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Voisine v. United States, *the Orlando Shooting, and the Suspension of Constitutional Rights*

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In the wake of the 2016 Orlando nightclub mass shooting, *Voisine v. United States*, a case the U.S. Supreme Court decided only two weeks later[1] has even more significance now than ever.[2] *Voisine v. United States* raises an important, timely question: When can constitutional rights, and in particular the Second Amendment right to bear arms, be suspended?[3] The case – which involved a defendant who, like the Orlando perpetrator, had a history of domestic violence[4] – further emphasizes why our society must be more principled and

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[1] Voisine v. United States, 136 S.Ct. 2272 (2016).

[2] Gal Tziperman Lotan, *Orlando Mass Shooting: Timeline of Events*, ORLANDO SENTINEL (Jun. 13, 2016), http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-pulse-shooting-tick-tock-20160613-story.html.

[3] *Voisine*, 136 S.Ct. at 2276.

[4] *Id*. at 2277; Jack Healy, *Sitora Yusufiy, Ex-Wife of Orlando Suspect, Describes Abusive Marriage*, N.Y. TIMES (Jun. 13, 2016), http://www.nytimes.com/2016/06/14/us/sitora-yusufiy-omar-mateen-orlando-shooting.html.

consistent in making this kind of determination.

1. ***Voisine v. United States***

Voisine involved a defendant charged with breaking a federal law[5] called the Lautenberg Amendment,[6] which prohibits any person "who has been convicted in any court of a misdemeanor crime of domestic violence" from possessing "any firearm or ammunition."[7] Voisine, the defendant in this case, was convicted of "intentionally, knowingly or recklessly" using physical force against his girlfriend.[8] Even after he was convicted, however, he continued to possess his gun.[9] His illegal possession case made it all the way up to the Supreme Court, where Voisine argued that he had not intentionally or knowingly used physical force, and that the Lautenberg Amendment should not be interpreted as encompassing recklessness.[10]

Formally, the Court faced a question merely of statutory interpretation, holding that the statute encompasses recklessness.[11] However, in the lower courts, Voisine made another argument: that the Lautenberg Amendment infringed on his Second Amendment right to bear arms.[12] The Court declined to take up that question. But Justice Thomas, asking his first question from the bench in ten

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[5] *Voisine*, 136 S.Ct. at 2277.

[6] Lautenberg Amendment, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (1996) (codified as amended at 18 U.S.C. §§ 921-922, 925 (2013)).

[7] 18 U.S.C. § 922(g)(9) (2012).

[8] *Voisine*, 136 S. Ct. at 2277 (citing ME. REV. STAT. ANN., tit. 17-A, § 207(1)(A)) (2001).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 2277-78, 2282.

[12] The First Circuit disposed of this argument by citing to case precedent in the circuit already upholding the constitutionality of 18 U.S.C. § 922(g)(9). United States v. Voisine, 778 F.3d 176, 186 (1st Cir. 2015) (citing United States v. Booker, 644 F.3d 12, 22-26 (1st Cir. 2011) (law is more precisely tailored to reducing gun violence that felony prohibition that *Heller* presumptively declared valid)). Several other circuit courts have also upheld the constitutionality of the Lautenberg Amendment, on various bases. *See* United States v. Staten, 666 F.3d 154, 160-68 (4th Cir. 2011) (law survives intermediate scrutiny on basis of evidence, including evidence that domestic abuse committed by person with firearm is more likely to be deadly); United States v. Skoien, 614 F.3d 638, 643-44 (7th Cir. 2010) (law survives scrutiny on basis of evidence, including that person with violent past is more likely to commit violence in future).

years,[13] only shortly after the death of similarly conservative Justice Scalia, brought up the issue during oral arguments.[14] He asked the lawyer for the federal government if she knew of "another constitutional right that can be suspended based upon a misdemeanor violation of a State law?"[15] The lawyer did not – something that Justice Thomas eventually emphasized in his dissenting opinion, where he criticized the fact that "[w]e treat no other constitutional right so cavalierly."[16]

