

Essay

The Second Amendment's Racial Justice Complexities

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*The relationship between the Second Amendment and racial justice is complicated. That's because the relationship between penal administration and racial justice is complicated. The briefing in *New York State Rifle & Pistol Association v. Bruen* perfectly proves this point. A group of public defenders favored striking down New York's concealed carry licensing law to further racial justice, while a group of civil rights organizations argued that the law should be upheld to further racial justice. What the briefing revealed is that Black people have an interest in being free from racially disparate policing and prosecution of all criminal laws, including gun laws. But Black people also have an interest in being safe from gun violence, which they are disproportionately victims of—both at the hands of private citizens and police. Bruen ignored these interests when it announced a “history and tradition” test for judging the constitutionality of gun laws, a test that disempowers Black people by tying the constitutionality of gun regulation to a time when Black people were not fully part of the polity. In so doing, the Court frustrated another racial justice interest: the democratic interests of communities of color to regulate firearms in a manner they best see fit. When “aiming for answers,” we must acknowledge the racial justice complexities that arise in the context of gun regulation, and propose solutions that*

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promote Black people's interests in liberty, safety, and self-governance.

INTRODUCTION

One would hardly look at modern Second Amendment jurisprudence and believe it to be the model of clarity.¹ Yet it does helpfully illuminate one thing: the racial justice dynamics of gun regulation are complicated.² Thus, any racially-sensitive solution to gun violence must be multifaceted.

On one hand, Black people³ are more likely than any other demographic to be policed and imprisoned for violating gun laws (and criminal laws more broadly).⁴ It is therefore unsurprising

1. See, e.g., Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 139–40 (2023) (first citing *Antonyuk v. Bruen*, 624 F. Supp. 3d 210 (N.D.N.Y. 2022); then citing *Antonyuk v. Hochul*, 635 F. Supp. 3d 111 (N.D.N.Y. 2022); and then citing *Antonyuk v. Hochul*, 639 F. Supp. 3d 232 (N.D.N.Y. 2022)) (describing a set of three conflicting gun regulation opinions decided within ten weeks of each other that each failed to articulate clear principles); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 76 (2023) (“*Bruen* has already generated—and is likely to continue generating—confused and confusing lower court precedent.”).

2. See, e.g., Daniel Harawa, *The Racial Justice Gambit*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 5, 2022) [hereinafter Harawa, *Gambit*], <https://firearmslaw.duke.edu/2022/01/the-racial-justice-gambit> [<https://perma.cc/UR77-A3PJ>] (explaining that racial justice can be used to support multiple Second Amendment interpretations). As Professor Khiara Bridges put it: “[T]he answer to the question of what racial justice requires is difficult in the context of guns. . . . Black people are ravaged when guns proliferate, and they are ravaged when the nation uses the carceral system to contain the proliferation of guns.” Khiara M. Bridges, Foreword, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 84–85 (2022).

3. This Article pays particular attention to the plight of Black people in America given the unique over-policing of Black people and their overrepresentation among gun violence victims as compared across all demographics. Cf. Angela J. Davis, *Introduction* to POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, at xi, xiv–xvii (Angela J. Davis ed., 2017) (explaining the book’s focus on Black men as the most adversely impacted demographic “at every stage of the [criminal legal] process”); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426–27 (2016) (explaining the article’s focus on Black men because they are “prototypical criminals in the eyes of the law”).

4. See Harawa, *Gambit*, *supra* note 2 (noting that for thirteen years straight, over ninety percent of those arrested for possessing a firearm without a license in New York City were Black or Latino); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 (2023) (listing actions police are more likely to take towards Black people, including stopping, arresting, and using force).

that many view the reduction of the footprint of the criminal legal system to be a racial justice imperative.⁵ From this vantage point, it is easy to understand why some racial justice advocates support a muscular vision of the Second Amendment. *Any* construction of the Constitution that leads to the striking of criminal laws, they argue, redounds to Black people's benefit.⁶

On the other hand, Black people are also disproportionately the *victims* of gun violence.⁷ And even when they are not victims, Black people are more likely to be *exposed* to gun violence by living in closer proximity to it.⁸ Not to mention Black people are more likely than any other demographic to be shot and killed by police.⁹ From this perspective, it's just as easy to understand why other racial justice advocates argue that restricting gun possession is a racial justice imperative.¹⁰

5. See, e.g., *infra* Part I.A (describing the position in *Bruen* of the public defenders).

6. See Daniel S. Harawa, *NYSRPA v. Bruen: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 167 (2023) [hereinafter Harawa, *Weaponizing Race*] ("Some argued that jettisoning New York's gun licensing scheme would benefit people of color given that 'virtually all of [the people] whom New York prosecutes for exercising their Second Amendment rights are Black or Hispanic.'" (alteration in original) (quoting 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.]).

7. See Alex Nguyen & Kelly Drane, *Gun Violence in Black Communities*, GIFFORDS L. CTR. (Feb. 23, 2023), <https://giffords.org/memo/gun-violence-in-black-communities> [<https://perma.cc/4YGG-RBA2>] ("Black Americans die from gun violence at nearly 2.4 times the rate of white Americans.").

8. See *id.* ("[T]he impacts of [gun] violence are felt across entire communities, contributing to generations of trauma and collective grief that have disproportionately affected Black people.").

9. *Id.* ("When compared to all other racial and ethnic groups, Black Americans experience the highest rate of fatal police shootings. Police fatally shoot Black Americans at three times the rate they fatally shoot white Americans." (footnote omitted)). There's also the ever-looming threat of racial terrorism and targeted mass shootings. See Harawa, *Weaponizing Race*, *supra* note 6, at 177 ("[I]ncreased gun ownership among Americans more broadly creates an extra layer of risk given the anti-Black sentiment and rising white nationalism in some segments of society.").

10. See, e.g., *infra* Part I.B (describing the position in *Bruen* of the NAACP Legal Defense Fund and National Urban League). This is not to say that gun regulation will be used to disarm police (another problem for a different day). Rather, as explained later, a legally armed Black person may appear more threatening to police given the associations of Blackness with criminality and

And on yet a third hand, the Supreme Court has attempted to silence Black voices in the gun regulation debate. By resorting to a methodology of constitutional interpretation that turns on “history and tradition,”¹¹ Black people’s ability to shape the constitutional discourse is limited.¹² The scope of Second Amendment rights is determined by analogizing to laws passed at a time when Black people were not fully part of the polity.¹³ *Bruen* enshrined a view of the Second Amendment that was not actualizable “for certain people at the time of its drafting,” while also expressing no concern for those people now.¹⁴

The racial justice interests in the Second Amendment context are multifaceted. This is because the racial justice interests in penal administration more broadly are multifaceted. Professor Trevor Gardner has identified three distinct interests that

dangerousness. Harawa, *Weaponizing Race*, *supra* note 6, at 176–77; *see infra* Part II.B.

11. *See Bruen*, 597 U.S. at 22 (“We assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition.”).

12. This point has been observed in critiques of originalism more broadly. *See, e.g.*, Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 358 (2022) (“Because . . . what lives in memory shapes who has authority, the originalist account of Framers and Founders—who not only sat atop but also enforced a system of racial and sexual hierarchy—is also the story of who has authority to proclaim the Constitution’s meaning for us today.”); Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 517–19 (2011) (explaining the “dead hand” argument that the original understanding of the Constitution does not have democratic pedigree to bind those who had no say in its enactment).

13. Professors Joseph Blocher and Eric Ruben call this “originalism-by-analogy.” Blocher & Ruben, *supra* note 1, at 99.

14. Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 400 (2018); *see also* G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN’S L. REV. 739, 742 (2021) (“[Originalism] elevate[s] the white, male, propertied voices of the Framers to the exclusion of essentially all others.”); Christina Mulligan, *Diverse Originalism, History & Tradition*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 1) (on file with *Minnesota Law Review*) (“[B]y unnecessarily and incorrectly sending the message that the meaning of the Constitution to framing- and reconstruction-era white women and people of color doesn’t matter, the *Bruen* majority unnecessarily contributes to the narrative that originalism doesn’t care about these people, historically or today.”).

Black Americans have in penal administration: “liberty, security, and democratic.”¹⁵ But, as he explains, sometimes these interests can be in tension.¹⁶ This is abundantly apparent in the Second Amendment context. This Essay begins to think through these interests in the context of firearm regulation. And ultimately, the Essay argues that a multifaceted solution will be necessary to vindicate all three.¹⁷ We need to address racial disparities in criminal law enforcement, including reinvigorating the now impoverished Equal Protection Clause.¹⁸ We must consider noncarceral responses to the violation of gun laws.¹⁹ We have to invest in communities, especially Black communities, that have long been neglected, to reach the root causes of violence.²⁰ We have to empower communities to come up with creative solutions to tackle gun violence that escape constitutional strictures. And we can’t shy away from the hard work of deep cultural change around race to ensure that whatever the scope

15. Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1703 (2023).

16. *See id.* at 1725–57 (broadly explaining some of the tension amongst the liberty, security, and democratic interests).

17. *See generally* Brandon Tensley & Eva McKend, *The Fight to Curb Gun Violence Without Inflaming Racial Biases*, CNN (July 31, 2022), <https://www.cnn.com/2022/07/31/us/gun-laws-race-deconstructed-newsletter-reaaj/index.html> [<https://perma.cc/7B83-4S7L>] (recognizing the need to strengthen gun regulations given the disproportionate impact of gun violence on Black communities while cautioning against unintended consequences such as mass incarceration and over-policing).

18. *See* Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 454–55 (2022) (noting that there was not an equal protection challenge in *Bruen* because the Supreme Court has expressed concern about limiting prosecutorial discretion by allowing equal protection challenges without showing a clear discriminatory purpose).

19. *See id.* at 453 (explaining that government actors outside of the judiciary can enforce the Constitution through more equitable law enforcement and noncarceral alternatives).

