Article

Firearms Carceralism

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Gun violence is a pressing national concern. And it has been for decades. Throughout nearly all that time, the primary tool lawmakers have deployed to stanch the violence has been the machinery of the criminal law. Increased policing, intrusive surveillance, vigorous prosecution, and punitive penalties are showered on gun offenders. This Article spotlights and specifies this approach—what it calls "firearms carceralism"—and details how a decades-long bipartisan consensus generated a set of state-centered solutions to gun violence that has not meaningfully impacted the problem. Instead, those policies have exacerbated racial inequity and compounded civic and community harms.

The Article traces the escalating punitive measures imposed on gun offenders over the past half century. It first peers down into one microcosmic exemplar of firearms carceralism etched into federal mandatory minimum provisions and Supreme Court case law magnifying those penalties. It describes how criminal justice reforms have traditionally excluded those whose offenses are categorized as violent, and specifically and emphatically

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those who offend with guns by their side. It then draws out promising hints of a path to including gun offenders in efforts to reform or reimagine the criminal legal system.

Most fundamentally, however, the Article wages a sustained critique of the system of firearms carceralism that fronts aggressive law enforcement and draconian terms of incarceration. It describes the unjustifiable breadth and depth of these practices and the harmful, racialized, and exclusionary values they simultaneously draw from and reinscribe.

Finally, the Article argues in favor of three alternative paths to equitable peace and safety. First, it outlines private sector steps to, for example, dampen illicit firearms supply. Second, it highlights civil legal interventions like red flag laws and tort lawsuits against irresponsible gun sellers. Third, and most prominently, it underscores the promise of community violence intervention and restorative justice programs to bring meaningful safety apart from the carceral tools of coercive control.

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INTRODUCTION

In 1995, Azim Khamisa's twenty-year-old son, Tariq, was shot and killed while working as a pizza delivery driver.[1] Tariq's killer, Tony Hicks, was just fourteen when he pulled the trigger.[2] The murder shocked Tariq's family, devastating and destabilizing it.[3] Yet Azim sought to transform the tremendous loss of his son.[4] Several years after the murder, Azim visited Tony in prison and eventually befriended him.[5] Upon Tony's release, they worked together on restorative justice at the foundation launched in Tariq's memory.[6] A key insight Azim developed over the course of his meetings with Tony undergirds the central argument of this Article. Azim ultimately realized, he said, that "there were victims on both sides of the gun."[7]

In the contemporary United States, gun violence is often perpetrated by those who themselves have previously been

1. Sylvie Lubow & Mitra Bonshahi, *'Worth Being Forgiven': A Father and His Son's Killer Bring Past and Present Together*, NPR (Feb. 26, 2021), https://www.npr.org/2021/02/26/971327506/worth-being-forgiven-a-father-and-his-sons-killer-bring-past-and-present-together [https://perma.cc/U9U4-ZNVC].

2. *Id.* Tony—aged fourteen years, three months—was tried as an adult because of a California law enacted months earlier that made youths fourteen years old and up eligible for adult court. Tony was the first juvenile sentenced under this law. TINA SCHUSTER & THE TARIQ KHAMISA FOUNDATION, VICTIMS ON BOTH ENDS OF THE GUN 40–41 (2022) [hereinafter SCHUSTER].

3. Lubow & Bonshahi, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.* (describing the Tariq Khamisa Foundation).

7. Tony Hicks & Azim Khamisa, *Both Ends of the Gun: How Two Men Were Brought Together in Tragedy and Forgiveness*, STORYCORPS, https://storycorps.org/stories/both-ends-of-the-gun-how-two-men-were-brought-together-in-tragedy-and-forgiveness [https://perma.cc/TQW8-GDF2].

victimized.[8] As the old adage goes, "hurt people hurt people."[9] A study of shootings in Philadelphia in 2020, for instance, showed that individuals who pulled the trigger were about *seventy times* more likely than the average city resident to have previously been a shooting victim.[10] But American policymakers often blind themselves to this reality. Rather than address systemic or foundational conditions that foster violence, they have traditionally responded with what this Article calls *firearms carceralism*—a criminal-law-forward approach that foregrounds increased policing, intrusive surveillance, vigorous prosecution, and punitive penalties.[11] And yet, as Aya Gruber underscores, "a relentless

8. James Austin et al., *Reconsidering the "Violent Offender*,*"* THE SQUARE ONE PROJECT 7 (May 2019), https://squareonejustice.org/wp-content/uploads/2019/09/executive-session-pdf-Reconsidering-the-violent-offender-report-ONLINE_FINAL.pdf [https://perma.cc/8LY7-SH74] (noting that "often those with violence convictions also have suffered serious victimization themselves"); Jumaane D. Williams, *Reimagining Gun Violence Prevention and Public Safety for New York City*, OFF. OF THE PUB. ADVOC. 16 (Sept. 2022), https://advocate.nyc.gov/reports/reimagining-gun-violence-prevention-and-public-safety-new-york-city [https://perma.cc/UHD4-F4AX] ("[M]ost gun-violence in NYC is perpetuated by a small number of individuals, who are most likely victims of violence and may often engage in gun violence as a result of the environmental and economic stress factors . . . ."); *e.g.*, SCHUSTER, *supra* note 2, at 1–9 (recounting how a pre-teen Tony was nearby when two close cousins were killed in drive-by shootings).

9. *See* Raine Kuch, *Hurt People Hurt People: The Trauma Behind Gun Violence*, PUB. MEDIA NETWORK (Sept. 14, 2021), https://www.publicmedianet.org/blog/hurt-people-hurt-people-trauma-behind-gun-violence [https://perma.cc/87MW-B2NJ] (discussing the impact of trauma on the brain).

10. *100 Shooting Review Committee Report*, PHILA. INTERAGENCY RSCH. & PUB. SAFETY COLLABORATIVE 16 (2022) [hereinafter *Shooting Review Report*] (reporting that 7% of shooters had themselves previously been shooting victims, even though the shooting victimization rate in the city was approximately 0.1%).

11. S.M. Rodriguez et al., *Carceral Protectionism and the Perpetually (In)Vulnerable*, 20 CRIMINOLOGY & CRIM. JUST. 537, 538 (2020) (describing "carceralism" as "mass incarceration and institutionalization, surveillance and control"). *See generally* Esther K. Hong, The Carceral State(s) (Dec. 2023) (unpublished manuscript) (on file with *Minnesota Law Review*) (identifying how the phrase "carceral state" is used in many different ways for different purposes). Alice Ristroph describes how the Second Amendment operates in a carceral state through what she identifies as "carceral political theory." Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 205 (2021). Her incisive account focuses on the rights side of the question about guns; this Article focuses on the enforcement and punishment side. *See id.* at

focus on criminal law as the best, if not definitionally necessary, remedy to social harm obscures the reality that criminal law is also a primary *driver* of social harm."[12] To critique the blinkered perspective of firearms carceralism, this Article traces the escalating penal consequences visited on gun offenders over the last half century and argues for an approach to gun violence prevention that limits the primacy of carceral strategies to respond to the distressingly common recurrence of community violence.[13]

236 ("Doctrinal tensions between an individual right to bear arms and broad police authority to disarm may occupy courts for some time, but courts are likely to resolve these tensions by reaffirming or even expanding a criminality exception to the Second Amendment."). *Cf.* Laura G. Abelson, *Reevaluating Felon-in-Possession Laws After* Bruen *and the War on Drugs*, 15 U.C. IRVINE L. REV. (forthcoming 2024) (manuscript at 49–51) (on file with *Minnesota Law Review*) (identifying how developing Second Amendment doctrine is compounding inequality).

12. AYA GRUBER, THE FEMINIST WAR ON CRIME 193 (2020).

13. This Article is not arguing that criminal legal interventions are never appropriate when confronting gun violence (though it is not necessarily incompatible with such an argument). *Cf.* Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 551–56 (2022) [hereinafter McLeod, *Abolitionist Critique*] (proposing abolitionist solutions for understanding and dealing with violence, including gun violence). The Article argues that criminal law tools should not be the overwhelmingly dominant mode of responding to the problem. As Professors Ekow Yankah and Guyora Binder write, "that a criminal justice system is no substitute for the social infrastructure of a humane and democratic society does not mean it has no legitimate function in such a society." Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 225 (2022). For some of the rich discussions over the scope and degree of reformation necessary in the criminal legal system, see generally Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022) (offering a framework for abolitionist reform that draws on United States prison abolitionist organizing, campaigns, and intellectual work); Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273 (2020) (providing an analysis of how incremental reform affects larger "more thoroughgoing change"); Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (arguing for a new understanding of the Constitution that supports prison abolition); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020) (responding to Roberts, *supra*, by proposing minimalism as an alternative to abolition); Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651 (2017) (reviewing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015)) (exploring "aspirational accounts of decarceration" for their applicability to long term carceral change). With respect to gun violence specifically, several influential recent accounts

The time is ripe for this reconsideration. In policy and advocacy channels, change is afoot. Since taking office in 2021, President Biden has supported unprecedented funding for community violence interventions that invest heavily in the communities most impacted by gun violence.[14] Many gun-violence-prevention advocates have increasingly sought alternatives to more policing and additional sentence enhancements.[15] Advocates and activists have underscored the harms from a regime of firearms carceralism that relies unconditionally on, and resorts unhesitatingly to, police and prisons.[16] As legal scholar

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focus on lighter-touch criminal law approaches to confronting the problem. *See generally* ANTHONY A. BRAGA & PHILIP J. COOK, POLICING GUN VIOLENCE: STRATEGIC REFORMS FOR CONTROLLING OUR MOST PRESSING CRIME PROBLEM 4 (2023) (stating that although there are many underlying conditions that require attention, law enforcement plays an important role, and arguing that "serious violence rates can change dramatically even without fundamental social change"); THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 12 (2019) (arguing that "a balance of punishment and prevention works far better to reduce urban violence than either approach in isolation"); DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 52–53 (2011) (describing ways to tailor and target law enforcement efforts to stop the most serious forms of gun violence).

14. *Community Based Violence Intervention and Prevention Initiative*, OFF. OF JUST. PROGRAMS (May 23, 2022), https://www.ojp.gov/program/cvipi [https://perma.cc/RCJ4-2UGT] ("In FY2022, the Department of Justice launched the Community Based Violence Intervention and Prevention Initiative (CVIPI), a historic federal investment in community violence Intervention programs."); *e.g.*, Dan Hinkel & Casey Toner, *Big Talk, Slow Progress from Mayor Lightfoot on Anti-Violence Programs*, ILL. ANSWERS PROJECT (Feb. 17, 2023), https://illinoisanswers.org/2023/02/17/big-talk-slow-progress-from-mayor-lightfoot-on-anti-violence-programs [https://perma.cc/YV6C-93B3] (detailing how Chicago received $1.9 billion in anti-violence funding from the federal government).

15. *See, e.g.*, *Community Violence*, GIFFORDS, https://giffords.org/issues/community-violence [https://perma.cc/D345-9QCE] ("To address violence in the most impacted communities, it is critically important to invest in community violence intervention programs.").

16. *See, e.g.*, Lakeidra Chavis & Geoff Hing, *The War on Gun Violence Has Failed. And Black Men Are Paying the Price.*, THE MARSHALL PROJECT (Mar. 23, 2023), https://www.themarshallproject.org/2023/03/23/gun-violence-possession-police-chicago [https://perma.cc/Q33T-5H8N] (detailing the disparate effects of gun law enforcement); Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners at 5, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843) [hereinafter Brief of the Black Attorneys of Legal Aid et al.] (highlighting the ways that enforcement of New York's strict handgun licensing law caused harm to residents).

Khiara Bridges stresses, "we ought to be aware that as guns yield victims, using the criminal legal system to control access to guns yields victims as well."[17] And even some reform prosecutors have declined to aggressively seek mandatory minimum penalties for some classes of offenders who commit crimes with guns.[18]

Yet, despite recent progress in criminal justice reform writ large, entrenched views are difficult to unsettle. And one group that has traditionally been left out of reform talks includes those with convictions that can be characterized as "violent,"[19] and particularly the "bad guys with a gun."[20] In fact, one reason the push for reform has succeeded so thoroughly across the ideological spectrum is because it often expressly plays on the exclusion of violent offenders.[21] Many criminal justice reformers go out of

17. Khiara M. Bridges, Foreword, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 74 (2022).

18. *See, e.g.*, Frank Stoltze, *Gang, Gun Charges Plummet Under DA Gascón, Sparking Debate over Justice and Safety*, LAIST (Dec. 6, 2021), https://laist.com/news/criminal-justice/gang-gun-charges-plummet-under-da-gascon-sparking-debate-over-justice-and-safety [https://perma.cc/F5EX-B9X7] (describing Los Angeles District Attorney George Gascón's policies that disfavored using gun sentencing enhancements).

19. *See* GOTTSCHALK, *supra* note 13, at 167 ("Legislators and other public officials have been pursuing penal reform packages that reduce the penalties for drug offenses and some other nonviolent crimes while ratcheting up or leaving largely untouched the punishments for other crimes."); DAVID DAGAN & STEVEN M. TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION 164 (2016) (arguing that conservative criminal justice reform advocates concluded that the problems of earlier tough penalties were that they applied to nonviolent offenders, not that they were needlessly harsh as a whole).

20. *See* ANGELA STROUD, GOOD GUYS WITH GUNS: THE APPEAL AND CONSEQUENCES OF CONCEALED CARRY, at v (2015) ("The only thing that stops a bad guy with a gun is a good guy with a gun." (quoting NRA executive vice president Wayne LaPierre)). *Cf.* T. Brian Hogan, *Crime, Punishment and Responsibility*, 24 VILL. L. REV. 690, 699 (1979) ("When a man is killed on the streets of Leeds or Philadelphia, the chances are distinctly in favor of his being killed by a 'good' guy whose driving is impaired by alcohol, rather than a 'bad' guy with a gun.").

21. Mugambi Jouet, *Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization*, 55 ARIZ. ST. L.J. 239, 273 (2023) ("Worse, politicians frequently use violent offenders as a foil, defending merciless penalties in their cases in order to gain the political capital to lessen those for drug or property offenders."); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 186 (2017) ("[M]any states generate the political support for lessening property and drug crime sentences in part by toughening those for violent crimes."). President Trump's statements upon signing the First Step Act also show the utility of this

their way to ensure that those who have committed crimes deemed violent will not benefit from changes to the law.[22]

This exclusion fails to fully grapple with the harms the mid- to later-twentieth century severity revolution in criminal law generated.[23] Of course, the revolution exposed nonviolent offenders to harsh and oftentimes indisputably unjust punishment.[24] But it also has led to these same types of harshness toward many offenders whose offenses can be characterized as violent, including when those individuals were armed. Consider Wendell Rivera-Ruperto, "who ha[d] no prior criminal record and whose series of related crimes resulted in no harm to an identifiable victim" and yet received a *161-year* sentence because his criminal conduct occurred while he had a firearm.[25] That sentence is about nine times the average sentence for murder in this country.[26] Or Weldon Angelos, who unlawfully possessed guns at

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distinction as a framing device. *See Remarks by President Trump at Signing Ceremony for S. 756, the "FIRST STEP Act of 2018" and H.R. 6964, the "Juvenile Justice Reform Act of 2018,"* TRUMP WHITE HOUSE ARCHIVES (Dec. 21, 2018) [hereinafter *Trump Remarks*], https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-signing-ceremony-s-756-first-step-act-2018-h-r-6964-juvenile-justice-reform-act-2018 [https://perma.cc/QX4J-542P] ("[W]hen you have somebody put in jail for 54 years because he did something that has no chance of him coming out, and totally nonviolent but there was a violation of a rule, that's tough stuff.").

22. Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 555 (2019) (describing how progressive advocates for criminal justice reform often make an exception for "violent offenders"). This is connected to the way these same reformers often heap increasing punishment on gender-based violence and other wrongdoers that progressives exempt from their critiques of the carceral state. *See* GRUBER, *supra* note 12, at 137 (describing how progressives pushed for evidentiary changes to make it easier to convict certain kinds of criminal defendants); Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. (forthcoming 2024) (manuscript at 6–15) (on file with *Minnesota Law Review*) (exploring and critiquing the way many progressives hope the criminal law will help redistribute power and privilege).

23. *See* GOTTSCHALK, *supra* note 13, at 165 (arguing that "if the ultimate aim is to slash the prison and jail population, render the criminal justice system more just, and dismantle the carceral state without jeopardizing public safety," then the dichotomy "may be ultimately self-defeating").

24. *See, e.g.*, Ewing v. California, 538 U.S. 11, 30–31 (2003) (upholding a sentence of twenty-five years to life for a man who stole three golf clubs).

25. United States v. Rivera-Ruperto, 884 F.3d 25, 48 (1st Cir. 2018) (Barron, J., concurring in the denial of rehearing en banc).

26. DANIELLE KAEBLE, BUREAU OF JUST. STAT., NCJ 255662, TIME SERVED IN STATE PRISON, 2018, at 1 (2021) (stating that the median sentence for those convicted of murder was approximately 17.5 years).

home and carried a handgun to two marijuana deals, which triggered an additional fifty-five-year sentence—a sentence the trial court imposed pursuant to the law's mandatory command despite calling it "unjust, cruel, and even irrational."[27]

Excluding these individuals from criminal justice reform settles for half-way measures. In fact, it's worse than that; maintaining this dichotomy ends up exacerbating racial disparities because Black Americans with offenses deemed violent enter prison at higher rates than similar white offenders, and, relative to white prisoners, they serve longer sentences for violent offenses.[28] In addition, this dichotomy fails to grapple with how firearms function in American society.

No observer could deny that guns have a unique place in American culture.[29] They are revered,[30] constitutionally protected,[31] increasingly sought for personal protection[32]—yet at the same time widely recognized as dangerous tools liable to

27. United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) ("[This sentence] is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape."), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

28. *See* Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. 1, 8 (2022) (noting that decarceration of violent offenses is the only race-neutral decarceration strategy that would reduce Black overrepresentation in United States prisons); Austin et al., *supra* note 8, at 4 ("The [violent offender] label disproportionately affects people of color—black and Hispanic people comprise larger shares of people incarcerated for violent offenses in state prisons than white people.").

29. *See* Garry Wills, *Our Moloch*, N.Y. REV. (Dec. 15, 2012), https://www.nybooks.com/online/2012/12/15/our-moloch [https://perma.cc/M22B-QG69] ("The gun is not a mere tool, a bit of technology, a political issue, a point of debate. It is an object of reverence."). *See generally* JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 7–8 (2018) (discussing an urban/rural divide in attitudes toward gun ownership).

30. Wills, *supra* note 29 (describing guns as objects of reverence).

31. U.S. CONST. amend. II; *see, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (upholding the right to bear arms for self-defense).

32. *Cf.* Michael B. Siegel & Claire C. Boine, *The Meaning of Guns to Gun Owners in the U.S.: The 2019 National Lawful Use of Guns Survey*, 59 AM. J. PREVENTIVE MED. 678, 678 (2020) (reporting that nearly sixty percent of gun owners give defense as a primary reason for owning a gun). These numbers mark a shift from prior reasons for owning guns. *See* PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 6 (2020) (describing a recent "dramatic increase in self-protection as the stated reason for owning a gun").

tragic misuse. For this reason, guns have been subject to extensive regulation since before the founding of the Republic.[33] One primary mode of regulation has been through the criminal law.[34] At different times throughout American history, various types of gun possession, use, and carrying have been criminalized.[35] Yet guns proliferate in American life on a daily basis, with gun sales skyrocketing during the 2020 summer of unrest and in the years since.[36] Today, there are likely more guns in private hands than the total number of American adults.[37] The result is a glut of guns, a guaranteed right to own them, and a punitive response to their misuse. Increasingly, as part of the severity revolution, the penalties for unlawful possession and use have grown harsher and more punitive.[38] But there may be signs that this paradigm could be shifting, even for gun offenses.

This Article maps the story of this evolution in firearms carceralism—from increasing gun punitiveness to incipient skepticism of it—through the prism of two Supreme Court gun cases and one metastasizing mandatory minimum penalty provision. This Article underscores the role gun offenders play in mass incarceration, particularly those whose offenses might be considered or labeled violent. Scores of commentators have decried the War on Drugs—so many that some now refer to the conventional "*War against* the War on Drugs."[39] Many scholars have moved beyond the drug war to reevaluate punitive criminalization even

33. *See* BLOCHER & MILLER, *supra* note 29, at 14–23 (describing the long history of gun regulation).

34. Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 639 (2022) ("The federal government has largely approached this problem through the lens—and with the tools—of the criminal law.").

35. *See Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., https://firearmslaw.duke.edu/repository/search-the-repository [https://perma.cc/48XK-MX3J] (cataloguing more than 2,000 laws throughout Anglo-American history).

36. JENNIFER CARLSON, MERCHANTS OF THE RIGHT: GUN SELLERS AND THE CRISIS OF AMERICAN DEMOCRACY 6–8 (2023).

37. COOK & GOSS, *supra* note 32, at 3–4 (noting an estimate of 300 million guns in private hands in the United States).

38. Charles & Garrett, *supra* note 34, at 685–88 (describing a consensus on increasingly harsh punishment).

39. GOTTSCHALK, *supra* note 13, at 166–68 (emphasis added); GRUBER, *supra* note 12, at 7 ("Although there was and remains public appetite for political law-and-order talk, the war on crime is not the bipartisan issue it once was.").

for deeply harmful conduct.[40] But those who have explored concerns relevant to this Article have largely focused on issues such as mass incarceration and nominally *nonviolent* firearm offenses like simple unlawful gun possession,[41] or *violent* offenses more generally without attention to the specific and unique role of guns.[42] Though this Article builds upon and expands the

40. *See, e.g.*, JODY ARMOUR, N*GGA THEORY: RACE, LANGUAGE, UNEQUAL JUSTICE, AND THE LAW 20 (2020) ("[T]he greatest driver of mass incarceration and threat to racial justice in criminal matters is . . . the disproportionate blame and punishment of guilty black people who have committed serious or violent offenses."); Binder & Yankah, *supra* note 13, at 227 ("[E]ven where felony murder is used to convict unjustifiable police killings we should hesitate to think a shortcut has won the day."); Benjamin Levin, *Wage Theft Criminalization*, 54 UC DAVIS L. REV. 1429, 1435 (2021) ("Troublingly, the literature and activism relating to wage theft have failed to reckon with the stakes of using criminal law and incarceration as the tools to remedy workplace violations."); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 657 (2009) ("The argument here is not that date rape is not a 'real' crime, but rather that addressing sexualized violence through increasing the prosecutorial power of the state is an endeavor in which, at this particular moment, feminists should no longer enlist."); *see also* GRUBER, *supra* note 12, at 5 ("Millennial feminism exists, as I once did, in an uncomfortable equilibrium of distaste for gender crimes *and* punishments."); Judith Levine & Erica R. Meiners, *Violence Cannot Remedy Violence*, BOS. REV. (Aug. 21, 2020), https://bostonreview.net/articles/violence-cannot-remedy-violence [https://perma.cc/AXT7-FRD2] (arguing that "the sprawling body of lengthy sentences, post-incarceration restrictions, and surveillance of people convicted of sex-related offenses" should be abolished because it is unjust and ineffective).

41. *E.g.*, Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) (focusing on the criminal regulation of gun possession); Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L.J. 1429 (2021) (focusing on the same). *Cf.* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573 (2022) (offering a defense of felon-in-possession laws). In a symposium essay, David Patton explored themes similar to the ones this Article discusses, but his essay is focused mainly (though not exclusively) on gun possession offenses. *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011 (2020) [hereinafter Patton, *Movement*]; *see also* David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427 (2011) (providing a similar focus).

42. *E.g.*, DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021) (discussing violence as a broad category); Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847 (2020) (exploring the effects of labeling felons as violent); GOTTSCHALK, *supra* note 13 (exploring penal reform in the context of politics);

important work of several scholars,[43] it also plows new ground.[44] It contends that firearms carceralism has not and does not work and that instead gun offenders ought to be included in the reorientation of the criminal legal system away from severe sanctions. It argues, through this lens, against the calls for reform that include only the "non, non, nons"[45] and that categorically distance those gun offenders who might be deemed "violent."[46]

Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (exploring the effects of classifying crimes as violent). One notable exception is James Forman Jr., who devotes attention to how guns played a major role in the harsh sentencing turn and urges policymakers to avoid the problematic distinction in reform efforts between violent and nonviolent offenders. *See* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).

43. In the spirit of avoiding overly grandiose claims to novelty, I fully acknowledge that my argument relies on and builds from the insights and scholarship of several other scholars exploring similar ideas, including Alice Ristroph, Essay, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); Ristroph, *supra* note 42; SKLANSKY, *supra* note 42; Jouet, *supra* note 21; Levin, *supra* note 41; and Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821 (2023). This Article, however, brings a different lens and focus to the problem and is one of the first in legal scholarship to explore the burgeoning literature and research on community violence interventions. For an example of this burgeoning literature, see Christopher Lau, *Interrupting Gun Violence*, 104 B.U. L. REV. (forthcoming 2024) (on file with *Minnesota Law Review*).

44. Scholars in other disciplines, like criminology and sociology, have recently explored related phenomena in depth with the methods and tools of their fields. *See* BRAGA & COOK, *supra* note 13 (exploring related phenomena in the fields of criminology and public policy); JENNIFER CARLSON, POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE (2020) (exploring related phenomena in the field of sociology).

45. GOTTSCHALK, *supra* note 13, at 165 ("[Lawmakers] have concentrated their efforts on how to shorten the prison stays of nonviolent, nonserious, and nonsexual offenders (the so-called non, non, nons) and how to keep them out of prison altogether."); *see also* GRUBER, *supra* note 12, at 184 ("Now that mass incarceration is firmly embedded in the public vocabulary, it is common for policy makers to criticize harsh punishment of 'nonviolent drug offenders.'").

46. *See* ARMOUR, *supra* note 40, at 14 (creating a framework that puts at the center "someone whom liberal critics of mass incarceration too often discount or deny: the violent offender"); Michael O'Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a "Violent" Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165, 168 (2019) (arguing that the consequences for offenses involving violence "seem to impose on violent offenders an even deeper loss of status than that which follows from other convictions—a veritable third-class citizenship"); Klingele, *supra* note 42, at 869 ("[T]he label 'violent felon'

The Article also pushes beyond reforms tinkering with the criminal legal system itself and joins the calls to reimagine public safety—and gun safety—without first resort to carceral control.[47] It makes this argument in four Parts. Part I describes *Deal v. United States* and the political and legal climate that led to enactment and frequent revision of the mandatory minimum gun penalties in 18 U.S.C. § 924(c),[48] as well as the other ways that state governments were at the same time increasing punishments for gun crimes.

Part II turns to *Dean v. United States*, explaining the surrounding circumstances that enabled a conservative Supreme Court to express implicit concern about the length of Dean's sentence and ultimately rule in his favor; this Part also highlights the legacy of firearms carceralism on the state and federal prison population and law enforcement policies.

Part III forms the heart of the argument, showing the ways that firearms carceralism is mis-calibrated and thus fails to serve public safety ends and also, more fundamentally, compounds rather than corrects systemic inequality.

Finally, Part IV turns to solutions. It argues in favor of prioritizing non-carceral approaches to reducing gun violence, such as private sector strategies and civil legal mechanisms, with a special emphasis on expanding funding and support for restorative justice programs that include gun crimes[49] and for

may well do extra damage by signaling not only that a person has transgressed the law, but also that violence has somehow become a petrified component of his or her character, defining not only past conduct but also future behavior.").

47. *E.g.*, Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 687 (2022) ("We cannot police our way out of mass shootings, nor does it make any sense to try. Violence and coercion cannot cure violence and coercion.").

48. *See infra* notes 69, 73 and accompanying text.

49. Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1040 (reporting that systematic evaluations of restorative justice programs in several countries have shown that "restorative models decrease the risk of reoffending, especially for violent crimes"); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 423–34 (identifying barriers to restorative justice alternatives). In fact, these programs have shown promise in individual cases. *See, e.g.*, Virginia Bridges, *He Shot a 10-Year-Old Durham Girl in the Stomach. Restorative Justice Has Begun the Healing*, HERALD SUN (Apr. 5, 2018), https://www.heraldsun.com/news/local/crime/article207914219.html [https://perma.cc/CFM8-VTFJ].

community-based violence intervention programs.[50] In short, policymakers can and should learn from Azim's insight that victims often lie on both sides of the gun;[51] we cannot simply punish our way out of the problem.[52]

I. *DEAL* AND THE PROMISE OF A "CRIMINOLOGICAL WONDER DRUG"

Over the last sixty years, gun politics and policy have changed dramatically. The Supreme Court's announcement of an individual constitutional right to keep and bear arms in 2008 is perhaps the change that most vividly captures public attention.[53] But a development just as important, if not more so, has occurred in the realm of criminal law. "Beginning in the 1970's, Congress deliberately chose to assume a more active role in federal sentencing, fundamentally altering our nation's sentencing goals and practices."[54] This active role and fundamental alteration meant an increasingly quick turn to mandatory minimum penalties for crime,[55] especially crimes committed with firearms.[56]

Like the federal government, many states during this time period were enthusiastic participants in what Jonathan Simon

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50. *See generally* Amber K. Goodwin & T.J. Grayson, *Investing in the Frontlines: Why Trusting and Supporting Communities of Color Will Help Address Gun Violence*, 48 J.L., MED. & ETHICS (SPECIAL SUPP.) 164 (2020) (advocating for violence prevention programs that rely on community relations).

51. *See supra* note 7 and accompanying text.

52. *See* Hasbrouck, *supra* note 47, at 687; *see also* GRUBER, *supra* note 12, at 192 ("[W]e will never incarcerate our way to gender equality and nonviolence.").

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

54. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 188 (1993).

55. FORMAN, *supra* note 42, at 7 ("Beginning in the early 1970s, America had adopted an array of increasingly tough approaches to crime, including aggressive street-level policing, longer sentences, and a range of lifetime punishments such as felon disenfranchisement."); Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, YALE L.J.F. 791, 791 (2019) ("Since the 1980s, Congress has consistently made federal criminal justice significantly more punitive.").

56. FORMAN, *supra* note 42, at 60–61, 74–75 (noting the special focus on gun use in crime).

has called "the severity revolution."[57] And that severity has included pronounced use of aggressive policing and prosecution.[58] After all, "[i]ncreased severity always requires two components: harsher laws and harsher enforcement."[59] Guns were—and are—an important part of the story of punitive modes of policing and punishment during this era.[60] Notably, the push for harshness was bipartisan[61] and crossed racial[62] and gender[63] divides.[64]

Now, beginning in the past decade, a similarly bipartisan chorus of commentators has begun to vocally question this reliance on increasingly severe police tactics and harsh prison

57. Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIA. L. REV. 217, 219–20 (2001) (explaining the shift from a focus on humanity to severity).

58. GRUBER, *supra* note 12, at 81 ("By the 1980s, the rehabilitative, interventionist ideal championed by sociologists was giving way to simple incapacitation and deterrence through incarceration as the exclusive way to address crime.").

59. JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER 8 (2023).

60. Sara Sun Beale, Essay, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1641 (2002) ("After several rounds of statutory increases, the penalties [for unlawful gun possession and use of a gun in a crime] are now much higher than penalties for criminal conduct that accompanies gun possession and also very high relative to penalties for other serious offenses."); CARLSON, *supra* note 44, at 57 (describing the "War on Guns" as part of the broader crime war strategies of the past several decades).

61. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 307 (2016) (noting that over a series of decades "a bipartisan political consensus had modernized and expanded the carceral state, disinvesting from social welfare measures while escalating crime control and penal programs in response to the threat of collective violence").

62. FORMAN, *supra* note 42, at 75 (documenting support for mandatory sentences for gun-involved crime among both Black and white lawmakers).

63. GRUBER, *supra* note 12, at 1 (reporting concern "that women's criminal law activism had not made prosecution and punishment more feminist" but had instead "made feminism more prosecutorial and punitive").

64. It still pervades many approaches to gun criminalization. *See* Aziz Huq et al., *Governing Through Gun Crime: How Chicago Funded Police After the 2020 BLM Protests*, 135 HARV. L. REV. F. 473, 474 (2022) (describing the response of the Democratic Chicago Mayor Lori Lightfoot to gun violence, in which her administration "pressed for a set of coercive responses that again had at best questionable effects on gun violence even as they more assuredly reinforced racially stratified patterns of law enforcement").

sentences.[65] This chorus has highlighted the devastating consequences the severity paradigm has wrought on individuals, families, communities, and the nation as a whole.[66] The statistics are familiar to many: nearly two million people are in jail or prison in the United States, representing an almost five-fold increase in the incarcerated population over the last four decades; the United States imprisons more people per capita than nearly any other country; and harsh sentencing laws have created a situation where one out of every seven prisoners is serving a life sentence.[67] Like many other burdens in America, these fall disproportionately on the poor and Black.[68]

65. Hopwood, *supra* note 55, at 793 n.14 ("Groups as diverse as the American Civil Liberties Union, the Heritage Foundation, the Brennan Center for Justice, and the American Conservative Union Foundation all support federal criminal justice reform. The push for federal criminal justice reform is one of the few bipartisan issues left in the Congress."); *Trump Remarks*, *supra* note 21 ("[T]hose of us that voted for these tough mandatory minimums, 30 years ago, realized that there is some unfairness in it, and I think this legislation will bring fairness to this system of sentencing." (quoting Senator Chuck Grassley)); *New Poll Finds That Urban and Rural America Are Rethinking Mass Incarceration*, VERA INST. OF JUST., https://www.vera.org/newsroom/new-poll-finds-that-urban-and-rural-america-are-rethinking-mass-incarceration [https://perma.cc/68EM-YJ2T] (reporting that a recent poll showed "that a 40 percent plurality believe incarceration rates in their communities are too high"). Michelle Alexander's pathbreaking book, *The New Jim Crow*, surely helped to raise the profile of the movement against mass incarceration. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). *See* FORMAN, *supra* note 42, at 220 (observing that "the book quickly became required reading for anyone concerned about mass incarceration"); Hopwood, *supra* note 55, at 800 ("Legal scholarship focused on mass incarceration and criminal justice reform exploded after Michelle Alexander's book . . . was published in 2012.").

66. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2 (2019) (explaining that though recent criminal justice "policies are unquestionably tough on budgets, tough on individuals, and tough on communities," there are reasons to wonder whether those polices are "really tough on crime itself").

67. *United States of America*, WORLD PRISON BRIEF, https://www.prisonstudies.org/country/united-states-america [https://perma.cc/6GQK-FNX8]; *Growth in Mass Incarceration*, THE SENT'G PROJECT, https://www.sentencingproject.org/research [https://perma.cc/V6GY-8Y4F].

68. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system [https://perma.cc/62MG-DP8F]

Attending to *Deal* and *Dean* helps contextualize these trends in firearms carceralism. *Deal v. United States*[69] was decided in 1993. *Dean v. United States*[70] was decided in 2017. These cases epitomize key markers—metaphorical bookends—in the tough-on-crime politics that characterized the criminal legal system's approach to guns (and much else) during the last half century.[71] To be sure, *Deal* is not the beginning, but it does serve as an exemplar of the severity paradigm at its apex; and *Dean* is not the end, but it does signal a hopeful skepticism of the old approach. Deal's harsh sentence generated no sympathy from the Supreme Court; two and a half decades later, Dean found a more receptive audience.

The charge that anchored both Dean and Deal's steep sentences is 18 U.S.C. § 924(c). Though the statute has transformed meaningfully since its enactment in 1968,[72] its central component—in 1991, 2015, and today—is a separate criminal offense that carries a mandatory minimum sentence for carrying or using a gun in certain federal crimes, like bank robbery.[73] These two decisions and the underlying charge are not isolated cases.[74]

("The racial disparities in the adult and juvenile justice systems . . . are compounded by discretionary decisions and sentencing policies that disadvantage people of color because of their race or higher rates of socioeconomic disadvantage.").

69. 508 U.S. 129 (1993), *superseded by statute*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, *as recognized in* United States v. Davis, 139 S. Ct. 2319 (2019).

70. 581 U.S. 62 (2017).

71. *See* PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE 181–82 (2018) ("Since the late 1960s, the dominant approach to dealing with the challenges of urban poverty and violent crime has been to disinvest in low-income communities and to invest in the police and the criminal justice system—a strategy of abandonment and punishment.").

72. *See* Charles & Garrett, *supra* note 34, app. at 704–15 (charting all the changes to the statute since its creation).

73. 18 U.S.C. § 924(c)(1)(A); *see also* ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH 274 (2022) (noting that laws like firearm possession offenses and sentencing add-ons "typically involve guns that don't go off, but are seen as sufficiently risky that mere possession is criminalized" and "[i]f a gun does go off – if it is used to shoot someone – criminal law typically addresses that actual harm through assault or homicide law").

74. Indeed, as a mandatory minimum provision, § 924(c) is an important part of the kinds of draconian sentencing laws that contribute to mass

Deal was only the Supreme Court's third substantive engagement with § 924(c) since the law's enactment in 1968, and the statute was the federal government's first ever mandatory minimum penalty for gun crime.[75] It was also the first case the Court decided after Congress intervened to revise the statute to overturn the prior two decisions (in 1978 and 1980) that had construed the statute narrowly and in a way that benefitted criminal defendants.[76] A chastened Court no longer read leniency into the law. The case is emblematic of the tough-on-crime era in which a majority of Justices minimized any role for the rule of lenity. *Dean* is similarly instructive as a case study of the way in which the popular and academic criticisms about mass incarceration may have influenced a reading of the statute that counseled in favor of leniency.[77]

The rest of this Part charts the case of Thomas Deal, with a focus on the social context, lawmaking, and scholarship that brought about Congress's and the Court's endorsement of firearms carceralism and punitive view of gun crime. Section A details Deal's offense, from conviction to Supreme Court decision. Section B describes the circumstances that led to the statutory offense for which Deal was convicted and the push for harsh gun crime sentencing. Finally, Section C turns to post-*Deal* developments in gun criminalization and punishment.

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incarceration. *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 13 (2007) ("[T]here is no denying a central truth: the prison population is produced by sentencing policy, and the problem of mass incarceration cannot be addressed without changing sentencing law and practice.").

75. *See* Charles & Garrett, *supra* note 34, at 655–56 ("[Section 924(c)] also increased punishment for using a gun in a crime—and set a mandatory sentencing floor.").

76. Simpson v. United States, 435 U.S. 6 (1978) (invoking the rule of lenity to hold a defendant may not be sentenced under another statute in addition to § 924(c)); Busic v. United States, 446 U.S. 398 (1980) (finding § 924(c) may not be applied where a felony itself provides for enhancement when possessing a firearm); United States v. Gonzales, 520 U.S. 1, 10 (1997) (noting that the 1984 amendments to the statute meant "Congress thus repudiated the result[s]" of the earlier decisions).

77. In 2018, as part of the First Step Act, Congress eliminated the kind of charge stacking that led to Thomas Deal's draconian sentence, but the change is not retrospective. *See If the Law Is Wrong Now, It Was Wrong Then: The Case for First Step Act Retroactivity*, FAMS. AGAINST MANDATORY MINIMUMS, https://famm.org/stories/if-the-law-is-wrong-now-it-was-wrong-then-the-case-for-first-step-act-retroactivity [https://perma.cc/U27T-47RD].

A. *DEAL V. UNITED STATES*

Over the course of several months in early 1990, Thomas Deal committed six bank robberies in Houston, Texas.[78] He used a gun each time.[79] When he was arrested several months later, the government charged Deal with six counts of bank robbery, six counts of violating § 924(c), and one count of being a felon in possession of a firearm.[80] He took the case to trial, and a jury found him guilty on each count.[81] After trial, Deal took issue with how the government sought to apply § 924(c)'s sentencing provisions to his conduct. At the time, the statute provided that if a person used or carried a gun in a crime of violence, the person must be sentenced to a mandatory sentence of five years' imprisonment for the first conviction.[82] It went on to say that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years."[83]

Deal argued he only merited the five year mandatory penalty on each § 924(c) count because he only received a single conviction for all the offenses in one proceeding (i.e., all five counts were part of his first "conviction").[84] The "second or subsequent" language, he contended, was ambiguous and therefore the rule of lenity should apply in his favor.[85] The government responded, and the district court agreed, that the twenty-year tack-on applied to every § 924(c) count after the first one.[86] The difference for Deal was whether the conviction on his six § 924(c) counts would amount to thirty years of imprisonment added on to the sentence for his bank robbery charges or the 105 year addition the government urged.

