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RETHINKING GUN VIOLENCE PREVENTION: POST-*BRUEN* POLICING AND THE DECRIMINALIZATION OF MINORITY GUN OWNERSHIP

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INTRODUCTION

For decades a successful conservative movement has worked to refashion the Second Amendment from a collective right to maintain militias towards a wide-ranging individual right to keep and bear arms.[1] However, absent from this newfound right have been poor men of color, who instead of benefiting from a philosophy centered on liberalizing gun ownership, have continued to experience increased criminalization.[2] The gun-rights movement came to a head in June 2022, when the Supreme Court decided *New York State Rifle & Pistol Association Inc. v. Bruen,* upending decades of legal precedent by vastly restricting state governments power to regulate an individual's right to bear arms in public.[3] To the surprise of some legal commentators,[4] a collection of Black public defenders and legal aid attorneys joined forces to submit an amicus curiae brief in favor of overturning the gun regulations in question,

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[1] *See* Josephine Harmon, *The Rise of The Conservative Legal Movement Reshaped Gun Politics*, WASH. POST (July 15, 2022, 6:00 AM), https://www.washingtonpost.com/made-by-history/2022/07/15/rise-conservative-legal-movement-reshaped-gun-politics/.

[2] *See* Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 175 (2018).

[3] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[4] Sharone Mitchell, Jr., *There's No Second Amendment on the South Side of Chicago*, THE NATION (Nov. 12, 2021), https://www.thenation.com/article/politics/gun-control-supreme-court/.

seizing on an opportunity to abandon restrictions that disproportionately criminalized their poor clients of color.[5]

This paper will build on that amicus brief to argue that the Court's decision in *Bruen* should be used as a tool for decriminalization of minority gun ownership. This decision may lead to positive decarceral effects and ultimately force policy makers to tackle the root causes of gun violence, without relying on criminal sanctions. Part I will briefly summarize the history of American firearm regulations and its effect on the problem of mass incarceration.[6] Part II will discuss the history of Supreme Court jurisprudence under the Second Amendment, with an emphasis on the legal transformation of the past twenty years.[7] Part III will discuss the *Bruen* decision and evaluate the current state of gun regulation.[8] Finally, Part IV will argue that *Bruen* will have far reaching Fourth Amendment ramifications on police practices and states should seize this opportunity to abandon possession-policing in favor of polices that tackle the root causes of gun violence.[9]

I. A BRIEF HISTORY OF FIREARM CRIMINALIZATION AND ITS EFFECT ON MASS INCARCERATION

Despite the cultural prevalence of gun rights issues in modern politics, gun regulation as a controversial issue has only a brief history.[10] This section will begin by reviewing the history of American firearm regulation and subsequent criminalization. It will then assess the influence of regulation on police practices and conclude by evaluating the effect firearms regulation has had on mass incarceration.

A. Firearms and Regulation

Before the Twenty-First Century gun regulation was largely non-controversial, with the Supreme Court hearing only a limited number of relevant cases and largely dismissing any implication that regulation was at odds with the Second Amendment.[11] Before the Civil War,

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[5] *See* Brief of the Black Attorneys of Legal Aid, et al. as Amici Curiae Supporting Petitioners at 5-6, New York State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021) (No. 20-843).

[6] *See infra* Part I.

[7] *See infra* Part II.

[8] *See infra* Part III.

[9] *See infra* Part IV.

[10] Harmon, *supra* note 1 ("[Gun politics] would not become fraught until the late 1970s[.]").