20. *See generally, e.g.*, Jonathan Jay & Kalice Allen, *Curbing the Epidemic of Community Firearm Violence After the Bruen Decision*, 51 J.L., MED. & ETHICS 77 (2023) (framing community firearm violence as a public health crisis and analyzing its drivers); Michael R. Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379 (2022) (urging a public health approach to addressing gun violence); Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053 (urging a public health law framework for Second Amendment jurisprudence).

of Second Amendment rights, those rights can be exercised equally across demographics.²¹

None of this will be easy. But the fight for racial equity and justice never has been.

I. THE SECOND AMENDMENT'S RACIAL JUSTICE DEBATES

The racial politics at play in *New York State Rifle & Pistol Association v. Bruen* made national news. Much of the coverage focused on an amicus brief filed by a group of public defenders in favor of striking down New York's concealed-carry permitting law.²² Many viewed the brief as making strange bedfellows, especially given that other civil rights organizations filed briefs in favor of upholding the New York law.²³ In light of the dueling briefs, the *Wall Street Journal* editorial board ran an article announcing the "Progressive Gun-Control Crackup."²⁴ *Slate* exclaimed that "Public defenders have found common cause with the NRA at the Supreme Court,"²⁵ and in a separate article,

21. See generally IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS 2 (2020) ("Our choice-enhancing [gun control] proposals . . . provide[] a blueprint of how to make progress on gun violence without offending either the Supreme Court's current interpretation of the Second Amendment or the general public's sense of justice.").

22. Brief of the Black Attorneys of Legal Aid et al., *supra* note 6. While the lead named public defense group was the Black Attorneys of Legal Aid caucus, other public defender offices from across New York signed onto the brief.

23. See Brief of the NAACP Legal Defense & Educational Fund, Inc., and the National Urban League as Amici Curiae in Support of Respondents, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843) [hereinafter Brief of the LDF].

24. The Editorial Board, Opinion, *Progressive Gun-Control Crackup*, WALL ST. J. (July 23, 2021), <https://www.wsj.com/articles/progressives-gun-control-black-attorneys-of-legal-aid-supreme-court-amicus-brief-11627078928> [<https://perma.cc/APA4-84CP>].

25. Mary Harris, *A Criminal Justice Reformer's Case for Looser Gun Laws*, SLATE (Nov. 29, 2021), <https://slate.com/news-and-politics/2021/11/supreme-court-gun-case-public-defenders.html> [<https://perma.cc/E3R5-GXZT>].

asked whether “the Progressive Case Against New York’s Concealed Carry Ban Hold[s] Water?”²⁶ And a *Nation* op-ed pondered, “Why Are Public Defenders Backing a Major Assault on Gun Control?”²⁷

After the *Bruen* Court held the New York gun law was unconstitutional, *The New York Times* ran the headline: “Unlikely Fans of Supreme Court Ruling on Guns: Public Defenders.”²⁸ *The Washington Post* published an op-ed by public defenders from the Bronx entitled: “The Supreme Court’s Gun Ruling Was a Victory over Racist Policing.”²⁹ The seeming racial infighting surrounding *Bruen* became media fodder. It is therefore worth delving into the racial justice arguments made on both sides to see whether the tension is as thick as the coverage makes it seem. When considered against the backdrop of the racial disparities in both gun crime prosecution and gun violence, both sides had good points, and thus both sides could not fully address the various racial justice interests at play.

A. THE PUBLIC DEFENDERS’ BRIEF

Although *The New York Times* called the public defenders support of the Supreme Court’s ruling “unlikely,”³⁰ their position made perfect sense. As they articulated in their brief: “virtually all [of the people] whom New York prosecutes for exercising their Second Amendment rights are Black or Hispanic.”³¹ As the public defenders explained, Black people accounted for seventy-eight

26. Mark Joseph Stern, *Does the Progressive Case Against New York’s Concealed Carry Ban Hold Water?*, SLATE (July 27, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-new-york-concealed-carry.html> [https://perma.cc/749S-DKGF].

27. Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, NATION (July 26, 2021), <https://www.thenation.com/article/society/black-gun-owners-court> [https://perma.cc/JV4Z-69VL].

28. Jonah E. Bromwich, *Unlikely Fans of Supreme Court Ruling on Guns: Public Defenders*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/nyregion/guns-public-defenders-scotus.html> [https://perma.cc/S7AB-6APT].

29. Aimee Carlisle et al., Opinion, *The Supreme Court’s Gun Ruling Was a Victory over Racist Policing*, WASH. POST (June 28, 2022), <https://www.washingtonpost.com/opinions/2022/06/28/supreme-court-new-york-guns-racist-policing> [https://perma.cc/L8KE-PXRZ].

30. Bromwich, *supra* note 28.

31. Brief of the Black Attorneys of Legal Aid et al., *supra* note 6, at 5.

percent of all New York felony gun possession cases, despite comprising just eighteen percent of New York's population.³² Eighty percent of those arraigned for possession of a loaded firearm were Black and ninety-six percent of those who were arrested for this same charge were Black or Latino.³³ As the public defenders recounted, "each year, [they] represent hundreds of indigent people whom New York criminally charges for exercising their right to keep and bear arms."³⁴ They thus urged the Court to hold the New York statute unconstitutional and "create a rule that will in fact protect the Second Amendment rights of 'all' the people."³⁵

While the public defenders' brief focused on the racial disparities in the prosecution of gun crime in New York, their points resonate beyond the Empire State. Black people are also disproportionately prosecuted for violating federal gun laws. Between 2000 and 2016, forty-nine percent of all defendants convicted of violating federal gun laws were Black; only thirty percent were white.³⁶ Over fifty-eight percent of those convicted for violating one prominent federal gun law, 18 U.S.C. § 922(g), were Black, while less than twenty-four percent were white.³⁷ These disparities are unsurprising considering programs like "Project Safe Neighborhoods," a collaborative federal-state-local initiative that focuses on federally prosecuting gun crime, which effectively targets communities of color.³⁸ As indication of how the Project Safe Neighborhoods program in particular exacerbates the racial disparities in gun crime prosecution, one study found

32. *Id.* at 14.

33. *Id.* at 15.

34. *Id.* at 5.

35. *Id.* at 33.

36. Emily Tiry et al., *Prosecution of Federal Firearms Offenses, 2000–16*, URB. INST. 18 (Oct. 2021), <https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf> [<https://perma.cc/V74E-R57F>].

37. *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses*, U.S. SENT'G COMM'N 1 (July 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf [<https://perma.cc/992A-2Q3H>]. "18 U.S.C. § 922(g) prohibits certain persons from shipping, transporting, possessing, or receiving a firearm or ammunition while subject to a prohibition from doing so most commonly because of a prior conviction for a felony offense." *Id.*

38. See generally Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Gun Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305 (2007) (analyzing the disparate impact of the Project Safe Neighborhoods project and characterizing it as both "separate and unequal").

that close to ninety percent of those prosecuted under the program in the Eastern District of Michigan (which covers Detroit) are Black, and over eighty percent of defendants prosecuted under the program in the Southern District of New York (which covers New York City) are Black.³⁹ These statistics amplify the point the public defenders wanted to make: there is a nationwide trend of Black people being disproportionately punished for possessing guns.

B. CIVIL RIGHTS ORGANIZATIONS' BRIEF

The NAACP Legal Defense Fund (LDF) and Urban League's brief had a different focus: the racialized nature of gun violence. They pointed out that "Black Americans are . . . ten times more likely than white Americans to die from gun violence," and "[y]oung Black males are at a greater risk of sustaining injuries or dying from handgun violence than any other demographic group."⁴⁰ Looking nationwide, the groups noted that "firearm homicide remains the leading cause of death for young Black men, who are nearly 14 times more likely to die in a firearm homicide than white men, and 8 times more likely to die in a firearm homicide than the general population."⁴¹ And they highlighted the fact that the gun violence "problem is even more acute for young Black men and teens aged 15 to 34, who although make up just 2 percent of the nation's population, were among 37 percent of gun homicides in 2019"—a number "20 times higher than white males of the same age group."⁴²

39. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws and Black Communities*, RACE, RACISM & L. (Jan. 6, 2019), <https://www.racism.org/articles/law-and-justice/criminal-justice-and-racism/136-criminal-justice-generally/2484-federal-felon-in-possession?start=3> [<https://perma.cc/7YUB-H6PJ>].

40. Brief of the LDF, *supra* note 23, at 17–18.

41. *Id.* at 18.

42. *Id.* at 18–19. LDF and Urban League were not the only groups to raise the racialized nature of gun violence in the United States. For example, Amnesty International pointed out that "[g]un violence in the United States . . . disproportionately affects racial minorities nationwide," and argued that the inadequate regulation of firearms "has a discriminatory effect on African Americans and other minorities" in violation of "nondiscrimination obligations under international human rights law." Brief of Amnesty International USA and the Gun Violence and Human Rights Initiative of the Whitney R. Harris World Law Institute as Amici Curiae in Support of Respondents at 14, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843). A group of police chiefs

LDF and Urban League also tried to respond to the concerns of the public defenders. They acknowledged that “the racially discriminatory enforcement of criminal laws is a nationwide epidemic that denies full citizenship to Black people and other people of color.”⁴³ But they believed that such discrimination does not relieve states of their obligations to protect their citizens, especially their Black citizens and other citizens of color, from gun violence.⁴⁴ The solution for such discrimination, the civil rights group said, was not the expansion of Second Amendment rights, but a selective enforcement claim under the Equal Protection Clause of the Fourteenth Amendment.⁴⁵

C. *BRUEN*’S AFTERMATH

The available data from the year post-*Bruen* further complicates the narrative of how to think of the role of racial justice in the framing of Second Amendment rights. After the Court ruled that New York’s “proper-cause” requirement for a concealed-carry license was unconstitutional,⁴⁶ the number of gun arrests in New York City remained remarkably consistent. Between January and October 2021, before *Bruen* was handed down, the New York City Police Department (NYPD) made 3,815 gun arrests.⁴⁷ For that period in 2023, after *Bruen*, NYPD made 3,735

also acknowledged that “episodes of racism and bias can escalate into murder in a few short moments where handguns are readily accessible.” Brief of Former Major City Police Chiefs as Amici Curiae in Support of Respondents at 9–10, *Bruen*, 597 U.S. 1 (No. 20-843).