78. United States v. Deal, 954 F.2d 262, 262 (5th Cir. 1992), *aff'd*, 508 U.S. 129 (1993). He robbed four different banks, two of them twice. *See* Transcript of Oral Argument at 5, *Deal*, 508 U.S. 129 (No. 91-8199) [hereinafter *Deal* Argument Transcript].

79. *Deal*, 954 F.2d at 262.

80. *Id.*

81. *Id.*

82. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138–39 (current version at 18 U.S.C. § 924(c)).

83. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460, 102 Stat. 4181, 4373 (current version at 18 U.S.C. § 924(c)).

84. *Deal*, 954 F.2d at 263.

85. *Id.*

86. *Id.* at 262.

In a short and cursory opinion, the Fifth Circuit affirmed the lower court's judgment in February 1992. "If this were a matter of first impression before any Circuit Court, we might be inclined to explore the controversy further," the panel proclaimed.[87] But, since the federal courts of appeals that had considered the question at that time were unanimous on the issue, the court denied both relief and further explanation.[88] Two months after the Fifth Circuit's decision, the Tenth Circuit decided en banc that the enhanced penalty does not apply in this kind of situation, breaking from the otherwise uniform interpretation of courts of appeal and creating a circuit split.[89] That is where things stood in early April 1992, with a new split on a major gun sentencing enhancement.

This case, like all others, did not occur in a historical vacuum. And Supreme Court Justices, like the rest of us, are products of their time. On Wednesday, April 29, 1992, a large, violent protest broke out in Los Angeles after four white LAPD officers were acquitted of beating Rodney King.[90] The Watts uprising was "the largest incident of urban civil disorder in the twentieth century."[91] It lasted five days, resulted in more than fifty deaths, 2,000 injuries, thousands of damaged or destroyed buildings, and approximately $1 billion in property damage.[92] President George H.W. Bush condemned the violence[93] and urged

87. *Id.* at 263.

88. *Id.*

89. United States v. Abreu, 962 F.2d 1447, 1452–53 (10th Cir. 1992) (en banc) ("A statute designed to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense should not be construed to apply before that penalty has had the chance to have the desired effect on the offender."), *vacated*, 508 U.S. 935 (1993).

90. Anjuli Sastry Krbechek & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots [https://perma.cc/YH2N-2RW3].

91. HINTON, *supra* note 61, at 331.

92. Krbechek & Bates, *supra* note 90.

93. *Reaction to Los Angeles Police Trial*, C-SPAN (May 1, 1992), https://www.c-span.org/video/?25847-1/reaction-los-angeles-police-trial [https://perma.cc/3BJW-9J47] ("What is going on in LA must and will stop. As your President, I guarantee you, this violence will end."); *see also* Linda Feldmann, *Bush Wins Points for Speech on L.A. Riots*, THE CHRISTIAN SCI. MONITOR (May 4, 1992), https://www.csmonitor.com/1992/0504/04011.html [https://perma.cc/8L3C

"personal responsibility"[94] as a salve to urban crises, even as he admitted that the punitive policies of the last several decades had failed to stem the tide of crime, unemployment, and economic devastation.[95]

Writing contemporaneously in the *Los Angeles Times*, a reporter underscored the connection between the uprising and guns: "Burning and beatings may have produced the most indelible images during the riots of 1992, but bullets accounted for the greatest human wreckage."[96] And, he emphasized, "it is gun-related violence, authorities believe, that promises to endure as a bloody legacy to the riots."[97] Indeed, at this time in the early 1990s, the crime wave was peaking, with violent crime—and especially handgun crime—reaching truly shocking proportions.[98] Many Americans reported fear of violent crime.[99]

On May 7, 1992, just days after authorities contained the Watts uprising, federal public defenders filed a petition for certiorari on behalf of Deal, seeking to modify his extreme sentence

-LCE9] ("His speech [on May 1] seemed aimed mostly at middle-class whites as an attempt to reassure a nation where violence had spread to cities across the country, analysts say.").

94. *Excerpts from Speech by Bush in Los Angeles*, N.Y. TIMES, May 9, 1992, at 10, https://timesmachine.nytimes.com/timesmachine/1992/05/09/302692 .html [https://perma.cc/8N8P-HY42].

95. *Id.* (acknowledging that the social policies in the decades preceding the Watts uprising had failed to solve "the problems of poverty and racism and crime").

96. David Freed, *Under Fire: Guns in Los Angeles County*, L.A. TIMES (May 17, 1992), https://www.latimes.com/archives/la-xpm-1992-05-17-mn-415-story .html [https://perma.cc/5X8W-GQ45] ("Guns were never so visible in modern-day Los Angeles as they were during the riots.").

97. *Id.*

98. John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch .org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s [https://perma.cc/TS9Z -D4PD] (reporting nearly eighty violent victimizations per 1,000 people over age twelve in the mid-1990s compared to a rate almost four times lower—about twenty per 1,000—in the late 2010s).

99. Lydia Saad, *Fear of Conventional Crime at Record Lows*, GALLUP (Oct. 22, 2001), https://news.gallup.com/poll/5002/fear-conventional-crime-record -lows.aspx [https://perma.cc/69LU-QEGY] ("In 1993, 43% of Americans said there was an area within a mile of their home where they would be afraid to walk alone at night.").

for carrying guns in the course of robbing banks.[100] The Court granted review in October 1992 as Americans prepared to head to the polls for the presidential election contest between incumbent George H.W. Bush and Arkansas Governor Bill Clinton.[101] The Supreme Court heard oral arguments in March 1993.[102] At the time, the Justices, and the country, were swimming in waters filled with bipartisan "tough on crime" rhetoric.[103]

The oral arguments concerned technical questions of statutory interpretation, but also raised broader issues about the nature of § 924(c). Was it a recidivism statute, as Deal's lawyer argued, meant only to apply to an incorrigible offender who did not learn from prior imprisonment?[104] Or was it a habitual offender statute, as one of the Justices suggested, designed to severely punish serial criminals even if they had not yet been incarcerated?[105] Or was it a "dangerous person" statute, as the government argued, directed at indefinitely incapacitating gun offenders?[106]

Deal sought to underscore the ambiguity of the statute and thereby gain the benefit of the rule of lenity,[107] the "rule of statutory construction that requires a court to resolve statutory

100. *Search Results: No. 91-8199*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/91-8199.html [https://perma.cc/7AEC-GPRC].

101. *Id.*

102. *Id.*

103. President Clinton's first State of the Union Address, given a month before the arguments in *Deal*, emphasized both violent crime and guns as matters of national concern and on which he would act harshly. William J. Clinton, President, U.S., Address Before a Joint Session of Congress on Administration Goals (Feb. 17, 1993), *in* WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS, Feb. 17, 1993, at 220 ("And I ask you to help to protect our families against the violent crime which terrorizes our people and which tears our communities apart. We must pass a tough crime bill. I support not only the bill which didn't quite make it to the President's desk last year but also an initiative to put 100,000 more police officers on the street, to provide bootcamps for first-time nonviolent offenders for more space for the hardened criminals in jail, and I support an initiative to do what we can to keep guns out of the hands of criminals.").

104. *Deal* Argument Transcript, *supra* note 78, at 6 (arguing that § 924(c) "is a recidivist statute").

105. *Id.* at 8 (wondering whether the statute is "just a habitual criminal statute").

106. *Id.* at 25 (contending that "this is a dangerous person statute" and "not in anyway [sic] a recidivist statute").

107. *Id.* at 4 (explaining how the statute had two potential meanings).

ambiguity in favor of a criminal defendant."[108] The government tried to explain how its reading flowed from the plain text.[109] And the government leaned on the statute's harshness as a sign that Congress meant to deal severely with repeat offenders, whether a prior conviction had become final or not.[110] Understating the matter, the government informed the Court that "[b]y and large the changes that Congress has made to the scope of the statute since 1968 or to the scale of its penalties . . . manifest an attitude not of leniency but of increasing severity toward this very serious problem."[111] The rule of lenity, in other words, has no place in construing a gun statute saturated with severity.

The Supreme Court agreed. In a six-to-three opinion authored by Justice Antonin Scalia, the Court held that the statute's enhanced penalty unambiguously applied whenever one finding of guilt followed a prior such finding.[112] Since the jury found Deal guilty on six counts of violating § 924(c), the twenty-year enhancement applied for each of counts two through six, regardless of the fact that the convictions occurred in the same trial.[113] In an opinion displaying his confident textualism, Justice Scalia proclaimed that "[t]here is utterly no ambiguity in that [provision], and hence no occasion to invoke the rule of lenity."[114] The Court rejected a reading that assumed Congress meant only to apply the enhancement to an unrepentant offender whose initial punishment did not teach him a lesson. Perhaps other goals, the Court insisted, were served by the statute, like "taking repeat offenders off the streets for especially long

108. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018).

109. *Deal* Argument Transcript, *supra* note 78, at 37.

110. *Id.* at 27 ("What Congress in effect is saying to those persons is if you are the type of person who would do a crime with a gun more than once you are just too dangerous to have around and you must be separated and incapacitated from society.").

111. *Id.* at 37; *see also* Charles & Garrett, *supra* note 34, app. at 704–15 (chronicling the punitive changes to § 924(c)).

112. Deal v. United States, 508 U.S. 129, 132 (1993).

113. *Id.* at 133–34.

114. *Id.* at 135; *see also id.* at 136 ("Once text is abandoned, one intuition will serve as well as the other. We choose to follow the language of the statute . . . .").

periods, or simply visiting society's retribution upon repeat offenders more severely."[115]

In a dissent joined by Justices Harry Blackmun and Sandra Day O'Connor, Justice John Paul Stevens agreed with the majority that the statute was unambiguous—but in the opposite direction. For the dissenters, it was clear the enhancement applied only to a recidivist who garnered a second conviction after his first one had become final.[116] At the very least, Stevens argued, an interpretation that first arose nearly two decades after the statute was first enacted (i.e., the majority's interpretation) could hardly be deemed the only reasonable one.[117] Justice Stevens saw in the majority's opinion not just a one-off decision, but a broader indication that "textualism replaced common sense" in statutory interpretation involving § 924(c).[118] He rejected the majority's "unwarranted and unnecessarily harsh construction of § 924(c)" because in his view the decision was informed neither by history nor by common sense and could not be reconciled with the rule of lenity.[119] The majority, on the other hand, firmly endorsed a mode of firearms carceralism. Deal and those like him were the bad guys with guns that merited some of society's most severe sanctions.

Although Deal's crimes were undoubtedly serious, he did not fire his weapon or physically harm anyone.[120] Deal is not set to be released from federal prison until September 2091, when he would be 144 years old.[121] To place this sentence in context, in 1991—the year Deal was sentenced to 105 years' imprisonment on the gun charges—state offenders convicted of *murder* were

115. *Id.* at 136.

116. *Id.* at 141–42 (Stevens, J., dissenting).

117. *Id.* at 142–43.

118. *Id.* at 146.

119. *Id.*

120. I certainly do not mean to downplay the significance of the harm Deal caused. The trauma of victimization, especially when it occurs with the threat of a gun, is powerful and real. Yet Deal was punished much more harshly than individuals who have taken a life, even though his crimes do not fit the public perception of what it means to commit a "violent" crime. *Cf.* Klingele, *supra* note 42, at 851 ("In the popular imagination, the term [violent crime] conjures up images of bloodshed, torture, and all manner of intentionally-inflicted physical suffering.").

121. *Find an Inmate: Thomas Lee Deal*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmateloc (choose "Find By Name"; then search first field for "Thomas" and last field for "Deal") [https://perma.cc/EK5V-PQZ8].

serving less than one third of that, with an average sentence of about thirty-two years' imprisonment.[122] For all violent offenders combined, the average sentence for state prisoners at the time was eighteen years' confinement.[123] According to the Court, Congress had considered gun offenders like Deal tantamount to the worst of the worst.

B. MAKING A *DEAL*

Deal was not made in a day. And the ruling cannot be divorced from the social and political context that gave rise to it, nor from the historical background leading up to the decision. It is a particularly acute example of the firearms carceralism worldview enveloping federal lawmakers and Supreme Court Justices. And though the majority of firearms offenses and firearms offenders shuffle through state systems of policymaking, police, prosecutors, probation, parole, and prisons, the federal examples are noteworthy. *Deal* and § 924(c) provide a stark illustration of the phenomenon that devotes overwhelming criminal legal resources to controlling and caging those with guns.

It has long been this way. Because guns play an outsized role in crime, a gun's mere presence has for centuries escalated the legal system's punitive response to a criminal offense. As early as 1783, Connecticut made it a capital offense to commit a burglary or robbery while armed with a dangerous weapon—regardless of whether it was brandished or discharged.[124] To discourage dueling, Mississippi in 1837 imposed a mandatory minimum three-month jail sentence on anyone fighting in public while using "any rifle, shot gun, sword, sword cane, pistol, dirk, bowie knife, dirk knife, or any other deadly weapon."[125] Other states enacted similar sentence enhancements as guns, and

122. TRACY L. SNELL, U.S. DEP'T OF JUST., NCJ-142729, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1991, at 29 (1993).

123. *Id.*

124. An Act for the Punishment of Burglary and Robbery, 1783 Conn. Pub. Acts 633.

125. An Act to Prevent the Evil Practice of Dueling in This State and for Other Purposes § 5, 1837 Miss. Laws 289.

especially gun carrying, proliferated across the country in the mid-nineteenth century.[126]

As it had a century before, legislative focus on firearm violence began to increase appreciably in the 1960s and '70s.[127] That era ushered in a new approach to criminal law amid escalating crime, especially violent crime, rates.[128] "Americans wanted tougher laws, tougher cops, tougher prosecutors, and tougher judges."[129] More police and more aggressive policing accompanied harsher laws.[130] One tool to deal with these rising crime rates was a turn to mandatory minimum sentences and other penalty enhancements.[131]

Consider the provision applied to Thomas Deal: 18 U.S.C. § 924(c), enacted as part of the Gun Control Act of 1968. As it first appeared, that provision mandated a minimum one year sentence for anyone who used or unlawfully carried a firearm

126. *See, e.g.*, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN FEBRUARY, 1843, at 413 (C.C. Clay, ed. 1843) (reproducing an Alabama statute which imposed a maximum six-month sentence for anyone fighting in public who discharged or attempted to discharge a firearm, except in self-defense); A COMPILATION OF THE STATUTE LAWS OF THE STATE OF TENNESSEE, 52 (Seymour D. Thompson & Thomas M. Steger eds., 1873) (reproducing a Tennessee statute which imposed a minimum two-year sentence for anyone assaulting another if he had "at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself"); Persons Engaged in Criminal Offence, Having Weapons § 10, 1868 Fla. Laws 2538 (imposing a maximum three-month sentence if someone is arrested while "armed with or has on his person slung shot, metallic knuckles, billies, firearms or other dangerous weapon"); GENERAL LAWS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1010 (Gen. Assembly of R.I. ed., 1896) (imposing an enhanced punishment for being arrested with a weapon).

127. *See* Charles & Garrett, *supra* note 34, at 652–53.

128. Darren Lenard Hutchinson, *Who Locked Us up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2391 (2018) (reviewing FORMAN, *supra* note 42) ("In the 1970s, state and federal governments began enacting tough criminal law reforms, including the elimination of parole, mandatory minimum sentences, and enhanced sentences for certain offenders, including recidivists.").

129. BELLIN, *supra* note 59, at 6.

130. *Id.*

131. Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393, 394 (1979) (noting that proposals for mandatory minimums were "currently fashionable" in the 1970s).

during any federal felony, to be imposed on top of the punishment for the underlying offense.[132] A second violation of the statute garnered a mandatory five-year add-on.[133] The legislative record contains very little insight into its sponsor's or the legislature's goals.[134] There are some suggestions that the sponsor introduced the provision to burnish his tough-on-crime bona fides, and what better way in that time and place than to harshly punish the gun offender.[135] One thing is clear: the law targeted the risk that a gun may be used in criminal activity, rather than penalizing only its discharge or deployment, as has been true throughout much of our history.[136]

Section 924(c) was the first federal mandatory minimum penalty for a gun crime. Its enactment in 1968 is not surprising. The law was passed in the same year "Richard Nixon made street crime a major issue in the presidential campaign."[137] Other mandatory penalties and increased sentencing severity have often occurred in election years.[138] The provision creates what Justice Elena Kagan has called "a combination crime"[139]—a law that "punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm."[140] The two separate acts are (1) possessing or carrying a gun while (2) committing another crime. For Deal, carrying his gun during the bank robbery is what made the statute's enhanced penalties applicable.

The focus of these types of crimes is different from two other kinds of criminal sanctions related to guns and that get attention

132. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (current version at 18 U.S.C. § 924(c)).

133. *Id.*

134. Charles & Garrett, *supra* note 34, at 653; Simpson v. United States, 435 U.S. 6, 13 n.7 (1978) ("Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports.").

135. *See generally* Charles & Garrett, *supra* note 34, at 653 (describing the political backdrop to the Gun Control Act of 1968).

136. *See* Jouet, *supra* note 21, at 247 (describing bipartisan support for penalties for simply carrying a gun when committing another crime).

137. Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 64 n.9 (1993).

138. *Id.*

139. Rosemond v. United States, 572 U.S. 65, 75 (2014).

140. *Id.*

more often.[141] First, laws like § 924(c) are different than laws that directly punish criminal gun *use*—like assault with a deadly weapon or aggravated assault.[142] Combination crimes typically apply even when the gun is never used and can also apply when it is only tangentially related to the underlying crime.[143] Second, combination crimes are also different from mere unlawful possession crimes, like the state and federal prohibitions on firearm possession for those with felony convictions and other disqualifying records.[144] The combination crimes raise different issues altogether (indeed, they apply to one who can otherwise lawfully possess and carry a gun).[145]

In the years after enacting § 924(c), Congress often changed the provision to ratchet up the punishment.[146] Today, the statute contains a detailed sentencing scheme that provides various penalties depending on whether the weapon was carried, brandished, or discharged.[147] The penalties are now extreme. They apply to any gun used or carried "during and in relation to" a

141. *Id.* ("[Section] 924(c) establishes a free-standing offense distinct from any that might apply just to using a gun—say, for discharging a firearm in a public park.").

142. These are also different than other criminal laws that take into account the presence of a weapon. *See* Eric Ruben, *Public Carry and Criminal Law After* Bruen, 135 HARV. L. REV. F. 505, 506 (2022) (describing a set of criminal law doctrines implicated by public gun carrying).

143. *See, e.g.*, Smith v. United States, 508 U.S. 223, 236–37 (1993) (holding that "use" of a firearm in a crime includes using it as "an item of trade or barter" in, for example, a drug transaction); Muscarello v. United States, 524 U.S. 125, 126–27 (1998) (holding that a person "carries" a firearm during and in relation to a crime when a person "knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies").

144. 18 U.S.C. § 922(g).

145. *E.g.*, Press Release, U.S. Atty's Off., S. Dist. of Ga., Three Georgia Men Charged with Federal Hate Crimes and Attempted Kidnapping in Connection with the Death of Ahmaud Arbery (Apr. 28, 2021), https://www.justice.gov/usao-sdga/pr/three-georgia-men-charged-federal-hate-crimes-and-attempted-kidnapping-connection-death [https://perma.cc/FR2G-N3KK] (announcing § 924(c) charges against the men who pursued and ultimately killed Ahmaud Arbery, despite the fact that they were not prohibited from possessing guns and were lawfully carrying them pursuant to Georgia law).

146. Charles & Garrett, *supra* note 34, app. at 704–15 (cataloguing changes to § 924(c)); Abbott v. United States, 562 U.S. 8, 23 (2010) ("Between 1984 and 1998, Congress expanded the reach or increased the severity of § 924(c) on four occasions . . . .").