Justice Thomas's point underscores the broader, long-term importance of this case: the need for a principled, internally consistent method by which our society justifies suspending a person's constitutional rights, and particularly Second Amendment rights. The recent massacre in Orlando only emphasizes this need, given that the perpetrator was able to purchase firearms legally despite being investigated by the federal government for involvement in terrorism.[17] Additionally, in an even more direct connection to *Voisine*, the Orlando perpetrator also allegedly committed domestic violence against his then-wife, although unlike Voisine he was apparently never charged or convicted.[18]

Unfortunately, as Justice Thomas's question correctly implies, our society currently lacks such a principled, consistent method for justifying the suspension of constitutional rights. Yet, Justice Thomas is incorrect to state that the problem is manifested solely in a looser standard by which we suspend the right to possess firearms. Instead, the problem is two-fold, extending to *all* constitutional rights

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[13] Adam Liptak, *Clarence Thomas Breaks 10 Years of Silence at Supreme Court*, N.Y. TIMES (Feb. 29, 2016), at A1, http://www.nytimes.com/2016/03/01/us/politics/supreme-court-clarence-thomas.html?_r=0.

[14] Transcript of Oral Argument at 35-36, Voisine v. United States, 136 S.Ct. 2272 (2016) (No. 14-10154).

[15] *Id.* at 36.

[16] *Voisine*, 136 S. Ct. at 2291 (Thomas, J., dissenting).

[17] Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES (Jun. 12, 2016), http://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html; Eric Lichtblau & Matt Apuzzo, *Orlando Gunman Was on Terror Watchlist, F.B.I. Director Says*, N.Y. TIMES (Jun. 13, 2013), http://www.nytimes.com/2016/06/14/us/omar-mateen-fbi.html.

[18] Healy, *supra* note 4.

that we deem suspendable.

2. Suspending Other Constitutional Rights: Debtors' Prisons and Disenfranchisement

First, our society routinely suspends numerous constitutional rights, other than the right to possess firearms, for minor violations of the law. Though Justice Thomas implies that no other constitutional right can be suspended for a misdemeanor violation, this happens all the time, often with the official imprimatur of the law.[19] Perhaps the most egregious example concerns people who are routinely imprisoned for not paying fines imposed as a condition of their probation for simple misdemeanor violations like traffic tickets.[20] This has created a large problem of so-called "debtors' prisons."[21]

In *Bearden v. Georgia*, the Supreme Court itself held that such imprisonment is constitutional, and does not violate the Equal Protection Clause of the Fourteenth Amendment, if the defendant has the ability to pay but "willfully" refuses.[22] Already this is analogous to rights suspension in the context of firearms. Just as a misdemeanor renders inaccessible the right to possess a gun, to which a person is normally entitled by the Second Amendment, here it renders inaccessible the right to be treated the same as a person who *is* able to pay the fine, to which one is normally entitled by the Equal Protection Clause.[23] Yet, courts often take it a step further, outright disregarding *Bearden*'s charge by failing to inquire about ability to pay, or finding creative, yet ostensibly legal ways to circumvent *Bearden*.[24] For example, some claim that defendants are

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[19] *See* AM. CIV. LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 6-7 (2010), http://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf.

[20] *See id.*

[21] *See id.*

[22] Bearden v. Georgia, 461 U.S. 660, 672-73 (1983).

[23] *See id.* at 665-66 (acknowledging that the differential treatment of a defendant who does not pay an imposed fine, versus one who does, may violate the Equal Protection Clause, although certain circumstances may warrant consideration of indigent status in decisions to revoke probation).