43. Brief of the LDF, *supra* note 23, at 24.

44. *Id.* at 24–25.

45. *Id.* at 25. The public defenders rejected this solution, asserting that selective enforcement claims are “difficult, if not impossible, to prove.” Avinash Samarth et al., *We Are Public Defenders. New York’s Gun Laws Eviscerate Our Clients’ Second Amendment Rights.*, SCOTUSBLOG (Oct. 28, 2021) (quoting *People v. Robinson*, 767 N.E.2d 638, 654–55 (N.Y. 2001) (Levine, J., dissenting)), <https://www.scotusblog.com/2021/10/we-are-public-defenders-new-yorks-gun-laws-eviscerate-our-clients-second-amendment-rights> [<https://perma.cc/EYR5-WV4Z>].

46. *Bruen*, 597 U.S. at 71.

47. *NYPD Announces Citywide Crime Statistics for October 2022*, N.Y.C. POLICE DEPT (Nov. 3, 2022) [hereinafter *NYPD 2022*], <https://www.nyc.gov/site/nypd/news/p00066/nypd-citywide-crime-statistics-october-2022> [<https://perma.cc/6MFF-82C5>].

gun arrests.⁴⁸ Thus, the number of people arrested for gun possession in New York City decreased by only *eighty* total arrests. Perhaps these numbers should not be surprising. After all, *Bruen* only dealt with New York’s licensing law—it did not deal with the myriad criminal laws punishing gun use or possession.⁴⁹ Moreover, New York passed a new law right after *Bruen* came down, requiring a “good moral character” showing for a concealed carry permit.⁵⁰ And zooming out, many courts are still reluctant to find gun laws unconstitutional in the criminal context.⁵¹ For instance, in New York, the state’s highest court rejected a post-*Bruen* Second Amendment challenge to the state’s unlicensed public carry of a loaded firearm criminal statute, holding that *Bruen* did *not* automatically render New York’s criminal weapon possession law facially unconstitutional.⁵² Going by the numbers, *Bruen* did not lead (or has not yet led) to the

48. *NYPD Announces Citywide Crime Statistics for October 2023*, N.Y.C. POLICE DEPT (Nov. 8, 2023) [hereinafter *NYPD 2023*], <https://www.nyc.gov/site/nypd/news/p00095/nypd-citywide-crime-statistics-october-2023> [https://perma.cc/T256-UP73].

49. See, e.g., Harawa, *Gambit*, *supra* note 2 (noting some other gun possession-related penal laws that will remain on the books even after *Bruen*, including “brandish[ing]” a gun).

50. See Adam Liptak, *Supreme Court Leaves New York’s Gun Law in Place for Now*, N.Y. TIMES (Jan. 11, 2023), <https://www.nytimes.com/2023/01/11/us/new-york-gun-law-supreme-court.html> [https://perma.cc/QA87-EVMZ] (“The law, enacted in July, requires people seeking gun licenses to show that they have ‘good moral character’ and bans guns in many public locations. In addition, the law bans guns on private property unless the owner consents to their presence.”). The constitutional status of the law, however, is currently being challenged. The Second Circuit just upheld the constitutionality of much of the law, including the “good moral character” requirement. *Antonyuk v. Chiumento*, 89 F.4th 271, 311–12 (2d Cir. 2023); see also Jonah E. Bromwich, *New York’s Ban on Guns in Parks and Other ‘Sensitive’ Sites Is Affirmed*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/2023/12/08/nyregion/new-york-gun-law.html> [https://perma.cc/T8UD-WBBB] (“A federal appeals court on Friday upheld significant portions of New York’s expansive gun law, ruling that the state can ban the carrying of guns in schools, parks and other places and deny firearms to people whom local officials deem dangerous.”).

51. See, e.g., Eric Ruben et al., *One Year Post-Bruen: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 31–32 (2024) (providing an empirical analysis of a year’s worth of post-*Bruen* opinions and noting a range of constitutional challenge successes across jurisdictions).

52. See *People v. Cabrera*, No. 65, slip op. at 8 (N.Y. Nov. 21, 2023) (holding that the defendant did not preserve the Second Amendment issue due to an undeveloped record).

mass decrease in gun-related arrests for which the public defenders had hoped.⁵³

On the other hand, there has not been a mass increase in gun violence post *Bruen* either. To the contrary, in New York City, gun violence has *decreased* post-*Bruen*. Between January and October 2021, NYPD reported 1,129 shooting incidents.⁵⁴ For the same period in 2023, NYPD reported 839 shooting incidents, a nearly twenty-six percent decrease.⁵⁵ And gun violence is down across New York state. Comparing 2022 to 2023, there has been a twenty-four percent decrease in shooting incidents involving injury, a twenty-four percent decrease in the number of shooting victims, and a thirty-three percent decrease in the number of people killed by gun.⁵⁶ Thus, if New York is a case study, *Bruen* did not result in the mass increase in gun violence that the civil rights groups feared.⁵⁷

Of course, these numbers could simply reflect a lag in the effects of *Bruen*. Perhaps as New York processes more gun licenses, gun violence will increase. Perhaps as more people are legally able to possess guns, the rates of arrests for gun possession will go down. But perhaps what the early numbers reflect is that for all of the talk of a muscular Second Amendment, the realities look different when it comes to criminal law enforcement.

53. As I said before *Bruen* was even decided: “As sure as water is wet, jurisdictions will find other ways to criminalize Black gun ownership even if it is legal to carry a gun in public.” Harawa, *Gambit*, *supra* note 2.

54. *NYPD 2022*, *supra* note 47.

55. *NYPD 2023*, *supra* note 48.

56. *Gun Involved Violence Elimination (GIVE) Initiative: Shooting Incidents, Shooting Victims, and Individuals Killed by Gun Violence*, N.Y. STATE DIV. OF CRIM. JUST. SERVS. 3 (Jan. 10, 2024), <https://www.criminaljustice.ny.gov/crimnet/ojsa/GIVE%20Monthly.pdf> [<https://perma.cc/EYX9-9XR4>].

57. As of writing, data show that the number of mass shootings is also down as compared to 2021 levels. See Miranda Nazzaro, *U.S. Surpasses 500 Mass Shootings in 2023: Gun Violence Archive*, HILL (Sept. 17, 2023), <https://thehill.com/policy/national-security/4209371-us-surpasses-500-mass-shootings-in-2023-gun-violence-archive> [<https://perma.cc/SX5P-BQ36>]. It is fair to assume, however, that the number of Second Amendment *challenges* raised by criminal defendants has increased significantly. See Billy Clark, *Second Amendment Challenges Following the Supreme Court’s Bruen Decision*, GIFFORDS L. CTR. (June 21, 2023), <https://giffords.org/memo/second-amendment-challenges-following-the-supreme-courts-bruen-decision> [<https://perma.cc/HDY4-EZJ8>] (“In *Bruen*’s aftermath, we have seen an unprecedented number of lawsuits filed challenging a wide range of local, state, and federal gun laws.”).

To that point, the *civil* cases responsible for the modern expansive scope of Second Amendment rights in many ways featured model plaintiffs. Dick Heller of *District of Columbia v. Heller*⁵⁸ was a sixty-something-year-old special police officer.⁵⁹ Otis McDonald of *McDonald v. City of Chicago*⁶⁰ was a seventy-something-year-old retiree who wanted to possess a gun to protect himself from gangs and drug dealers.⁶¹ Robert Nash and Brandon Koch, the plaintiffs in *Bruen*, were “law abiding citizens” who had passed background checks, already possessed gun licenses for hunting, and who wanted concealed carry licenses to protect themselves and their families.⁶² When faced with these sympathetic plaintiffs, it was easy for the Court to advance an expansive view of what the Second Amendment allows. They were, in effect, championing the good guy with a gun.

The stakes feel much different when it comes to penal administration. By definition, in the criminal law context, the assessment of the constitutionality of a gun law comes only after a person has been arrested and charged (when the challenge is made at the trial level) or convicted (if a challenge is raised at the appellate level). In this context, very few courts have held that the Second Amendment requires reversal of criminal convictions. One year after *Bruen*, a study by Professor Eric Ruben and colleagues found that civil litigants are far more successful than criminal defendants when raising Second Amendment claims.⁶³ Criminal defendants were granted relief in only five

58. 554 U.S. 570 (2008) (holding that the Second Amendment protects the right to keep and bear arms for self-defense in the home).

59. See Michael Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO MAG. (May 19, 2014), <https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856> [<https://perma.cc/UT45-A9LQ>] (“They recruited an appealing plaintiff: Dick Heller, a security guard at the Thurgood Marshall Federal Judiciary Building, who wanted to bring his work revolver home to his high-crime neighborhood.”).

60. 561 U.S. 742 (2010) (holding that the Second Amendment is incorporated against the states).

61. See *Otis McDonald, 1933–2014: Fought Chicago’s Gun Ban*, CHI. TRIB. (Apr. 6, 2014), <https://www.chicagotribune.com/news/ct-xpm-2014-04-06-ct-otis-mcdonald-obituary-met-20140406-story.html> [<https://perma.cc/3WDR-6GBJ>] (“The tall, elderly, soft-spoken man insisted he needed a gun to shield his family from gangs and drug dealers that terrorized his Morgan Park neighborhood. He felt the Constitution gave him that right.”).