[11] *See infra* Part II.A.

firearms regulation largely focused on restricting the possession of guns by Black people, free or enslaved.[12] This also led to the proliferation of Black Codes, particularly in the South, which banned Black handgun ownership outright or created restrictive licensing regimes to the same effect.[13] With the passage of the Fourteenth Amendment, "[s]outhern states replaced their facially discriminatory laws with those that were facially race-neutral."[14] States throughout the country would continue to enact firearms restrictions in the early Twentieth Century, largely in response to Black men trained to use firearms returning from World War I, and the rise of organized crime in the prohibition era.[15]

This period also saw the proliferation of licensing regimes throughout the country, the most famous of which was New York State's Sullivan Law, which made it a crime to purchase or carry a handgun without a license.[16] New York's law, like many others enacted in the Twentieth Century, featured a "good cause" or "may issue" standard which gave the licensing agent ample discretion to determine who can legally possess or carry a gun.[17] Similarly, in the following twenty years many states enacted the Uniform Firearms Act,[18] which was championed by the NRA and other pro-gun activist groups.[19] This act required a license to carry a concealed handgun, which was issued only after the applicant could show "good character and a legitimate reason for

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[12] *See* Brief of Amicus Curiae Congress of Racial Equality at 8, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) [hereinafter Congress of Racial Equality] ("State legislation which prohibited the bearing of arms by [B]lacks was held to be constitutional due to the lack of citizen status of the Afro-American slaves.") (citation omitted); *see also,* Shreefter, *supra* note 2, at 166 ("[I]n Massachusetts, freed slaves were prohibited from participating in militia drills . . . In New Jersey, Blacks were excused from compulsory militia service . . . In New York . . . not only were Blacks and Native Americans prohibited from owning guns, but they were also prohibited from assembling in groups larger than four people.").

[13] Shreefter, *supra* note 2, at 168.

[14] *Id.* States took different approaches to disarming their Black populations, from prohibiting entire classes of firearms to enacting complicated tax structures. *Id.* at 168-69.

[15] Congress of Racial Equality, *supra* note 12, at 20-24.

[16] Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 436 (2016) [hereinafter Patrick Charles].

[17] *Id.* at 433; Matthew Bridge, *Exit, Pursued by A "Bear"? New York City's Handgun Laws in the Wake of* Heller *and* McDonald, 46 COLUM. J. L. & SOC. PROBS. 145, 151 (2012).

[18] David B. Kopel, *The Great Gun Control War of the Twentieth Century – and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1532 n.23 (2012). This Act was also known as the Uniform Pistol and Revolver Act. *Id*. at 1532.

[19] Patrick Charles, *supra* note 16, at 448.

carrying a concealed weapon."[20] Following a long history of localized gun control,[21] states and municipalities enacted a variety of regulations in the ensuing decades.[22] By the 1950s, seventeen [of the forty-eight states] required a license to carry a concealed firearm, "[s]even states and the District of Columbia required a license to carry a firearm either concealed or openly[,] [t]welve states prohibited the carrying of a concealed firearm, but did not require a license to carry a firearm openly[,]" and some remaining states imposed restrictions on carrying firearms in sensitive locations.[23] The common feature of these regulatory schemes was "good cause" or "may issue" licensing standards determined by a state or local official, and by 1960 every state, except Vermont and New Hampshire, adopted a firearms licensing law using this language.[24]

The passage of Sullivan's Law in New York started what would become the modern gun-rights movement, as organizations including the National Rifle Association (NRA) began grassroots organizing efforts against what they saw as overly restrictive licensing regimes that hurt law-abiding gun owners.[25] This mobilization would become increasingly effective in the second half of the Twentieth Century as groups led by the NRA effectively lobbied against "may issue" regimes and towards the more permissive "shall issue" alternative, and a position of zero compromise on gun control.[26]

Starting in the late 1960s and moving into the 1970s, a new conservative analysis of the Second Amendment emerged.[27] This new

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[20] Kopel, *supra* note 18, at 1532.

[21] *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 120 (2013) ("Urban gun control was thus a nationwide phenomenon, reaching from the harbors of Boston to the dusty streets of Tombstone, and it took many forms.").

[22] Patrick Charles, *supra* note 16, at 431.

[23] *Id.* at 432-33.

[24] *Id.* at 433.