[24] *See* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 382-83 (2012) (citing AM. CIV. LIBERTIES UNION, *supra* note 19,

going to jail for violating a court order rather than for not paying debts, and that, in some cases, defendants can actually request" jail to make restitution for their debts.[25] Lower courts routinely uphold such questionable programs.[26]

These practices have a direct, if unexpected, connection to another constitutional right that is often suspended for minor violations of the law: the right to vote. In particular, when a person has been disenfranchised for committing a crime, some states require repayment of all debts and fees acquired in the criminal justice system before re-enfranchisement – another scheme that courts have routinely upheld.[27]

In another direct rebuttal to Justice Thomas's argument, a small handful of states suspend the right to vote for those convicted of misdemeanors.[28] Most states suspend this right only when a person has been convicted of a felony. Yet, formalities aside, felony disenfranchisement practices shed light on the flawed logic of how violations are classified, which in turn leads to flawed logic in how rights are suspended. For example, states still routinely classify mere possession of marijuana as a felony.[29] By contrast, domestic violence, when classified as a misdemeanor, does not result in a similar suspension of rights – except, again, in certain states that do engage in misdemeanor disenfranchisement.[30]

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at 5).

[25] *Id.* at 383.

[26] *Id.* at 382.

[27] *Id.* at 387 n.217 (discussing states with such laws, such as Alabama, Arkansas, and Kentucky).

[28] For example, Illinois temporarily suspends the right to vote for any person who is incarcerated, even for non-felony offenses, while Kentucky and Missouri permanently disenfranchises people convicted of certain misdemeanor offenses, unless they receive an executive pardon. ILL. CONST. art. III, § 2; KY. CONST. § 145; MO. REV. STAT. § 115.133.1 (2016); MO. CONST. art IV, § 7 (discussing pardons).

[29] Ana Swanson, *How Much Weed You Need to Carry to Get a Felony Charge in 50 States*, WASH. POST, KNOW MORE (Apr. 27, 2015, 11:39 AM), http://knowmore.washingtonpost.com/2015/04/27/how-much-weed-you-need-to-carry-to-get-a-felony-charge-in-50-states.

[30] For example, Virginia, one of the few states that permanently disenfranchises those with felony convictions, characterizes certain domestic violence offenses as misdemeanors, which would not qualify for disenfranchisement. *See* VA. CONST. art. II, § 1 (establishing disenfranchisement of persons "convicted of a felony"); VA. CODE ANN. § 18.2.-57.2 (2016)

3. Prevention, Preservation, and Punishment: Insufficient and Inconsistent Justifications for the Suspension of Rights

Second, there is often a disconnect between the stated justification for suspending rights (which varies depending on the right at stake) and the decision as to which violations (or risk factors) do and do not trigger suspension. For example, the Supreme Court has stated that disenfranchisement is justified not as a punitive measure, as in the context of imprisonment for failure to pay fines as a condition of probation, but as a measure to "regulate the franchise" of voting.[31] As put by other courts, the measure serves "to preserve the purity of the ballot box."[32] Even taking for granted the general legitimacy of this justification, it is questionable to think that even people who have committed violent offenses could affect the purity of the vote in any meaningful way. Even if this were the case, the risk to the purity of the vote is arguably less concrete than the risk to safety created by permitting a person already convicted for misdemeanor domestic violence to possess a gun.[33] This becomes even more questionable when people are disenfranchised long after they complete their felony sentences – even permanently in some states, like Florida.[34] Yet, as Justice Marshall pointed out in his dissent in *Richardson v. Ramirez*, the case where the Supreme Court upheld the constitutionality of felony disenfranchisement,[35] violations of election law itself are often classified as misdemeanors, and thus cannot trigger disenfranchisement.[36]

(establishing assault and battery against a family member as a misdemeanor).

[31] Trop v. Dulles, 356 U.S. 86, 96-97 (1958).

[32] This phrase originated in Alabama in the antebellum period. *See* Washington v. State, 75 Ala. 582, 585 (Ala. 1884).

[33] *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003) (finding that abused women are five times more likely to be killed by their abuser if the abuser has access to a firearm).

[34] *State Criminal Re-enfranchisement Laws (Map)*, AM. CIV. LIBERTIES UNION, http://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map (last visited Jun. 17, 2016).

[35] Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

[36] *Id.* at 79-80 (Marshall, J., dissenting).