147. 18 U.S.C. § 924(c).

federal crime of violence or drug trafficking crime.[148] The bare minimum penalty is now five times greater than 1968's mandatory penalty.[149] Brandishing a weapon carries a seven-year minimum penalty while discharging one carries a ten-year minimum.[150] A repeat offender is subject to a mandatory twenty-five-year penalty.[151]

The federal government was not the only entity targeting guns for harsh punishment in the years ramping up to the crime war. States were and became full-fledged participants as well—each with their own trajectories.[152] In 1967, Illinois enacted a new combination crime that took the same approach as § 924(c) called "armed violence."[153] The statute provided that "[a] person commits armed violence when, while armed with a dangerous weapon, he performs any act prohibited" by specified provisions of the criminal code, including kidnapping, rape, aggravated assault, burglary, and others.[154] The statute imposed a mandatory minimum two-year sentence for the first offense and five years for a second or subsequent one.[155] As the Illinois Supreme Court explained: "The language of these sections does not require that there be a connection between the underlying felony and the fact that the felon was armed with a dangerous weapon while he committed the felony."[156] Having the gun is enough, even if it has *no* relation to the crime. In 1994, at the crest of the severity surge and around the time of *Deal*, Illinois ratcheted up penalties for its gun crimes, turning unlawful possession from a misdemeanor

148. *Id.*

149. *Compare id.* (imposing a minimum five-year imprisonment for using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime"), *with* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (current version at 18 U.S.C. § 924(c)) (imposing a minimum one-year imprisonment for using or unlawfully carrying a firearm during the commission of a felony).

150. 18 U.S.C. § 924(c).

151. *Id.*

152. BELLIN, *supra* note 59, at 21 (stating that, with respect to mass incarceration generally, "[s]tates followed different trajectories to a similar outcome").

153. Act of Aug. 3, 1967, art. 33A, 1967 Ill. Laws 2598.

154. *Id.* § 33A-2.

155. *Id.* § 33A-3.

156. People v. Haron, 422 N.E.2d 627, 629 (Ill. 1981).

to a felony and increasing the mandatory minimum sentence for its armed violence offense.[157]

Like other jurisdictions, Michigan, too, joined the combination-crime chorus. Its Felony Firearm Statute, which went into effect in 1977, mandated an additional two-year sentence for possession of a firearm while committing a felony.[158] Like § 924(c), Michigan's statute required the sentence to be served consecutively to the punishment for the underlying crime and prohibited a suspended sentence.[159] And, like § 924(c), it was predicated on a notion of deterrence: "The evident purpose of the statute is to enhance the penalty for the carrying or possession of firearms during the commission of a felony and thus to deter the use of guns."[160] Other states were also tacking on additional sentences for crimes committed with guns.[161]

Illinois's statute, and those like it, raised concerns from scholars and practitioners. As one commentator reported about the armed violence statute, "[a]ccording to many public defenders, instead of using the statute where the crime has been particularly heinous, the prosecutors have been using it when their case is borderline, to bolster its strength."[162] And, he emphasized, it often appeared to be applied capriciously and without a principled framework.[163] Indeed, these laws often magnify the power and discretion of prosecutors, making them one of the most important actors for understanding mass criminalization.[164]

157. Rick Pearson, *Gun Law to Trigger More Costs*, CHI. TRIB. (Aug. 9, 2021), https://www.chicagotribune.com/news/ct-xpm-1994-12-19-9412190169-story.html [https://perma.cc/9MB2-4SZ2].

158. *See* Heumann & Loftin, *supra* note 131, at 395.

159. *See id.*

160. People v. Moore, 679 N.W.2d 41, 46 (Mich. 2004).

161. *See, e.g.*, FLA. STAT. § 775.087(2)(a) (2023); MO. REV. STAT. § 571.015 (2023); An Act Concerning the Offenses with Firearms, 1975 Conn. Acts 372; CAL. PENAL CODE §§ 12022–12022.5 (West 2023); NEB. REV. STAT. § 28-1205 (2023).

162. Martin H. Tish, Comment, *Duplicative Statutes, Prosecutorial Discretion, and the Illinois Armed Violence Statute*, 71 J. CRIM. L. & CRIMINOLOGY 226, 242 (1980).

163. *Id.*

164. *See* PFAFF, *supra* note 21, at 135 ("Strike laws, other repeat offender laws, mandatory minimums, gun enhancements, long maximum sentences: all these make the prosecutor's threat to go to trial riskier for the defendant, and

Yet it is no surprise these types of laws were popular among the severity craze of the 1960s and '70s and the tough-on-crime era it helped to solidify. Prominent researchers at the time considered mandatory minimum penalties to be "something like a criminological wonder drug — a plan to reduce violent crime at minimal cost with no serious side effects."[165] And these laws were not just pages in a code. They were actively and enthusiastically enforced at both the state and federal level.[166]

In 1991, Attorney General Richard Thornburgh announced Project Triggerlock, which was designed to more thoroughly engage the federal government in deploying federal firearms laws—with their steep penalties—to attack street crime.[167] "A gun plus a crime equals hard Federal time," read the project's motto, indicating a focus on § 924(c)'s combination offense.[168] The approach bore fruit in increased charges. "Between 1989 and 1998, the number of federal firearms prosecutions went up 61 percent."[169] Over the two and half decades from the enactment of § 924(c) to the decision in *Deal*, both state and the federal governments had ratcheted up enforcement and punishment for gun crimes and created one of the largest imprisoned populations in the developed world.

But it is not clear how effective these policies were at meeting even their own professed goals. In 1990, the same year Deal was robbing banks with his gun, Congress directed the United States Sentencing Commission (the Commission) to produce a

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they serve as additional cards the prosecutor can offer to drop during the plea process in exchange for a deal."); ARMOUR, *supra* note 40, at 11 (citing Pfaff's work and writing that "first among those true causes of racialized mass incarceration is the nearly unchecked power of DAs"); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) ("Prosecutors are the most powerful officials in the criminal justice system."); *cf.* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1588 (2020) (underscoring the importance of the fact that prosecutors are local elected officials in much of the country).

165. Milton Heumann et al., *Federal Firearms Policy and Mandatory Sentencing*, 73 J. CRIM. L. & CRIMINOLOGY 1051, 1052 (1982). This was a view the researchers came to disavow. *Id.*

166. KENNEDY, *supra* note 13, at 47 (describing the increased attention to law enforcement solutions to gun violence in the 1990s).

167. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 396 (2006).

168. *Id.*

169. *Id.* at 397 (citation omitted).

report on mandatory minimum penalty provisions in federal law, including their compatibility with the recently enacted sentencing guidelines and the empirical effects of the provisions.[170] The Commission's 1991 report was quite critical about the concept of mandatory penalties.[171] Among other critiques, it reported that, despite the mandatory nature of the minimum penalties, more than a third of defendants whose conduct likely triggered such a statute pled guilty to an offense without a mandatory minimum, increasing disparity between similarly-situated defendants.[172] Even those disparities were not evenly distributed. The Commission found the data "strongly suggest[ed] that [whether] a mandatory minimum is applicable [in a particular case] appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum."[173] The Commission noted that the guidelines removed discretion from judges and appeared to transfer it to prosecutors who could decide whether and how to charge defendants whose conduct might implicate a mandatory minimum.[174]

C. AFTER *DEAL*

Congress essentially ignored these aspects of the Sentencing Commission's 1991 report. In 1998, just a few years after the report, Congress enlarged § 924(c) in response to what it perceived to be a too stingy Supreme Court reading, adding not only new and enhanced penalties, but also expanding the statute's scope.[175] The federal government, along with state and local officials, continued to find new ways to use the criminal legal system to deal with gun violence, even though the crime wave began

170. Crime Control Act of 1990, Pub. L. No. 101-647, § 1703, 104 Stat. 4789, 4845–46.

171. *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

172. *Id.* at ii.

173. *Id.*

174. *Id.* at iii; *see also* PFAFF, *supra* note 21, at 134–40 (describing the importance of prosecutorial discretion and decision-making in the rise of mass incarceration); DAVIS, *supra* note 164, at 5–8 (describing prosecutorial discretion).

175. An Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1, 112 Stat. 3469, 3469–70 (1998).

to recede after reaching its apex around the time the Supreme Court affirmed Deal's sentence.[176]

In 1997, for example, the Department of Justice launched Project Exile. It centered on Richmond, Virginia, and used federal gun laws to counteract violent crime trends in the city. "Essentially functioning as a sentence enhancement program, Project Exile targeted felons who were caught carrying firearms . . . and prosecuted them in federal courts where they received harsher sentences, no option of bail, and no potential for early release."[177] The term "exile" was used to indicate that offenders who used guns in their crimes could serve time in federal prisons far from their families and communities.[178] The program was popular across the ideological and political spectrum, and the evidence at the time was read to support its role in decreasing violent crime.[179] After all, "[f]rom thirty thousand feet, all tough-on-crime measures from the last three decades look as if they 'worked' because they coincided with the 'great crime decline.'"[180] During the 2000 presidential campaign, President Bush "made Exile a centerpiece of his crime-fighting platform" and "after he was elected, he made good on his promise with Project Safe Neighborhoods."[181]

Modeled on earlier programs like Exile, Project Safe Neighborhoods (PSN) began in 2001 and spread to all ninety-four

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176. Naomi Murakawa notes this phenomenon more broadly:

> Disjunctions between crime rates and tough policy are striking: crime rates and public punitiveness escalated most rapidly through the late 1960s and early 1970s, yet federal lawmakers enacted notoriously punitive drug penalties and three-strikes provisions two decades later, during the stable and declining crime rates of the late 1980s and 1990s.

NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 4 (2014).

177. *Program Profile: Project Exile*, NAT'L INST. OF JUST. (May 4, 2015), https://crimesolutions.ojp.gov/ratedprograms/413#1-0 [https://perma.cc/5H3U-ND4A].

178. Carl Bialik, *In the Shadow of Exile*, FIVETHIRTYEIGHT, https://fivethirtyeight.com/features/homicide-in-rochester [https://perma.cc/JPT3-UBW5].

179. *Id.*

180. GRUBER, *supra* note 12, at 91.

181. Bialik, *supra* note 178.

federal districts.[182] The specific details of PSN programs varied by district, but "increased prosecution by federal authorities was a key strategy across all districts."[183] And, as a result, "[t]hrough PSN (along with other federal initiatives), a greater number and variety of firearms offenses, including firearms-related drug and domestic violence offenses, that were previously handled by local officials now come to the attention of federal authorities."[184]

Other scholars have well-chronicled the enforcement efforts of these programs and the empirical results of Project Exile, PSN, and other gun interdiction programs.[185] These programs form part of the key building blocks in the firearms carceralism approach. Another innovation in the 1990s and 2000s to confront gun violence has received less attention: gun courts. Gun courts are a type of "problem-solving" court created in the heyday of such alternative courts.[186] Providence, Rhode Island, created the first gun court in 1994 and Birmingham, Alabama, followed the next year.[187] In the decades after these courts were established, cities like Boston, Philadelphia, and New York City experimented with gun courts.[188] Unlike other problem-solving courts, such as drug courts, gun courts have not received sustained empirical review. But at least one study, now more than a decade old, concluded that while Philadelphia's gun court increased

182. Emily Tiry et al., *Prosecution of Federal Firearms Offenses, 2000-16*, URB. INST. 20 (Oct. 2021), https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf [https://perma.cc/S2RF-Z9XV].

183. *Id.*

184. *Id.* (citation omitted).

185. *E.g.*, Ben Grunwald & Andrew V. Papachristos, *Project Safe Neighborhoods in Chicago: Looking Back a Decade Later*, 107 J. CRIM. L. & CRIMINOLOGY 131 (2017) (examining the effects of PSN in Chicago).

186. Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1482–83 (2017) ("Problem-solving courts are specialized criminal or quasi-criminal courts that often substitute treatment, monitoring, or community service, alone or in combination, for incarceration, and purport to provide a more effective and efficient criminal justice intervention by focusing scarce resources on recurring, systemic issues. They have emerged in a dizzying variety of forms: drug courts, mental health courts, domestic violence courts, community courts, gun courts, sex offender courts, homelessness courts, human trafficking courts, and gambling courts." (footnote omitted)).

187. Matthew Robin Nobles, Evaluating Philadelphia's Gun Court: Implications for Crime Reduction and Specialized Jurisprudence 39–40 (Aug. 2008) (Ph.D. dissertation, University of Florida) (on file with *Minnesota Law Review*).

188. *Id.* at 9.

convictions for gun crimes, it did not have long term effects on rates of gun violence.[189]

A literature review by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention observed that "[a]dult gun courts concentrate on quick and efficient case processing and usually result in harsh punishments, such as a long prison sentence, even for first-time offenders."[190] The report continued, describing the twin deterrence and incapacitation rationales for the programs: "The aim is to take violent offenders off of the streets as soon as possible and deter them from future gun-related crimes through harsh sentencing."[191]

Gun courts, or specialized dockets for gun cases, continue to this day. In March 2022, reports surfaced that New York City courts, reportedly under political pressure from Mayor Eric Adams's administration, would begin to "steer gun possession cases to specialized courtrooms, where judges will push prosecutors to provide evidence and plea offers, and hold routine check-ins aimed at moving cases along."[192] Some laud these changes as part of an optimal deterrence strategy "by signaling swift sanctions for the carrying of illegal weapons."[193] Others bemoan the pressure that fast-tracked cases will place on defense attorneys and their clients to take pleas.[194]

Philadelphia, too, reinvigorated its gun courts in 2021, "a decade after the city shut down its first seven-year experiment with it."[195] Like the rationale for New York's gun court, the

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189. *Id.* at 82–83.

190. *Gun Court,* OFF. OF JUV. JUST. & DELINQ. PREVENTION 2 (Sept. 2010), https://ojjdp.ojp.gov/mpg/literature-review/gun-court.pdf [https://perma.cc/45CR-MCFS].

191. *Id. See generally* Adi Leibovitch, *Punishing on a Curve,* 111 NW. U. L. REV. 1205 (2017) (describing how judges sentence based on the cases currently in front of them, leading to punishment "on a curve").

192. George Joseph, *NYC Courts Issue Rules to Ram Through Gun Cases, Under Political Pressure*, CITY (Mar. 8, 2022), https://www.thecity.nyc/2022/3/8/22967130/nyc-courts-gun-case-fast-track [https://perma.cc/VVU4-MP6H].

193. *Id.*

194. *Id.*; *see also* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 5 (2021) (underscoring and elaborating on the notion that the U.S. criminal legal system has become "a system of pressure and pleas, not truth and trials").

195. Ximena Conde, *Philly Gun Court Aims to Move Cases Through Faster, Prevent Future Crimes*, WHYY (Apr. 19, 2021), https://whyy.org/articles/philly

Philadelphia "DA's office says the idea behind this new court is to take these felony gun cases out of the long waitlist of thousands of other cases, reducing the backlog and deterring more serious gun-related crimes like homicides by ensuring swift justice."[196]

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In the years after the Supreme Court decided *Deal*, legislators and other officials continued to approach the problem of gun violence with their criminal law toolkit, practicing firearms carceralism as the funding for other social services receded. Few in positions of power questioned this single-minded focus during the height of the severity craze. But times were changing. By the end of the first decade of the new millennium, everyday Americans were awakening to the growing sense that something was amiss. Suddenly, in the wake of the 2008 financial crisis, and the resulting budgetary and fiscal constraints, it seemed a bipartisan group could get behind the goals of decreasing the criminal law's scope or severity—at least for some offenders.

II. *DEAN* AND THE LAW'S UNINTENDED CONSEQUENCES

By the end of President Barack Obama's eight years in office, the tides in public opinion had swung so much in favor of reforming the criminal justice system that his call for bipartisan efforts to enact change in his last state of the union address in 2016 obscured its historic nature.[197] For nearly half a century following the 1960s, "parties and their leaders competed on who could be more punitive and draconian on criminal sentencing."[198] Indeed, "for a president to stand before the American people and call on Congress to pass legislation to *reduce* imprisonment [was] unprecedented."[199] This path to a growing recognition, from both

-gun-court-aims-to-move-cases-through-faster-prevent-future-crimes [https://perma.cc/Z4Y4-YPJE].

196. *Id.*

197. Inimai M. Chettiar & Abigail Finkelman, *If You Blinked, You Missed When Obama Made Criminal Justice Reform History*, BRENNAN CTR. FOR JUST. (Jan. 13, 2016), https://www.brennancenter.org/our-work/analysis-opinion/if-you-blinked-you-missed-when-obama-made-criminal-justice-reform-history [https://perma.cc/QG3V-5SJL] ("There has never been a time when a president suggested at the State of the Union that we ought to incarcerate fewer people.").

198. *Id.*

199. *Id.*

judges and elected politicians,[200] took place in the shadow of *Deal*, and with hints that surface in *Dean*.

This Part first canvasses the facts and background of *Dean*, and then provides a brief sketch of where the firearms carceralism approach has led.

A. *DEAN V. UNITED STATES*

On an April night in 2013, Levon Dean, Jr., joined his brother to provide "muscle" for two female friends planning to rob one of the friend's prostitution clients.[201] At the hotel room where they were meeting, Dean's brother used the gun he brought with him to club the client over the head.[202] On another occasion a little over a week later, the brothers woke a drug dealer at his house early in the morning to steal drugs and money from him.[203] Dean's brother again used a gun to club the victim.[204] This time, they took a woman in the house with them, and Dean, with rifle in hand, directed her where to drive.[205] Shortly thereafter, the brothers were arrested and charged with a bevy of crimes.[206]

Among other counts, Dean was convicted of two § 924(c) counts for using a firearm in furtherance of a federal robbery for each of the two stick-ups.[207] Those two counts—under *Deal*'s method for counting a "second or subsequent conviction"—carried thirty years' mandatory minimum imprisonment (five years for the first count and twenty-five years for the second).[208]

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200. In addition to President Obama's remarks, even judges were calling on the Supreme Court to reconsider its Eighth Amendment precedent given draconian § 924(c) sentences. *See, e.g.*, United States v. Rivera-Ruperto, 884 F.3d 25, 45 (1st Cir. 2018) (Barron, J., concurring in the denial of rehearing en banc) (calling for a reconsideration of Eighth Amendment precedent in light of the trend not to impose life-without-parole sentences in many jurisdictions).

201. United States v. Dean, No. CR13–4082–MWB, 2014 WL 7339215, at *1 (N.D. Iowa Dec. 23, 2014), *aff'd*, 810 F.3d 521 (8th Cir. 2015), *rev'd and remanded* Dean v. United States, 581 U.S. 62 (2017).

202. *Id.* at *2.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at *3.

207. United States v. Dean, 810 F.3d 521, 526 (8th Cir. 2015), *rev'd and remanded* Dean v. United States, 581 U.S. 62 (2017).

208. *Id.* at 533.

Dean's other counts, including the underlying robberies themselves, generated a Guidelines sentencing range of about seven to nine years, and he argued that in calculating the sentence for those other counts, the district court should consider the fact that he faced the additional mandatory thirty years' imprisonment on his § 924(c) charges.[209] The district court desired to do so, it said, but "felt it did not have the discretion to do so" based on binding circuit precedent that required the underlying sentence to be calculated wholly apart from any add-on gun penalty.[210]

On appeal to the Eighth Circuit, a panel unanimously affirmed that decision.[211] It saw no ground to distinguish the earlier case on which the district court relied to deny Dean relief.[212] In that case, the court of appeals had held that the existence of a consecutive mandatory minimum sentence was an improper sentencing factor for a trial court to consider in setting the punishment for the underlying offenses.[213]

Dean's lawyer filed a petition for certiorari in May 2016,[214] which the Court granted a little more than a week before the 2016 presidential election.[215] During the course of that election, both parties were calling for reform of the criminal legal system, and criticizing harsh mandatory penalties in particular.[216] Indeed, then–Speaker of the House of Representatives and conservative Republican Paul Ryan was stating in the summer of 2016 that he "anticipate[d] that the House would bring up [criminal justice reform] legislation, some of which would alter mandatory minimum sentences and reduce the disparity between

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. United States v. Hatcher, 501 F.3d 931, 934–35 (8th Cir. 2007).

