says*, TRACE (Apr. 7, 2020), https://www.thetrace.org/2020/04/gun-safety-research-coronavirus-gun-sales/.

5. Lisa Dunn, *How Many People in the U.S. Own Guns?*, WAMU 88.5 AM. UNIV. RADIO (Sept. 18, 2020), https://wamu.org/story/20/09/18/how-many-people-in-the-u-s-own-guns/.

6. *See* Kiara Alfonseca, *What's Behind the Rise in Gun Ownership for People of Color?*, ABC NEWS (Nov. 4, 2021, 6:04 AM), https://abcnews.go.com/US/rise-gun-ownership-people-color/story?id=80008877.

7. *See* Mark Walsh, *School Groups Worry as Supreme Court Recognized Right to Carry Handguns in Public*, EDUC. WEEK (June 23, 2022), https://www.edweek.org/policy-politics/school-groups-worry-as-supreme-court-recognizes-right-to-carry-handguns-in-public/2022/06 (discussing many of the worried reactions educators had to the Supreme Court's decision in *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), which struck down a New York state law that placed strict restrictions on concealed-carry license applications).

8. N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) ("New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.").

9. District of Columbia v. Heller, 554 U.S. 570, 616 (2008).

10. Christianna Silva, *Some Black Americans Buying Guns: 'I'd Rather Go to Trial Than go to the Cemetery'*, NPR (Sept. 27, 2020, 7:00 AM), https://www.npr.org/2020/09/27/911649891/some-black-americans-buying-guns-i-d-rather-go-to-trial-than-go-to-the-cemetery.

11. *Id.*

12. *See* Alfonseca, *supra* note 6.

13. *See* Silva, *supra* note 10.

14. *See id.* ("[T]here are many factors pushing Black people to buy firearms, including 'the politics right now, the pandemic and the racial tone: Those three things together act as kind of a three-headed monster that is driving folks to come to us.'").

Unfortunately, studies show that owning a gun may correlate with higher risks for accidental gun violence, suicide, and domestic violence—suggesting that gun ownership might not offer the protection that Americans envision.[15] While the risks associated with owning a gun plague all Americans, armed Black Americans are specifically at an increased risk of violence, especially from law enforcement.[16] One study shows that Black men are nearly three times more likely to be killed by the police than white[17] men.[18] Lethal actions by law enforcement disproportionately affect Black people and most victims are reported to be armed with a gun themselves.[19]

So, why can't Black Americans protect themselves like white Americans by carrying a gun for protection? Stereotypes of the "dangerous" Black man perpetuate social expectations of what purpose a Black man may have for carrying a gun.[20] These biases are deeply rooted in the creation and foundation of the Second Amendment, when Black people were heavily restricted from owning guns, stemming from the fears of white people that Black men would initiate a slave rebellion with lethal weapons.[21] Despite the fact that over three hundred years have passed since the establishment of the Second Amendment, carrying a gun still looks very different for Black people compared to white people. Persistent stereotypes are rooted in the Second Amendment: White people who use guns for self-defense are labeled as

15. *See* Dunn, *supra* note 5.

16. *See Impact of Gun Violence on Black Americans*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/issues/gun-violence-black-americans/ (last visited Sept. 19, 2022) ("Black Americans are disproportionately impacted by gun violence. They experience 10 times the gun homicides, 18 times the gun assault injuries, and nearly 3 times the fatal shootings by police of white Americans.").

17. This Comment will capitalize *Black*, and not *white*, when referring to groups in racial, ethnic, or cultural terms. "For many people, *Black* reflects a shared sense of identity and community. *White* carries a different set of meanings; capitalizing the word in this context risks following the lead of white supremacists." *See* Mike Laws, *Why We Capitalize 'Black' (and not 'white')*, COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php; *see also* Doug Colbert & Colin Starger, *A Butterfly in COVID: Structural Racism and Baltimore's Pretrial Legal System*, 82 MD. L. REV. 1 (2022) (applying the same capitalization conventions for "Black" and "white"); Dan Friedman, *Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly From Enacting Retroactive Civil Laws?*, 82 MD. L. REV. 55 (2022) (same).

18. *See* Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. OF THE NAT'L ACAD. OF SCI. 16793, 16794 (2019).

19. *See* Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 12 U.S. States, 2009–2012*, 51 AM. J. PREVENTIVE MED. S173, S173 (2016) (finding that while victims of police-involved deaths were majority white (52%), the deaths were disproportionately Black (32%) with a "fatality rate 2.8 times higher" among Black people, and "most victims were reported to be armed (83%)").

20. *See infra* Part III.

21. *See infra* Section I.A.

heroes and protectors,[22] while Black people who carry or use guns for self-defense are stereotyped as the "dangerous" Black man trope.[23]

This Comment will address the counter-story and history of the Second Amendment and the racist roots of the fundamental right to bear arms. Approaching this issue through a Critical Race Theory perspective, this Comment will describe how white people have crafted the law to benefit themselves. Furthermore, this Comment will discuss the perpetuation of differential racialization and the negative stereotyping of Black people by consistently preserving and protecting the needs of white Americans when applying the Second Amendment.[24] These stereotypes, created in the 1700s by white people who were fearful of Black people with guns, have continued to exist, permeating our current culture and justice system.[25] To provide an example of the disparate application of the Second Amendment to Black Americans, this Comment will draw a comparison between two case studies to portray the similarities between the original intent of the right to bear arms and the current interpretation.[26] This Comment will offer a method to address bias in the courtroom by encouraging courts to bring attention to the negative racial influence of the Second Amendment by instructing jury members on the history of the Second Amendment and the consequences of the influential and enduring white perception of the "dangerous" Black man.[27] The counter-story of the Second Amendment provides the foundation necessary to understand the lack of gun rights for Black Americans that continue to infiltrate modern gun legislation and judicial perspectives.[28]

I. BACKGROUND

The ratification and creation of the Second Amendment is generally understood in the context of the framers' desire to provide the states with the right to carry and use firearms for protection against the government.[29] Fueled by the fear that the federal government had too much power, the Second Amendment established a constitutional check on Congress to

22. *See infra* Part II.
23. *See infra* Part III.
24. *See infra* Part III.
25. *See infra* Section I.A.
26. *See infra* Part II.
27. *See infra* Part IV.
28. *See infra* Part I.
29. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 211–13 (1983) (explaining the two "camps" that promote different interpretations of the Second Amendment's origins; one finding the right to be supportive of the state's right to keep armed forces, while the other "camp" believes in the "right of the people" and gun rights as an individual right).

organize a federally regulated militia group.[30] While the exact intent of the Second Amendment is often debated, the majority of Americans hail the Second Amendment as one of the first times that Americans were provided with the opportunity to exercise the individual right to protection, free from the strict control of the government.[31] On the surface, the right to keep and bear arms seemed like a forward step toward establishing individual rights for all Americans, but below the surface, the Founders were fueled by racism.[32] The counter-story of the Second Amendment is often unknown or misunderstood.[33]

Laws prohibited Black people from owning guns and using firearms beginning in the 1700s.[34] At that time, white colonists regulated the purchase, ownership, and use of guns in order to keep firearms out of the hands of Black people.[35] White colonists feared Black people—both free and enslaved—and expected them to rebel against slavery causing violence and insurrectionist protests.[36] To protect themselves, white people established restrictive gun regulations and often used firearms against Black people for self-defense.[37] While the Fourteenth Amendment eliminated many race-based gun control regulations, Black people have continued to suffer from the inequal application of the Second Amendment, specifically regarding the right to self-defense.[38] The following Section will define and inform the true history of the Second Amendment, as well as track the journey of gun control from the 1700s to the current firearm legislation in America that disproportionally benefits white people over Black people.[39]

A. Early Gun Control Regulations of the 1600–1700s

In 1610, one of the first gun-related crimes committed in North America occurred in Virginia, after the settlers arrived on land owned by Indigenous Americans.[40] At first, the Powhatan people were hospitable to the settlers, but

30. *Id.*

31. *See id.* at 206, 219, 256.

32. *See also infra* Section I.A.

33. *See generally* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 6 (Nancy Miller ed., 2021).

34. *See infra* Section I.A.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See infra* Section I.D.

39. *See infra* Section I.A–F.

40. *See* THOM HARTMANN, THE HIDDEN HISTORY OF GUNS AND THE SECOND AMENDMENT 26–27 (Elissa Rabellino ed., 2019) (detailing the relationship that the Powhatan people had with the English settlers and the downfall of their hospitality after the settlers invaded their campgrounds).

the positive relationship quickly dissolved following a violent fight.[41] The soldiers killed Indians, burned their homes, and attacked their children.[42] Gun-based "skirmishes" became increasingly more common as time went on and the use of guns for protection followed.[43]

By 1619, nearly thirty enslaved Black people arrived on a white-led ship at Point Comfort in Hampton, Virginia, marking the start of slavery in America.[44] The institution of slavery quickly flourished, under the torture and heinous control of the white settlers.[45] It came as no surprise to white settlers that Black enslaved people found slavery to be horrifically brutal labor, even recognizing that the institution of slavery naturally "bred insurrection."[46] Because of this, white settlers feared angry armed Black men and were terrified of the potential for violent slave rebellions and revolts.[47] To quell rising concerns of violence against white settlers, these settlers established regulations regarding who could carry a gun to ensure that only white settlers could brandish a weapon.[48] Some of the first regulations on firearm ownership originated in Virginia around 1640, specifically "prohibit[ing] n*****,[49] slave and free, from carrying weapons."[50] The early regulations fueled the creation of large, armed, white militia groups with the purpose of protecting white communities from possible "insurrectionist scares."[51] As the population of Black enslaved people rose, the colonies adjusted their patrol groups, eventually creating an unimaginably powerful "community police force," with the ultimate purpose of defending white people and their families.[52] The primary function of the white southern militias were to

41. *Id.*

42. *Id.*

43. *Id.* at 30 ("English settlers were determined to dominate the land they had stolen and settled—and to utterly destroy the indigenous people they encountered on the stolen land. And that required guns and the marksmanship skills that come with a developing gun culture.").