Such inconsistency can also occur in the context of firearms – though, again, not in the form that Justice Thomas posits. Here, the justification is different from other rights-stripping contexts – it is not punitive, or purity-preserving, but preventative of threats. Implicitly, this justification recognizes that preventative nature: that the right to possess a gun in the home for self-defense is fundamental. More than any other fundamental right, it has the power when exercised to take lives immediately and unjustifiably. Accordingly, in *District of Columbia v. Heller*, the Supreme Court case recognized an individual right to possess a gun for self-defense in the home,[37] but also stated that its decision was not meant to question a myriad of other types of firearms regulations designed to prevent threats, such as restrictions on firearms for those with mental illness.[38] This is a restriction that would arguably be more dubious in other contexts where rights are suspended.

Thus, because the justification here is different, a different result is justified. Arguably this preventative goal is even more important, and so substantiates more leeway to regulate, than any punitive or purity-preserving ballot. Simultaneously, the government has more leeway to invoke threat-prevention to regulate firearms as compared, for example, to the leeway it has to justify its own use of deadly force for preventing a threat. In the former, a private individual's right to possess a gun is at stake – a right that is not truly coterminous with the right to keep one's life.[39] But in the latter, a private individual's right to

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[37] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[38] *Id*. 626-27.

[39] It is worth noting here an argument by gun rights advocates: that the individual liberty to own firearms is fundamental regardless of the negative impact on others. *See* Joe "The Plumber" Wurzelbacher, *An Open Letter: To the Parents of the Victims Murdered by Elliot Rodger*, BARBWIRE (May 27, 2014), http://barbwire.com/2014/05/27/open-letter-parents-victims-murdered-elliot-rodger (memorably stating that "your dead kids don't trump my Constitutional rights"). One could interpret this to mean that those who choose to exercise the right to bear arms should have great leeway to do so, *id.,* regardless of whether exercise of that right for self-defense is necessary. *See* Marvin Lim, *A New Approach to the Ethics of Life: The "Will to Live" in Lieu of Inherent Dignity and Autonomy-Based Approaches*, 24 S. CAL. INTERDISC. L.J. 27, 130-38 (2015). One could also interpret this perspective, then, to value a given set of lives over *all* lives: the hypothetical ability of some people to use firearms is valued over taking real opportunities to preserve the lives of others. *See id*.

keep one's life *is* directly at stake.

This provides another rebuttal to Justice Thomas's point in *Voisine*, which is concerned more about looser standards for suspending the right to bear arms, and less about the broader lack of vision in how constitutional rights in general are suspended.[40] As a matter of legal precedent alone, the wide breadth of historical limitations on Second Amendment rights, including limitations imposed even when no crime is committed, justifies the Lautenberg Amendment's provision regarding misdemeanors.[41] But, equally, if not more importantly, the logic behind these limitations begins to dispense of Justice Thomas's apparent desire for formalism: Voisine was convicted for a violent offense – regardless of whether it was intentional, willful, or reckless, and regardless of whether the offense was a misdemeanor or felony.

4. Developing a Coherent Framework for Suspending the Right to Bear Arms

At the same time, the preventative justification still needs clearly defined and coherently applied limiting principles. Perhaps there is no better case for this than a question raised in the wake of the Orlando shooting: should people suspected, but not convicted or even indicted, of involvement in terrorist activities be able to purchase a gun? To some people, including lawmakers, the answer is

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Arguably, then, this perspective does not fully value human life. In the author's opinion, when evidence shows that at least *one* more life will be saved by having a regulation than by not having it, and other regulations will achieve the same (or greater) benefits only by further restricting the right, there should be a sufficiently compelling justification for regulation. Many regulations should meet this standard, even if they also prevent some potentially legitimate use of firearms. *Cf*. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1467-70, 1483 (2009) (explaining that heightened scrutiny of firearm laws can range from the most demanding standard requiring "substantial scientific proof to show that a law will indeed substantially reduce crime and injury," to the least demanding standard "to simply require a logically plausible theory of danger reduction"). However, regulations must still not unjustifiably discriminate between who, in the same context, should and should not be able to have a gun. *See infra* notes 51-53 and accompanying text.