62. Petition for Writ of Certiorari at 3, 5–6, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843).

63. Ruben et al., *supra* note 51, at 33.

percent of cases.⁶⁴ By comparison, civil plaintiffs were granted relief in fifty-five percent of cases.⁶⁵ In other words, courts are far more squeamish adopting an expansive view of the Second Amendment when the person advancing the argument is a “bad guy with a gun.”

The oral arguments in *United States v. Rahimi* seem to bear this out.⁶⁶ Argued in November 2023, the Supreme Court will decide whether 18 U.S.C. § 922(g)(8), which prohibits people with court-issued domestic violence protective orders from possessing guns, is constitutional under the Second Amendment.⁶⁷ The oral arguments in the case struck a completely different note than previous Second Amendment cases precisely because Zackey Rahimi was the quintessential bad guy who very few people would want walking around armed—after Rahimi was put under an agreed-to domestic violence order and was prohibited from possessing a gun, he participated in *five* shootings over the course of just two months, including shooting his gun at a

64. *Id.* (finding that relief was granted in only sixteen criminal cases and denied in 298 criminal cases).

65. *Id.* (finding that relief was granted in eighty-two civil cases and denied in only sixty-eight civil cases). Professor Jacob Charles similarly found that criminal claims were rarely successful, especially as compared to civil claims. See Charles, *supra* note 1, at 125–26 (finding that criminal Second Amendment claims had a success rate of less than four percent but civil cases had a success rate of over thirty percent).

66. See Transcript of Oral Argument, *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (No. 22-915) (mem.) (granting certiorari) (argued Nov. 7, 2023).

67. See Adam Liptak & Glenn Thrush, *Supreme Court to Hear Major Guns Case Involving Domestic Violence*, N.Y. TIMES (June 30, 2023), <https://www.nytimes.com/2023/06/30/us/politics/supreme-court-gun-laws-domestic-violence.html> [<https://perma.cc/JN2D-AXKS>] (“The Supreme Court agreed on Friday to consider whether the government may forbid people subject to domestic violence orders from having guns, setting up a major test of its ruling last year vastly expanding people’s right to arm themselves in public.”).

Whataburger simply because his friend's credit card was declined.⁶⁸ Based on oral arguments, the Court was far less sympathetic to Mr. Rahimi's Second Amendment claim as compared to the plaintiffs in *Heller*, *McDonald*, and *Bruen*.⁶⁹

Again, the racial justice dynamics surrounding the Second Amendment and gun regulation are complicated. Looser gun licensing regimes may not actually lower the racial disparities in gun-related arrests.⁷⁰ Stricter gun licensing regimes do not seem to affect the racial disparities in who is affected by gun violence.⁷¹ And the Second Amendment essentialism apparent in the civil context rapidly recedes in the criminal context, where

68. See Alejandro Serrano, *U.S. Supreme Court Hears Texas Case About Whether Domestic Violence Suspects Can Be Banned from Having Guns*, TEX. TRIB. (Nov. 7, 2023), <https://www.texastribune.org/2023/11/07/supreme-court-guns-domestic-violence-rahimi> [<https://perma.cc/C28U-UNVU>] (cataloging Rahimi's past gun violence); Abbie VanSickle, *Texas Man at Center of Supreme Court Case Says He No Longer Wants Guns*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/06/us/politics/supreme-court-rahimi.html> [<https://perma.cc/ZG5Y-3HHB>] (describing Rahimi's handwritten apology letter from jail).

69. Reading tea leaves, many commentators believe the Court will reject Mr. Rahimi's Second Amendment claim. See, e.g., Jimmy Hoover, *Supreme Court Appears Likely to Uphold Gun Ban Following Restraining Orders*, NAT'L L.J. (Nov. 7, 2023), <https://www.law.com/nationallawjournal/2023/11/07/supreme-court-appears-likely-to-uphold-gun-ban-following-restraining-orders> [<https://perma.cc/5YNB-SAYG>] ("A vast majority of the justices at the oral argument in *U.S. v. Rahimi* seemed skeptical that the 1994 ban violates the Second Amendment's right to keep and bear arms."); Marco Poggio, *Justices Skeptical of Keeping Domestic Abusers Armed*, LAW360 (Nov. 7, 2023), <https://www.law360.com/articles/1720073/justices-skeptical-of-keeping-domestic-abusers-armed> [<https://perma.cc/5ZEQ-WHP7>] ("The U.S. Supreme Court on Tuesday appeared skeptical of a lower-court decision that a federal law prohibiting people who are subject to domestic violence restraining orders from owning firearms violates the Second Amendment."); Amy Howe, *Justices Appear Wary of Striking Down Domestic-Violence Gun Restriction*, SCOTUSBLOG (Nov. 7, 2023), <https://www.scotusblog.com/2023/11/justices-appear-wary-of-striking-down-domestic-violence-gun-restriction> [<https://perma.cc/6PAJ-AK88>] ("During just over 90 minutes of oral argument on Tuesday, a majority of the justices seemed wary of the consequences of allowing a ruling by a federal appeals court that struck down the law to stand."). If the commentators are right, this further supports the bad-guy-with-a-gun thesis.

70. See Harawa, *Gambit*, *supra* note 2 ("[L]oosening gun licensing requirements says nothing about felon in possession laws, which Black people are disproportionately charged with violating.").

71. See Harawa, *Weaponizing Race*, *supra* note 6, at 164–65 (explaining the threat of violence to Black men despite licensing requirements).

the people disproportionately likely to be prosecuted for gun possession are Black or Brown.⁷² The next Part contemplates some solutions that begin to address the various racial justice complexities when it comes to gun regulation and violence in the United States.

II. RECONCILING SECOND AMENDMENT RACIAL JUSTICE INTERESTS

The good faith debates over the racial justice implications of gun regulation capture the various and sometimes discordant interests that Black Americans have in penal administration. Professor Trevor Gardner identified three distinct interests that Black Americans may have when it comes to the administration of criminal law.⁷³ The first is a “liberty interest”: the interest in “racially unbiased criminal procedures” and “racially *proportionate* penal outputs.”⁷⁴ This is the interest the public defenders focused most heavily on when making racial justice arguments in *Bruen*.⁷⁵ Then, there is the “security interest”: the interest in “state protection from private violence.”⁷⁶ This is the interest that the civil rights organizations centered, though they also were concerned with the risk of State violence at the hands of police.⁷⁷ Finally, there is the “democratic interest”: “the African American interest in state adoption of [their] preferred policies.”⁷⁸ Studies show that people of color are more supportive of gun control measures than white people, with the highest support among Black Americans.⁷⁹ But by framing the issue of gun

72. See *supra* notes 31–34 and accompanying text.

73. Gardner, *supra* note 15, at 1701.

74. *Id.*

75. See Brief of the Black Attorneys of Legal Aid et al., *supra* note 6, at 5 (arguing that the enforcement of gun laws are not racially proportionate).

76. Gardner, *supra* note 15, at 1735.

77. See Brief of the LDF, *supra* note 23, at 17–19 (noting the higher rates of gun violence experienced by Black Americans).

78. Gardner, *supra* note 15, at 1750.

79. *Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive*, PEW RSCH. CTR. (Apr. 20, 2021), <https://www.pewresearch.org/politics/2021/04/20/amid-a-series-of-mass-shootings-in-the-u-s-gun-policy-remains-deeply-divisive> [<https://perma.cc/V3ZZ-FN3K>] (“Majorities of Black adults (75%), Asian adults (72%) and Hispanic adults (65%) say that gun laws should be stricter, compared with 45% of White adults.”); see also Sakshi Venkatraman, *People of Color Have the Highest Support for Gun Laws*, *New Study*

regulation as a constitutional question shaped by historical practices—when Black people were not fully part of the polity⁸⁰—the Court in *Bruen* undermined this interest.⁸¹

As Gardner acknowledges, Black Americans' liberty, security, and democratic interests in penal administration can lie in tension.⁸² This Part seeks to ease the tension by identifying solutions that satisfy each interest. In so doing, this Part reveals what perhaps should be obvious: complex problems require layered solutions, *especially* when dealing with issues of race.

A. THE LIBERTY INTEREST: NONCARCERAL SOLUTIONS AND EQUAL PROTECTION

The public defenders in *Bruen* rightly focused on the fact that Black people are disproportionately punished for violating gun laws.⁸³ This problem calls out for a reinvigorated view of equal protection to address the racial biases in penal administration. It also calls for noncarceral solutions to ensure that Black people are not funneled into prison for gun possession.

As the civil rights groups responded to the public defenders, one way to address the racial disparities in gun prosecutions is

Finds, NBC NEWS (June 29, 2023), <https://www.nbcnews.com/news/asian-america/people-color-highest-support-gun-laws-new-study-finds-rcna91887> [<https://perma.cc/2ZWZ-XG37>] (“Black adults show the highest support for stricter gun laws, at 77%, followed by Asians, at 74%, Latinos, at 68%, and whites, at 51%.”); Blocher & Siegel, *supra* note 18, at 456 (citing studies that show “[c]ommunities of color highly value self-defense through law”).

80. See Joseph Blocher & Andrew Willinger, *Does the Second Amendment Make Gun Politics Obsolete?*, 55 POLITY 363, 366–67 (2023) (“[P]erhaps *Bruen*’s most egregious problem—the one that will have the most long-lasting effects—is its seeming rejection of the *relevance* of contemporary evidence regarding gun policy. . . . [The *Bruen*] approach is normatively dubious because many questions of gun regulation turn on context and community standards, which counsels that any constitutional test must leave some room for elected politicians to tailor gun laws to local conditions based on popular opinion.”); Reva B. Siegel, Commentaries, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 901 (2023) (“The tradition-entrenching methods the Court employed to decide *Bruen* . . . elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law.”).