44. *See* NIKOLE HANNAH-JONES, THE 1619 PROJECT 2, 8, 9 (2021).

45. *Id.*

46. ANDERSON, *supra* note 33, at 12 (citing SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 137 (Harvard Univ. Press 2001)).

47. *Id.*

48. *See generally* Steve Ekwall, *The Racist Origins of US Gun Control: Laws Designed to Disarm Slaves, Freedmen, and African-Americans*, SEDGWICK CNTY., https://www.sedgwickcounty.org/media/29093/the-racist-origins-of-us-gun-control.pdf (last visited Sept. 19, 2022) (providing examples of the slave codes, Black codes, and economic-based gun bans that were implemented to prevent Black people from owning a gun).

49. This word is blurred out because it remains a racial slur and deeply offensive to many people. While important to use unaltered and direct quotes in historical academic writing, the deeply rooted insult accompanied by the use of this word cannot be ignored and is recognized by the author.

50. Ekwall, *supra* note 48, at 1–2.

51. ANDERSON, *supra* note 33, at 12; *see also* Ekwall, *supra* note 48.

52. ANDERSON, *supra* note 33, at 13 (citing HADDEN, *supra* note 46, at 17).

eliminate slave revolts and seize any weapons held by enslaved people.[53] When violence occurred, Black enslaved people were brutally attacked, crafting a cycle of fear and anger, further prompting white colonists to "crack down [on] any conspiracies or uprisings" and strictly patrol Black enslaved people.[54]

By the early 1700s, most white colonists owned guns for protection against enslaved people, with around seventy-percent of colonists, in states like North Carolina, South Carolina, Virginia, and Maryland, owning a gun.[55] Many states quickly established race-based gun bans that strictly limited access to guns for Black people. For example, in 1712, Virginia and South Carolina both created gun bans, stating that "no N**** or slave shall carry . . . any sort of gun, or firearm without a certificate from his master, mistress or overseer . . . and if any N**** or slave [has a weapon he] shall be apprehended . . . ."[56] The acts often included language that allowed white colonists to conduct intrusive searches of enslaved men's belongings to locate firearms and ammunition.[57] Additionally, the acts instructed white colonists to "keep all [their] guns when out of use in the most private and least frequented rooms in [the] house" to ensure that Black enslaved people could not access the weapons while working.[58] During this time, Black enslaved people were extremely limited in their ability to protect themselves from violent attacks and were left without the defense of weapons to fight back against the horrors of slavery.

B. The American Revolution and the Fight for Individual Gun Rights

In the early 1770s, tensions were rising between Britain and the thirteen American colonies.[59] Britain wanted to continue its control, but the colonies desperately wanted to establish independence through the creation of their

53. *Id.* at 12.

54. Joyce Tang, *Enslaved African Rebellions in Virginia*, 27 J. BLACK STUD. 598, 604 (1997).

55. *See* ANDERSON, *supra* note 33, at 17 ("Meanwhile, whites, particularly on plantations, were stacking up the arms. . . . '50% of all wealthholders in the Thirteen Colonies in 1774 owned guns.' That percentage soared to 69 percent when isolated to the South."); *see also* Saul Cornell & Eric M. Ruben, *The Slave-State Origins of Modern Gun Rights*, ATLANTIC (Sept. 30. 2015), https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/ (explaining that carrying a weapon denoted a man as manly and gave men "secret advantages").

56. L.H. Roper, *The 1701 "Act for the Better Ordering of Slaves": Reconsidering the History of Slavery in Proprietary South Carolina*, 64 WM. & MARY Q. 395, 410 (2007); *see also* Ekwall, *supra* note 48.

57. ANDERSON, *supra* note 33, at 18–19.

58. Roper, *supra* note 56, at 410.

59. *Battles of Lexington and Concord*, HISTORY (Aug. 27, 2021), https://www.history.com/topics/american-revolution/battles-of-lexington-and-concord#section_1.

own government and economic system.[60] Colonial resistance to the British peaked at the battle of Lexington and Concord, marking the "shot heard 'round the world," signifying the start of The American Revolution.[61] American colonists scrambled to create a strong and able-bodied militia to protect the colonies from the impending British invasion.[62] Colonists depended on easy and quick access to a firearm and worked tirelessly to "stockpile weapons," "manufacture ammunition," and "organize militias" for their protection from the British.[63]

Despite their enslavement, Black people served as soldiers in the American Revolution.[64] The white colonists quickly retracted "whites-only" regulations because there were not enough white men to fight in the war.[65] However, rather than joining the scrambling colonists, many Black slaves took the opportunity created by the chaos of the war to escape slavery—by either joining the British Army or running away.[66] Lord Dunmore of England noticed the large population of Black enslaved people within the colonies—nearly 2.5 million[67]—and offered Black enslaved people the opportunity to fight alongside the British in exchange for a promise to grant their freedom from slavery.[68] Lord Dunmore's proposition was a stark contrast to the heinous torture of slavery and many Black enslaved people secretly desired a British win, under the impression that a British victory would put an end to slavery.[69] Referred to as the Revolutionary War's "dirty little secret," this tragic truth emphasizes the sheer desire of Black enslaved people to become

60. David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 48 (2002).

61. *See Battles of Lexington and Concord*, *supra* note 59 (noting the beginning of the Battle of Concord as the "shot heard 'round the world," which was written in a poem by Ralph Waldo Emerson).

62. *American Revolution Begins at Battle of Lexington*, HISTORY (Apr. 18, 2022), https://www.history.com/this-day-in-history/the-american-revolution-begins.

63. WILLIAM BRIGGS, HOW AMERICA GOT ITS GUNS: A HISTORY OF THE GUN VIOLENCE CRISIS 19 (2017); *see also* Kates, Jr., *supra* note 29, at 214–15 (discussing the importance of bearing a weapon for protection and "the duty to keep arms" as it "applied to every household").

64. *See* Simon Schama, *Dirty Little Secret*, SMITHSONIAN MAG., https://www.smithsonianmag.com/history/dirty-little-secret-115579444/ (last visited Oct. 19, 2022).

65. ANDERSON, *supra* note 33, at 18–19.

66. *See* Schama, *supra* note 64.

67. *American Revolution*, SLAVERY & REMEMBRANCE, http://slaveryandremembrance.org/articles/article/?id=A0064 (last visited Oct. 19, 2022).

68. *Lord Dunmore's Proclamation, 1775*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/spotlight-primary-source/lord-dunmores-proclamation-1775 ("I do hereby farther declare all indented servants, N*****, or others . . . free, that are able and willing to bear arms, they joining his Majesty's troops, as soon as may be, for the more speedily reducing this colony to a proper sense of their duty, to his Majesty's crown and dignity.").

69. *See* Schama, *supra* note 64.

free by any means necessary as nearly 1,000 enslaved people accepted Dunmore's offer.[70]

Naturally, this proposition infuriated white colonists who feared the idea of armed and retaliatory Black people, especially those fighting alongside the British army.[71] Because many Black enslaved people fled or accepted Lord Dunmore's proposition, Black enslaved people were immediately labeled as traitors who betrayed their loyalty to the American colonies.[72] White colonists believed that the proposition stirred a "servile insurrection" and attempted persuasive "psychological warfare" to convince Black enslaved people that the British proposition was not as promising after all.[73] Britain's strategically crafted alliance with Black enslaved people established intense fear in the white colonists, who tried to counter-act the British proposition with cautionary tales that enslaved people would be "worse off [in Britain] than under Virginia masters," who understood and felt "pity" for their status.[74] White colonists were labeled the heroes of the American Revolution, while Black enslaved people were labeled as distrustful for abandoning American soldiers and joining Lord Dunmore. As a result, many were sanctioned to dangerous and intense work, and if returned to their captors faced serious punishment, including the death sentence, for running away.[75] Following the aftermath of war, white colonists restricted Black people from joining American militias, even when there were not enough white people to enlist and serve.[76]

The Declaration of Independence in 1776 marked the American colonies' independence from British control.[77] Following this newly established freedom, many states began to craft their own constitutions and bills.[78] Some states even crafted regulations on individual gun rights.[79] For example, the Virginia Declaration of Rights included a provision that "a well-

70. *Id.*; *see also* Ted Brackemyre, *Lord Dunmore: American's First Villain?* U.S. HIST. SCENE, https://ushistoryscene.com/article/lord-dunmore/.

71. *See* HARTMANN, *supra* note 40, at 48 ("[S]outhern legislators and plantation owners lived not just in fear of their own slaves rebelling, but also in fear that their slaves could be emancipated through military service.").

72. Dave Davies, *Historian Uncovers the Racist Roots of the 2nd Amendment*, GA. PUB. BROAD. (June 2, 2021, 3:41 PM), https://www.gpb.org/news/2021/06/02/historian-uncovers-the-racist-roots-of-the-2nd-amendment.

73. Benjamin Quarles, *Lord Dunmore as Liberator*, 15 WM. & MARY Q. 494, 495–99 (1958).

74. *Id.* at 499.

75. *Id.* at 499, 500; *see also* ANDERSON, *supra* note 33, at 23.

76. ANDERSON, *supra* note 33, at 22.

77. *See generally* William F. Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319, 320 (1900).