[40] *See Voisine*, 136 S.Ct. at 2291 (2016) (Thomas, J., dissenting).

[41] Other than limitations for those with mental illness, federal law also extends restrictions to, for example, those addicted to controlled substances, and persons who have renounced their American citizenship. 18 U.S.C. § 922(g)(2)-(9) (2012).

"yes."[42] Many likely weigh the gravity of the potential harm such access to firearms can cause against the idea that the right to bear arms is different, in both potential destructive power and positive benefits, from other constitutional rights.[43]

Nevertheless, others argue that people suspected as terrorists by the government are still entitled due process, encompassing a right to due process when the government is considering a bar on their ability to purchase and possess firearms.[44] One argument is concerned less about the inability of any person to access a firearm, and more about the general harm to civil liberties, including to equal protection principles, that occurs whenever due process is unjustifiably curtailed when the government attempts to combat terrorism, enforce immigration laws, or generally take action in the name of national security.[45] Many point to solutions that would provide more due process protections, while still enabling the

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[42] *See* Alicia Parlapiano, *How Terrorism Suspects Buy Guns - and How They Still Could, Even With a Ban,* N.Y. TIMES (Jun. 15, 2016), http://www.nytimes.com/interactive/2016/06/14/us/gun-purchase-ban-for-suspected-terrorists.html.

[43] *See, e.g.*, Timothy Edgar, *Guns and the No-Fly List: Of Course We Shouldn't Allow Suspected Terrorists to Buy Firearms*, L.A. TIMES (Jun. 17, 2016), http://www.latimes.com/opinion/op-ed/la-oe-edgar-watch-list-no-fly-guns-20160617-snap-story.html (arguing that, while the Supreme Court has declared both the right to bear arms and the right to travel as "fundamental liberties," the latter is "exercised far more frequently," as support for position that government should use watch lists to restrict firearms purchases).

[44] *See* Hina Shamsi, *Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms*, AM. CIV. LIBERTIES UNION: SPEAK FREELY (Dec. 7, 2015), http://www.aclu.org/blog/speak-freely/until-no-fly-list-fixed-it-shouldnt-be-used-restrict-peoples-freedoms.

[45] *See, e.g.*, Adam Winkler, *Time for a 'No Buy' List on Guns*, N.Y. TIMES (Jun. 13, 2016), http://www.nytimes.com/2016/06/14/opinion/time-for-a-no-buy-list-on-guns.html. In fact, one of the terror watch list measures considered in Congress originally included a provision intended to stop so-called "sanctuary cities" providing safe haven for undocumented immigrants. Protect America Act of 2015, S. 2912, 114th Cong. § 401 (2015). This was a provision that, in lieu of direct gun violence prevention measures, was intended to respond to a 2015 shooting in San Francisco by an undocumented perpetrator. Julia Preston, *San Francisco Murder Case Exposes Lapses in Immigration Enforcement*, N.Y. TIMES (Jul. 7, 2015), http://www.nytimes.com/2015/07/08/us/san-francisco-murder-case-exposes-lapses-in-immigration-enforcement.html; 161 CONG. REC. S7315 (daily ed. Oct. 20, 2015) (statement of Sen. Ted Cruz) (discussing San Francisco case in advocating for bill).

government to neutralize threats from would-be or active terrorists.[46]

In the end, this position is still reconcilable with the idea that the suspension of rights is different vis-à-vis firearms than in the context of any other constitutional right: Even if more leeway should be given to the threat-prevention justification for suspending rights, this does not mean that *any* invocation of the justification is legitimate. Due process requires that the standard still be clearly defined and subject to as little vagary and human bias as possible, and equal protection is important regardless of what is concretely at stake. Underscoring this need is that the suspension of rights across *all* contexts already tends to harm traditionally vulnerable minority groups, as practices like debtors' prisons and felony disenfranchisement all too clearly show.[47]