214. Petition for Writ of Certiorari, Dean v. United States, 581 U.S. 62 (2017) (No. 15-9260).

215. Dean v. United States, 580 U.S. 951 (2016) (mem.).

216. Leigh Ann Caldwell, *Donald Trump Challenging Criminal Justice Reform Efforts*, NBC NEWS (Aug. 16, 2016), https://www.nbcnews.com/politics/2016-election/donald-trump-challenging-criminal-justice-reform-efforts-n632091 [https://perma.cc/2DH5-AG55] (describing how the effort to pass criminal justice reform at the federal level gained momentum for the two years prior to the 2016 election).

crack and cocaine sentencing" in the coming months.[217] After Donald Trump's election as President, legislative efforts to generate bipartisan reform at the federal level continued.[218] Advocates for change were hailing 2016 and the coming years as "a more receptive political environment for criminal justice reform" because by that time "[t]he issue of mass incarceration ha[d] gained broader attention among diverse constituencies."[219]

Like the 1990s, Supreme Court Justices were not walled off from these broader shifts in popular and elite opinion.[220] But some did sound skeptical about Dean's position during oral arguments. Justice Ruth Bader Ginsburg suggested that Dean's reading of the statute would essentially nullify § 924(c)'s bar on concurrent sentences if it permitted, for example, a one-day sentence for the underlying offense.[221] Justice Anthony Kennedy piled on, "[i]t seems to me that you have to concede that your position completely negates . . . or can completely negate the

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217. *Id.*

218. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/Y9F5-5TRR] (noting that despite some fears of Trump's views on the issue, a bipartisan group of lawmakers continued to push for new legislation).

219. Nicole D. Porter, *State Advances in Criminal Justice Reform, 2016*, THE SENT'G PROJECT 1 (Jan. 2017), https://www.sentencingproject.org/app/uploads/2022/08/State-Advances-in-Criminal-Justice-Reform-2016-1.pdf [https://perma.cc/KT94-Z92U].

220. *Cf. supra* notes 90–103 and accompanying text (describing the historical context of Deal v. United States, 508 U.S. 129 (1993)).

221. Transcript of Oral Argument at 4, Dean v. United States, 581 U.S. 62 (2017) (No. 15–9260) [hereinafter *Dean* Argument Transcript]. In addition to Justice Ruth Bader Ginsburg, the more liberal leaning Justices Elena Kagan and Stephen Breyer also expressed skepticism. Justice Kagan said, "sometimes the way we try to understand statutes is to say any reading that utterly eviscerates something that Congress clearly did say can't be a good reading." *Id.* at 6. Justice Breyer queried whether there was anything to suggest that the additional penalty was "a proper factor for departure" in calculating the sentence for the underlying offenses. *Id.* at 15–16. *See also* Douglas Berman, *Opinion Analysis: Justices Make Statutory Sentencing Issue Look Simple*, SCOTUSBLOG (Apr. 4, 2017), https://www.scotusblog.com/2017/04/opinion-analysis-justices-make-statutory-sentencing-issue-look-simple [https://perma.cc/9YHC-3LBQ] ("At oral argument in February, even those justices who most often rule in favor of criminal defendants expressed concern about congressional sentencing goals when considering Dean's argument.").

effect of 924[c]."[222] The Justices sensed a tension between § 924(c)'s text, which contained no express prohibition on a one-day sentence for the underlying offense, and its clear purpose, which was to impose the severe twenty-five-year penalty consecutively, "in addition to" any other sentence for the underlying crimes.[223] Chief Justice John Roberts, for example, suggested that although Dean's reading would be contrary to the purpose of § 924(c), it might constitute "technical compliance" with the statute.[224]

When the decision was issued in April 2017, it was unanimous. Chief Justice Roberts's opinion for the Court came down on the side of the text over and against any apparent purpose.[225] The opinion was direct and short, but it also contained hints about the Justices' awareness of just how severe § 924(c)'s mandatory minimums are, particularly in light of the then-current consensus about the scale of the mass incarceration crisis. These hints harkened to the oral argument, where Justice Kagan had asked about the text, noting that her point went "back to what the Chief Justice said, he said, well, when there's a 30-year sentence implicated, you better be pretty clear."[226] Justice Sonia Sotomayor asked how old Dean was, and, after telling the Justices that he was twenty-four, Dean's attorney stressed the impact of the mandatory minimum: "[U]nder the current sentence, he would serve more time than he's actually lived."[227]

222. *Dean* Argument Transcript, *supra* note 221, at 9.

223. 18 U.S.C. § 924(c)(1)(A).

224. *Dean* Argument Transcript, *supra* note 221, at 45; *see also* Douglas Berman, *Argument Analysis: Justices Struggle with Interplay Among Federal Sentencing Statutes*, SCOTUSBLOG (Mar. 1, 2017), https://www.scotusblog.com/2017/03/argument-analysis-justices-struggle-interplay-among-federal-sentencing-statutes [https://perma.cc/VF86-K8NP] (suggesting that a strict textualism might carry the day).

225. *Dean*, 581 U.S. at 71 ("The Government speaks of Congress's intent to prevent district courts from bottoming out sentences for predicate § 924(c) offenses whenever they think a mandatory minimum under § 924(c) is already punishment enough. But no such intent finds expression in the language of § 924(c).").

226. *Dean* Argument Transcript, *supra* note 221, at 38; *see also id.* at 46 ("[Roberts:] I think it's right for a criminal defendant when they're facing 30 additional years to insist that the government turn square corners.").

227. *Id.* at 14.

In his opinion for the Court, the Chief Justice tied these elements to sentencing factors that Congress directed judges to consider. On the need to keep the public safe, he wrote:

> Dean committed the two robberies at issue here when he was 23 years old. That he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether—in connection with his predicate crimes—still more incarceration is necessary to protect the public.[228]

In describing how a court ought to consider deterrence, the Chief wrote that "the District Court could not reasonably ignore the deterrent effect of Dean's 30–year mandatory minimum."[229] In other words, Dean's lengthy sentence seems to have affected the Justices' thinking in this case in a way Deal's 105-year sentence didn't much register back in the 1990s tough-on-crime heyday.[230]

Of course, none of the solicitude I see in the opinion is express. The opinion does not *say* that Dean's punishment is unnecessarily harsh or even that the harshness itself warrants the discretion it finds that judges retain. But it does seem significant that the opinion came down at the same time the country at large was undertaking bipartisan and widespread re-evaluation of mandatory minimum penalties and collectively bemoaning the costs (for some, primarily financial ones, for others, deep personal and community ones) of the system of mass incarceration that set the United States far apart from the rest of the world.[231] And, irrespective of whether such thinking did play any explicit role in the decision, it nonetheless marks a notable point in the story of harsh sentencing for gun laws by highlighting just how severe § 924(c) could be.

B. FIREARMS CARCERALISM IN THE AFTERMATH OF *DEAN*

In the lead-up to *Dean*, § 924(c) continued as a mainstay of federal enforcement power. From 2000 to 2016, the federal government charged more than 57,000 defendants with violating

228. *Dean*, 581 U.S. at 67–68.

229. *Id.* at 68.

230. *See supra* Parts I.A–B.

231. Prior § 924(c) cases had instead, like *Deal*, often emphasized that "it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." United States v. Gonzales, 520 U.S. 1, 10 (1997).

this provision, convicting 93.6% of those charged.[232] Violations of § 924(c) constituted a substantial portion of all federal firearm offenses, making up about 24% of all federal firearm convictions in 2016.[233] The number of individuals charged with § 924(c) offenses increased every single year for six years after the introduction of Project Safe Neighborhoods in 2000.[234] But, perhaps as an indication of how these steep penalties are used more as leverage tools than imposed as necessary punishment, federal prosecutors ended up dismissing most § 924(c) charges when a defendant pled guilty.[235] As researchers reported, "[t]he share of defendants who pleaded guilty and had the 924(c) charge dismissed peaked at 52 percent in 2016."[236]

Section 924(c) makes up the lion's share of mandatory penalties, but it is not the only harsh minimum penalty for gun offenses.[237] Nearly 9,000 federal defendants were given a sentence enhancement under the Armed Career Criminal Act (ACCA) during the 2000 to 2016 period.[238] The average sentence for these defendants was a staggering 191 months—nearly sixteen years—in prison.[239]

Dean is not alone in marking a new era of Supreme Court scrutiny of harsh gun crime statutes and harsh interpretations of those statutes. Just two years before *Dean*, the Supreme Court struck down the so-called residual clause in ACCA as unconstitutionally vague, narrowing its scope dramatically.[240] It did the same for the similar clause in § 924(c) a few years after *Dean*.[241] That same year, it also tossed a conviction under § 922(g) for unlawfully possessing firearms because the government hadn't proved the defendant knew he was unlawfully present in the United States and therefore unable to possess a gun.[242] And in

232. Tiry et al., *supra* note 182, at 11 tbl.8.

233. *Id.* at 16.

234. *Id.* at 11 tbl.8.

235. *Id.*

236. *Id.* at 11.

237. While 24% of federal firearms offenders were convicted of § 924(c) offenses and subject to enhanced penalties in 2016, only 4% of these offenders were given ACCA enhancements. *Id.* at 16.

238. *Id.* at 16 tbl.11.

239. *Id.*

240. Johnson v. United States, 576 U.S. 591, 606 (2015).

241. United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019).

242. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019).

2022, the Court adopted a narrow reading of ACCA that requires the predicate felonies to occur at distinctly separate times.[243] These Court decisions dampening the effect or constricting the reach of gun crimes take place within a broader context of growing nationwide skepticism about the ability of increased prison time to solve the problems of public safety.

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Unlike Thomas Deal, Levon Dean got relief from the Supreme Court. One could easily find the differential treatment entirely justified on formal legal grounds. That may well be how the Justices themselves experienced the differences. But the cases are still focal points for analyzing the problems of firearms carceralism. *Deal* was decided at a time when the received wisdom—and bipartisan consensus—hailed tough-on-crime approaches as the key to reducing violent crime. *Dean* was decided at a time when the harms of the tough-on-crime approach were more likely to draw attention than its purported benefits. Indeed, underscoring this development is the First Step Act, which passed in 2018 and modified the statute to vindicate *Deal*'s reading—no longer would a second or subsequent conviction garner the multi-decade recidivist add-on unless a prior conviction had already become final.[244] If that version of the law had been in effect at the time of their convictions, Thomas Deal would likely be out of prison today, and Levon Dean would likely be facing two decades less confinement.

III. CONFRONTING THE PROBLEM

Building on the incipient yet latent concerns in *Dean*, this Part critiques firearms carceralism, the dominant framework for gun criminalization that prioritizes harsh policing and penalties and relies nearly exclusively on carceral control. Employing Benjamin Levin's framework in discussing mass incarceration writ large, this Part advances both an *over* critique and a *mass* critique of firearms carceralism, particularly mandatory minimums of the type confronted in *Deal* and *Dean* and the policing

243. Wooden v. United States, 595 U.S. 360, 363 (2022) ("Convictions arising from a single criminal episode, in the way Wooden's did, can count only once under ACCA.").

244. *See* Jouet, *supra* note 21, at 248–49.

tactics that give rise to them.[245] These critiques further bear on all manner of gun crimes, including nominally nonviolent possession offenses, mandatory minimum penalties for recidivists, and extreme sentences for the combination offenses often characterized as violent.

The *over* critique focuses on the over-criminalization and over-punishment for these types of offenses.[246] It argues against the host of ways that a gun's presence escalates legal consequences, often transforming situations (not all of which are even criminal on their own) into offenses eligible for some of society's most brutal consequences.[247]

The *mass* critique in this context, like in that of mass incarceration generally, is not about "a miscalibration" but instead protests "that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities."[248] This critique confronts the problems of firearms carceralism from a different angle, arguing that brutal policing and escalating consequences are pernicious and harmful to the very same communities that experience the brunt of gun violence harm.[249] To simplify, the *over* critique is more focused

245. I draw these frames from Benjamin Levin's work on criminal justice reform. *See* Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L.J. 747, 750 (2021) ("The *over* frame suggests that '[t]here is an optimal rate of incarceration and an optimal rate of criminalization, but the current criminal system is sub- (or, perhaps extra-) optimal in that is has criminalized too much and incarcerated too many;' in contrast, the *mass* frame rejects the focus on miscalibration and suggests 'that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities.'" (alteration in original) (quoting Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262–63 (2018) [hereinafter Levin, *Myth*])).

246. *See* Levin, *Myth*, *supra* note 245, at 284–90 (describing the *over* critique).

247. *Id.*

248. *Id.* at 263.

249. *See* KENNEDY, *supra* note 13, at 17 ("Most of those arrested, prosecuted, jailed, imprisoned, on probation, and on parole come from and return to the poor, hot-spot neighborhoods where the drugs, crime, and violence are also worst."); Joshua Aiken, *The Armed Individual, Black Life, and the Race for New Social Worlds*, THE BROOKLYN RAIL (Nov. 2023), https://brooklynrail.org/2023/11/criticspage/The-Armed-Individual-Black-Life-and-the-Race-for-New-Social-Worlds [https://perma.cc/3JVV-8Z3W] ("For the communities most impacted by gun violence—Black neighborhoods with concentrations of chronic poverty—

on the statistics, while the *mass* critique is more focused on the sociology.

A. An *Over* Critique of Firearms Carceralism

The current criminal prohibitions are overly reactionary. They *over*-penalize and *over*-punish gun crimes in ways that do not appreciably further public safety.

1. The Breadth of Gun Crimes

Consider first the breadth of gun crimes. One recent study estimated that, as of 2010, 6% of the total U.S. population and a whopping 33% of Black men had felony convictions[250]—a status that makes merely possessing a gun unlawful under every state's law and a federal crime punishable by up to a decade and a half in prison.[251] Those laws ensnare millions of people, the bulk of whom have not shown a proclivity for violence.[252] Whether one thinks that breadth is a matter for Second

routine disappearances fuel a racial sense of precarity. Children lose parents; neighbors lose neighbors; and everyone loses time." (footnotes omitted)); Bridges, *supra* note 17, at 84–85 ("[G]un violence, as well as the nation's use of prisons and police to curb gun violence, have been devastating to black people and communities. Black people are ravaged when guns proliferate, and they are ravaged when the nation uses the carceral system to contain the proliferation of guns." (footnote omitted)); *cf.* GRUBER, *supra* note 12, at 57 ("[S]ocial scientists have now confirmed that poor women of color are, in fact, more vulnerable to the harms of domestic violence *and* to the harms of policing.").

250. Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions [https://perma.cc/7CF4-M329].

251. 18 U.S.C. § 922(g)(1). To be sure, some states do have in place statutory mechanisms to restore gun rights, which can also remove the federal prohibition for state convictions, but the qualifying criteria, exclusions, and standards vary widely. *See 50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, RESTORATION OF RTS. PROJECT § 3 (Dec. 2021), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges [https://perma.cc/EQ55-MHN2] (categorizing loss and restoration of firearm rights under federal law in all fifty states). For federal felony offenses, nothing short of a presidential pardon removes the prohibition. *See* United States v. Bean, 537 U.S. 71 (2002) (holding that federal courts cannot relieve felons of the federal prohibition).

252. In 2006 alone, for example, state courts sentenced more than a million people on felony counts, only eighteen percent of which were violent felonies. SEAN ROSENMERKEL ET AL., BUR. OF JUST. STAT., NCJ 226848, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 3 tbl.1.1 (2009).

Amendment doctrine to cabin, as does Justice Amy Coney Barrett,[253] or that it is a matter for policymakers to change, there's no denying that the prohibition's lifetime bar to gun possession covers—and criminalizes—people that no conceivable public safety rationale could justify.[254]

Just as the *status-based* prohibitions can be overbroad, so too can *use-based* prohibitions, like those in § 924(c) that impose a mandatory minimum sentence, and *recidivist-based* mandatory minimums in ACCA,[255] and their counterparts in state law. In *Muscarello v. United States*, for example, the Supreme Court said that § 924(c)'s penalty for carrying a gun in a crime applies even when a person "carries" a gun in a trunk while driving or with the gun locked in the car's glove compartment.[256] In *Smith v. United States*, the Court held that "use" of a gun in a qualifying crime can even include simply trading it for drugs.[257] For the even-higher enhancement when a person "discharges" a firearm, the Court has held that even an accidental discharge merits the greater penalty.[258] And Illinois's armed violence crime does not even require a bare minimum connection between the weapon and the crime.[259]

ACCA's steep fifteen-year add-on can apply to individuals who have never committed a violent crime in their lives because the Act makes predicate crimes not just violent ones, but also

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253. Kanter v. Barr, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting) ("If the Second Amendment were subject to a virtue limitation, there would be no need for the government to produce—or for the court to assess—evidence that non-violent felons have a propensity for dangerous behavior.").

254. *See, e.g.*, C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 696 (2009) ("Is the public safer now that Martha Stewart is completely and permanently disarmed?").

255. Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. 418, 421 (2022) ("Congress enacted the ACCA to combat violence, yet as currently structured, the ACCA punishes some people who have never committed a violent offense. The triggering offense, 18 U.S.C. § 922(g), simply requires possession, receipt, transport, or shipment of a firearm or ammunition, not use. Additionally, the predicate convictions may be exclusively drug offenses." (footnote omitted)).

256. 524 U.S. 125, 126–27 (1998).

257. 508 U.S. 223, 236–37 (1993). But, just to be clear, trading drugs to get the gun does *not* count as "use" of the gun in a qualifying crime. Watson v. United States, 552 U.S. 74, 79 (2007).

258. Dean v. United States, 556 U.S. 568, 571–72 (2009).

259. People v. Haron, 422 N.E.2d 627, 629 (Ill. 1981).

"serious drug offenses."[260] But recent research has undermined any link between that criminal history and the recidivism Congress thought necessitated strict penalties. As legal scholar Jennifer Lee Barrow finds, "people sentenced under the ACCA who committed fewer than three 'violent felon[ies]' recidivate at a rate no greater than the federal population as a whole."[261]

The laws are, on their face, written to apply to a broad swath of gun-related conduct. In fact, in recent years, the Supreme Court has struck down aspects of both § 924(c) and ACCA on vagueness grounds precisely because of how broadly Congress wrote the laws. In *Johnson v. United States*, the Supreme Court ruled that ACCA's residual clause, which defined qualifying predicate crimes as including those that "involve[] conduct that presents a serious potential risk of physical injury to another," was unconstitutionally vague.[262] According to the Court, "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."[263] The Court declared § 924(c)'s similar residual clause unconstitutional a few years later.[264]

In short, these criminal provisions cover much more ground than can be justified on public safety grounds. As Barrow put it with respect to ACCA, "'[a]rmed career criminals' may not be as dangerous as their name makes them sound."[265]

2. The Depth of Gun Crimes

Next, consider the depth of gun penalties. The mandatory minimum penalties associated with just being armed during a crime or armed after several past convictions can be staggering. Legal scholar David Patton chronicled some of the extreme sentences under § 924(c), including several 100+ year sentences:

> Eric Andrews, who was 19 when he engaged in several robberies over a one-month period of time and was sentenced in federal court in Philadelphia in 2006 to 311 years in prison;
>
> . . . .

260. 18 U.S.C. § 924(e)(1).

261. Barrow, *supra* note 255, at 419 (alteration in original).

262. 576 U.S. 591, 596–97 (2015).

263. *Id.* at 597.

264. United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019).

265. Barrow, *supra* note 255, at 428.

> Ian Owens, who was sentenced to 117 years in 2005 in federal court in the Eastern District of Michigan for committing a series of bank robberies in which nobody was seriously injured; [and]
>
> . . . .
>
> Robert Rollings, who was sentenced to 106 years in 2001 in federal court in Chicago for participating in four bank robberies in which nobody was physically injured.[266]

These sentences are significantly longer than what are often considered worse crimes.[267] As of 2018, for state prisoners "the median prison time served for murder in the United States is 17.5 years, and the median amount of time served for any violent offense is 2.4 years."[268]

Similarly, the Supreme Court has long recognized the severity of penalties under ACCA, which creates a mandatory minimum penalty of fifteen years' imprisonment for an unlawful gun possessor with three prior violent felony or serious drug crime convictions.[269] In 2022, in *Wooden v. United States*, the Supreme Court sided with a criminal defendant against the government's attempts to impose substantially more prison time under ACCA.[270] In one night in 1997, William Wooden burglarized ten storage units in a single-building storage facility and subsequently pleaded guilty to ten separate counts of burglary.[271] When police subsequently discovered guns in his home a decade and a half later, he was convicted of unlawfully possessing firearms under § 922(g)(1).[272] Absent any ACCA enhancement,

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266. Patton, *Movement*, *supra* note 41, at 1027 (footnotes omitted).