78. BRIGGS, *supra* note 63.

79. *Id.*; *see also* Saul Cornell, *The Changing Meaning of the Right to Keep and Bear Arms: 1688–1788: Neglected Common Law Contexts of the Second Amendment Debate*, in GUNS IN LAW 33–34 (Austin Sarat et al. eds., 2019).

regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State . . . ."[80] Virginia emphasized the citizen's right to firearm ownership for the purpose of protecting the state from potential invasion.[81] Similarly, the 1780 Massachusetts Constitution, provided that "[t]he people have a right to keep and to bear arms for the common defense."[82] At the time, states' constitutions conceptualized individual gun ownership as a way to defend against foreign invasion and attack, while also providing each state with the ability to self-regulate individual gun rights instead of relying on the government to establish gun control.[83]

The Articles of Confederation were drafted in 1777, but were not ratified until 1781.[84] Prior to the ratification, each state varied in their policies, by creating their own regulations, economic structure, and taxation plans.[85] Thomas Jefferson and James Madison recognized the inconsistencies and set out to draft the United States Constitution and the Bill of Rights.[86] A majority of the Constitutional Convention members still owned enslaved people, affirming that white Americans still widely relied upon the institution of slavery and that the decisions of the Convention were "held hostage to the tyranny of slave owners."[87] Because many white Americans saw slavery as vital to the success of farming and Southern livelihood, they agreed that the institution of slavery could not be upended by the creation of a unified Constitution.[88] Southern states desperately sought to continue enslavement and "threatened to bolt" if the Convention discontinued the slave trade.[89] On the other hand, the Northern states were not as invested in slavery, and instead focused on securing a new unified government system.[90] The very first drafts

80. BRIGGS, *supra* note 63, at 21 (quoting VA. CONST., Decl. of Rts. art. 13 (1776)).

81. *Id.* at 22 (quoting MASS. CONST. art. XVII (1780)).

82. *Id.*

83. *Id.* at 22–23 (explaining that "[b]y 1784, eleven colonies had adopted constitutions. . . . Seven of those eleven constitutions included language about firearms in their declarations of rights").

84. ANDERSON, *supra* note 33, at 23.

85. *Id.*

86. *See* HARTMANN, *supra* note 40, at 37 ("Madison's newly proposed Constitution would bring the states into a single union, knit together by a federal government, something functionally lacking under the Articles.").

87. ANDERSON, *supra* note 33, at 26.

88. *Id.*

89. *Id.* at 26, 30 (quoting JAMES T. KLOPPENBERG, TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT 407 (2016)). (Members of the Constitutional Convention noted that "Blacks' freedom, even through some type of military service, was simply 'incompatible with the felicity of our country'").

90. *See* Paul Finkelman, *Slavery, the Constitution, and the Origins of the Civil War*, 25 ORG. AM. HISTORIANS MAG., Apr. 2011, at 14, 15 (discussing the differences between the Southern and Northern interests in the slave trade and abolition).

of the United States Constitution were fueled by the Southern desire to continue slavery, eventually seeping into the foundation of the United States Bill of Rights.[91]

C. The Creation and Establishment of The Second Amendment

During the creation of the United States Constitution, states still heavily relied upon the institution of slavery—and still incited riots and rebellion.[92] To quell enslaved peoples' insurrections, white Southern men served in militia groups known as "slave patrols," which were specifically organized to keep Black enslaved people on plantations and return those who had escaped back to their white owners.[93] State-based militia groups were responsible for managing enslaved peoples' rebellions, such as the Stono Rebellion, Shay's Rebellion, and other smaller insurrections.[94] White Southern slaveowners advocated for individual gun ownership in order to weaponize firearms for the control of Black enslaved people.[95] The slaveowners were concerned that the Constitution would eliminate their individual gun rights by establishing the right to bear arms only for militias, thus exposing white slaveowners to violent rebellions without any weapons to protect themselves.[96] George Mason, one of the founders, argued that a federal militia group without individual state-based gun rights would leave states defenseless when the federal militias were called to war.[97] The drafters were confronted with a seemingly unsolvable issue—how to establish a system that pleased both the Northern states' desire for unity and the Southern states' desire for individual self-defense.

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91. *See infra* Section I.C.

92. *See supra* Section I.B.

93. *See* HARTMANN, *supra* note 40, at 31.

94. *See* ANDERSON, *supra* note 33, at 34 ("[T]he militia . . . was instrumental in shutting down the massive Stono Rebellion. . . . The Southern militias not only quelled rebellions; they were also there to prevent another Stono."). Insurrections occurred in several states, such as Virginia, New York, and South Carolina. Black enslaved people were horrifically attacked, "burn[ed]," hung, and "broken on the wheel." Harvey Wish, *American Slave Insurrections Before 1861*, 22 J. NEGRO HIST. 299, 308 (1937). Notably, one insurrection was planned for May 6, 1720, which included a plan to gather at a local church and seize guns for their attack. The "elaborate plot" was discovered by white farmers and the white militia "descended upon the [B]lacks and killed the greater number, leaving few to escape." *Id.* at 309. Rumors of attacks spread rapidly, and white men carried guns in preparation. *See id.* at 308–12.

95. *See* Benjamin Quarles, *The Colonial Militia and Negro Manpower*, 45 MISS. VALLEY HIST. REV. 643, 647 (1959) ("[T]he barring of N***** from the militia was commonly supplemented by laws to keep weapons out of their hands.").

96. *See* ANDERSON, *supra* note 33, at 32 (noting that the South feared the federally controlled militia would be "impotent" as a slave control group).

97. *See id.* at 29 ("George Mason, who owned hundreds of slaves, laid out a scenario in which the U.S. Congress could call on the state's militia during wartime, leaving 'Virginians defenseless.'").

Though wary of standing militia groups during peacetime, Thomas Jefferson recognized the value of maintaining community patrol groups to monitor enslaved people for defense and protection.[98] James Madison and Patrick Henry encouraged the drafters to consider the importance of the slave patrols in controlling and managing Black enslaved people for the protection of white people and their families.[99] George Mason also argued for individual gun rights, emphasizing that the militia groups were vital to keeping the owners of enslaved people safe.[100]

The very first draft of the Second Amendment came from James Madison:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.[101]

While Madison's draft articulated his first attempt at appealing to both the North and the South, by establishing individual gun rights separate from the federally regulated militia, this attempt was only one of the seventeen drafts he wrote.[102] At the time, it seemed nearly impossible to address and satisfy both the Northern and Southern states' concerns regarding militia control and gun rights.[103] With both sides becoming impatient without a solidified Constitution, James Madison rushed to ratify the amendments with the intention of quickly appeasing both the North and South before "polarizing differences between the two could destroy even the faintest possibility of ratification."[104] Eventually, the Second Amendment went through to the Senate, altering the language to affirm that individual gun rights were not limited to federal militia groups.[105] Finally, the official construction of the Second Amendment emerged from the committee in 1789:

98. *See* HARTMANN, *supra* note 40, at 43 ("Jefferson found justification for his opinion. 'The Greeks and Romans had no standing armies,' he wrote . . . 'yet they defended themselves. . . . Their system was to make every man a soldier, and oblige him to repair to the standard of his country whenever that was reared. This made them invincible; and the same remedy will make us so.'").

99. *See* ANDERSON, *supra* note 33, at 34–35.

100. *Id.*

101. *Id.* at 35 (quoting MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 52 (2014)).

102. *Id.*

103. *Id.*

104. *Id.* at 35–36.

105. *Id.* at 38.

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[106]

The amendments were sent to the states and were officially ratified into the Bill of Rights on December 15, 1791, "steeped in anti-Blackness," and "swaddled in the desire to keep African-descended people rightless and powerless . . . ."[107]. The Bill of Rights influenced the creation of future state regulations and laws for the first 60 years in the United States.[108]

D. The Restrictive Black Codes and Persistent Oppression of the 1850s

Around 1850, a growing number of people began to oppose slavery, and in response, Southern slaveholders passed an even more strict law to protect their ability to own and control enslaved people, known as the second Fugitive Slave Act.[109] The Act stripped free Black men of their rights and allowed for the capture of runaway enslaved people.[110] White men traveled to the free Northern States and seized Black enslaved people to bring them back to the South.[111] Black abolitionists and their white accomplices collected and purchased firearms to protect Black enslaved people who were hunted by the 'slave patrols.'[112]

To further control enslaved people and ensure that only white people had access to guns, the Southern states implemented a variety of strategies that prohibited Black people from accessing firearms, known as "Black Codes."[113] Black Codes included regulations that barred free Black men from carrying and owning guns–leaving all Black men defenseless against Southern white men during attacks.[114] Though at the time, some free Black men had the option to purchase a firearm, most guns were excessively taxed, priced very high, or banned from sale to enslaved people.[115]

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106. *See id.* at 38 (quoting U.S. CONST. amend. II).

107. *Id.* at 39.

108. *Id.*

109. *See* History, *Sound Smart: The Fugitive Slave Act of 1850 | History*, YOUTUBE (Nov. 29, 2016), https://www.youtube.com/watch?v=JkHK8qDrTTM (discussing the history and timeline of the Fugitive Slave Act).

110. *See The Fugitive Slave Law*, DIGIT. HIST., https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3276.

111. Gene Demby & Natalie Escobar, *From Negro Militias to Black Armament*, NPR (Dec. 22, 2020, 1:15 PM), https://www.npr.org/sections/codeswitch/2020/12/22/949169826/from-negro-militias-to-black-armament.

112. *See generally* Charles B. Dew, *Black Ironworkers and the Slave Insurrection Panic of 1856*, 41 J.S. HIST. 321, 326–27 (1975) (discussing the insurrections and the collections of arms and ammunition that were discovered and seized).

113. *See* Ekwall, *supra* note 48.

114. *Id.*

115. *Id.*; *see also* CAROL ANDERSON, *supra* note 33, at 60.

Each state established their own version of the Black Codes. For example, Louisiana passed a Black Code that denied the use of firearms for all enslaved people.[116] South Carolina only allowed Black enslaved people to own guns if they had acquired permission from their white slaveowner.[117] Florida only allowed free Black men to carry guns if they had acquired court approval.[118] Some states even argued that free Black men were "not citizens" and therefore not entitled to bear arms or benefit from any Amendment ratified in the Constitution.[119]

Following these restrictions, the Supreme Court upheld slavery in 1857, in the notorious landmark case of *Dred Scott v. Sandford*.[120] In this case, the Court declared that Black people were not citizens of the United States, holding unconstitutional the Missouri Compromise, therefore eliminating Congress' power to prohibit slavery in the South.[121]

The issue of slavery continued causing tension between the North and South, marking the beginning of the Civil War in 1861.[122] Slavery was at the heart of the war, along with the fight for states' independent rights and the preservation of the Union.[123] The war ended four years later in 1865, with Confederate surrender.[124] On December 18, 1865, the United States adopted the Thirteenth Amendment, abolishing slavery and freeing more than 100,000 enslaved people.[125] However, slavery was not officially deemed to be over until 1866, when Congress enacted the Civil Rights Act of 1866, securing rights for all individuals born in the United States and eliminating many of the strict regulations still present for newly freed Black people.[126] Though the institution of slavery had been abolished, the racist beliefs of white Americans were still strong and ingrained within the states.[127] The states had to learn how to manage a post-war environment that, on its face, established equal treatment between white and Black people, but in reality,

116. Ekwall, *supra* note 48.

117. *Id.*

118. *Id.*

119. *Id.*

120. 60 U.S. (19 How.) 393 (1857).