History itself shows a litany of firearms laws specifically intended to disarm minorities, a fact that Justice Thomas himself has powerfully emphasized.[48] Contemporary firearm laws and proposals may not have the same nefarious intent behind them; they could even benefit the minority communities most affected by gun violence. Nevertheless, it is clear enough from practices like Stand Your Ground that these laws can facilitate not just baseless, but also discriminatory perceptions of who is a threat (often leading people to create the very situation, where none existed before, in which they feel that there is an *imminent* threat that compels their use of force).[49] The right to self-defense is

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[46] Winkler, *supra* note 45 (arguing that the U.S. Attorney General should be required to establish in court proceeding, albeit secret, that there is probable cause to believe someone is a terrorist and thus can be denied the right to firearms).

[47] *See, e.g.*, Cammett, *supra* note 24, at 364-69.

[48] McDonald v. Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part) (stating that in the antebellum period, "blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants"). We should seek to under why some minorities today particularly choose to bear arms, for purposes like self-defense and defending themselves against tyranny. Adam Winkler, *The Secret History of Guns*, THE ATLANTIC (Sept. 2011), http://www.theatlantic.com/magazine/print/2011/09/the-secret-history-of-guns/308608 (discussing the pro-gun Black Panthers). These purposes, however, are not necessarily inconsistent with firearms regulations to ensure that the safety of all people, inclusive of those who choose not to bear arms.

[49] *See generally* AM. BAR ASS'N NAT'L TASK FORCE ON STAND YOUR GROUND LAWS, FINAL REPORT

unquestionably universal, and we could all hypothesize potential exigent circumstances where we might want a gun to defend ourselves. As such, the right to own a firearm is an absolute right to many people, for whom it is part and parcel of the natural right to self-defense. At the same time, to the extent such practices give wide berth to only *some* who wish to possess firearms and use them ostensibly for self-defense, they subordinate the protection of *all* human *lives* to the *liberty* of the select – even those for whom guns are necessary to protect life in theory alone.[50]

AND RECOMMENDATIONS (2015), http://www.americanbar.org/content/dam/aba/images/diversity/SYG_Report_Book.pdf. Stand Your Ground laws also have questionable historical roots in the South and in the West. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 432-33 (1999) (finding that these laws originated "[b]y virtue of the slave culture in the former and the frontier culture in the latter," both of which "inherited rich systems of honor that put a premium on physical displays of courage and on violent reactions to slights," the so-called "'true man' doctrine"). Stand Your Ground laws also reject the idea, recognized in some duty-to-retreat jurisdictions, that a person who wrongfully creates the situation causing him or her to need self-defense, does not have valid access to it. *See, e.g.*, State v. Turner, 886 N.E.2d 280, 284 (Ohio App. 2008).

[50] A link also exists to recent policing incidents across the country. Police officers have been able to invoke Stand Your Ground. *See, e.g.*, Rafael Olmeda, *Broward Deputy Won't Face Trial in Fatal Shooting of Jermaine McBean,* SUN SENTINEL (Jul. 28, 2016), http://www.sun-sentinel.com/local/broward/fl-deputy-peraza-stand-your-ground-ruling-20160727-story.html (judge ruling that actions of a police officer fell under the protection of Florida Stand Your Ground law and dismissing manslaughter charge). In addition, discriminatory perceptions of threats lead private *and* public entities not just to inflict excessive force on minorities, but also to disable the ability of minorities to defend themselves with firearms – whether by perceiving that their firearm possession is a threat in itself, or, in the case of certain government regulations, preventing their acquisition of firearms in the first place. *See* Stephen A. Crockett Jr., *Watch: Vigilante White Guy Tackles Black Man Licensed to Carry a Gun*, THE ROOT (Jan. 22, 2015), http://www.theroot.com/articles/news/2015/01/watch_vigilante_white_guy_tackles_black_man_licensed_to_carry_a_gun/47 (regarding private perceptions of threats); David A. Graham, *The Second Amendment's Second-Class Citizens*, THE ATLANTIC (Jul. 7, 2016), http://www.theatlantic.com/politics/archive/2016/07/alton-sterling-philando-castile-2nd-amendment-guns/490301. This exposes a potential inconsistency on the part of opponents of the watch list measures, at least those who are gun rights advocates that have traditionally equated the right to bear arms with the right to self-defense itself. It is inconsistent that they would not oppose government policing that has rendered minority rights to firearms effectively a liability. *See* Brian Fung, *The NRA's Internal Split Over Philando Castile*, WASH. POST (Jul. 9, 2016), http://www.washingtonpost.com/news/post-nation/wp/2016/07/09/the-nras-internal-revolt-over-philando-castile (discussing the tepid response of NRA after police shooting of black man carrying a firearm legally).There are