81. See sources cited *supra* note 79.

82. Gardner, *supra* note 15, at 1726.

83. See Brief of the Black Attorneys of Legal Aid et al., *supra* note 6, at 5 (stating that most of the public defenders’ clients prosecuted for gun possession are Black or Hispanic).

to bring selective prosecution or selective law enforcement claims under the Equal Protection Clause against the government.⁸⁴ After all, the “central purpose” of the clause is to remediate “official conduct discriminating on the basis of race.”⁸⁵

But as the law currently stands, these claims are rarely successful, and the Equal Protection Clause has proved inadequate at curbing racially biased policing and prosecution.⁸⁶ Under current doctrine, a person claiming racially selective prosecution “must demonstrate that the . . . prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’”⁸⁷ To satisfy the “discriminatory effect” prong, the person “must show that similarly situated individuals of a different race were not prosecuted.”⁸⁸

This standard has proved near impossible to meet.⁸⁹ While, as Professors Joseph Blocher and Reva Siegel note, the more “natural doctrinal home” for the public defenders’ arguments may be the Equal Protection Clause, the conservative Supreme Court has made it nearly impossible to win an equal protection challenge to a “facially neutral criminal law like New York’s.”⁹⁰

84. See Brief of the LDF, *supra* note 23, at 25.

85. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

86. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 18 (1998) (noting that equal protection challenges to selective prosecution are nearly impossible to prove, and that unconscious bias may be fueling much of the discrimination rather than intent).

87. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

88. *Id.*

89. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 109 (rev. ed. 2012) (“[T]he Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well.”); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 *CHL-KENT L. REV.* 605, 605 (1998) (“Successful claims of equal protection violations are few and far between.”); Erik Luna, *Transparent Policing*, 85 *IOWA L. REV.* 1107, 1139 (2000) (“The bar for selective enforcement and prosecution claims has been set at a nearly unreachable height for the vast majority of criminal defendants, an example of an abstract right with no practical remedy.”); Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 *NW. U. L. REV.* 987, 992 (2021) (labeling the selective enforcement/prosecution standard as “insurmountable”).

90. Blocher & Siegel, *supra* note 18, at 454.

Thus, for selective prosecution/enforcement to ever become a viable path for solving racially disparate policing and prosecution, we must reimagine equal protection doctrine. Luckily, scholars are already engaged in this project. For example, Professor Darren Hutchinson argues that a “meaningful racial equality doctrine would instead give substantial weight to the historical and contemporary use of criminal law as an instrument of racial subordination.”⁹¹ Professor Dorothy Roberts asserts that we should “end[] the discriminatory intent rule” and “[c]hang[e] the meaning of discrimination from racial bias to racist impact.”⁹² Either of these proposals would be more effective at addressing the racially-biased criminal procedures identified by the public defenders. And of course, penal bureaucrats could take proactive steps to reduce the racial disparities in penal administration, doing their part in ensuring the equal protection of law *without* the threat of constitutional litigation.⁹³

To be sure, litigation alone will not fully vindicate the Black liberty interest. We must, as Blocher and Siegel later argue, simultaneously “reduce reliance on the criminal law” more broadly and pursue noncarceral solutions to gun crime.⁹⁴ To this end, at the local level, community violence intervention programs “have been shown to break cycles of violence by connecting high-risk individuals to wraparound social services.”⁹⁵ These programs can take many forms.

91. Darren Lenard Hutchinson, “*With All the Majesty of the Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 418 (2022).

92. Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 102–03 (2019). Professor Jonathan Feingold has made a similar argument. See Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 542 (2019) (“[M]any policies likely to have a disparate impact will not necessarily implicate racial mismeasures concerns.”).

93. See, e.g., Blocher & Siegel, *supra* note 18, at 458–59 (noting the rise of progressive prosecutors who “understand their role *constitutionally*, as promoting public safety in a way that also promotes equality and procedural fairness”).

94. *Id.* at 457 (“[I]t is critical for those designing public safety strategies to reduce reliance on the criminal law and to involve other parts of government in implementing policies that prevent violence, with the goal of making criminal law the strategy of last rather than first resort.”).

95. *Id.* at 458 (quoting Myah Ward, *Gun Control Legislation Isn’t Going to Happen. Here’s What Biden’s Doing Instead.*, POLITICO (Nov. 5, 2021), <https://www.politico.com/news/2021/11/05/biden-gun-violence-legislation-519625> [<https://perma.cc/QG3T-9ZUN>]).

For example, “hospital-based violence interruption programs” operate out of emergency departments and trauma centers and provide survivors of violence with the resources necessary to facilitate their recovery.⁹⁶ The services provided under these programs include mental health services, victim-of-crime compensation, employment, and housing.⁹⁷ Studies of such programs have found they decrease violent injury recidivism.⁹⁸

Group violence intervention programs involve collaboration among community leaders, social service providers, and (to varying degrees) law enforcement.⁹⁹ They aim to identify and support those at the highest risk of violence.¹⁰⁰ These programs find that there are readily identifiable groups of people who commit most violent crime and aim to engage individuals in these groups to try to prevent violence through outreach, intervention, and community mobilization.¹⁰¹ Studies show that this type of intervention is also successful at reducing violent gun crime.¹⁰²

96. See, e.g., Catherine Juillard et al., *A Decade of Hospital-Based Violence Intervention: Benefits and Shortcomings*, 81 J. TRAUMA & ACUTE CARE SURGERY 1156, 1156 (2016) (“Over the past decade, a number of hospital-based violence intervention programs (VIPs) have emerged to leverage this [early intervention] opportunity for breaking the cycle of violence.”).

97. *Id.* at 1159.

98. See, e.g., *id.* at 1156 (“Interim analyses found this model to reduce injury recidivism and to be cost-effective in its process.”); Vincent E. Chong et al., *Hospital-Centered Violence Intervention Programs: A Cost-Effectiveness Analysis*, 209 AM. J. SURGERY 597, 603 (2015) (“Evaluations of these violence intervention programs demonstrate that they are effective in reducing both violent injury recidivism and criminal justice recidivism.” (footnote omitted)); cf. Tina L. Cheng et al., *Effectiveness of a Mentor-Implemented, Violence Prevention Intervention for Assault-Injured Youths Presenting to the Emergency Department: Results of a Randomized Trial*, 122 PEDIATRICS 938, 942 (2008) (finding that a mentor-implemented violence prevention intervention in hospital emergency departments serving assault-injured youths resulted in decreased aggression and increased self-efficacy). In addition, these programs can reduce recidivism hospitalization costs. Chong et al., *supra*, at 598.

99. See *Group Violence Intervention: An Implementation Guide*, NAT’L NETWORK FOR SAFE CMTYS. 1 (2015), <https://portal.cops.usdoj.gov/resourcecenter/ric/Publications/cops-p280-pub.pdf> [<https://perma.cc/MJB4-3W94>] (“[V]iolence can be dramatically reduced [with] a partnership of community members, law enforcement, and social service providers . . .”).

100. See *id.* at 84 (“The analysis determines which street groups are the most violent and victimized at the current time.”).

101. *Id.* at 4.

102. See *id.* at 5 (“The typical impact [of group violence intervention programs] is a 35 to 60 percent reduction in community-wide levels of homicides

Violence interruption models have also proved to be a successful noncarceral solution for gun crime. Under these programs, persons known as violence interrupters identify and mediate potential conflicts, while outreach workers provide case management support and help individuals access needed social services.¹⁰³ One example of a successful violence interruption model is the one developed by Advance Peace, an organization that delivers anti-violence programming to individuals involved with urban gun violence.¹⁰⁴ A key component of the program is the Peacemaker Fellowship, which provides mentoring and social support through street outreach workers.¹⁰⁵ Advance Peace also provides financial assistance, educational opportunities, and social services navigation support.¹⁰⁶ Studies show that Advance Peace's model, and similar programs, have been successful at reducing violent gun crime in cities across the country.¹⁰⁷

In arguing that the *Bruen* Court should hold that New York's concealed-carry permitting law is unconstitutional, the public defenders grounded their arguments in a Black liberty interest.¹⁰⁸ To begin to address their concerns around the disparate policing and prosecution of Black people for possessing firearms, we must reinvigorate equal protection and encourage criminal law administrators to take proactive steps without the threat of litigation to address racial biases. But that alone is not enough if part of the liberty interest is also conceived of as reducing the number of Black people who are incarcerated writ

and a significant but sometimes lesser reduction in nonfatal shootings citywide.”).

103. See Jeffrey A. Butts et al., *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. PUB. HEALTH 39, 41 (2015) (describing the role of violence interrupters and outreach workers).

104. See generally ADVANCE PEACE, <https://www.advancepeace.org> [<https://perma.cc/5C3Q-4KV9>] (detailing Advance Peace's initiatives to invest in the development, health, and well-being of those in need).

105. See Heather Tirado Gilligan, *Advancing Peace, Against the Odds*, APPEAL (Aug. 3, 2022), <https://theappeal.org/advance-peace-stockton-gun-violence-prevention> [<https://perma.cc/JC9A-PG5D>] (“Outreach workers . . . recruit [those in high-target neighborhoods] as ‘Operation Peacemaker’ fellows. Over the course of this 18-month program, fellows develop a close relationship with their outreach workers, who provide counseling and mentorship to help them build a life outside of gangs, guns, and the underground economy.”).

106. See *id.* (highlighting the “array of services” Advance Peace provides).

107. *Id.* (“Advance Peace has become one of a handful of programs that have been associated with reductions in gun violence.”).

108. See *supra* Part I.A.

large. To address this aspect of the liberty interest, noncarceral solutions to gun crime are key.