121. *Id.* at 488.

122. *Civil War Begins*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Civil_War_Begins.htm (last visited Sept. 19, 2022).

123. *See Civil War*, HISTORY (Jan. 13, 2021), https://www.history.com/topics/american-civil-war/american-civil-war-history.

124. *Id.*

125. *See* Mary Crooks, *Dec 18, 1865 CE: Slavery is Abolished*, NAT'L GEOGRAPHIC (July 8, 2022) https://education.nationalgeographic.org/resource/slavery-abolished.

126. Alfred Avins, *The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274, 304–05 (1967).

127. Demby & Escobar, *supra* note 111.

continued to perpetuate the idea that Black people were not equal to white people.[128] The Ku Klux Klan first came into existence during this time, promoting the idea that Black people did not deserve the same rights as white people, providing an example of the social climate after the Civil War.[129] Despite the many who remained hopeful, the Reconstructionist era was inevitably bleak and Black people were ruthlessly attacked by white supremacists.[130] During this time, Black people first began to carry firearms for self-defense and protection, and continued to fight for individual rights as progress remained stagnant up to the 1960s.[131]

E. The Black Panthers and 1960s Gun-Control on Individual Rights

Looking forward to the modern application of gun rights, the 1960s marked a historic period for Black individuals and the inconsistent application of the right to bear arms.[132] Noticing the stark misapplication of the Second Amendment, Huey Newton and Bobby Seale founded The Black Panther Party for Self-Defense ("BPP") in October 1966 after the assassination of Malcom X.[133] The group monitored police activity in predominantly Black communities and conducted protests in a unique form—by arriving at public events with firearms.[134] Nonviolent protests failed to further their mission and they believed that such events "could not truly liberate [B]lack Americans or give them power over their own lives."[135] The Black Panthers also formed Copwatch Patrols, which traveled through neighborhoods with police scanners so they could show up when the police had stopped an individual in a Black neighborhood.[136]

128. *Id.*

129. ANDERSON, *supra* note 33, at 96.

130. *See id.* at 100.

131. *See id.* at 102 ("Unarmed, African Americans were vulnerable. Very vulnerable. They knew, however, that it was not the presence of weapons or lack of weapons that put crosshairs on their lives; it was their Blackness.").

132. *See infra* Section II.E.

133. *See Black Panthers*, HISTORY (Jan. 25, 2022), https://www.history.com/topics/civil-rights-movement/black-panthers (the party dropped "for Self-Defense" from its name in 1967); *see also* Clayborne Carson & David Malcolm Carson, *Black Panther Party*, *in* ENCYCLOPEDIA OF THE AMERICAN LEFT (Mari Jo Buhle et al. eds., 1990), https://web.stanford.edu/~ccarson/articles/am_left.htm.

134. *See* Jessica C. Harris, *Revolutionary Black Nationalism: The Black Panther Party*, 86 J. NEGRO HIST. 409, 414 (2001) ("[The Black Panthers] set up a system of armed cars to patrol the [B]lack community. When the police stopped [B]lack people, the patrols would intercede to assure that constitutional rights were not violated.").

135. *The Black Panther Party: Challenging Police and Promoting Social Change*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/explore/stories/black-panther-party-challenging-police-and-promoting-social-change (last visited Sept. 19, 2022).

136. *See* HARTMANN, *supra* note 40, at 78–81 (discussing a historical confrontation between the Black Panthers' Copwatch Patrols and the police in February 1967).

They received national attention on May 2, 1967, when they arrived at Ronald Reagan's luncheon event armed with pistols and shotguns.[137] Seale read a statement:

> "The American people in general and the [B]lack people in particular" . . . must "take careful note of the racist California legislature aimed at keeping the [B]lack people disarmed and powerless. Black people have begged, prayed, petitioned, demonstrated, and everything else to get the racist power structure of America to right the wrongs which have historically been perpetuated against [B]lack people[.] The time has come for [B]lack people to arm themselves against this terror before it is too late."[138]

The California government met their protest with a swift reaction.[139] The State quickly established a law, the Mulford Act (AB-1591) that banned the carrying of loaded guns in public, even adding a special provision that made the law effective immediately.[140] Ronald Reagan denounced The Black Panthers publicly, stating that there was "no reason why . . . a citizen should be carrying loaded weapons."[141] Following Reagan's lead, several other states began passing gun-control laws to limit who could open-carry firearms and when people could exercise the right.[142]

By the early 1970s, internal disagreements weakened The Black Panthers, including lack of involvement, expensive membership, and external attacks.[143] Unfortunately, most of the Panther leaders were either in prison, had left the country, or were killed by 1972.[144] The United States government, specifically the Federal Bureau of Investigation ("FBI"), violently attacked The Black Panthers who were the victims of nearly 80% of the 295 FBI "authorized actions" against Black political groups.[145] Despite their demise, The Black Panthers remain inspirational for current activists

137. *See* Adam Winkler, *The Secret History of Guns*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/ (last visited Oct. 19, 2022).

138. *Id.*

139. *Id.*

140. *Id.*

141. HARTMANN, *supra* note 40, at 79.

142. *Id.* at 80.

143. *See* D.S. Gaikwad, *The Black Panther Party of USA: Rise and Fall*, 64 PROC. INDIAN HIST. CONG. 1326, 1330 (2003) ("With this violent posture of Black Panther Party, Federal Bureau of Investigation and Justice Department, and numerous Police Departments came forward to eliminate the threat of the Black Panthers in the period between 1967–1972.").

144. *Id.* at 1331.

145. Ollie A. Johnson III, *Explaining the Demise of The Black Panther Party: The Role of Internal Factors*, *in* THE BLACK PANTHER PARTY RECONSIDERED 391, 395–99 (Charles E. Jones ed., 1998).

who are fighting against racism and inequity within the application of the modern right to bear arms.[146]

F. Gun-Control Regulation Affirmed by The Supreme Court

While the right to bear arms was debated heavily within the states, this right was inert as a constitutional rights issue and the Supreme Court rarely heard cases regarding the Second Amendment.[147] It was not until the 2008 landmark Supreme Court decision in *District of Columbia v. Heller*,[148] regarding a Washington, D.C. handgun regulation, that the Supreme Court finally addressed the Second Amendment.[149] The D.C. regulation prohibited the individual possession of handguns and made the act of carrying a firearm a criminal offense.[150] As a D.C. special police officer, Dick Heller, received authorization to carry a firearm on duty for his job and applied to register his handgun to keep the weapon at home.[151] The District refused his registration, prompting Heller's lawsuit.[152]

The Court held that the Second Amendment protects the individual right to possess firearms, noting that although the original intent of the Second Amendment was grounded in the need for self-defense in regard to militia groups, the ability to "'bear arms' [is] not limited to the carrying of arms in a militia."[153] The Court emphasized that the historical state adoption of the Second Amendment provides "strong evidence" that the "founding generation conceived of the right" to "protect[] an individual citizen's right to self-defense."[154] *Heller* established the constitutional right to keep and bear arms for individual and private use, affirmatively establishing the right to bear arms far beyond the use of only those in militia groups.[155]

Immediately following *Heller*, Otis McDonald, joined by the National Rifle Association, filed suit in United States District Court to challenge a 1982 Chicago law that banned the registration of handguns and made registration a prerequisite to the possession of a firearm.[156] *McDonald v. City*

146. Andrew R. Chow, *How the Black Panther Party Inspired a New Generation of Activists*, TIME (Feb. 12, 2021, 8:00 AM) https://time.com/5938058/black-panthers-activism/.

147. JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 13 (Alexander Tsesis ed., 2018).

148. 554 U.S. 570 (2008).

149. BLOCHER & MILLER, *supra* note 147.

150. *Heller*, 554 U.S. at 573.

151. *Id.*

152. *Id.*

153. *Id.* at 585.

154. *Id.* at 603.

155. *See* BLOCHER & MILLER, *supra* note 147, at 13, 73.

156. McDonald v. City of Chicago, 561 U.S. 741 (2010).

of Chicago[157] was filed on the same day as *Heller* in 2008, but the Court did not hear the case until 2010.[158] The Court held that the individual right to own guns was fundamental to the "scheme of ordered liberty and system of justice" and therefore could not be infringed upon by state governments.[159] States were now restricted from placing blanket regulations on the individual right to bear weapons, establishing the right to bear arms for everyone, with some minor state-based restrictions.[160]

Additionally, prior to *Heller*, in 1895, the Supreme Court affirmed the use of guns for the purpose of defending oneself, your family, and your home.[161] In *Beard v. United States*,[162] the Court considered whether a white man was wrongfully charged with murder when he fatally shot a man outside of his home in self-defense, rather than retreating into his home for protection.[163] Justice Harlan wrote the opinion, holding that a man "may stand his ground and defend himself with such means as are within his control."[164]

The Court affirmed the right to self-defense again, in *Brown v. United States*,[165] which confirmed that people do not have a duty to retreat and may stand their ground through self-defense.[166] Eventually, this led to the creation of the "Castle Doctrine" in several states, which permits an individual to use "reasonable force" and, if necessary, "deadly force," to protect themselves from an incoming intruder.[167] Various state legislatures have adopted the doctrine and codified or expanded it within state bills.[168] In addition to this common law doctrine, many states have composed similar "Stand Your Ground" laws that permit an individual to use "deadly force" within a claim of self-defense.[169]

157. 561 U.S. 741 (2010).