267. *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) ("The 55–year sentence . . . . is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal 'three strikes' provision. At the same time, however, this 55–year additional sentence is decreed by § 924(c)."), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

268. Barrow, *supra* note 255, at 429 (footnote omitted). The average sentence for all violent crimes was nearly five years, but fifty-seven percent of those with violent offense convictions were released within three years. KAEBLE, *supra* note 26, at 1.

269. *See* Wooden v. United States, 595 U.S. 360, 364 (2022) (noting how the *maximum* penalty for unlawful possession alone is five years shorter than the *minimum* penalty when ACCA applies and describing how the case under review "reveals the discrepancy as especially stark").

270. *Id.* at 363.

271. *Id.*

272. *Id.* at 363–64.

Wooden's recommended sentencing range was twenty-one to twenty-seven months.[273] With ACCA, it metastasized into a 188-month sentence.[274] Wooden argued the enhancement was improper because ACCA required the three predicate felonies be committed "on occasions different from one another" to qualify, and his ten burglaries were all on one occasion.[275]

The lower courts disagreed, but a unanimous Supreme Court vindicated Wooden's reading of the law.[276] Writing for the majority, Justice Kagan emphasized that ACCA meant to punish the repeat offender.[277] The Court rejected the government's reading, which it underscored could "make someone a career criminal in the space of a minute."[278] Once again, a close read can suggest concerns about the draconian punishments ACCA imposes. As Justice Kagan said: "Wooden and Petty both served significant sentences for their crimes, and rightly so. But in enacting the occasions clause, Congress made certain that crimes like theirs, taken alone, would not subject a person to a 15-year minimum sentence for illegally possessing a gun."[279]

The over-application of incredibly lengthy sentences is costly. Of course, in financial terms, imprisonment is expensive,[280] and the high sentence length for § 924(c) and ACCA defendants magnify those costs.[281] But it is also costly in terms of society overall. As the next Section explores in more detail, gun

273. *Id.* at 364.

274. *Id.* at 365.

275. *Id.* at 364 (quoting 18 U.S.C. § 924(e)(1)).

276. United States v. Wooden, No. 3:15-CR-12-TAV-CCS, 2015 WL 7459970 (E.D. Tenn. Nov. 24, 2015), *aff'd*, 945 F.3d 498 (6th Cir. 2019), *rev'd and remanded* Wooden v. United States, 595 U.S. 360 (2022).

277. *Wooden*, 595 U.S. at 372.

278. *Id.* at 369.

279. *Id.* at 375–76.

280. *E.g.*, BELLIN, *supra* note 59, at 11 ("Between 1982 and 2010, the total amount spent by the States on incarceration (including parole and probation) rose from $15 billion a year to $48.5 billion. Between 1980 and 2013, annual federal corrections spending grew from under $1 billion to almost $7 billion.").

281. It also imposes costs on the judiciary and the criminal justice system more broadly. *See* Barrow, *supra* note 255, at 421–22.

crime severity often devastates the very same communities that bear the brunt of the harm that gun violence generates.[282]

Yet, despite the breadth and depth of these penalties, some might consider the sentences justified if they are producing results in lower violent crime rates. But even before considering the costs (both economic and otherwise), there is good reason to doubt that stacking further penalties onto an offender's sentence length has any real effect on crime rates.[283] For example, research on deterrence has repeatedly shown that the certainty of punishment matters much more than the severity of punishment.[284] Even the United States Department of Justice acknowledges that "[i]ncreasing the severity of punishment does little to deter crime."[285] Given the human and economic cost, and little to no benefit, from mandatory minimum penalties, it's not surprising that in the last few years there has developed "a broad consensus among legal organizations, scholars, and many practitioners that such policies are counterproductive to a fair and effective system of justice."[286]

B. A *MASS* CRITIQUE OF FIREARMS CARCERALISM

But this concern with overbreadth is not the only or even most pressing reason to criticize the current criminal

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282. *See* Joshua Aiken, *What the Panthers Meant by Self-Defense: Race, Violence, and Gun Control*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 9, 2022), https://firearmslaw.duke.edu/2022/08/what-the-panthers-meant-by-self-defense-race-violence-and-gun-control [https://perma.cc/N9D4-WX3R] ("Firearm regulation, policing and criminalization, and other legal forms of subjection all underwrite the unequal society that is America; a society that systematically leaves some people extremely vulnerable to trauma and injury."); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 99 (2008) ("Imprisonment affects the children of people who are locked up and their families; it affects community infrastructure—the relations among people in communities and the capacity of a community to be a good place to live, work, and raise children—and it affects how safe a community is to live in.").

283. *See* BELLIN, *supra* note 59, at 5 ("Increasing criminal punishments is like increasing a lottery prize from $1 million to $50 million. It's a big deal for the winner, but for most people nothing changes.").

284. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 247350, FIVE THINGS ABOUT DETERRENCE 1 (2016) ("The *certainty* of being caught is a vastly more powerful deterrent than the punishment.").

285. *Id.*

286. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, JUDICATURE, July–Aug. 2010, at 6, 40.

framework. The existing criminal regulation of firearms results in locking up masses of Black and brown men for keeping or bearing arms in the wrong place or space. Felon in possession laws—those that bar anyone with a felony conviction (or some misdemeanors, often those categorized as violent) from having a gun—directly prohibit the ability to keep arms. Laws punishing the carrying of guns while committing a crime directly prohibit the bearing of arms.[287] Adjudicated one-by-one, these cases add up to a mass system of punitive punishment for the people from the very same communities that gun violence devastates.[288] This is the heart of the *mass* critique—that even if gun crime statutes were perfectly calibrated to single out especially bad conduct with draconian penalties, they still would not be justified because they reinscribe the very same racial disparities that gun violence itself imposes and that fail to deal with the conditions that create the violence in the first place.[289]

1. Estrangement by Design

Punishing gun crime harshly allows public officials to purport to deal with the problem. In reality, enforcement efforts have often made things worse. Consider Project Exile. By *design*, the program encouraged separation from the community—and

287. I am not claiming these laws necessarily infringe on Second Amendment rights. There may well be no constitutional right to possess arms for those with felony convictions, *see* Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, LAW & CONTEMP. PROBS., 2020, at 53, 61, and there is almost certainly no right to carry arms while committing a crime, *see* United States v. Love, 647 F. Supp. 3d 664, 670 (N.D. Ind. 2022) (finding support in *Bruen* for the exclusion of Second Amendment protection for carrying firearms while committing a crime), but these laws do burden conduct that is lawful in other circumstances and may have a disproportionate impact on poor men of color.

288. *Cf.* Ristroph, *supra* note 43, at 1634 ("To get to mass incarceration, we needed a way of thinking about criminal law that would mean that in each individual case—for millions of individual cases—prosecution and punishment seemed like a good idea.").

289. McLeod, *Abolitionist Critique*, *supra* note 13, at 531 ("[T]he primary response to interpersonal violence, particularly gun violence, has consistently been militarized criminal law enforcement, which diverts public resources from the most desperately impacted communities to the coffers of the criminal legal system while doing little if anything to stop the associated suffering.").

not exclusively for the most dangerous or habitual offenders.[290] As one recent article describes:

> A federal charge of illegal use or possession of a gun — often tacked on to charges for selling drugs or for other related offenses — could mean serving time far from home. You wouldn't know your fellow inmates. Your parents and children and partners wouldn't be able to visit easily. State prison was close to home. Federal prison was exile.[291]

In other words, the cruelty was the point. Project Exile faced early criticism for vesting so much discretion in federal prosecutors in ways that threatened to disproportionately harm racial minorities.[292] Those who created the program in the Eastern District of Virginia stated their desire to avoid local "Richmond juries"[293] and putatively soft-on-crime state court judges.[294]

One defendant caught up in Project Exile moved to dismiss his federal indictment because, he argued, "his prosecution in federal, rather than state, court [wa]s an unconstitutional attempt to avoid a jury pool consisting of greater numbers of African–Americans."[295] The court rejected the claim because individuals lack a right to any particular racial composition of the jury and because the defendant failed to meet the high bar for a selective prosecution claim.[296] Moreover, the court held, the mere racially disparate impact of Project Exile—implemented in largely Black communities in Virginia, but not against individuals "in outlying areas of the Eastern District of Virginia, who are

290. *See* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 309–10 (2007) (summarizing the history of Project Exile); Bialik, *supra* note 178 ("Mark Hosken, a federal public defender in Rochester, said Exile didn't target only people who seemed likely to commit gun violence.").

291. Bialik, *supra* note 178.

292. United States v. Jones, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999) ("The vast majority, and perhaps as many as ninety percent of the defendants prosecuted under Project Exile are African–American.").

293. *Id.* at 308.

294. *Id.* at 309 ("At the inception of Project Exile, the United States Attorney, the Commonwealth's Attorney and the Chief of Police asserted that federal prosecution was necessary because state court judges were unlikely to impose sentences sufficiently severe to serve as sufficient punishment for, or adequate deterrence of, narcotics related firearm offenses.").

295. *Id.* at 306.

296. *Id.* at 311 ("A successful case of selective prosecution cannot be made absent a clear showing of racial animus and the defendant has not made a clear showing on that facet of his claim.").

more likely to be Caucasian"—could not state an equal protection claim under Supreme Court doctrine.[297]

Yet the court still felt the need to take "this opportunity to express its concern about the discretion afforded individuals who divert cases from state to federal court for prosecution under Project Exile" and concern, too, that race may in fact play a role in those discretionary decisions.[298] Another similar challenge years later also failed. In that case, the Black defendant pointed to two white men caught unlawfully possessing firearms whose cases were not taken federal and presented statistics showing that over several years more than 86% of the unlawful possession cases brought in the Eastern District of Virginia were against Black offenders.[299]

The judicial hesitation about Exile did nothing to stop the appetite for the program. As Bonita Gardner underscores, "[t]he district court's reservations carried little impact and apparently generated no pause outside the courtroom."[300] Project Exile served as the template for Project Safe Neighborhoods, implemented in many communities with predominantly Black residents.[301] Legal challenges arising from these prosecutions showed wildly disproportionate impacts: 90% of prosecutions were of Black Americans in the Eastern District of Michigan, more than 80% in the Southern District of New York, more than 90% in the Southern District of Ohio, and as many as 90% in the Eastern District of Virginia.[302]

Project Exile is not something relegated to a bygone era of tough-on-crime enthusiasm. In a deeply reported 2016 article, journalist Carl Bialik describes Rochester, New York's, Project Exile, the longest-running such program in the country.[303] Despite generating over 600 sentences worth a total of 3,411 years in federal prison over nearly two decades, "in Rochester, like

297. *Id.* at 312.

298. *Id.* at 311 & n.9.

299. United States v. Venable, 666 F.3d 893, 899 (4th Cir. 2012) ("For the three combined years, of the 316 individuals charged, 274 were African American, resulting in an overall percentage of 86.71 percent.").

300. Gardner, *supra* note 290, at 311.

301. *Id.* at 316 (finding that Project Safe Neighborhoods targets the thirty cities with the largest African American populations in the United States).

302. *Id.* at 317.

303. Bialik, *supra* note 178.

everywhere else, no one knows whether Exile works."[304] The city's murder rate in 2016, at the time of the article, was more than four times higher than New York City's.[305]

One story underscores the impact. Juma Sampson, caught selling drugs to make ends meet in 2000, was swept up in Rochester's Exile because law enforcement discovered a gun in his girlfriend's home—and successfully argued that he had access to it.[306] Though Sampson had no past violent convictions and none of the offense conduct was violent, he received a twenty-five-year sentence.[307] As it was designed to do, the program exiled Sampson: "Exile has cut Sampson off from his parents and his fiancée, as well as his son, who Sampson said was 9 months old when he was locked up and just finished 11th grade, and his son's mother."[308] Sampson was not released until 2019.[309]

State enforcement efforts aimed at gun crime have often been even more unjust and arbitrary than those like Exile.[310] As criminologist Dave Olson explains, police often use unlawful firearm possession as a proxy for gun violence, and yet

> the means by which the police identify people illegally possessing firearms often rely on approaches—hot-spot policing, aggressive enforcement of traffic laws, and stop-and-frisk practices in communities with high rates of gun violence and large concentrations of Black residents—that have the potential of exacerbating distrust between police and minority communities.[311]

New York City is a case in point. The city's longstanding stop and frisk policies arose largely in response to fears of gun

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Find an Inmate: Juma Sampson*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmateloc (choose "Find By Name"; then search first field for "Jumas" and last field for "Sampson") [https://perma.cc/Y8NJ-CQ5J].

310. *See, e.g.*, BAYNARD WOODS & BRANDON SODERBERG, I GOT A MONSTER: THE RISE AND FALL OF AMERICA'S MOST CORRUPT POLICE SQUAD (2020) (discussing the counterproductive and corrupt Baltimore Gun Trace Task Force).

311. David Olson, *Illegal Firearm Possession: A Reflection on Policies and Practices That May Miss the Mark and Exacerbate Racial Disparity in the Justice System*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 19, 2022), https://firearmslaw.duke.edu/2022/01/illegal-firearm-possession-a-reflection-on-policies-and-practices-that-may-miss-the-mark-and-exacerbate-racial-disparity-in-the-justice-system [https://perma.cc/RK4D-D247].

crime.[312] City officials justified the need for the wide net and intrusive searches because they had to get the guns off the street.[313] Prominent political scientists argued that police should "just take away their guns."[314]

Even today, the city still takes a tough-on-crime approach. A remarkable amicus brief filed in a recent Second Amendment case, *New York State Rifle & Pistol Ass'n v. Bruen*, on behalf of Black Attorneys of Legal Aid and other public defender organizations underscored these facts.[315] The brief highlighted both the way that the city's policing disproportionately impacted people of color and how the statutory framework mandated harsh sentencing, often categorizing unlawful gun possession as itself a "violent felony."[316]

Other major metropolitan centers have similarly used counterproductive and coercive methods surrounding gun interdiction.[317] Baltimore, for example, justified draconian enforcement practices—which enabled abuse by nearly eliminating oversight of specialized units—on the grounds that it had to get guns off the street.[318] Chicago law enforcement has also produced results along these same lines.[319] It has swept up large numbers of disproportionately young Black men into a harsh and unforgiving

312. *See* Leah Libresco, *It Takes a Lot of Stop-and-Frisks to Find One Gun*, FIVETHIRTYEIGHT (June 3, 2015), https://fivethirtyeight.com/features/it-takes-a-lot-of-stop-and-frisks-to-find-one-gun [https://perma.cc/J6UL-37NJ].

313. Brief of the Black Attorneys of Legal Aid et al., *supra* note 16, at 12–13 ("New York City also aggressively sends its police onto the streets with a strict directive: take firearms away from minority men and deter them from carrying.").

314. *See* James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG. (Mar. 20, 1994), https://www.nytimes.com/1994/03/20/magazine/just-take-away-their-guns.html [https://perma.cc/5QTA-5EHR] ("[Our goal] should be to reduce the number of people who carry guns unlawfully . . . .").

315. Brief of the Black Attorneys of Legal Aid et al., *supra* note 16, at 12–13.

316. *Id.* at 4–5 ("[V]irtually all our clients whom New York prosecutes for exercising their Second Amendment right are Black or Hispanic. And that is no accident. New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities . . . . And they have branded our clients as 'criminals' and 'violent felons' for life.").

317. *See* McLeod, *Abolitionist Critique*, *supra* note 13, at 532–35 (discussing gun-focused "strike forces").

318. WOODS & SODERBERG, *supra* note 310, at 2–3 (describing the use of Baltimore's Gun Trace Task Force as a front for a robbery scheme).

319. *See* Olson, *supra* note 311 (discussing "crack downs" on illegal gun possession).

criminal legal system.[320] Increased public scrutiny on problematic specialized crime-fighting units arose in the aftermath of Tyre Nichols's January 2023 beating death.[321] These units are a short-sighted response to violent crime that bear all the hallmarks of the paradigm of firearms carceralism: "[I]nstead of addressing social problems, such as poverty and lack of economic opportunity, elected officials turn to police leaders, who often reach for a familiar tool: aggressive enforcement tactics."[322]

Project Exile and efforts like it threaten only to further exacerbate the problems that gun violence creates for communities of color and in neighborhoods with concentrated disadvantage. As its name connotes, Project Exile was about separation. Legal scholar and sociologist Monica Bell describes how crime enforcement can create "legal estrangement," a concept that includes both the subjective experience of some groups that the law and its enforcers are not there to protect them and an objective, structural dimension that includes the conditions giving rise to the subjective experience.[323]

The doctrine and practice of policing "leaves large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection."[324] Abysmal clearance rates for the most serious types of gun violence bear out the impression that many poor communities of color receive the law's force but not its protection.[325] "Despite the

320. *Id.* (examining how arrests and convictions for illegal possession of firearms disproportionately impact Black men).

321. Ian T. Adams & Seth W. Stoughton, *Tyre Nichols' Death Underscores the Troubled History of Specialized Police Units*, THE CONVERSATION (Feb. 1, 2023), https://theconversation.com/tyre-nichols-death-underscores-the-troubled-history-of-specialized-police-units-198851 [https://perma.cc/NY28-RM49] ("Scandal connects these [specialized] units. In each case – and in many more – officers stepped over the line from aggressive enforcement to misconduct, abuse or even outright criminality.").

322. *Id.*

323. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

324. *Id.* at 2057.

325. *See* BRAGA & COOK, *supra* note 13, at 3 ("If shooters are routinely convicted and imprisoned, that threat will have reality and be transmitted more effectively to the relevant individuals (members of violent gangs and other high-risk individuals)."); *see also* Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA.

seriousness of . . . violent crimes committed with a firearm, not only are a substantial portion not reported to the police, but of those that are reported to the police, most do not result in an arrest."[326] One set of recent data showed that only three in every five non-fatal violent firearm crimes were reported to authorities, and that an arrest was made in only about one in three non-fatal aggravated assaults and robberies where a gun was used.[327] In other words, for every ten violent yet nondeadly gun crimes, police only make an arrest in about two of them. Some places are worse. In Chicago, "clearance rates for the actual violent crimes committed with a firearm remain low: in 2019, less than 10% of aggravated batteries and robberies with a firearm resulted in an arrest."[328]

These police practices, and the enforcement methods they bring with them, can make the most impacted communities feel estranged from the government. When severe, often mandatory sentences are meted out for those caught, these individuals are literally estranged, cut off from the community and excluded from membership in the polity.[329] The whole cycle of firearms carceralism serves to alienate overpoliced and minoritized individuals.

> People of color are harassed through stop-and-frisk hunts for unlicensed firearms; search warrants are executed in ways that traumatize those affected; individuals are incarcerated in dirty, unsafe jails and prison; [and] people have to live their lives saddled with the devastating consequences of having been convicted of a "violent felony."[330]

The Constitution, as Alice Ristroph reminds,[331] accommodates this exclusion, declaring slavery abolished "except as a punishment for crime,"[332] and allowing the disenfranchisement

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L. REV. 47, 53 (2020) ("[P]olice are much less effective than we might think at solving all major crimes and have not significantly improved in the last thirty years."); Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2048–51 (2022) (discussing disparate clearance rates based on race).

326. Olson, *supra* note 311.

327. *Id.*

328. *Id.*

329. *See* Bridges, *supra* note 17, at 73.

330. *Id.* (footnote omitted).

331. Ristroph, *supra* note 11, at 206 ("[T]he Constitution as interpreted (and in some instances, even as written) excludes criminals from its broad promises of equality.").

332. U.S. CONST. amend. XIII.

of those who have violated the criminal law.[333] That's counter-productive to creating real safety and security. Prison harms individuals, and their ability to reintegrate into society, as well as the surrounding communities from which disadvantaged groups are routinely imprisoned.[334] As Bell says, "[t]he legal estrangement perspective treats *social inclusion* as the ultimate end of law enforcement."[335] Inclusion, in other words, is the opposite of Exile. A better approach to dealing with gun violence, both its causes and effects, centers the humanity of those involved. As Azim underscored, there are often victims on both sides of the gun.[336]

2. Naturalizing the White Defender

A related critique about the firearms carceralism approach is the premise driving so much of the system.[337] One view about the role of guns in American life hinges on what the system's defenders see as characterological distinctions baked into personality and character.[338] There are two classes of people from this perspective: the Second-Amendment-valorized law-abiding

333. *Id.* amend. XIV, § 2.