B. THE SECURITY INTEREST: COMMUNITY INVESTMENT AND CULTURAL CHANGE

The civil rights groups in *Bruen* rightly focused on the fact that Black people are disproportionately the victims of gun violence. Given that incarceration has little effect on crime,¹⁰⁹ there needs to be an approach other than prosecution to address this gun violence epidemic, with a focus on the root causes of crime. Public health research indicates that poverty and socioeconomic status are important social determinants of crime.¹¹⁰ Thus, policies that address these socioeconomic factors, including community investment and robust social services that work to reduce crime, serve the Black interest in security.

As a start, increasing access to healthcare, substance use treatment, and mental health treatment is linked to reductions in crime and recidivism. For example, states that expanded Medicaid coverage under the Affordable Care Act saw significant decreases in annual crime rates.¹¹¹ A 2022 study found that counties that expanded Medicaid eligibility experienced reduced drug and violence-related arrests.¹¹² Expanded access to mental

109. See, e.g., Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, 19 FED. SENT'G REP. 221, 221 (2007) (“[A]nalysts are nearly unanimous in their conclusion that continued growth in incarceration will prevent considerably fewer, if any, crimes than past increases did and will cost taxpayers substantially more to achieve.”); James Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, BRENNAN CTR. FOR JUST. 5 (2016), https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf [<https://perma.cc/B2FV-ZUVZ>] (“[D]ecades of data shows that increased incarceration played an extremely limited role in the crime decline.”).

110. E.g., GREGG D. CARUSO, PUBLIC HEALTH AND SAFETY: THE SOCIAL DETERMINANTS OF HEALTH AND CRIMINAL BEHAVIOR 2 (2017) (“One of the most important determinants of health and criminal behavior is poverty and socioeconomic status.”).

111. Jacob Vogler, *Access to Healthcare and Criminal Behavior: Evidence from the ACA Medicaid Expansions*, 39 J. POL'Y ANALYSIS & MGMT. 1166, 1167 (2020) (“[R]eported violent crime rates decreased by 5.3 percent in states that chose to expand Medicaid coverage relative to states that did not expand.”).

112. Jessica T. Simes & Jaquelyn L. Jahn, *The Consequences of Medicaid Expansion Under the Affordable Care Act for Police Arrests*, PLOS ONE, Jan. 12, 2022, at 1, <https://doi.org/10.1371/journal.pone.0261512> (“We observe a 19–

health treatment is also linked to reduced violent crime rates.¹¹³ Furthermore, at the community level, neighborhoods with local substance use treatment facilities likewise saw a reduction in violent and financially motivated crimes in the area.¹¹⁴

Evidence also suggests that community investment can improve safety outcomes. For example, providing direct financial assistance has been linked to crime reduction. One study of men who had been involved in the criminal legal system found that short-term financial assistance, especially when combined with therapy, curtailed violence and crime for at least a year.¹¹⁵ Another study found that emergency financial assistance for those experiencing economic insecurity in Chicago reduced arrests for violent crimes by fifty-one percent.¹¹⁶ Investing in housing and reducing residential segregation can also reduce violence. As an example, increasing access to rental housing in low-income neighborhoods using Low-Income Housing Tax Credits has been found to reduce violent crime.¹¹⁷ Likewise, providing

29% negative difference in arrests for violence in [counties] the three years after Medicaid expansion.”).

113. Dave E. Marcotte & Sara Markowitz, *A Cure for Crime? Psycho-Pharmaceuticals and Crime Trends*, 30 J. POLY ANALYSIS & MGMT. 29, 30–31 (2010) (finding that increased access to psychiatric drugs to treat mental illness resulted in a decrease in violent crime rates).

114. See Samuel R. Bondurant et al., *Substance Abuse Treatment Centers and Local Crime*, 104 J. URB. ECON. 124, 131 (2018) (“Our estimates of the effects on agency-level crime indicate that an additional facility in a county reduces municipal rates of homicide, aggravated assault, robbery, motor vehicle theft, and burglary.”).

115. See Christopher Blattman et al., *Reducing Crime and Violence: Experimental Evidence from Cognitive Behavioral Therapy in Liberia*, 107 AM. ECON. REV. 1165, 1200–04 (2017) (discussing how pairing therapy with cash helped subjects change people’s “intentions, identity, and behavior” and led to a decrease in crime).

116. Caroline Palmer et al., *Does Emergency Financial Assistance Reduce Crime?*, 169 J. PUB. ECON. 34, 35 (2019).

117. Matthew Freedman & Emily G. Owens, *Low-Income Housing Development and Crime*, 70 J. URB. ECON. 115, 115 (2011) (“Under the LIHTC program, certain high-poverty census tracts receive Qualified Census Tract (QCT) status, which affects the size of the tax credits developers receive for building low-income housing. . . . [This causes] low-income housing development in the poorest neighborhoods [that] brings with it significant reductions in violent crime.”).

grants to low-income homeowners for structural repairs can significantly reduce homicides and other crime.¹¹⁸ For people recently released from prison, permanent supportive housing has been found to reduce recidivism.¹¹⁹

Another approach to reducing violence through community investment is addressing environmental factors. Crime Prevention Through Environmental Design programs focus on improving conditions of the built environment where violence occurs to reduce opportunity and motive for future crime in the area.¹²⁰ Studies have found that renovating vacant buildings, land, and lots in disinvested communities reduces violent crime rates.¹²¹ One study out of Philadelphia, for example, found that the presence of street lights, illuminated signs, painted crosswalks, public transportation, parks, and maintained vacant lots were associated with decreased odds of homicide.¹²² In Flint, Michigan, neighborhoods that participated in the Clean and Green program, in which community members cleaned and maintained vacant lots, saw forty percent fewer assaults and violent crimes than neighborhoods that did not participate.¹²³ Investing in neighborhood improvement projects offers additional safety dividends. In Seattle, a program that provides matching funds to

118. Eugenia C. South et al., *Association Between Structural Housing Repairs for Low-Income Homeowners and Neighborhood Crime*, JAMA NETWORK OPEN, July 21, 2021, at 1, 7, <https://doi.org/10.1001/jamanetworkopen.2021.17067> (“[S]tructural repairs to the homes of low-income owners were associated with a modest, but significant, reduction in crime at the block face level.”).

119. See Jocelyn Fontaine, *The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners*, 15 CITYSCAPE: J. POL’Y DEV. & RSCH. 53, 53 (2013) (summarizing how the Return Home—Ohio program, which provides housing to recently released prisoners, significantly reduced recidivism for those with disabilities).

120. See Michelle C. Kondo et al., *Neighborhood Interventions to Reduce Violence*, 39 ANN. REV. PUB. HEALTH 253, 253 (2018) (noting that environmental-level changes show promise as a “practical, sustainable, and high-impact” measure to prevent violence).

121. See *id.* at 256–61 (reviewing literature comparing violence outcomes before and after a change is implemented in the built environment).

122. Alison J. Culyba et al., *Modifiable Neighborhood Features Associated with Adolescent Homicide*, 170 JAMA PEDIATRICS 473, 476–77 (2016).

123. Justin E. Heinze et al., *Busy Streets Theory: The Effects of Community-Engaged Greening on Violence*, 62 AM. J. CMTY. PSYCH. 101, 106 (2018).

community organizations for neighborhood improvement projects substantially decreased violent crime, especially in the most disadvantaged neighborhoods.¹²⁴

A final example of a potential security measure: investments in place-based nonprofit organizations can significantly affect community safety. One study found that in any city with at least 100,000 residents, every ten additional community nonprofits focused on building stronger neighborhoods and reducing violence leads to a twelve percent drop in the homicide rate, a ten percent drop in the violent crime rate, and a seven percent drop in the property crime rate.¹²⁵ Research also shows that community-based organizations dedicated to fostering collective efficacy and social cohesion can fuel crime reductions,¹²⁶ and that these organizations are most effective when they have geographic and cultural ties to specific neighborhoods.¹²⁷

Thus, while policing and prosecution is often offered as a solution to crime, the criminal legal system is necessarily reactive. To truly serve the African American security interest, we must be proactive, which requires a sustained investment in Black neighborhoods to counter a sustained history of *disinvestment* as a necessary step to reducing the racial disparities in gun violence.¹²⁸

124. Lauren J. Krivo, *Reducing Crime Through Community Investment: Can We Make It Work?*, 13 CRIMINOLOGY & PUB. POL'Y 189, 190 (2014) (“The NMF program provides matching funds to community organizations that apply to work on specific neighborhood improvement projects. . . . [O]ver the course of their involvement in the program, Seattle neighborhoods that received more NMF funds saw substantial declines in violent crime.”).

125. Patrick Sharkey et al., *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214, 1215 (2017).

126. Leah Sakala & Nancy La Vigne, *Community-Driven Models for Safety and Justice*, 16 DU BOIS REV. 253, 255 (2019).

127. See Jesse Jannetta et al., *Federal Investment in Community-Driven Public Safety*, URB. INST. 6 (Sept. 2020), <https://www.urban.org/sites/default/files/publication/102877/federal-investment-in-community-driven-public-safety.pdf> [<https://perma.cc/WJ56-QLNH>] (describing how organizations with “geographic ties to specific neighborhoods” and “cultural connections to specific communities within neighborhoods” can effectively address community safety needs and challenges).

128. PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 20–23 (2013) (discussing the problems caused by America’s history of disinvestment in urban neighborhoods and how sustained investment is the only way to counter it).

But there's another aspect to the security interest that is important to consider when thinking and about race and gun violence—the increased threat from law enforcement that no doubt will come with increased gun ownership.¹²⁹ As more Black people seek to exercise their Second Amendment rights,¹³⁰ there must be sustained cultural work in undoing the connotation of Blackness with criminality and dangerousness to ensure Black gun ownership does not exacerbate the disproportionate police violence Black people face.