Ultimately, it becomes harder to adhere to these constitutional principles when formal charges, let alone convictions for any crime (whether misdemeanor or felony), or court orders adjudicating incapacity, are necessary to suspend the right to possess firearms. To ensure such adherence, an accurate assessment of risk is paramount and should drive the legal framework for suspending the right to firearms, not vice versa. Categorizations are inevitable, and as with restrictions on other constitutional rights, these categorizations need not inevitably be subject to exacting judicial scrutiny.[51] Still, the law should spurn overly broad categorizations.[52] Furthermore, achieving an accurate assessment also requires providing fair opportunities for an individual to challenge their inclusion in a category of prohibited possessors of firearms.[53]

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also potential connections to another practice by the government to combat terrorism: the targeted killings of American citizens, where the private right to self-defense is at stake, but there is arguably less worry, unlike with firearms regulations, that government action would ensnare non-minorities. *See* AMNESTY INT'L, UNITED STATES OF AMERICA: 'TARGETED KILLING' POLICIES VIOLATE THE RIGHT TO LIFE (2012), http://www.amnestyusa.org/sites/default/files/usa_targeted_killing.pdf.

[51] *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227, 236-39 (2006) (stating that "only a small subset of fundamental rights triggers strict scrutiny," and that burdens on even the most "preferred rights," like the right of speech, religion, voting, marriage, and privacy, do not always trigger scrutiny, particularly for "unpreferred" individuals like those incarcerated).

[52] One quintessential example is considering all mental illness as creating similar propensity to endanger one's or others. *See* Robert Luther III, *Taking Aim at Recent Legislative Proposals to Curb Gun Violence from Mental Illness: A Second Amendment Response*, 53 HARV. J. ON LEGIS. 369, 377 (2016) (point out that, under federal firearms law, "a person who is hospitalized for anorexia is treated the same as someone hospitalized for paranoid schizophrenia with a history of violence"). Most incidents of gun violence do involve perpetrators with a history of mental illness, and most people with mental illness do not commit gun violence. *See, e.g.*, Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240 (2015) (reviewing literature that reaches this conclusion); Jeanne Y. Choe et al., *Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns*, 59 PSYCHIATRIC SERV. 153 (2008) (meta-analysis of empirical studies on the link between violence and mental illness, showing that vast majority of those with severe mental illness do not perpetrate violence). Ultimately, even correct perceptions that individuals who commit violence tend to belong to certain populations cannot be conflated with the idea that any individual from that population poses even a marginally higher threat.

[53] On one end of the spectrum, these opportunities for challenge, of course, would not extend to circumstances where there is evidence that an individual will commit an imminent, specific act of violence. *See* Luther, *supra* note 52, at 383-84 (discussing firearms suspension

Voisine itself demonstrates the importance of such due process protections beyond the terrorism example. Second Amendment issue aside, Justice Thomas also disagreed with the majority's statutory interpretation that the Lautenberg Amendment encompassed recklessness.[54] He argued that the majority's interpretation would encompass reckless use of force even when there is no intention to direct that force against any person.[55] Notably, Justice Sotomayor