158. *Id.*

159. *Id.* at 763.

160. BLOCHER & MILLER, *supra* note 147, at 97–99 (It is important to note that the Second Amendment was not considered absolute, and *Heller* listed a variety of exceptions to accommodate the majority of gun regulations—including concealed carry bans, bans on unusual and dangerous weapons, and restrictions on where someone could bring their gun in public places.).

161. BRIGGS, *supra* note 63 at 190.

162. 158 U.S. 550 (1895).

163. BRIGGS, *supra* note 63 at 191.

164. *Beard,* 158 U.S. at 563.

165. 256 U.S. 335 (1921).

166. *Id.* at 343.

167. Anne Teigen, *Self Defense and "Stand Your Ground,"* NAT. CONF. STATE LEGISLATURES, (Feb. 9, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx.

168. *Id.*

169. *See* Cynthia V. Ward, *Stand Your Ground and Self-Defense*, 42 AM. J. CRIM. L. 89, 90 (2015) ("'Stand your Ground'. . . bars the prosecution of people who use deadly force against a

Most recently, in *New York State Rifle & Pistol Ass'n v. Bruen*,[170] the Supreme Court struck down New York state's "proper-cause" requirement for obtaining an unrestricted license to carry a gun because it violated citizens' Fourteenth Amendment right to ordinary self-defense needs through the exercise of the Second Amendment right to bear arms. The New York state "proper-cause" law sought to establish a requirement where individuals seeking a permit had to demonstrate an "active need" for protection, rather than basic interest in self-defense. Black Americans have reported feeling fearful in response to this decision, as they have the highest growth in gun ownership at 58.2%, versus white people at 55% ownership status.[171] Historical perspectives regarding armed Black men will continue to perpetuate modern views, while this decision broadens access to weapons, and provides even more opportunities for gun violence.[172]

The ability to exercise the right to self-defense, implied in the right to bear arms from the Second Amendment, is heavily influenced by the racist history and creation of the Amendment.[173] While application of the right to bear arms seems neutral on its face, the racially charged foundation of the Second Amendment affects how self-defense claims are applied to white and Black people in modern judicial systems.[174] The following Section will provide examples of the individual exercise of the Second Amendment, specifically noting the differences between a white man and a Black man.[175]

II. RELEVANT CASE STUDIES

As demonstrated through the creation of the Second Amendment, the drafters crafted the fundamental right to bear arms to alleviate the concerns of white Southerners who worried that a unified government and established Constitution would impede their ability to carry guns for self-defense against Black enslaved people.[176] White Southerners were not carrying guns for protection against foreign invasions—rather they were carrying guns and

deadly aggressor without first attempting to retreat, or offers such persons a valid self-defense claim against a charge of criminal homicide.").

170. 142 S. Ct. 2111 (2022)

171. *See* Alana Wise, *Black Gun Owners Have Mixed Feelings About the Supreme Court's Concealed-Carry Ruling*, NPR (July 13, 2022, 3:16 PM) https://www.npr.org/2022/07/13/1110570938/black-gun-owners-supreme-court-concealed-carry-new-york.

172. *Id.*

173. *See supra* Section I.C.

174. *See infra* Part II.

175. *See infra* Part II.

176. *See supra* Section I.A–C.

exercising the right to open carry in order to protect themselves from Black slave rebellions, further inciting unnecessary violence.[177]

Because of the racist foundation of the Second Amendment, the application of the right to bear arms in modern society evidences a significant disparity. Inconsistencies arise in self-defense claims, specifically when Black Americans are attempting to protect themselves.[178] White people who exercise their right to self-defense are often more likely to avoid severe legal repercussions, while Black people who attempt to argue similar defenses are less likely to succeed.[179] The initial foundations of the Second Amendment to aid in the protection of the white man parallels society today, as Black men are still seen as threatening to white safety.[180] The following Case Studies provide stark examples of the inconsistency present in the right to bear arms for a white man, Kyle Rittenhouse, and a Black man, Jessie Murray, Jr.[181] This Section will show the disparities prevalent in the application of the right to self-defense for Black and white people, while also pointing to the similarities between our current application of the Second Amendment and the historical application of the Second Amendment.

A. Kyle Rittenhouse

On August 25, 2020, seventeen-year-old Kyle Rittenhouse, armed with an AR-15-style rifle, arrived in downtown Kenosha, Wisconsin on the third day of protests over the shooting of a Black man, Jacob Blake, by Officer Rusten Sheskey.[182] The protests were generally peaceful, but violent at points—with damaged cars, fires, and smashed streetlamps.[183] Kenosha police were overwhelmed by the protests, which encouraged local citizens to arm themselves and provide support.[184]

177. *Id.*

178. *See infra* Part II.

179. *See* Cynthia K.Y. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L.R. 367, 372 (1996) ("If the victim belongs to a racial group whose members have been socially constructed as foreigners or illegal immigrants . . . jurors may subconsciously minimize the harm suffered by the victim and may be more willing to view the defendant's use of force as reasonable than if the victim were perceived to be an "average" American.").

180. *See supra* Part I.

181. *See infra* Part II.A–B.

182. *See* Julia Bosman, *Kyle Rittenhouse Acquitted on All Counts*, N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial (detailing the Kyle Rittenhouse trial and case).

183. *Id.*

184. *Id.*

Rittenhouse arrived in Kenosha to aid in guarding a used-car dealership due to concerns that the business would be looted and attacked.[185] Rittenhouse shot and killed two men, and injured a third, after being chased into a parking lot.[186] Rittenhouse shot an unarmed man, Joseph Rosenbaum, four times.[187] Anthony Huber, who pursued Rittenhouse as he fled the scene, died after a gunshot wound to the chest from Rittenhouse.[188] Lastly, Gaige Grosskreutz, who also pursued Rittenhouse when he fled, survived his injuries from Rittenhouse.[189] During the trial, Kyle Rittenhouse and his lawyers argued that he acted in self-defense, claiming that he feared for his life during the chase.[190] In Wisconsin, the definition of "self-defense" is met if the defendant can reasonably prove that he acted in a way to "prevent imminent death or great bodily harm to himself."[191] Alternatively, the prosecutors argued that Rittenhouse created the dangerous situation by bringing the weapon to the protests and engaging the protesters in confrontational ways.[192] Although Rittenhouse placed himself voluntarily in a position of grave danger, the jury ultimately held that Rittenhouse shot the three men in self-defense, finding that he "was acting as part of a 'well-regulated militia' under the Second Amendment."[193]

The Rittenhouse case garnered widespread media attention, including comments in support of Rittenhouse's heroism from former President Donald Trump.[194] Far-right conservative groups portrayed Rittenhouse as a hero, heralded for his ability to "defend" businesses and people from protestor violence.[195]

185. *Kyle Rittenhouse Timeline: From Cleaning Graffiti to Killing in a Single Night*, GLOB. NEWS (Nov. 12, 2021, 2:09 PM), https://globalnews.ca/news/8366948/kyle-rittenhouse-timeline-cleaning-graffiti-shooting/.

186. *Id.*

187. *Id.*

188. Eric Levenson et al., *Kyle Rittenhouse Testifies He Knew Joseph Rosenbaum was Unarmed but Acted in Self-Defense During Fatal Shooting*, CNN (Nov. 10, 2021, 10:16 PM), https://www.cnn.com/2021/11/10/us/kyle-rittenhouse-trial-wednesday/index.html.

189. *See supra* note 185.

190. Becky Sullivan, *Kyle Rittenhouse is Acquitted of All Charges in the Trial Over Killing 2 in Kenosha*, NPR (Nov. 19, 2021, 5:53 PM), https://www.npr.org/2021/11/19/1057288807/kyle-rittenhouse-acquitted-all-charges-verdict.

191. David French, *Kyle Rittenhouse's Acquittal Does Not Make Him a Hero*, ATL. (Nov. 16, 2021), https://www.theatlantic.com/ideas/archive/2021/11/kyle-rittenhouse-right-self-defense-role-model/620715/.

192. *Id.*

193. ANDERSON, *supra* note 33, at 159 (citing Jerry Lambe, *Attorneys Pounce on Kyle Rittenhouse's Reported Well-Regulated Militia' Legal Defense*, L. & CRIME (Sept. 1, 2020, 12:36 PM), https://lawandcrime.com/high-profile/attorneys-pounce-on-kyle-rittenhouses-reported-well-regulated-militia-legal-defense/).

194. *Id.* at 160.

195. *Id.*

B. Jessie Murray, Jr.

Jessie Murray, Jr. and his wife were at a local bar in Jonesboro, Georgia when four or five highly intoxicated white men approached him.[196] The men were loud and made rude comments to Jessie's wife, Traci, a white woman.[197] One of the men stumbled directly into Traci and did not apologize for his actions.[198] Jessie got up and stood between his wife and the intoxicated man and instructed the man to get away from his wife.[199] The man responded, "You need to f–ing leave" while the other white men began to surround Jessie and his wife.[200] Quickly, Jessie left the bar, without Traci, deciding to get his gun from his car before he returned to get Traci out of the bar safely.[201] Arriving back at the door to the bar, the intoxicated men would not let him re-enter the bar, blocking Traci from leaving as well.[202] In fear for his and his wife's safety, Jessie attacked one of the men who was blocking his entrance.[203] Almost immediately, the other men joined in the fight, violently beating and attacking Jessie.[204] During the violent attack, the gun in Jessie's pocket accidently went off, killing one of the men, Nathaniel Adams, a former police officer.[205] Once police arrived on the scene, police took Jessie to the police station and eventually charged him with malice murder in the first degree and aggravated assault for the death of Adams.[206]

Georgia, like many other states, had established a Stand Your Ground law during the 2000s, that gave people the right, when faced with a justified threat, to use "force . . . intended or likely to cause death or great bodily harm only if he or she reasonably believed that such force was necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony."[207] During Jessie's trial however, the court dismissed his self-defense argument, finding that the men were not behaving in any way that would make Jessie fearful of his or his wife's well-being.[208] The judge explained that the intoxicated men were not acting in a

196. Carol Anderson, *Self-Defense*, *in* THE 1619 PROJECT, *supra* note 44, at 249, 250.

197. *Id.*

198. *Id.*

199. Mo Barnes, *Jesse Murray, Denied Stand Your Ground Defense in Georgia, Wins Victory*, ROLLING OUT (June 30, 2017, 9:35 AM), https://rollingout.com/2017/06/30/jesse-murray-denied-stand-ground-defense-georgia-wins-victory/.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See* Anderson, *supra* note 196, at 250.