Blackness has long been viewed as a proxy for dangerousness.¹³¹ Research suggests that Black individuals—based solely on their skin color—are perceived as more threatening and more violent.¹³² One reason for this presumption is the prevalence of the “deviance narrative,” which constructs racial identity in terms of bestiality or pathology, portraying young Black males as controlled by their animalistic instincts.¹³³ This narrative has

129. This can be seen through the disparate impact New York's gun laws had on people of color pre-*Bruen*. See Brief of the Black Attorneys of Legal Aid et al., *supra* note 6, at 5 (“Worse, virtually 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. That remains the effect of its enforcement by police and prosecutors today.”).

130. Curtis Bunn, *Why More Black People Are Looking for Safety in Gun Ownership*, NBC NEWS (June 14, 2022), <https://www.nbcnews.com/news/nbcblk/black-people-are-looking-safety-gun-ownership-rcna32150> [https://perma.cc/FW6J-FJ8W] (describing the increase in Black gun ownership and the reasons for it). It's worth noting that Black gun owners also filed briefs in support of striking down the New York gun law in *Bruen*. Brief for Amicus Curiae National African American Gun Association, Inc. in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (No. 20-843).

131. For a historical overview, see N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321–25 (2004) (documenting the history of racial stereotyping and myths associated with Black men and violence and danger).

132. See, e.g., L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75 (2017) (“Research in the field of social psychology over the past four decades repeatedly demonstrates that most individuals of all races have implicit, i.e., unconscious, racial biases linking Blacks with criminality and Whites with innocence.”).

133. Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1304 (1995) (“The deviance narrative constructs racial identity in terms of bestiality or pathology. This construction portrays young black males as deviant objects controlled by bestial instincts or pathological impulses.” (footnote omitted)); see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White*

real consequences, making Black people more susceptible to violence at the hands of law enforcement.¹³⁴ In fact, consistent with this deviance narrative and the connotation of Blackness with dangerousness, police officers are far more likely to use deadly and nondeadly force against Black people.¹³⁵ This was true before *Bruen* and the Court's expansion of the Second Amendment outside the home. Given the connotation of Blackness with dangerousness, there is a real risk that the Black-is-dangerousness concerns will be exacerbated when a Black person is, or even thought to be, exercising the right to carry a gun in public.¹³⁶ Professor Khiara Bridges observed that "*Bruen* does not eliminate the dangers attendant to the presumption that black people are armed and dangerous"¹³⁷ Indeed, if anything, *Bruen* amplifies it.

Fears—On the Social Construction of Threat, 80 VA. L. REV. 503, 514 (1994) (discussing conceptions of race and how an "animal-like" view of Black people could lead to them being controlled).

134. See generally Martel A. Pipkins, "*I Feared for My Life*": *Law Enforcement's Appeal to Murderous Empathy*, 9 RACE & JUST. 180, 182–183 (2019) (describing how a master narrative of fearing Black people has led to violence against them by police officers). This narrative can even extend to prosecutors. See Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 485–92 (2021) (detailing how prosecutors may make explicit or implicit appeals to racial bias, how prosecutors' own implicit biases might inform trial argument, and how trial narratives may invoke stock stories despite prosecutor mitigation).

135. E.g., Denise Herd, *Cycles of Threat: Graham v. Connor, Police Violence, and African American Health Inequities*, 100 B.U. L. REV. 1047, 1050 (2020) ("[T]he risk of African American men being killed by the police is more than three times that of white men, despite their much lower prevalence in the population."); Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1210 (2019) ("On nonlethal uses of force, blacks . . . are more than 50 percent more likely to experience some form of force in interactions with police.").

136. Harawa, *Weaponizing Race*, *supra* note 6, at 176.

137. Bridges, *supra* note 2, at 85. Professor Shaun Ossei-Owusu vividly makes the same point: "One can only shudder at the prospect of police officers, who already say they feel threatened by Black skin, operating under the presumption that a Black person they encounter on the beat is legally strapped." Shaun Ossei-Owusu, *The Itchy Trigger Finger of Clarence Thomas*, BALLS & STRIKES (Nov. 4, 2021), <https://ballsandstrikes.org/scotus/clarence-thomas-bruen-recap> [<https://perma.cc/AFM8-NRUP>]. There is also the fear that police will believe Black people are illegally carrying firearms regardless of how permissive a jurisdiction's gun laws are. See, e.g., *United States v. Black*, 707 F.3d 531, 535 (4th Cir. 2013) (noting that the police officers in the case stopped a group of Black men who were openly carrying, which was legal, because in their

As such, one prerequisite to the Black security interest is a change to the narrative around Blackness. Scholars have suggested that the deviance narrative can be challenged by the “defiance narrative,” which constructs racial identity in terms of rage and rebellion, depicting young Black males as rationally resisting racial subordination.¹³⁸ They argue that the defiance narrative could transform how we think about criminal behavior and emphasize the positive impacts such a narrative shift might generate.¹³⁹

Another approach, Professor Avlana Eisenberg argues that “[m]eaningful reform will require supplanting this deeply flawed danger narrative with a new policing frame,” which she calls “communitarian policing.”¹⁴⁰ Communitarian policing “emphasizes values of professionalism, as well as the shared interests among individuals in a polity and the importance of their interactions.”¹⁴¹ To adopt this new frame, police departments must “replac[e] the unfounded, exaggerated danger narrative with an empirically grounded understanding of risk as contingent and contextual.”¹⁴² Departments must cultivate a culture of empathy to combat the us-versus-them mentality, focusing on the “needs and past traumas of those policed” while also “[a]ddressing the mental health needs of officers.”¹⁴³ And departments must reconceive policing as a collaborative effort, where officers act as part of a “‘service team’ geared towards identifying and addressing the needs of community members.”¹⁴⁴

Beyond police, other actors within the penal system have a role to play in combating the Black-as-dangerous trope. In the

experiences people in this predominantly Black neighborhood did not carry guns in this way).

138. See, e.g., Alfieri, *supra* note 133, at 1304, 1318 (defining the defiance narrative and arguing for its application to “transform, rather than transcend, notions of criminal behavior”). See generally Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (discussing defiance and how it can play a role in a “revitalized black community”).

139. See Alfieri, *supra* note 133, at 1317–18 (summarizing various scholars’ perspectives on the value of defiance).

140. Avlana K. Eisenberg, *Policing the Danger Narrative*, 113 J. CRIM. L. & CRIMINOLOGY 473, 481 (2023).

141. *Id.*

142. *Id.* at 518.

143. *Id.* at 519.

144. *Id.*

courtroom context, prosecutors can make the conscious choice against trafficking in pernicious anti-Black stereotypes as they try their cases.¹⁴⁵ And when prosecutors resort to these racist tropes, defense lawyers can attempt to neutralize them through counternarrative, highlighting for the judge and jury how various arguments traffic in racism.¹⁴⁶ Judges, too, have a role to play, as they can instruct juries to contemplate their own racial biases and warn against parties making stereotyped racialized arguments,¹⁴⁷ which can be especially important in interracial stand your ground cases.¹⁴⁸

Of course, this list is not exhaustive. The cultural work must be done outside the penal system, too, as anti-Blackness is woven into the social fabric.¹⁴⁹ Complete cultural change around

145. See Conway, *supra* note 134, at 498–503 (arguing that trial narratives that advance or invoke a racialized stereotype or stock story violate prosecutors’ duty to seek justice).

146. See generally Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 342–43 (2012) (highlighting the use of counternarratives by defense attorneys as a way to counter a prosecutor’s narrative).

147. Jonathan Markovitz, “A Spectacle of Slavery Unwilling to Die”: *Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873, 877 (2015) (calling for judges to “instruct legal fact finders that it is unreasonable as a matter of law to rely upon racial stereotypes in order to determine the nature of a violent threat”); see Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 95 (2014) (arguing for a solution to racial bias that “calls attention to the ways in which race is constructed by other actors in the legal system, including the trial judge”).

148. Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and Its Racial Implications*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 18, 2022), <https://firearmslaw.duke.edu/2022/01/the-dangerous-expansion-of-stand-your-ground-laws-and-its-racial-implications> [https://perma.cc/92DV-9JP5] (“In Stand-Your-Ground states, ‘homicides in which white shooters kill Black victims are deemed justifiable five times more likely than when the situation is reversed.’” (citation omitted)); Lee, *supra* note 147, at 111–12 (citing an empirical study that found that white-on-Black homicides are 281% more likely to be found justified in stand your ground cases).

149. See Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 71–104 (2018) (detailing the “four centuries of racial injustice” in the United States). See generally Yuvraj Joshi, *Racial Transitional Justice in the United States*, in RACE AND NATIONAL SECURITY 191, 198–206 (Matiangai V.S. Sirleaf ed., 2023) (exploring how racial tension and the opportunity for transitional justice has played out in American culture, including legal opinions).

anti-Black narratives will require generations-long work.¹⁵⁰ But if Black people are ever to be secure from violence—both at the hands of private individuals and the State—a conscious effort at dismantling the connotation between Blackness and dangerousness is necessary to vindicate the Black security interest.

C. THE DEMOCRATIC INTEREST: POWER RECALIBRATION

One concern with the Supreme Court's decision in *Bruen* is how it frustrates democracy.¹⁵¹ By tying the constitutionality of modern gun regulation to what was accepted historically, the Court severely limited (or attempted to severely limit)¹⁵² a community's ability to engage in democratic contestation and enact gun regulation best suited to local interests.¹⁵³ *Bruen*'s frustration of the democratic interest is perhaps most heavily felt by Black people, who are by far more likely to favor stricter gun regulation.¹⁵⁴ Therefore, to vindicate the Black democratic interest, there must be a power recalibration that encourages noncarceral self-regulation to achieve the outcomes constitutionally foreclosed by *Bruen*.¹⁵⁵ Because even in the face of *Bruen*, communities, especially communities of color, have tools available that can work to limit the proliferation of firearms.