[25] Hope Reese, *How the NRA Went from a Marksmanship Group to a Controversial Political Powerhouse*, VOX (Apr. 2, 2020, 11:00 AM), https://www.vox.com/the-highlight/2020/3/24/21191524/nra-national-rifle-association-history-frank-smyth-wayne-la-pierre. The core difference between the early NRA and the NRA of today was a willingness to compromise. *Id.* The group supported gun control to some extent, including the National Firearms Act in 1934 and the Gun Control Act of 1968, before taking an increasingly hardline view of the Second Amendment into the 1970s and beyond. *Id.*

[26] Patrick Charles, *supra* note 16, at 461-66.

[27] *See* Kopel, *supra* note 18, at 1553-54. Known as the "Standard Model" this new academic perspective refashioned the Second Amendment from a collective right to an individual right of law-abiding citizen that could only have limited non-prohibitory controls. *Id.* at 1554, 1592.

individual rights based approach shaped legislation and motivated NRA lobbying.[28] For the next thirty years the primary trend in state laws followed this shifting conservative framework, with states that had previously enacted strict "may issue" licensing regimes transitioning to mandatory "shall issue" models for concealed carry permits.[29] In addition, the gun rights lobby made considerable progress at the state level by successfully amending state constitutions towards "gun-friendly Second Amendment analogues" and preempting localities from enacting more stringent firearms regulations.[30] However, not all states followed this conservative push.[31] Moving into the 2000s, liberal states and large urban areas continued to strengthen their discretionary licensing regimes, enact outright bans on specific categories of weapons, and establish background checks.[32]

At the federal level, Congress first enacted firearms regulations with the National Firearms Act of 1934.[33] This law required manufacturers, importers, and dealers of firearms to register with the government, banned certain classes of weapons, and instituted a federal excise tax for purchases.[34] The motivating force behind this legislation was to tackle "the increasing mobility of crime and criminals" by regulating machine guns, short-barrel shotguns or rifles, and silencers.[35] Only four years later Congress continued its regulatory push with the Federal Firearms Act of 1938[36] which created, "(1) a more comprehensive manufacturer and dealer licensing system, and (2) . . . a class of prohibited persons who could not receive, ship, or transport weapons."[37]

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[28] *See id.* at 1592, 1603.

[29] Patrick Charles, *supra* note 16, at 473 ("[B]y the close of the [T]wentieth [C]entury a total of twenty-nine states adopted 'shall issue' licensing regimes, thus making 'shall issue' the jurisdictional majority in the United States.").

[30] *Id.* at 471-73 ("[I]n 1979 forty-three states allowed their respective cities, towns, and localities to enact more stringent firearm regulations, yet by 2005 the NRA was successful in shifting that number to just five.").

[31] William J. Vizzard, *The Current and Future State of Gun Policy in the United States*, 104 J. CRIM. L. & CRIMINOLOGY 879, 886 (2015).

[32] *See id.* at 884-86.

[33] National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236, 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801, 5849).

[34] *Id.*

[35] Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 646-48 (2022). The writers of the National Firearms Act initially intended to include handguns and pistols in the regulatory scheme, but after considerable lobbying from the NRA, that portion of the bill was removed. Kopel, *supra* note 18, at 1533.

[36] Federal Firearms Act, Pub. L. No. 75-785, § 2(a), 52 Stat. 1250, 1250 (1938) (repealed by Pub. L. No. 90-351, § 906, 82 Stat. 197, 234 (1968)).

[37] Charles & Garrett, *supra* note 35, at 649.