208. Barnes, *supra* note 199.

way that would cause anyone to reasonably believe that "deadly force was necessary."[209] Ultimately, Jessie was found guilty by the jury and sentenced to five years' probation by the judge.[210]

C. Comparing Access to Self-Defense Between White and Black People

Countless examples show that white men who carry guns are portrayed and understood by the court differently than Black men who carry guns.[211] While Rittenhouse was heralded as a hero and vigilante serving to protect himself and his community from violence, the use of a weapon by a Black man is not considered justified in the same way.[212] This inconsistency can be traced to the roots of the Second Amendment because the current right to bear weapons for Black men remains restrictive and unequal—just as it was in the 1700s.[213] Since then, Black men have been characterized as dangerous and reckless when carrying a gun.[214] This same perception penetrates the socially accepted understanding of what qualifies as reasonable fear of another when establishing a justified use of self-defense.[215] Jury members' unavoidable implicit racial biases affect their understanding of justified self-defense, contributing to the disparate modern application of the Second Amendment.[216] The following Section will discuss how implicit bias works within the courtroom, as well as some of the methods courts have established to address racism among jury members.[217]

III. IMPLICIT BIAS AND "SHOOTER BIAS" IN SELF-DEFENSE CLAIMS

People of color in America have been historically oppressed through our social systems and government institutions, and the existence of implicit racial bias among Americans is "well-documented" and "obvious."[218] Racial

209. *Id.*

210. *Id.* While five years' probation is not a significantly severe consequence on its face, probation affects every aspect of an individual's life, from when they may leave their home, who they may visit, as well as weekly meetings and appointments with counselors and probation officers. Additionally, research on sentencing outcomes between white and Black people illustrate how pervasive and common these discrepancies are. "Black male offenders . . . receive longer sentences than similarly situated White male offenders." *See* UNITED STATES SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2.

211. *See infra* Part II.

212. *See infra* Part II.

213. *See supra* Part I.

214. *See supra* Part I.

215. *See infra* Part III.

216. *See infra* Part III.

217. *See infra* Part III.

218. *See* Jeena Cho, *Tackling Implicit Bias*, 106 AM. BAR ASS'N J. 11, 11–12 (2020) (discussing racial bias within the legal profession).

bias is especially prevalent in the criminal justice system.[219] The Supreme Court acknowledged the prevalence and influence of racism in the courtroom in 1931, in the case of *Aldridge v. United States*.[220] The Court reversed the Black defendant's murder conviction because the trial judge presiding over the case had not questioned the jury members on their racial prejudice and beliefs.[221] Additionally, in *Turner v. Murray*,[222] the Court reversed a Black defendant's conviction because the jury had not been told that the case involved a Black man killing a white man.[223]

Implicit bias is defined as an unconscious thought process that dictates our behavior and actions.[224] As humans, we create schemas throughout our daily lives during our direct and indirect experiences.[225] These experiences, such as hearing a story, watching a movie, listening to the news, or interacting with friends, all work to establish certain articulable characteristics about specific people which are eventually recognized by the cognitive process, creating patterns.[226] Most people are unaware that they are acting on these beliefs, "hence the term implicit or unconscious."[227] Implicit bias is generally harmless, but can become extremely harmful in the courtroom when it influences an individual's perception of specific groups based on their race.[228] Notably prevalent in gun-related cases, research reveals that "shooter bias" influences the outcome of self-defense claims because people are more likely to shoot "unarmed Black men than unarmed [w]hite men."[229] Furthermore, studies have shown that simple, ambiguous behaviors are implicitly perceived as "violent" more often when the individual is Black, rather than white.[230]

Studies have measured the impact of a defendant's race on the decision to shoot, finding that the decision to pull the trigger is quicker when

219. *Id.*

220. 283 U.S. 308 (1931).

221. *Id.* at 311.

222. 476 U.S. 28 (1986).

223. *Id.* at 36.

224. *See* Alfred Ray English, *Understanding Implicit Bias*, 55 ARIZ. ATT'Y MAG., Mar. 2019, at 10, 11 (explaining the role that human cognition plays in establishing and creating implicit bias).

225. *Id.*

226. *See* Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 SOC. PSYCH. Q. 6, 6–7 (2008) (noting how the images we "are inundated with" "from childhood" "convey racial inequality").

227. Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 81 (2020).

228. *Id.* at 81–82.

229. *See* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISC. 210, 223 (2012) (explaining a study in which participants revealed levels of "shooter bias" that suggested implicit stereotypes influence shooting decisions more so than explicit or conscious racist attitudes).

230. *Id.* at 227.

participants are faced with an image of an armed Black man.[231] Researchers have concluded that, "[B]lack[] [people] face a threat from firearms that is both far more significant and different in character than that posed to white [people]."[232] Social perceptions of the "dangerous" Black man infiltrate the idea of what constitutes "danger," directly affecting whether a jury member will justify an individual's use of force.[233] For example, Jennifer Eberhardt, in her book, *Biased*, found that images of Black people shown to a group of participants were "consistently perceived as a threat."[234] In the study, the participants quickly viewed images of Black and white subjects and linked the concept of danger most affirmatively with images of Black people.[235] Eberhardt emphasized that the social association of Black men with the concept of danger, "influences not only how we see [B]lack people but how we see guns."[236] Courts have attempted to mitigate the prevalence of racial bias in the courtroom by allowing lawyers to strike jury members who exhibit explicit racial biases and oppressive beliefs.[237]

Bringing attention to an individual's implicit bias within the courtroom has been successful in mitigating racial bias in some cases. For example, the United States District Court for the Western District of Washington published a video on implicit bias and the impact of unfair prejudice in the courtroom.[238] Another court in the Western District of Washington created jury instructions to "raise[] awareness to the associations jurors may be making without express knowledge and directing the jury to avoid using those associations."[239] While these methods restrict explicit racism in the courtroom and work to bring attention to the impact of racism within the justice system, actually removing and separating racial implicit bias from cognitive thought is impossible because implicit bias is unknown to the

231. *Id.* at 223.

232. *Id.* at 224.

233. *See* Jim Sliwa, *People See Black Men as Larger, More Threatening Than Same-Sized White Men*, AM. PSYCH. ASS'N (Mar. 13, 2017), https://www.apa.org/news/press/releases/2017/03/black-men-threatening (discussing a study that found Black men to be disproportionately more likely to be shot and killed by police by reason of their "physical size"); Ian Millhiser, *Man Sentenced to Die After 'Expert' Testified That Black People Are Dangerous*, THINKPROGRESS (Apr. 25, 2016 12:00 PM) https://archive.thinkprogress.org/man-sentenced-to-die-after-expert-testified-that-black-people-are-dangerous-dc0ebdfb64a6/.

234. *See* Anderson, *supra* note 196, at 253.

235. *Id.*

236. *Id.*

237. *See* Ashok Chandran, *Color in the Black Box: Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 37 (2014) (explaining that the process of voir dire is a popular way for lawyers to eliminate jury members who exhibit racial biases).

238. *See* Gregory Cusimano, *Implicit Unconscious Bias*, 79 ALA. LAW. 418, 424 (2018) (detailing steps taken by other courts to address the issue of unconscious bias in the courtroom).

239. *Id.*

individual harboring the beliefs.[240] Implicit bias is difficult to analyze because individuals are not aware of when they are relying on an implicit bias versus a neutral opinion.[241] This affects the jury's evaluation of an individual, leaving open whether the jury based its decision on racial stereotypes or the factual elements of the case.[242] Even if a jury member is provided with educational materials about the existence of implicit bias, if the individual does not personally believe they are biased, eliminating the impact of racial bias in the courtroom remains unresolved.

Instead of informing jury members about bias and racism in the courtroom, jury members should receive educational material on the comprehensive history of the Second Amendment and examples of relevant case studies that portray the disparate exercise of the right to self-defense.[243] Jury members must be provided with the explicit and expressed knowledge of self-defense-related racial biases, as well as the tools to rework and re-establish their own perceptions, acknowledging the root of their beliefs in historically-ingrained stereotypes.[244] Attacking this issue with a holistic approach of educating jury members would have a greater effect in eradicating bias in self-defense cases, allowing for a solution that accepts unavoidable implicit bias, while also aiming to identify and acknowledge historically-founded and falsely created stereotypes.[245]

IV. ANALYSIS AND SOLUTIONS

The historical influence of the Second Amendment has infiltrated the modern interpretation of the right to bear arms.[246] The modern application and social understanding of the exercise of the Second Amendment parallels the same beliefs from the 1700s—that the right to bear arms is designed for the protection and safety of white people and does not extend to Black people.[247] The history of the Second Amendment has influenced social perceptions of danger, by villainizing armed Black people and applying a persona of danger and violence.[248] This perception directly affects how jury members analyze self-defense cases.[249] Approaching this issue holistically by

240. *See* Anderson *supra* note 196, at 253; *see also* Cho, *supra* note 218, at 12 ("It caught me by surprise when I first took the Harvard Implicit Association Test, which measures unconscious bias. The test revealed I had many common biases . . . My initial reaction was surprise, then denial.").

241. Su, *supra* note 227, at 82.

242. *Id.* at 83.

243. *See infra* Part IV.

244. *See infra* Part IV.

245. *See infra* Part IV.

246. *See supra* Part I.

247. *See supra* Part II.

248. *See supra* Part III.