334. *See* CLEAR, *supra* note 74, at 3 ("The concentration of imprisonment of young men from disadvantaged places has grown to such a point that it is now a bedrock experience, a force that affects families and children, institutions and businesses, social groups and interpersonal relations."); *id.* at 64 ("Because housing in the United States is economically and racially segregated, incarceration that concentrates by socioeconomic status and race also concentrates by location."); MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK AND HOW WE CAN DO BETTER 5 (2014) ("[Released prisoners] emerg[e] from their isolation poorer and more alienated than when they went in.").

335. Bell, *supra* note 323, at 2067 (emphasis added).

336. *See supra* note 7 and accompanying text.

337. I am indebted to the work and insights of Alice Ristroph for much of the discussion in this Subsection. *See* Ristroph, *supra* note 11.

338. *E.g.*, Lindsay Livingston, *Good [Black] Guys with Guns: Performance and the Anti-Black Logic of US Gun Culture*, LATERAL (Spring 2020), https://csalateral.org/forum/gun-culture/good-black-guys-with-guns-livingston [https://perma.cc/K6R2-2TMH] ("One of the primary modalities of contemporary gun culture is identifying gun users as either good guys or bad guys. This concept roots gun use in a steadfast ontological binary; you are either a good guy (with a gun) or not.").

citizens on the one hand, and criminals on the other.[339] Criminals use guns to commit crime. Law-abiding citizens use guns to prevent crime. These are distinct classes that should be governed by different rules.[340] Criminals (and noncitizens)[341] should be heavily punished for even possessing guns,[342] let alone carrying[343] or discharging them.[344] Law-abiding citizens should be heavily protected in their possessing,[345] carrying,[346] and deploying guns.[347] As one opinion writer put it:

> [T]here are two wildly different gun cultures in our country. One is the freedom-loving, gun-rights culture that upholds the responsible use of guns for hunting, sport and self-defense. The other is the criminal culture that thrives in the places where government restricts gun rights.[348]

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339. Ristroph, *supra* note 11, at 211–12 ("[T]he content of criminal law is likely to look different in a carceral state, for state actors will need ample discretion to decide who is 'law-abiding' and who is 'criminal.'"). *See generally* Maxine Burkett, *Much Ado About . . . Something Else:* D.C. v. Heller*, the Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 J. GENDER, RACE & JUST. 57 (2008) (describing the racial myths underlying Second Amendment debate).

340. *Cf.* I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018) (exploring the ways in which the Supreme Court's criminal procedure jurisprudence delineates a concept of what it means to be a good citizen).

341. *See* Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437, 1442 (2023) (arguing that federal law and court decisions restricting noncitizen gun rights "help relegate immigrants and guns to an obscured and hidden corner of American political and constitutional thought: a dark recess where political expediency, an unsympathetic population, and legal uncertainty converge to erode constitutional coverage").

342. *See* 18 U.S.C. § 922(g) (detailing groups of people who cannot possess guns).

343. *See id.* § 924(c) (setting forth punishments for carrying a gun during a federal crime).

344. *See id.* (providing enhanced penalties for firing a gun).

345. *Heller* dealt with firearm possession in the home. District of Columbia v. Heller, 554 U.S. 570 (2008).

346. *Bruen* dealt with public carry. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

347. *See* Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 610 (2022) (describing how stand-your-ground laws protect the rights of some groups to use their guns to defend themselves in public).

348. Frank Miniter, *America Has Two Gun Cultures: Don't Blame Law-Abiding Gun Owners for Murders*, FOX NEWS (Feb. 21, 2018), https://www

The two, he asserted, should not be conflated. This line of argument runs throughout the opposition to gun regulation—the notion that law-abiding citizens should not be burdened because criminals break the law. These views represent a sort of gun dualism, a view of violence that dismisses the role of guns as catalysts for aggression and disregards the influence of situational factors on violent conduct. It can be seen in the dichotomizing tendency of gun-rights groups like the NRA to juxtapose the "good guys with guns" from the bad ones.[349] The perspective is echoed in Justice Scalia's opinion for the Court in *District of Columbia v. Heller*, where he repeatedly invoked the Second Amendment's protection for "law-abiding" citizens[350] and contrasted this archetypical American with the "attacker"[351] and "burglar"[352] who would threaten his safety at home. (As Susan Liebell observes in underscoring *Heller*'s blindness to gender-based violence, sometimes in fact the attacker comes from inside the house.)[353]

Gun-rights advocacy pushes almost ineluctably in the direction of gun dualism. In order to secure gun rights most robustly for some, advocates strive to create a dividing line that separates out the bad actors. The NRA and pro-gun groups push for harsh and punitive punishment for the "criminals" as a way to insulate the "law-abiding" class from restrictions that would hamper their ability to keep and carry weapons.[354] What some scholars call the "War on Guns"[355] cannot be understood apart from the war *for* guns. The constitutional fulcrum in this debate is the Second Amendment. As Ristroph writes, despite surface inconsistencies, the Second Amendment fits perfectly in a carceral society.[356] Describing what she calls "carceral political theory," Ristroph cogently details the divide in governing philosophy between the naturalized "law-abiding" and naturalized

.foxnews.com/opinion/america-has-two-gun-cultures-dont-blame-law-abiding-gun-owners-for-murders [https://perma.cc/JB4W-DWM4].

349. *See supra* note 20 and accompanying text.

350. *Heller*, 554 U.S. at 625, 635.

351. *Id.* at 629.

352. *Id.*

353. Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in* District of Columbia v. Heller, 53 POLITY 207, 209–10 (2021).

354. Charles & Garrett, *supra* note 34, at 654–55.

355. CARLSON, *supra* note 44, at 57.

356. *See* Ristroph, *supra* note 11.

"criminal."[357] In this context, "the right to bear arms is not simply a right that belongs to some members of the political community but not others. It is a right that some individuals possess *for the purpose of* doing violence to other members of the community—those labeled 'criminals.'"[358]

Yet this reductive dichotomy "assume[s] that the definition of a 'law abiding citizen' is ontologically stable, self-evident, and easily discernable in a moment of violent confrontation."[359] There's good reason to be doubtful about those assumptions. A person is law-abiding up until they commit their first crime, after all, and sometimes by then it's too late.[360] In 2019, a young white man with no prior criminal record walked into a Walmart with an AR-15 rifle strapped to his back.[361] Shoppers recoiled in fear: some ran, others scattered.[362] But the man was a prototypical law-abiding citizen exercising his state-created right to openly carry a long gun in public.[363] Actually, this scenario happened twice within the span of a single week.[364] In the first instance, the man opened fire and killed fifteen people.[365] In the second, the man did not.[366] When detained, the second man explained that he was simply testing whether or not Walmart respected his Second Amendment right.[367] In these scenarios, nothing separated the law-abiding citizen from the criminal

357. *Id.* at 208–15.

358. *Id.* at 223.

359. Livingston, *supra* note 338.

360. Brandon del Pozo (@BrandondelPozo), X (formerly TWITTER) (Jan. 24, 2023), https://twitter.com/brandondelpozo/status/1617877600327856132?s=51&t=FdsAjCUHLmixTmTPh9SCug [https://perma.cc/3CNA-V7DZ] ("Most of the mass killers in our country were the outward textbook definition of 'a good guy with a gun' up until the moment they started killing.").

361. Chris Perez, *Man Who Walked into Walmart with 'Tactical Rifle' Says He Was Testing 2nd Amendment*, N.Y. POST (Aug. 10, 2019), https://nypost.com/2019/08/09/man-who-walked-into-walmart-with-tactical-rifle-says-he-was-testing-2nd-amendment [https://perma.cc/YNF7-B6U8].

362. *Id.*

363. *Id.*

364. Vanessa Romo, *El Paso Walmart Shooting Suspect Pleads Not Guilty*, NPR (Oct. 10, 2019), https://www.npr.org/2019/10/10/769013051/el-paso-walmart-shooting-suspect-pleads-not-guilty [https://perma.cc/QTU3-7B4V].

365. *Id.*

366. Perez, *supra* note 361.

367. *Id.*

until one pulled the trigger. No reactive gun-punishment scheme could have differentiated between these actors before the fact.

A 2023 story in the *New York Times* explores this phenomenon through another eerily similar case arising out Georgia.[368] There, just weeks after a mass shooting in a Colorado grocery store, a man with a bag full of firearms unpacked an AR-15-style rifle in a supermarket restroom.[369] A customer alerted security, who summoned police to arrest the man.[370] They found that "[h]e was wearing body armor and carrying six loaded weapons — four handguns in his jacket pockets, and in a guitar bag, a semiautomatic rifle and a 12-gauge shotgun."[371] He was charged with reckless conduct, but many commentators and criminal law experts have a hard time understanding what he did that was unlawful in a state that permits open carry.[372] "The episode, and others like it, speaks to a uniquely American quandary: In states with permissive gun laws, the police and prosecutors have limited tools at their disposal when a heavily armed individual's mere presence in a public space sows fear or even panic."[373] The naturalized, pre-political sense of the law-abiding versus criminal does not serve us well.[374]

And this reductive dichotomy is inherently racialized in the United States.[375] As journalist Jamil Smith pointed out in the aftermath of police shooting deaths of Black men: "the 'good guy with the gun' is never Black."[376] Smith describes the tragic

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368. Richard Fausset, *A Heavily Armed Man Caused Panic at a Supermarket. But Did He Break the Law?*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2023/01/02/us/atlanta-gun-laws.html [https://perma.cc/99EB-UP2S].

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *See* Ristroph, *supra* note 11, at 235–36 (discussing the problematic ways these assumptions play out in the real world).

375. *Id.*; *see also* Aiken, *supra* note 249 (describing the racial connotations of the good guy with a gun and the bad one and arguing that in the United States "being Black and bearing a gun collapses distinctions between danger, risk, and threat").

376. Jamil Smith, *The 'Good Guy with the Gun' Is Never Black*, ROLLING STONE (Nov. 27, 2018), https://www.rollingstone.com/politics/politics-features/good-guy-with-gun-760557 [https://perma.cc/4NXK-787U]; *see also id.*

shootings of Emantic Bradford and Jemel Roberson, two otherwise good guys with a gun—"[o]utside of being black."[377] According to witnesses, they were both shot and killed by police when trying to *prevent* shootings, Bradford at a mall and Roberson as a security guard at a lounge.[378] Law enforcement viewed the two armed Black men as themselves the threat.[379] Mounds of empirical research shows these officers were not alone in viewing Black men as threats.[380]

The conceptual framework distinguishing the "law-abiding" from the "criminal" is also often gendered. The good *guy* with a gun protects his family and community.[381] The paradigmatic "citizen-protector" envisioned in portrayals of responsible gun-ownership is the father or husband who stands as guardian over his household.[382] And this conception of the male protector is enshrined in the Supreme Court's decision in *Heller*. The decision,

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(responding to the silence of gun-rights advocates after the death of Philando Castile and decrying that "[w]e are most useful to them either as victims or as the victimizers. Never as the hero.").

377. *Id.*

378. *Id.*

379. *Id.*

380. For just a small sampling of the research, see Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 UC DAVIS L. REV. 745, 785 (2018) (exploring social science literature on the influence of skin tone and Afrocentric facial features on the length of criminal sentences); Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 641–42 (2003) (proposing that implicit prejudice biases perceptions of the facial emotions displayed by others); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 753 (1995) ("[B]oth black and white children rated ambiguously aggressive behaviors (e.g., bumping in the hallway) of black actors as being more mean or threatening than the same behaviors of white actors."); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 595–97 (1976) (studying the differentiation of perceptions of intergroup violence). *Cf.* Joseph Blocher et al., *Pointing Guns*, 99 TEX. L. REV. 1173, 1179–80 (2021) (discussing these biases when it comes to guns).

381. *See* Liebell, *supra* note 353, at 225 (discussing the stereotype of man being the protector and defender of women).

382. JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 10 (2015) (discussing how guns can be a response to instability and precarity that "encourage men to embrace their duties as protectors" and "represent . . . a civic duty to protect one's family and community").

writes political scientist Susan Liebell, "leaves contemporary women without a clear constitutional ruling on armed self-defense *within the home* against the people who historically and statistically threaten them the most: husbands, lovers, and acquaintances."[383] Just as Black men are often viewed as threats when armed, women are often viewed as vulnerable and in need of protection.

Historian Carol Anderson sums up well the predictable consequences from the combination of super-strong protection for gun rights with super-strong punishment for gun crime: "African Americans were always the ones who posed the threat and always the ones who bore the brunt of the decision [to criminalize certain conduct]."[384] Taking guns and gun crime *seriously* does not require sole or even primary reliance on the machinery of what we know to be a deeply problematic criminal legal system. "It is indeed possible to value the human lives of both victims and offenders, to denounce wrongdoing and sentence mercifully."[385]

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These twin concerns—both the *over* and the *mass* critique—of the current criminal legal approach to dealing with gun violence reveal the deeply problematic nature of the decades-long consensus on firearms carceralism. And the critiques in this Part ought to resonate with those in favor of broader criminal justice reform, reminding us that we are all "more than the worst thing we've ever done."[386]

IV. BEYOND FIREARMS CARCERALISM

This Part builds on *Dean*'s recognition of the tragic consequences that harsh sentencing imposes and the critique of policing, enforcement, and sentencing raised in Part III. It outlines

383. Liebell, *supra* note 353, at 210.

384. CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 14 (2021); *see also* Daniel Harawa, *The Racial Justice Gambit*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 5, 2022), https://firearmslaw.duke.edu/2022/01/the-racial-justice-gambit [https://perma.cc/QZ38-9PT5] ("[O]ne thing seems clear—no matter who ultimately wins in *Bruen*, Black people are bound to lose.").

385. Jouet, *supra* note 21, at 33.

386. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014) (emphasis omitted).

three alternatives to the criminal legal system that may reduce gun harms without reproducing the harms to the communities most affected by gun violence. But beyond these reforms, shifts in legal doctrine could also play a large role in reducing the footprint of the criminal legal system,[387] such as a reinvigorated rule of lenity[388] or a new approach to Eighth Amendment proportionality review that takes wide discrepancies between conduct and prison time seriously.[389]

This Part focuses on three extra-doctrinal avenues: (1) private regulation through business policies; (2) civil legal strategies, including tort lawsuits and gun violence restraining orders; and, most promising, (3) community violence intervention (CVI) and restorative justice. Some methods may be more effective than others, and some may be more politically palatable than others. None need to be tried to the exclusion of others, but among the options outlined here, CVI and restorative justice

387. F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2302 (2022) ("History tells us that judges have in the past—and could again in the future—play a significant role in counterbalancing the political and institutional pressures that have drastically expanded the scope of criminal law."). And, of course, Congress or states could make statutory changes. Congress, for example, could repeal the mandatory minimums for firearms offenses, eliminate the requirement that firearm sentences be served consecutively to those for the underlying contact, make the First Step Act retroactive, and much more. The proposals in this Part focus on what may be more realistic options in the short term.

388. *See supra* note 108 and accompanying text; Hessick & Hessick, *supra* note 387, at 2300 (recognizing that the rule of lenity "has been hollowed out over the last century and rarely plays a role in interpretations"); *see also* Wooden v. United States, 595 U.S. 360, 392 (2022) (Gorsuch, J., concurring in the judgment) ("From the start, lenity has played an important role in realizing a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.").

389. *See, e.g.*, Matt Kellner, *Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure*, 132 YALE L.J.F. 75 (2022) (exploring the doctrinal regime regulating noncapital sentences); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627 (2021) (providing an overview of the Eighth Amendment gross disproportionality doctrine); Sara Sun Beale, *The Story of* Ewing*: Three Strikes Laws and the Limits of Eighth Amendment Proportionality Review*, *in* CRIMINAL LAW STORIES 427, 458–63 (Donna Coker & Robert Weisberg eds., 2013) (describing the limits of Eighth Amendment proportionality review and the "rare" success of challenges to extreme sentences).

appear to be the most viable and equitable avenues for generating meaningful reductions in community gun violence.

A. Private Regulation

Private retailers, banks, and other businesses have all in recent years responded to mounting pressure campaigns by restricting the ways they deal with firearms. Apple and PayPal, for example, have declined to process transactions for firearms or ammunition through their transaction-processing platforms.[390] Several large banks have either terminated lending relationships with gun manufacturers or dealers or imposed restrictions on those with whom they deal.[391] Some stores, like Walmart and Dick's Sporting Goods, have limited the types of firearms or ammunition they sell.[392] Groups seeking greater regulation have sought more business involvement in restricting access to guns.[393]

One could question whether or not changes to business policies could really ever make a dint in gun violence. But advocates hope that businesses can leverage their market power to force gun industry actors to change certain practices aimed at decreasing the sales of weapons to potentially risky users or diversion of weapons into illegal channels. And, given the scale of human and economic impact from gun violence, even small movements can be significant.[394] While many of these business practice changes

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390. Hollie McKay, *US Banks and Financial Institutions Have Been Slowly Severing Ties with the Gun Industry*, FOX NEWS (July 22, 2020), https://www.foxnews.com/us/us-banks-financial-institutions-severing-ties-gun-industry [https://perma.cc/JY3N-YVUV].

391. *Id.*

392. Ryan W. Miller, *Dick's Sporting Goods Sawed $5M Worth of Guns into Scrap. It's Not the Only Company Limiting Sales*, USA TODAY (Oct. 8, 2019), https://www.usatoday.com/story/money/2019/10/08/dicks-sporting-goods-walmart-kroger-gun-ammo-sales-limits/3908609002 [https://perma.cc/5X38-6MQH].

393. *E.g.*, *About Us*, GUNS DOWN AMERICA, https://www.gunsdownamerica.org/about [https://perma.cc/72M5-G7DQ] ("Guns Down America also pushes corporations to embrace the cause of gun violence prevention in order to jumpstart the cultural and political change necessary to create safer communities for us all.").

394. *See* Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, *in* SUING THE GUN INDUSTRY 1, 19 (Timothy D. Lytton ed., 2005) ("One should be careful not to belittle the value of marginal reductions in

are relatively new,[395] recent empirical research does support their effectiveness in reducing at least some forms of gun violence—suggesting that they might impact other forms as well.

For example, in 1994, Walmart stopped selling handguns in almost all of its stores, and a 2020 study found that "[f]rom 1994 to 2005, across a number of difference-in-difference specifications and after controlling for a variety of legal, social and demographic variables as well as county and time fixed effects, counties with Walmarts robustly experienced a 3.3 to 7.5% reduction in the suicide rate."[396] The authors found no substitution effect by increases in non-firearm suicides.[397] As they conclude, Walmart's decision contributed to saving 500 to 1,000 lives every year.[398]

This research study fixated on one retailer's effect on suicide deaths, but it is not hard to imagine that restrictive policies may also have some impact on firearm accidents and intentional homicides by increasing the cost or convenience of weapons to those intent on doing harm. Of course, these privatized efforts may inspire legislative backlash. In 2021, for instance, the Texas Legislature responded to the growth of private regulation by forbidding local governments from "contracting with banks (for financing, bond issues, etc.) that 'discriminate' against firearm or ammunition manufacturers."[399] Other states have similar laws or proposals that target private industries that attempt to restrict firearms more strictly than state or federal law.[400]

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gun violence. Indeed, marginal reduction is a mark of success for most, if not all, public policies aimed at addressing social problems.").

395. Ian Ayres et al., *The Walmart Effect: Testing Private Interventions to Reduce Gun Suicide*, 48 J.L., MED. & ETHICS (SPECIAL SUPP.) 74, 74 (2020) (noting that many corporate policies changed after the 2018 Parkland shooting and that "[i]t is too early to empirically assess post-Parkland events").

396. *Id.* at 75.

397. *Id.*

398. *Id.* at 82.

399. *See* Dru Stevenson, *Guns and Banks: New Laws & Policies*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Apr. 7, 2022), https://firearmslaw.duke.edu/2022/04/guns-and-banks-new-laws-policies [https://perma.cc/T94F-XD57].

400. *Id.*

B. CIVIL LEGAL STRATEGIES

Private sector regulation may make some modest inroads into gun violence, but there are other legal mechanisms that could supplement these private choices. This Section highlights two: (1) gun violence restraining orders or "red flag" laws, and (2) civil lawsuits.