Despite federal disinterest in firearms prosecutions over the preceding three decades,[38] civil unrest in the 1960s,[39] and a popular movement among Black citizens to arm themselves,[40] these conditions culminated in a period of increased regulation.[41] The Gun Control Act of 1968 (GCA)[42] passed at the height of this civil unrest following high profile assassinations of Dr. Martin Luther King, Jr., and Attorney General Robert Kennedy.[43] This new legislation largely focused on gun dealers, requiring federal registration, keeping records,[44] and banning certain mail-order sales.[45] Additionally, the GCA banned all gun possession for certain classes of people.[46] In the fifty years since the passage of the GCA, it has been repeatedly revised and is still "the governing framework for federal firearms laws."[47]

In the 1980s, at a time when rising crime rates were the center of political conversation, a growing conservative gun lobby saw the passage of the Armed Career Criminal Act (ACCA), which worked to amend certain aspects of federal gun legislation for those categorized as criminal, but did little to substantively change federal rules.[48] The

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[38] *Id.* at 652-53.

[39] Shreefter, *supra* note 2, at 170.

[40] *Id.* at 171. This Black self-defense and firearms movement in the 1960s was largely a response to persistent terror inflicted by the KKK in the South and in areas where law enforcement declined to protect Black communities. Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 949, 951 (1999).

[41] Shreefter, *supra* note 2, at 170-73.

[42] Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (1968).

[43] Vizzard, *supra* note 31, at 882 ("Between 1963 and 1968, a combination of rising crime rates, administration support, and the murders of Martin Luther King, Jr. and Robert Kennedy finally generated enough antigun political support to push the Gun Control Act (GCA) through Congress.").

[44] Form 4473 required information on the gun sold, as well as demographic and contact information for the buyer. Kopel, *supra* note 18, at 1545-46.

[45] *Id*. at 1546. This registration regime was the result of prolonged negotiations with the NRA, which lobbied successfully to ensure there would be no national registration of gun owners. *Id.* at 1545.

[46] *Id.* at 1546. The classes of people include convicted felons, illegal aliens, and illegal drug users. *Id.*

[47] Charles & Garrett, *supra* note 35, at 657-58. These reforms largely increased the penalties and expanded sentencing enhancements, including: (1) an amendment requiring that the term of imprisonment could not run concurrently with any other sentence in 1971; (2) instituting mandatory minimums in 1984; (3) adding drug trafficking crimes to the predicate offense list in 1986; and (4) expanding § 924(c) to include not only the use of a firearm, but possession in furtherance of a predicate offense as well in 1998. *Id.* at 656-57.

[48] *See id.* at 658-61. While the ACCA did not enact novel restrictions on gun possession it did increase sanctions for offenders with prior felonies prosecuted for firearm possession. *Id.* at 659 ("[A]ny person caught unlawfully possessing firearms

Firearms Owners Protection Act (FOPA) on the other hand, reflecting a more "hardline NRA[,]" loosened many of the restrictions imposed by the GCA by repealing some of the interstate sale provisions, and making enforcement against dealers more difficult.[49] In 1993, The Brady Act passed after more than a decade of lobbying following the assassination attempt of President Reagan in 1981 that left his Press Secretary James Brady gravely injured.[50] This new legislation's most enduring legacy was the creation of the National Instant Criminal Background Check System, which "conducted automated background checks on all firearm sales…by licensed gun dealers[,]" but the reform was far from initial expectations.[51]

Perhaps the most infamous of the federal tough on crime legislation was the 1994 Crime Bill, formerly codified as the Violent Crime Control and Law Enforcement Act of 1994.[52] In a rare showing of bipartisan support, "[b]oth conservatives and liberals attempt[ed] to outdo each other in their posturing and proposals to be increasingly punitive toward criminals."[53] The legislation banned assault weapons, prohibited the possession of handguns or ammunition by juveniles, added domestic violence offenders to the list of prohibited persons, and directed the Sentencing Commission to create firearm-related sentence enhancements.[54] In the years since the passage of the 1994 Crime Bill, while federal gun control has polarized along party lines and there has been little substantive legislation, an increase in high profile mass shootings have kept the issue in the public spotlight.[55]

(e.g., felons) after three prior [predicate felony] convictions faced a mandatory minimum sentence of 15 years in prison.").

[49] *Id.* at 662-64. ("The NRA, other pro-gun interest groups, and gun-friendly legislators ensured that FOPA would make enforcement against dealers more difficult.").