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in instances of emergency). A comparison to the Fourth Amendment search and seizure context would still suggest a probable cause standard for ascertaining imminent threat, a high bar: the Supreme Court has held that police may arrest people without a warrant, only if an actual crime has been committed in their presence or they have probable cause to believe someone has committed a felony – but the arrest must be adjudicated in reasonable time. Gerstein v. Pugh, 420 U.S. 103, 113-114 (1975). A variety of questions are necessary to ask: is the threat one of violence, what is the likelihood of the threat coming to pass (e.g., plans, ideation), will the threat be eliminated or reduced by taking this specific action (and, if so, will it harm innocent people, even if not with direct intention to do so), and is the suspected threat actually emanating from this particular source or person? In the context of terror-related measures, the challenge is ensuring that the person being targeted is, in fact, an actual part of a conspiracy – even one where there is no one plan to commit a concrete act of violence – and not merely guilty by association.

On the other end, these opportunities could also extend not just to challenging their inclusion in a category, but to challenge past judicial determinations that a person is a prohibited possessor as a justification for perpetual rights suspension. *See id.* at 375-78 (discussing permanent bars to firearms possession). *Cf.* United States v. Engstrum, No. 2:08-CR-430-TS, 2009 WL 1683285, at *3 (D. Utah 2009) (2009), *mandamus granted sub nom* (pursuant to ruling that defendant charged with possession in violation of Lautenberg Amendment could use Second Amendment as affirmative defense, instructing jury to acquit if defendant posed no risk of future violence notwithstanding misdemeanor domestic violence conviction). In re United States, 578 F.3d 1195, 1197 (10th Cir. 2009) ("direct[ing] the district court not to instruct jury" regarding Second Amendment defense). While past indicators of violence can be partially predictive of future predilection, to the extent that, in other contexts, we reject this argument to justify perpetual restrictions that prevent full reintegration, some limiting principle should exist in this context as well. *See, e.g.*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARRESTS AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT, at 15-16 (2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf (requiring employers that consider criminal records of applicants, for purposes such as workplace violence-reduction, to assess "the time that has passed since" the conviction and/or completion of sentence, among other factors). These limiting principles might take into account, of course, that it is more difficult to make predictions about risk the less time has passed, arguably so much so that some automatic time limitations may be justified. *See id.*

[54] *See* Voisine, 136 S.Ct.at 2282-83 (2016) (Thomas, J., dissenting).

[55] *Id.* at 2287.

joined this section of Justice Thomas's.[56] Some commentators have argued that, in doing so, she was driven by the idea that the unique nature of these situations makes parsing through domestic violence charges particularly difficult.[57] In this way, the challenge is quite similar to that posed by *Bearden* in the misdemeanor probation context: Where there is a lack of clarity on *mens rea*, the law may suspend constitutional rights where there is insufficient culpability, and, in the case of firearms, insufficient grounds to believe that a person poses a true risk. This challenge only emphasizes the need for due process protections.

5. Moving Forward

In this way, the *Voisine* case raises large, looming questions about how we strip people of their constitutional rights, especially – but ultimately not limited to – the Second Amendment. Though the Supreme Court did not answer these questions, the Orlando shooting highlights their import. Moving forward, our society must find more consistent and principled methods for making these determinations – particularly in the context of firearms. These nuances can inform people across the political spectrum, as we all ask ourselves how we would deal ideally with the common goal of reducing violence.

[56] *Id.* at 2282.

[57] *See, e.g.*, Daniel Denvir, *The Court's Leading Carceral Critic: Why Sonia Sotomayor Dissented on Gun Ban for Domestic Abusers*, SALON (July 1, 2016), http://www.salon.com/2016/07/01/the_courts_leading_carceral_critic_why_sonia_sotomayor_dissented_on_gun_ban_for_domestic_abusers (quoting public defender counsel who argued that emotional nature of domestic violence charges, and fact that they typically do not originate with police "unlike charges for non-domestic crimes," leave them more vulnerable to abuse).