249. *See supra* Part III.

informing jury members about the historical influence of the Second Amendment and the modern application of the right to bear arms will help to eradicate racial bias in the courtroom because jury members will be able to recognize the influence of historically-based racial bias and separate it from what is heard on the witness stand.[250]

A. The Racial Influence Driving a Finding of Justified Fear in Self-Defense Claims

The implied right to self-defense offered through the Second Amendment's right to bear arms is not equally exercised by all people.[251] Black people suffer from oppressive and racist stereotypes that impact their ability to exercise the right to self-defense or the right to own weapons.[252] Implicit bias—prejudicial beliefs that unconsciously encourage the favor of one group of people over another—permeate social perspectives and affect how society generally interprets fear.[253] The modern stereotypical fear of Black men distinctly parallels the historical fear held by white people in the 1700s.[254] This pervasive modern bias directly affects how reasonable fear is evaluated and justified in self-defense claims.[255] When jury members make a decision, they draw their conclusion from their personal opinions and beliefs, unconsciously relying on the false social perception that Black men are dangerous.[256] Jury members, relying on their biases, may dismiss, trust, or

250. *See infra* Part IV.

251. *See supra* Part II.

252. *See supra* Part III.

253. *See* Kerry O'Brien et al., *Racism, Gun Ownership and Gun Control: Biased Attitudes in US Whites May Influence Policy Decisions*, 8 PUB. LIB. SCI. ONE 1, 2 (2013) ("Negative attitudes towards [B]lacks, along with conservative and political ideologies, appear to be related to fear of [B]lack violence and crime.").

254. *See* Mary Beth Oliver, *African American Men as "Criminal and Dangerous": Implications of Media Portrayals of Crime on the "Criminalization" of African American Men*, 7 J. AFR. AM. STUD. 3, 5 (2003) (Black men are portrayed as dangerous in media. Research reveals that Black characters on reality programming tend to be shown as "violent or threatening.").

255. *See* English, *supra* note 224, at 10, 11; *see* Lee, *supra* note 179, at 406 (Numerous studies show that stereotypes about Black people as violent and dangerous directly influence perception and judgment, traceable to historical attempts to criminalize Black people.).

256. Note, *Black Lives Discounted: Altering the Standard for Voir Dire and the Rules of Evidence to Better Account for Implicit Racial Biases against Black Victims in Self-Defense Cases*, 134 HARV. L. REV. 1521, 1524 (2021) [hereinafter Note, *Black Lives Discounted*]; *see, e.g.*, SENTENCES IMPOSED ON THOSE CONVICTED OF FELONY ILLEGAL POSSESSION OF A FIREARM IN ILLINOIS, CENTER FOR CRIMINAL JUSTICE RESEARCH, POLICY, AND PRACTICE 1 (2021) ("The majority of felony firearm possession convictions in Illinois occur in Cook County, primarily involve Black men . . . . 74% of individuals convicted of Class 4 Felony firearm possession were Black men."); N.Y. STATE DIV. OF CRIM. JUST. SERVS., NYS ADULT ARRESTS AND PRISON SENTENCES BY RACE/ETHNICITY IN 2019 (2019) (while 58% of the adult New York State population identifies as white and 15% identifies as Black, 48% of all 2019 sentences to prison were of Black defendants).

overly criminalize an individual based on an unconscious stereotype.[257] By recognizing these biases historic roots, and the ways in which these biases impact the justice system, jury members will approach conclusions of the law with an increased awareness of racial bias in self-defense cases.[258]

1. The Historical Stereotype of Black Men as "Dangerous" Influences the Modern Discrimination of Black Men.

Black men have been perceived as "dangerous" since the 1700s, when gun control laws and patrol groups were established to manage enslaved people.[259] Today, numerous studies show that Black men are still socially perceived to be more "dangerous" and threatening compared to white people.[260] Racial bias remains widespread, because it is maintained throughout our structural application of the law and prevalent within our persistent historical inequities from the 1700s.[261]

The true history of the Second Amendment shows how Black people were perceived in the 1700s and how these biases stood as the underlying reasons for the creation of the Second Amendment.[262] The Second Amendment was established to protect white people and their families.[263] The historical "Black Codes" of the mid-1800s also restricted the freedom of Black citizens in all areas of life.[264] Black people were segregated in their ability to attend school, vote, work, buy homes, and get married, establishing a significant divide in the freedom of Black versus white people.[265] Additionally, the legacy of slavery and segregation persisted throughout history, evident in the 1960s Black Panther Movement and the modern 2000s over-policing of majority Black neighborhoods.[266] These events crafted and perpetuated a pro-white bias against the "dangerous" and "threatening" Black man that has cued decades of discrimination.[267] There is a clearly established "causal connection between past racial discrimination and current racial

257. *See supra* note 241, at 84.

258. *See infra* Part IV.

259. *See supra* Section I.A–C.

260. *See supra* Part II.

261. *See* B. Keith Payne et al., *Historical Roots of Implicit Bias in Slavery*, 116 PROC. NAT'L ACAD. SCI. 11693, 11693–94 (2019) (showing how modern-day implicit bias is related to "historical persistence" of racial attitudes and beliefs).

262. *See supra* Section I.C.

263. *Id.*

264. *See supra* note 261, at 11697.

265. *See* Ekwall, *supra* note 48.

266. *See supra* Section I.D–F; *see also* Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTSNOW (June 17, 2020), https://now.tufts.edu/2020/06/17/how-racial-segregation-and-policing-intersect-america.

267. *See* Payne et al., *supra* note 261, at 11697.

inequality."[268] Our society has synonymized Black people with criminality, dangerousness, and fear since the 1700s, when gun control was fueled by a fear of Black slave insurrections and violence.[269] The consistent systemic racism that persists throughout our American culture, government, and regulatory systems perpetuate these harmful ideologies and are far more influential than individually held implicit biases.[270]

Research shows that racial bias towards Black people persists today, especially in the criminal justice system.[271] One study recognized that Black people are more likely to become victims in self-defense cases because of the strong "mental association linking [B]lackness and criminality" that "it can affect what people in the defendant's position see."[272] Other studies have found that participants are more likely to correlate Black faces and features as "criminal" when compared to white faces and features.[273] And others find that people are more likely to misperceive an item for a gun in the hands of a Black individual than a white individual, implying an implicit association between violence, guns, and Black bodies.[274] The social perception that Black

268. *See* Mason D. Burns et al., *"Past Injustice and Present Prejudice": Reducing Racial Bias and Increasing Sympathy by Framing Historical Racism as Recent*, 25 GRP. PROCESSES & INTERGROUP RELS. 1312, 1327 (2022) (conducting four studies that investigated the "roots of privity judgements" focusing on "subjective temporal perceptions" and their association with implicit decisions).

269. *See supra* Part I.

270. *See supra* Part III.

271. *See supra* Part III.

272. Note, *Black Lives Discounted*, *supra* note 256, at 1524; *see also* Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 622–23 (2015) (Research shows that teachers are more likely to perceive a Black student's misbehavior in the classroom as a part of a problematic pattern of behavior.); ANDERSON, *supra* note 33, at 266 ("In 2020, the U.S. Commission on Civil Rights reported . . . the criminal justice system is ten times more likely to rule a homicide justifiable if the shooter is white and the victim in Black than the other way around. In fact, the report notes that when a white person kills an African American, it is 281 percent more likely to be ruled a "justifiable homicide" than a white-on-white killing."); Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites Are Far More Likely to Be Ruled "Justifiable"*, MARSHALL PROJECT (Aug. 14, 2017, 5:30 AM), https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable ("When a white person kills a [B]lack man . . . in one in six of these killings, there is no criminal sanction. . . [W]hen Hispanics killed [B]lack men, about 5.5 percent of cases were justifiable. When whites killed Hispanics, it was 3.1 percent. When [B]lacks killed whites, the figure was just 0.8 percent. When [B]lack males were killed by other [B]lacks, the figure was about 2 percent, the same as the overall rate."); Robert Verbruggen, *Fatal Police Shootings and Race: A Review of the Evidence and Suggestions for Future Research*, MANHATTAN INST. (Mar. 9, 2022) (https://www.manhattan-institute.org/verbruggen-fatal-police-shootings) ("Approximately a quarter of [fatal police shootings] are Black. This is roughly double the Black share of the overall population . . . .").

273. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878–81 (2004).

274. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY SOC. PSYCH. 181, 182 (2001).

people are more "dangerous" directly relates to the history and disproportionate exercise of the right to bear arms. Racial bias is ingrained in our historically founded and socially accepted perceptions of Black people and inherently intertwine with the jury's analysis of justified fear.

2. Jury Members Determine What Qualifies as a "Reasonable Fear" and Implicitly Incorporate Historical Racial Bias Into Their Analysis.

The ability to successfully exercise the right to self-defense should not be restricted based on the race of the defendant. Rittenhouse, a white man, was able to publicly carry and shoot his gun for self-defense in public, while Black men, like Jessie Murray, Jr., are unable to exercise the same desire for personal protection.[275] Jury members heard both of these cases and found Rittenhouse to have established a "justified" showing of fear.[276] Self-defense claims rely on a "reasonable" showing of "fear" by the individual who acted in self-defense.[277] The jury members must decide whether the fear experienced by the individual was, in fact, reasonable.[278] Jury members inherently draw their conclusions about reasonable fear based on their own biases and opinions.[279] Because the stereotype of the "dangerous" and "armed" Black man is still prevalent[280] a pattern of inequality is established when jury members find more justification for self-defense for the white defendants against Black men rather than for Black defendants who carry a gun.[281]

Self-defense laws vary by state, and each state has created different requirements necessary to establish a claim for self-defense.[282] In general, however, self-defense is usually defined as "the use of force justified by

275. *See supra* Part II.

276. *See supra* Part II.

277. *Self-Defense Laws in The U.S.*, SCHARFF L. FIRM, https://scharfflawfirm.com/self-defense-laws-u-s/ (last visited Sept. 19, 2022).

278. *Id.*

279. *Id.*

280. *See* Meikhel M. Philogene, *Why the Black Man is Really Gray*, NAT'L LAWS. GUILD R. 49, 56 (2019) (The research indicated that there was a strong stereotype depicting Black people as "aggressive, violent, and dangerous").