A recent legal innovation in the battle against gun violence are civil protection orders, often called "red flag" laws, gun violence restraining orders, or extreme risk protection orders (ERPOs).[401] These civil orders follow the model of domestic violence restraining orders (DVROs) and temporarily bar a person who poses a risk of imminent harm to himself or others from possessing firearms.[402] Although many of these laws are relatively new, the empirical research generated so far has shown that the laws can be effective at preventing suicide.[403] Growing evidence suggests they may be a useful tool to prevent mass shootings as well.[404] One recent study reported twenty-one instances in which California's law was used to disarm a person threatening a mass shooting, and in which no subsequent shooting occurred.[405] Along with DVROs that restrict firearm possession, ERPOs can be useful tools that enable state intervention to protect against an imminent risk of gun harm without invoking the state's penal apparatus.[406]

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401. *See* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020).

402. *Id.* at 1294.

403. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, LAW & CONTEMP. PROBS., 2017, at 179, 204–06 (finding meaningful reductions in firearms suicide when extreme risk laws are used effectively).

404. *See* Andrew Kenney, *Are Mass Shootings Being Stopped by Colorado's 'Red Flag' Law?*, COLO. PUB. RADIO NEWS (Feb. 8, 2023), https://www.cpr.org/2023/02/08/colorado-red-flag-law-mass-shootings [https://perma.cc/54MS-AGSW]; Sheryl Gay Stolberg, *A Florida School Received a Threat. Did a Red Flag Law Prevent a Shooting?*, N.Y. TIMES (Jan. 16, 2023), https://www.nytimes.com/2023/01/16/us/politics/red-flag-laws-mass-shootings.html [https://perma.cc/B76N-25Y8].

405. Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings: A Case Study*, 171 ANNALS INTERN. MED. 655, 656 (2019).

406. To be sure, violation of an ERPO (or DVRO) is typically a criminal offense, but the laws' focus on prevention of harm rather than meting out

On top of these civil legal orders, civil lawsuits have the potential to create policy changes that may decrease gun violence.[407] There are signs, in just the last few years, that we may be witnessing a "revival" of mass tort suits against the gun industry.[408] For nearly two decades, the Protection of Lawful Commerce in Arms Act (PLCAA) stood as a barrier to most gun industry lawsuits, but things may be changing.[409] Advocates argue that greater accountability for gun manufacturers through civil liability can create incentives for gun makers to better police their distribution channels and choke off some streams of illicit firearms trafficking, or perhaps to create new technologies that limit the use of weapons' utility in the hands of risky users.[410] By doing so, these advocates hope, fewer firearms will end up in the hands of those intent on doing harm.[411] In 2022, for example, New York passed a "pioneering, first-in-the-nation gun industry liability law"[412] that holds gun makers and distributors responsible to create reasonable controls to prevent their firearms from being unlawfully sold in the state.[413] Civil lawsuits like these can

draconian post-harm punishment makes them preferable to many of the usual legal interventions around gun violence.

407. *See* Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390 (2021) (assessing whether the Remington Arms precedent provides possibilities of reviving firearms mass tort litigation).

408. *Id.*

409. Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 FLA. L. REV. 833, 835–39 (2023) (discussing the history of PLCAA).

410. Zellnor Y. Myrie, *The Gun Industry Is Killing Black America. It's Time We Do Something About It*, GRIO (Dec. 17, 2020), https://thegrio.com/2020/12/17/gun-industry-killing-black-america [https://perma.cc/4UE8-MLFY].

411. *Id.*

412. Press Release, Zellnor Myrie, N.Y. State Sen., One Year Later, New York's Gun Industry Liability Law Is Changing History (July 8, 2022), https://www.nysenate.gov/newsroom/press-releases/2022/zellnor-myrie/one-year-later-new-yorks-gun-industry-liability-law?page=0 [https://perma.cc/L4EH-DWMT].

413. Keshia Clukey, *New York Enacts First-in-U.S. Law to Limit Gun-Liability Shield*, BLOOMBERG L. (July 6, 2021), https://news.bloomberglaw.com/us-law-week/new-york-enacts-first-in-u-s-law-to-limit-gun-liability-shield [https://perma.cc/ZG59-Z99A]. Of course, supply-side efforts will not work in all instances—nor will they have immediate effects. As the review committee concluded after assessing gun violence in Philadelphia, the state is a source-state for guns and many guns used in shootings were purchased long ago, meaning that "attempts to limit the future supply of guns now will not impact the current gun violence crisis." *Shooting Review Report*, *supra* note 10, at 17.

indicate "a productive shift of focus from exclusively criminally prosecuting street-level gun possession by young people with relatively little power and limited choices to linking homicidal violence with militarized weapons-industry groups."[414]

C. Community Violence Intervention and Restorative Justice

The most comprehensive and promising approach, however, relies neither on the private market nor on the civil legal system, but on a community-based approach to gun violence prevention.[415] CVI comes in many different forms and varieties, but it holds special appeal in this particular political moment—both because it decreases reliance on the costly and often harmful criminal legal system and because it appeals across the ideological spectrum.[416] The latter point is worth emphasizing: conservative gun-rights proponents are happy to have resources and attention focused away from manufacturers, retailers, and the customary types of gun regulation historically tied to the weapons themselves; and, on the other side of the spectrum, even those who are not enamored by guns welcome solutions focused on the communities most devastated by gun violence with strategies developed by those closest to the problem.

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414. McLeod, *Abolitionist Critique*, *supra* note 13, at 547.

415. *See* Jennifer Carlson, *Beyond Law and Order in the Gun Debate: Black Lives Matter, Abolitionism, and Anti-Racist Gun Policy*, BRENNAN CTR. FOR JUST. 8 (June 2021), https://www.brennancenter.org/our-work/research-reports/beyond-law-and-order-gun-debate [https://perma.cc/9AJJ-NRLY] ("Cure Violence initiatives point to what an abolitionist approach to gun violence — one that at the very least *decenters* the criminal justice system — might look like."). These kinds of initiatives can be funded and supported by city, state, or Federal Offices of Gun Violence Prevention. *See* Jason Tan de Bibiana et al., *Coordinating Safety: Building and Sustaining Offices of Violence Prevention and Neighborhood Safety*, VERA INST. OF JUST. (Nov. 2023), https://www.vera.org/publications/coordinating-safety [https://perma.cc/75X7-MW3H]. Heeding the calls of activists, President Joe Biden created the first Federal Office of Gun Violence Prevention in 2023. *See* Molly Nagle et al., *Biden Announces White House Office of Gun Violence Prevention*, ABC NEWS (Sept. 22, 2023), https://abcnews.go.com/Politics/biden-announce-white-house-office-gun-violence-prevention/story?id=103394253 [https://perma.cc/8DJA-Y5FN].

416. *See* Jeffrey A. Butts et al., *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. PUB. HEALTH 39, 40 (2015) (distinguishing law enforcement models to decrease violence with other models).

There is no one form of CVI and no defining characteristic of the various interventions under the umbrella term.[417] Most programs, however, share a cluster of similar characteristics: they are focused on the individuals most at-risk for violence; support wrap-around services, like mental health counseling and job training; work with credible messengers in the community to promote alternatives to violence; and rely little if at all on formal connections with law enforcement and the criminal legal apparatus.[418] Without trying to be comprehensive, this Section briefly describes three major CVI programs, their approaches, and preliminary evidence about their effectiveness: Advance Peace, READI Chicago, and Cure Violence.

Advance Peace focuses narrowly on individuals in a community at highest risk for gun violence and invites them into a program called "the Peacemaker Fellowship."[419] The fellowship lasts a year and a half, and includes daily mentoring and support services.[420] Program participants are paired with "Neighborhood Change Agents"—often individuals who were themselves formerly involved in community violence—to help get services and outreach they need.[421] The participants are paid a monthly stipend for staying in the program and incentive bonuses "for meeting agreed-upon life goals like obtaining a driver's license or GED."[422] These goals are developed individually as participants

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417. *See* Brittany Nieto et al., *2023 Community Violence Intervention Legislative Year in Review*, GIFFORDS: BLOG, https://giffords.org/blog/2023/12/2023-community-violence-intervention-legislative-year-in-review [https://perma.cc/9GYZ-2KQ5] (describing different CVI approaches).

418. Nazish Dholakia & Daniela Gilbert, *Community Violence Intervention Programs, Explained*, VERA INST. OF JUST. (Sept. 1, 2021), https://www.vera.org/community-violence-intervention-programs-explained [https://perma.cc/5G3L-TLES]; *see Reducing Violence Without Police: A Review of Research Evidence*, JOHN JAY COLL. OF CRIM. JUST. RSCH. & EVAL. CTR. (Nov. 2020) (describing a non-policing approach to reducing violence).

419. *The Solution*, ADVANCE PEACE, https://www.advancepeace.org/about/the-solution [https://perma.cc/VX34-ZNMV].

420. Jason Corburn et al., *Advance Peace & Focused Deterrence: What Are the Differences?*, ADVANCE PEACE (July 2020), https://www.advancepeace.org/wp-content/uploads/2020/08/ap-focused-deterrence-v1-1.pdf [https://perma.cc/SJ5G-MJJQ].

421. *Id.*

422. Champe Barton, *Pioneering Violence Prevention Program to Offer Mentorship, Financial Incentives*, THE CURRENT (Oct. 1, 2021), https://thecurrentga.org/2021/10/01/pioneering-violence-prevention-program-to-offer-mentorship-financial-incentives [https://perma.cc/P7KM-32NA].

create a LifeMAP—a management action plan—with goals for different areas of life, ranging from "housing, education, employment, transportation, finances, safety, [and] family/relationships" to "physical health, mental health, and spiritual, recreational, and social connections."[423] The program does not collaborate with law enforcement and treats individuals, not groups, who are at the greatest risk for violence, recognizing that "those at the center of urban gun hostilities" have experienced past traumas that "are often contributing to their use of firearms."[424]

Advance Peace has been the subject of several empirical evaluations. One study showed that the program cut firearms violence and crime substantially after its adoption in Richmond, California, but not non-firearm violence.[425] In 2021, New York City announced plans to bring the Advance Peace model to the city as part of its gun violence reduction strategy, citing (among others), "[a] peer-reviewed study of the implementation of Advance Peace in Sacramento demonstrat[ing] a 27% reduction in gun violence in the program's catchment area over 2 years."[426]

READI Chicago also takes a holistic view of the causes and solutions to urban gun violence.[427] READI identifies the most at-risk men in some of Chicago's most violent neighborhoods and invites them to participate in its eighteen-month job program and counseling services.[428] The program combines proven

423. *Transform Lives: A Model of Community Safety*, ADVANCE PEACE 3, https://www.cityofsacramento.org/-/media/Corporate/Files/CMO/Gang-Prevention/Resources/AModelofCommunitySafety.pdf?la=en [https://perma.cc/QYV4-NBPM].

424. Corburn et al., *supra* note 420, at 4.

425. Ellicott C. Matthay et al., *Firearm and Nonfirearm Violence After Operation Peacemaker Fellowship in Richmond, California, 1996–2016*, 109 AM. J. PUB. HEALTH 1605 (2019).

426. Press Release, N.Y.C. Pub. Advoc. Jumaane D. Williams, NYC Public Advocate, Mayor Announce Pilot Program To 'Advance Peace,' Prevent Gun Violence (Mar. 15, 2021), https://www.advocate.nyc.gov/press/nyc-public-advocate-mayor-announce-pilot-program-advance-peace-prevent-gun-violence [https://perma.cc/48J5-SZPS].

427. *About*, READI CHICAGO, https://www.heartlandalliance.org/readi/about [https://perma.cc/9S4N-V65A].

428. *READI Chicago Evaluation Finds Reductions in Shootings and Homicides*, READI CHICAGO 2 n.1 (Mar. 2022), https://www.heartlandalliance.org/wp-content/uploads/2022/05/READI-Chicago-20-month-outcomes-analysis-March

mental health interventions like cognitive-behavioral therapy with paid transitional employment to help program participants decrease violence.[429] These twin features form the core of the program, though READI also makes a safe place available for participants to congregate and provides referrals for other types of services that participants might need.[430]

In a detailed empirical evaluation of the program released in March 2022, researchers found evidence that READI reduced gun-related serious violence: shooting and homicide arrests (down 63%) and victimizations (down 19%).[431] The evidence did not, however, show that program participants were any less likely to be arrested for other less serious forms of violence, including armed robbery and non-shooting aggravated battery.[432] Yet, given the social, emotional, and financial toll of the most serious types of gun violence, researchers estimated that READI generated a benefit-cost ratio from violence reduction alone of at least 3:1.[433]

Cure Violence is one of the oldest models for doing violence prevention apart from police power.[434] As its name suggests, the intervention starts from the position that "[v]iolence behaves like a contagious problem. It is transmitted through exposure, acquired through contagious brain mechanisms and social processes, and it can be effectively prevented and treated using health methods."[435] Treating serious violence as a public health problem, Cure Violence takes a three-fold path: "interrupting transmission directly, identifying and changing the thinking of potential transmitters . . . , and changing group norms regarding violence."[436] It recruits participants with serious risks for violence and deploys antiviolence messaging and intervention, often through the use of violence interrupters—staff members who were themselves once involved in crime and violence—to

-2022.pdf [https://perma.cc/TAJ2-5FHC] (noting the change to a twelve-month job).

429. *Id.* at 1.

430. *Id.* at 2.

431. *Id.* at 1.

432. *Id.* at 2 n.3.

433. *Id.* at 1.

434. *About Us*, CURE VIOLENCE GLOB., https://cvg.org/about [https://perma.cc/5JA6-ZH9C].

435. *Id.*

436. Butts et al., *supra* note 416, at 40.

mediate and interrupt cycles of violence.[437] Outreach workers, too, help disrupt violence and work as quasi–case managers "to help connect high-risk individuals to positive opportunities and resources in the community, including employment, housing, recreational activities, and education."[438]

The Cure Violence model—which bears different names in different locations—has been subject to numerous evaluations.[439] In a 2015 overview, researchers described the available data bleakly:

> [T]he evaluation evidence in support of the CV model to date is mixed at best. Credible evaluations of the CV model tend to find some effects in some intervention neighborhoods but not in others. Or, they find possible effects on one type of violence but not on others. In every study, evaluation researchers also identify implementation obstacles that hinder the program and most likely limit its efficacy.[440]

Despite the difficulty of accurately measuring the effectiveness of the Cure Violence model, the programs have remained popular, and several more recent evaluations have continued to make the case for further experimentation with the programs.[441]

Just as CVI addresses gun violence without relying on coercive policing methods and post-hoc punishment, restorative and transformative justice interventions dealing with gun violence hold promise as part of a just and equitable solution.[442] These

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437. *Id.* at 41.

438. *Id.*

439. *The Evidence of Effectiveness*, CURE VIOLENCE GLOB. (Aug. 2021), https://cvg.org/wp-content/uploads/2021/09/Cure-Violence-Evidence-Summary.pdf [https://perma.cc/B6QA-3YCX].

440. Butts et al., *supra* note 416, at 47.

441. Shani A. Buggs et al., *Using Synthetic Control Methodology to Estimate Effects of a Cure Violence Intervention in Baltimore, Maryland*, 28 INJURY PREVENTION 61 (2022); *see also* Megan T. Stevenson, *Cause, Effect, and the Structure of the Social World*, 103 B.U. L. REV. 2001, 2003 (2024) (arguing against a singular focus on interventions that can pass rigorous empirical testing because "most reforms and interventions in the criminal legal space are shown to have little lasting impact when evaluated with gold-standard methods of causal inference").

442. *See* Joshua Wachtel, *Psychologists for Social Responsibility Recommend Restorative Justice for Reducing Gun Violence*, INT'L INST. FOR RESTORATIVE PRACS. (Jan. 17, 2013), https://www.iirp.edu/news/psychologists-for-social-responsibility-recommend-restorative-justice-for-reducing-gun-violence [https://perma.cc/YRS2-NRYN]; *see also* Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 406 (2007)

programs, as California's Attorney General describes in discussing resources for gun violence prevention, "attempt[] to heal the wounds of crime and violent crime by helping offenders understand and accept responsibility for the injury they have caused" as well as undertake "efforts to make the victim whole again."[443] They have shown success not just for nonviolent crime, but for violence as well.[444]

Some localities are attempting restorative justice diversion from the criminal legal system in cases dealing with gun harms.[445] In Durham, North Carolina, for example, restorative justice was employed in 2018 in response to charges for assault with a deadly weapon inflicting serious injury and possession of a stolen firearm.[446] In that case, a gun that James Berish possessed accidentally discharged, sending a bullet through the apartment building floor and into a sleeping ten-year-old in the unit below, injuring but not killing her.[447] In a series of meetings and conversations, Berish took responsibility and made amends with the ten-year-old and her family.[448] Research suggests these processes can be better for both victims and offenders than the typical blunt and punitive tools of the criminal legal system.[449]

(outlining other potential "non-traditional crime prevention and crime resolution methods" to deal with even violent crime, including varieties of community justice measures).

443. *Gun Violence Prevention: State and Local Organization and Program Resources*, OFF. OF GUN VIOLENCE PREVENTION, https://oag.ca.gov/ogvp/resource-gun-prevention [https://perma.cc/26DA-Y2R2].

444. Katherine Beckett & Martina Kartman, *Violence, Mass Incarceration and Restorative Justice: Promising Possibilities*, UNIV. OF WASH. (June 20, 2016), https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2017/02/Restorative_Justice_Report_Beckett_Kartman_2016.pdf [https://perma.cc/28NY-4FBA].

445. Many of the existing programs are funneled through the criminal legal system, making criminal justice actors like prosecutors, police, and judges the ones with the ultimate say over whether this route is available.

446. Janine Bowen & Evan Matsumoto, *In First-of-Its Kind Deal, Man Pleads Guilty to Durham Shooting That Injured Girl*, WRAL NEWS (Apr. 5, 2018), https://www.wral.com/in-first-of-its-kind-deal-man-pleads-guilty-to-durham-shooting-that-injured-girl/17465116 [https://perma.cc/RR2Q-HM97].

447. *Id.*

448. *Id.*

449. Jill Suttie, *Can Restorative Justice Help Prisoners to Heal?*, GREATER GOOD (June 9, 2015), https://web.archive.org/web/20160507031228/http://greatergood.berkeley.edu/article/item/restorative_justice_help_prisoners_heal [https://perma.cc/2V9C-LSCS].

CONCLUSION

This Article has underscored how policymakers traditionally treated gun offenders, even when they do not pull the trigger, as among the worst of the worst, subject to lengthy sentences that can amount to death by incarceration.[450] Yet, as Azim Khamisa teaches, even those who pull the trigger can themselves be victims. The approach of firearms carceralism has not worked. It has not meaningfully dampened the violence and has, at the same time, destroyed families and communities through dragnet policing and surveillance and exiling incarceration. In short, "when we use the apparatus of the criminal legal system to stem the proliferation of guns in disadvantaged, vulnerable communities, lives are also destroyed."[451]

It doesn't have to be this way.[452] Alternatives to firearms carceralism include mechanisms to limit the very real devastation that gun violence causes, especially to disadvantaged communities of color, without reliance on more police and prison time.[453] Private sector and civil legal strategies might mitigate some aspects of the problem. But the most promising solutions on the horizon are community violence intervention and restorative justice programs that treat both victims and offenders as full members of the political community.[454]

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450. Terrell Carter et al., *Redeeming Justice*, 116 NW. U. L. REV. 315, 318 (2021) (discussing how a life sentence renders an irrevocable judgment about human value and, for those who have experienced it, "feels more like death than life and is more aptly called death by incarceration").

451. Bridges, *supra* note 17, at 73.

452. Li, *supra* note 43, at 1904 ("To treat gun violence as a matter of civil rights, proponents of gun-violence prevention must affirmatively take account of the alarming racial disparities in law enforcement."); Aiken, *supra* note 249 (discussing ways "[t]o take the realities of gun violence seriously" through a broader lens than simply "the pathologizing of bad actors"); McLeod, *Abolitionist Critique*, *supra* note 13, at 556 ("For contemporary abolitionists, to eliminate violence requires addressing its roots in those practices that produced and continue to perpetuate entrenched inequality, racialized poverty, and militarist violence.").

453. Bridges, *supra* note 17, at 73 ("When guns proliferate in disadvantaged, vulnerable communities, lives are destroyed . . . .").

454. *See generally* Bell, *supra* note 323 (describing social inclusion as a way to counteract the damaging effects of legal estrangement).