150. Cf. Lawrence, *supra* note 149, at 70 (describing and arguing for the Truth and Reconciliation process that involves acknowledging the harms done and attempting “through conscious acts of reconciliation and healing, to account for the massive harms done”).

151. See Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1894 (2023) (“In addition to calling into question existing forms of gun regulation, the historical method apparently precludes the implementation of novel forms of regulation adapted to meet contemporary needs . . .”).

152. Professors Joseph Blocher and Reva Siegel have persuasively explained how to interpret *Bruen*'s methodology in a way that still allows for “locational restrictions that protect [the] democratic community against weapons threats.” Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. 1795, 1799 (2023).

153. See Li, *supra* note 151, at 1894 (noting how *Bruen*'s historical test will “discourage experimentation” and “gun-regulation innovation”); Blocher & Siegel, *supra* note 18, at 451 (highlighting that *Bruen* will restrict “the democratic authority of communities to seek freedom from gun violence through law”).

154. See *supra* note 79 and accompanying text.

155. See Li, *supra* note 151, at 1906 (arguing that community-violence intervention programs live outside of constitutional constraints and help “to discredit

One example of a state-wide self-regulation tool encouraged by Professors Ian Ayers and Fredrick Vars is self-exclusion.¹⁵⁶ As they envision it, states could pass laws that would allow people to voluntarily add their names to the National Instant Criminal Background Check System “No Guns” list.¹⁵⁷ “By passing a statute that prohibits registrants from purchasing and possessing guns (and forwarding the registrants’ names to NICS), states can create a credible system whereby registrants will be incapacitated from purchasing a firearm from gun dealers not only in their state of registry but throughout the country.”¹⁵⁸ And while Ayers and Vars focus on why voluntary self-exclusion laws might be particularly helpful for those experiencing suicidal ideations, Professor Dru Stevenson has explained that those with “religious, moral, social, or philosophical reasons” might want to voluntarily render themselves ineligible for buying or possessing guns, too.¹⁵⁹

Another measure that states can use to regulate firearms are gun removal programs that seek to dispossess gun owners who are later prohibited from possessing firearms. These programs require a patchwork of legislation.¹⁶⁰ First, there are “prohibitor laws,” which categorize people who are forbidden from possessing guns.¹⁶¹ Then, states can require handgun sales to be

a Second Amendment jurisprudence that pretends that gun violence in communities of color has nothing to do with the Constitution’s guarantee of a right to bear arms”).

156. Ian Ayers & Fredrick E. Vars, *Libertarian Gun Control*, 167 U. PA. L. REV. 921 (2019).

157. *Id.* at 924. See generally Ian Ayers & Fredrick E. Vars, *Gun Owners Support the Right Not to Bear Arms*, 69 EMORY L.J. 1131 (2020) (discussing the mechanics of Donna’s Law and public support for it).

158. Ayers & Vars, *supra* note 156, at 924.

159. Dru Stevenson, *Going Gunless*, 86 BROOK. L. REV. 179, 180 (2020). At least three states have enacted such laws, and others are considering them. Susan Spencer, *Donna’s Law: A New Suicide Prevention Tool*, CBS NEWS (Mar. 5, 2023), <https://www.cbsnews.com/news/donnas-law-firearms-and-suicide> [<https://perma.cc/5MMP-B4RH>].

160. See *At the Forefront of Gun Safety: Removing Illegal Guns*, EVERYTOWN FOR GUN SAFETY (Nov. 16, 2022), <https://everytownresearch.org/report/at-the-forefront-of-gun-safety-removing-illegal-guns> [<https://perma.cc/98Q4-U8GL>] (noting that these schemes “build and capitalize on several other foundational laws”).

161. *Id.*

registered with a government entity.¹⁶² And finally, states can monitor registered gun purchasers and track to see whether they have been subjected to a conviction or court order that renders them prohibited from possessing a firearm.¹⁶³ At their most effective, these programs also require careful attention to administration. Officials must investigate whether a person has relinquished their firearms and, if not, implement a procedure to notify a gun owner that they must relinquish their gun, and provide a (hopefully nonpunitive) process for them to do so.¹⁶⁴

There are also a number of noncarceral steps outside of legislation that local communities can take to regulate firearms. For example, local governments and community organizations can organize gun buyback programs.¹⁶⁵ These programs have long been used by civil rights groups working to curb gun violence in communities of color.¹⁶⁶ Communities can implement gun lock and lockbox giveaways¹⁶⁷ and offer free gun safety

162. *Which States Require Handgun Sales Records Be Sent to Law Enforcement?*, EVERYTOWN FOR GUN SAFETY (Jan 4, 2024), <https://everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement> [https://perma.cc/5CN7-HEWH].

163. *At the Forefront of Gun Safety: Removing Illegal Guns*, *supra* note 160.

164. *Id.* See generally Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POLY REV. 559, 587–94 (2020) (detailing the actors that must be involved in the successful coordination of a removal program). Six states have implemented these programs. *At the Forefront of Gun Safety: Removing Illegal Guns*, *supra* note 160. And while these programs are most often implemented to disarm people who are subject to some kind of domestic violence order, they do not have to be limited as such. See *id.* (describing examples of successful removals outside the domestic violence context).

165. *E.g.*, Zara Amaechi, *Gun Buyback Event Offers Dallas Residents a Safe Way to Dispose of Firearms*, KERA NEWS (Oct. 3, 2023), <https://www.keranews.org/government/2023-10-03/gun-buyback-event-offers-dallas-residents-a-safe-way-to-dispose-of-firearms> [https://perma.cc/2SPU-PUR3].

166. See Li, *supra* note 151, at 1879–80 (noting civil rights groups' participation in gun buyback programs).

167. *E.g.*, Adel Toay, *Public Health Hosts Gun Lockbox Giveaways Across King County on National Gun Violence Awareness Day*, KING 5 NEWS (June 2, 2023), <https://www.king5.com/article/news/local/seattle/public-health-gun-lockbox-giveaways-king-county-national-gun-violence-awareness-day/281-c4220f7f-b4bc-4227-a828-531b81cfe29e> [https://perma.cc/P3FA-RGXU]; Morse Diggs, *Atlanta Secures Funding for Free Gun Boxes*, FOX 5 ATLANTA (June 21, 2023), <https://www.fox5atlanta.com/election/atlanta-secures-funding-for-free-gun-boxes> [https://perma.cc/7XSL-EV36]; WSYX Staff, *City Giving Away 5,000 Gun Lock Boxes Monday*, ABC 6 NEWS (July 10, 2023), <https://abc6onyourside.com/news/local/city-giving-away-5000-gun-lock-boxes-monday-guns-locks>

courses to promote responsible gun ownership.¹⁶⁸ They can invest in youth, as quality schooling and programming is shown to decrease future crime.¹⁶⁹ The list could continue.

And while perhaps these measures may not be as effective as more all-encompassing gun regulation, they prove that communities are not powerless to regulate firearms. Thus, despite *Bruen*'s antidemocratic sweep, these types of power-recalibrative measures are particularly important when considering the Black democratic interest.

CONCLUSION

Not only are the racial justice interests in gun safety and regulation complex, but they can also be conflicting. Thus, any racially-sensitive solution to gun violence must be multipronged to ensure Black people are: (1) not disproportionately punished for exercising their gun rights; (2) safe from gun violence; and (3) empowered to enact firearm policies that best serve their interests and those of their communities. This will require litigation breathing new life into the Equal Protection Clause. Penal

-safety-columbus-council-police-fire-firearms [https://perma.cc/7TH7-3R4Q]; Will Gonzalez, *Richmond Police Officer Free Gun Safes to City Residents*, ABC 8 NEWS (Aug. 26, 2023), https://www.wric.com/news/local-news/richmond/richmond-police-offering-free-gun-safes-to-city-residents [https://perma.cc/5R7K-4USY].

168. *E.g.*, Kacey Buercklin, *New Orleans Police Offering Gun Safety Classes That Are Free to the Public*, WDSU 6 NEWS (Feb. 6, 2023), https://www.wdsu.com/article/new-orleans-police-free-gun-safety-classes/42765135# [https://perma.cc/ABP9-UTGK]; Patricio G. Balona, *Permitless Carry Law, Gun Accidents Prompt Sheriff's Office to Offer Gun Safety Classes*, DAYTONA BEACH NEWS-J. (Aug. 3, 2023), https://www.news-journalonline.com/story/news/local/volusia/2023/08/03/the-classes-are-being-offered-after-floridas-no-permit-law-passed/70453436007 [https://perma.cc/EV8F-JQD4]; Stephen Cohn, *Free Gun Safety Classes in Milwaukee*, ABC 12 WISN (July 21, 2023), https://www.wisn.com/article/free-gun-safety-classes-in-milwaukee/44615025# [https://perma.cc/2HZF-5P4N].

169. *See* E. Jason Baron et al., *Public School Funding, School Quality, and Adult Crime 2–4* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29855, 2022) ("Specifically, we find that students exposed to 10% additional operating expenditures from kindergarten through third grade are 2 percentage points, or 15%, less likely to be arrested in adulthood (through age 30)."); *cf.* Randi Hjalmarsson et al., *The Effect of Education on Criminal Convictions and Incarceration: Causal Evidence from Micro-Data*, 125 *ECON. J.* 1290, 1293 (2015) ("Our [results] indicate a causal relationship between years of schooling and whether a male engages in criminal activity and the severity/intensity of his offences.").

bureaucrats will have to think beyond incarceration and reflect on how their policies and practices may inculcate subordination and in response, make meaningful change. Policymakers must, rather than reacting to violence, be proactive and address the root causes of crime by investing in communities that have long been neglected (at times, purposefully so). And communities, particularly Black communities, must be creative when adopting policies and deploying strategies that promote gun safety. Complex problems—and ensuring racial equity is as complex as it gets—call for complex solutions.