281. *See* Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL'Y INSIGHTS FROM THE BEHAV. AND BRAIN SCIS. 103, 105 (2014) ("When the person was unarmed, participants mistakenly decided to shoot more often if he was Black than [w]hite. Personal stereotypes or prejudices did not predict performance on the task, but awareness of societal stereotypes about Black[] [people] and violence did.").

282. *See Self-Defense Laws in The U.S.*, *supra* note 277.

defending oneself or another from injury."[283] The individual must possess a good faith and reasonable belief, based on the indication of a threat, that the individual's life or body were in danger of injury.[284] The force used by the individual must be proportional to the harm intended by the assailant and can serve as either a perfect or imperfect defense, dependent on the circumstances.[285] To succeed on a claim of self-defense, the individual must provide a sufficient justification for their defense—one that the jury members consider reasonable.[286] The individual provides justification through the description of the incident and an explanation of the fear and danger that they experienced.[287] The jury members then will determine whether the fear experienced by the individual is reasonable enough to justify the individual's defensive act.[288]

While the legal requirements governing self-defense seem neutral, the success rate of self-defense claims are not. The shooting of a Black person by a white person is found justified about 17% of the time, while the shooting of a white person by a Black person is only found justified about 1% of the time.[289] Because self-defense claims are assessed according to the interpretation of danger from the individual, in order to succeed, the jury and the judge have to agree with the individual that a reasonable threat or fear existed during the incident.[290] The racial bias of jury members critically affects this stage of analysis because jury members decide what constitutes a "reasonable" threat based on their own opinions of what would be fearful or terrifying to them.[291]

When jury members evaluate reasonable fear, they unconsciously incorporate social bias into their conclusion. Jury members improperly evaluate self-defense claims "based on stereotypes rather than taking in the whole picture" of the defendant's presentation, failing to acknowledge that

283. See Andrea L. Earhart, Note, *Should a Defendant be Denied the Affirmative Defense of Self-Defense if the Criminal Act Was Not Intentional? Self-Defense of Defense for Self?* Duran v. State*, 990 P.2d 1005 (Wyo. 1999)*, 1 WYO. L. REV. 699 (2001) (describing the elements of self-defense).

284. *Id.* at 719–20.

285. *Id.* at 700.

286. *Id.* at 702.

287. *Id.*

288. *Id.* at 713.

289. Patrik Jonsson, *Racial Bias and 'Stand Your Ground' Laws: What the Data Show*, CHRISTIAN SCI. MONITOR (Aug. 6, 2013), https://www.csmonitor.com/USA/Justice/2013/0806/Racial-bias-and-stand-your-ground-laws-what-the-data-show.

290. Ward, *supra* note 169, at 118 ("Michael Yaki of the United States Commission on Civil Rights voiced this concern . . . '. . . there is bias in the assertion or the denial of Stand Your Ground, depending on the race of the victim or the race of the person asserting the defense . . . .'").

291. Note, *Black Lives Discounted*, *supra* note 256, at 1525.

their decision is intertwined with historical racial influence, the modern inequality of gun rights, and implicit biases.[292]

B. Jury Member Education and Working Toward Combating Implicit Bias

In order to establish equity in the application of the Second Amendment for Black people, reliance on racial bias in the courtroom must be mitigated. As discussed in Part IV, implicit bias is prevalent in the human experience and is functionally impossible to eliminate completely.[293] Human beings inherently group together with people who share similar beliefs, feelings, and physical attributes to them.[294] Because of this, implicit bias is hard to eliminate and generally unavoidable. Notably, even critical race theorists assert that racism is a normal incident of the social experience because it is embedded in our systems and institutions.[295]

Many legal scholars have attempted to address implicit bias in the courtroom by suggesting methods of shielding the defendant's race from the jury, in order to ban the use of "prejudicial racialized imagery in self-defense cases."[296] Other courts have proposed a more general approach, by having the judge presiding over a case simply ask the jury not to consider their implicit biases in their decisions.[297] Some courtrooms have even implemented jury instructions that tell jurors not to be influenced by the defendant's race, ethnicity or gender, while others include an instruction for the jury members on what implicit bias means.[298] While these methods are helpful in bringing attention to the issue of racism and the cultural biases individuals may hold, these solutions are not specific enough nor do they address the historical influence specifically prevalent in self-defense and gun-related crimes for Black Americans. Instead, jury members should be instructed on the racist history of the Second Amendment to understand holistically how Black Americans are perceived when they attempt to exercise their right to self-defense and the inherent social biases that society holds and relies upon when analyzing self-defense cases for Black

292. Su, *supra* note 227, at 83.

293. *See supra* Part III.

294. *See* Tyron P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 DREXEL L. REV. 631, 641 (2018) ("[A]nyone can, and everyone does have implicit biases . . . .").

295. *See id.* at 640 ("Racism . . . begins in the mind as a thought process. Rational people do not want to be racist; they desire to give up the hold of their racist unconscious.").

296. *See* Note, *Black Lives Discounted*, *supra* note 256, at 1534.

297. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1598 (2013) (providing an excerpt from Judge Bennett's instructions to jury members before beginning trial, where he asks the jury to "not decide the case based on 'implicit biases'").

298. *Id.*; *see also* Su, *supra* note 227, at 89.

Americans. By educating jury members about these disparities, jury members should be able to recognize inequalities. This method will help to eliminate jury members' unconscious discrimination against Black Americans because the jury will actively understand the history and creation of harmful racial biases and see how the influence of these biases penetrate and alter their own personal beliefs and opinions.

Instructing jury members about the racial influence of the Second Amendment and asking pointed questions designed to identify the prevalence of racially influenced fear will bring awareness to the harmful biases harbored by jury members in self-defense cases and encourage holistic consideration that acknowledges the impact of individual and personal racial biases. Mitigating racial bias in the courtroom through secretive tests, such as an implicit association test, or through jury instructions designed to silently draw out these unconscious beliefs, fail to resolve the issue because these attempts do not bring active awareness and notice to an individual's racial bias. As discussed in Part III, racial biases and perceptions are crafted through all of the experiences in which an individual participates in, such as: where someone grew up, the college they attended, the television shows they watched, where they bought their groceries, the career they pursued, etc.[299] To some extent, many legal scholars believe that everyone exhibits discriminatory behaviors because we have all been a part of a common history where racism was, and still does play, a dominant role.[300] Providing potential jury members with a full understanding of the history of the Second Amendment and actively bringing attention to the historical and racial influence regarding gun rights, including the harmful stereotypes associated with Black men who carry guns, would mitigate jury members' implicit biases about self-defense by informing jury members of the potential for bias while simultaneously confronting the disparate application of the Second Amendment.

It is important for individuals, especially those involved with the judicial system as jury members, to be aware of and educated on how to ensure fairness and equality in the cases that they hear.[301] Jury members who are instructed to disregard their biases may actively attempt to do so but will ultimately fail because personal opinions are reliant on personal bias, and are therefore simply unavoidable. Furthermore, disregarding personal opinion and bias is impossible in the courtroom, where jury members must sincerely rely on their instincts and personal opinions when deciding whether a

299. *See* Charles R. Lawrence III., *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (explaining that Americans share many of the same ideas, beliefs, and attitudes in which we inherently connect to an individual's race).

300. *Id.* at 333–35.

301. Cusimano, *supra* note 238, at 423.

defendant is guilty of a crime. Instead of instructing jury members to "overlook their senses and feelings" in regard to the race of the defendant, the court should instruct jury members about why these biases exist, explain how they have been perpetuated, encourage jury members to confront these perceptions, and detail the relationship of the social perception to the historical roots of the Second Amendment.[302]

The educational material would consist of a short document, similar to the Background Section included in Part I of this Comment, and would address the honest and truthful influence that encouraged the creation of the Second Amendment. Jury members would be instructed on American history, starting with the beginning of the American Revolution, in order to understand why white people wanted to control enslaved people and the influence behind early gun-control regulations. Jury members would also learn about the drafting of the Second Amendment and the concerns between the North and South regarding the issue of slavery and gun-rights. Additionally, jury members would be instructed on slave patrol militia groups and the inequality surrounding the exercise of the Black right to bear arms. In addition to the historical section of the lesson, jury members would also be shown relevant case studies that parallel the racist application of gun rights in the twenty-first century, comparing the ability of white people to carry guns versus the ability of Black people to exercise the same right. At the conclusion of the lesson, jury members should be able to understand the impact of the racist history of the Second Amendment and the interplay between the history and the current application of the right. This holistic approach will help jury members to recognize opinions they may hold and the root cause of their beliefs. Even if a jury member harbors an implicit bias and is unaware of the racial bias, the comprehensive educational approach is beneficial because it provides jury members with factual information that will either support or dismiss their implicit beliefs and draws their attention to the disparate impact of the modern Second Amendment currently. Therefore, jury members will have a wealth of knowledge to think about and consider when analyzing self-defense cases.

After participating in the instructive lesson jury members would be more aware of their biases and have a complete understanding of how to appropriately analyze what constitutes a "reasonable" fear or threat, while actively acknowledging the interaction of their personal opinions within the context of our harmful, yet widespread, historically based social perceptions of the "dangerous" Black man. Striking jury members who exhibit any articulable level of bias after a short exam or questionnaire is not accurate, as bias is unconscious and ingrained. Instead, all courts should mandate pre-trial

302. *Id.*

jury information that expressly provides the knowledge and information necessary to make an informed decision regarding self-defense. This would allow the jury members to understand their preconceptions and have the requisite knowledge to accept and apply their new understanding of the historical influence of the Second Amendment to adjudicate on the case.

CONCLUSION

The racist history of the Second Amendment is often unknown, but directly penetrates our social culture and the ability of Black Americans to exercise the right to bear arms. By informing jury members about the racial history of the Second Amendment and by alerting jury members' attention to the persistent disparities present in the modern application of the Second Amendment, jury members will be able to acknowledge that implicit, historically ingrained racial biases exist and incorporate this knowledge into a more just and holistic analysis of self-defense cases for Black Americans.