[50] Kopel, *supra* note 18, at 1567, 1582.

[51] Charles & Garrett, *supra* note 35, at 668.

[52] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[53] Charles & Garrett, *supra* note 35, at 669 (quoting Tony G. Poveda, *Clinton, Crime, and the Justice Department*, 21 SOC. JUST. 73, 73 (1994)).

[54] *Id.* at 669-70. The assault weapons ban featured a sunset clause, which required Congress to renew the legislation after ten years and grandfathered in all assault weapons legally purchased before the legislation passed. *Id.*

[55] *See* Annie Karni & Luke Broadwater, *A Timeline of Failed Attempts to Address U.S. Gun Violence,* N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/politics/gun-control-timeline.html.

B. Firearms and Policing

As firearm possession has faced increasing criminalization, policing practices have developed in response.[56] This has resulted in a conflict between the Second Amendment's right to bear arms[57] and the Fourth Amendment's protections from unreasonable searches and seizures.[58] This conflict is most relevant to the proliferation of "stop-and-frisk" policing, stemming from the Supreme Court's 1968 ruling in *Terry v. Ohio*.[59] Despite the Court's seemingly limited decision emphasizing the objective requirements law enforcement must meet to effectuate a legal *Terry* stop, this new tactic exploded in large urban centers where local police took advantage of the case's convenient ambiguity to incapacitate those they already suspected as criminal.[60] Large northeastern cities in particular capitalized on strict "may issue" firearms regulations to determine that any indication someone in a high crime area is carrying a weapon is sufficient to support a reasonable assumption of criminality and thus to conduct a stop and frisk.[61]

This increase in stop and frisk policing coincided with a political environment that sought to capitalize on public fear of crime by scapegoating young men of color.[62] In New York City, where Mayors Giuliani and then Bloomberg embraced a broken windows policing strategy with the explicit goal of getting guns off of the street, incidents of stop and frisk were particularly egregious.[63] However, investigations into

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[56] *See generally*, Samuel Peterson & Shawn Bushway, *Law Enforcement Approaches for Reducing Gun Violence,* RAND: GUN POL'Y IN AM. (Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/essays/law-enforcement-approaches-for-reducing-gun-violence.html.

[57] U.S. CONST. amend II.

[58] U.S. CONST. amend IV.

[59] 392 U.S. 1, 30 (1968) (holding that an officer may briefly stop and conduct a limited search of a suspect's outer garments to find weapons if they reasonably believe, in light of their training and experience, that criminal activity is afoot, and the person may be armed and dangerous).

[60] Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 877 (2001).

[61] *See id.* at 923, 925. *See also* Illinois v. Wardlow, 528 U.S. 119, 121, 124 (2000) (holding that police did not violate the Fourth Amendment when they conducted a *Terry* stop of a Black man in a high crime area based off only nervous and evasive behavior).

[62] *See* Bridge Initiative Team, *Factsheet: NYPD Stop and Frisk Policy,* GEO. UNIV. (Jun. 5, 2020), https://bridge.georgetown.edu/research/factsheet-nypd-stop-and-frisk-policy/.

[63] David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets,* N.Y. TIMES (Feb. 15, 1999), https://www.nytimes.com/1999/02/15/nyregion/success-of-elite-police-unit-exacts-a-toll-on-the-streets.html ("Mr. Giuliani . . . adopted a 'zero tolerance' policy toward minor offenses, in the hope that arrests on low-level offenses

these police practices in New York, and beyond, revealed the policies shortcomings as a policing tool and severe racial and socioeconomic biases.[64] The most striking finding from statistics on *Terry* stops was their sheer ineffectiveness at actually seizing any evidence of illegal activity—"[o]f those frisked, a weapon was found only 2 percent of the time."[65] Furthermore, in New York where stop and frisk practices were most famously championed as a crime stopping tool,[66] analyses conducted of police stops at the height of the Bloomberg administration indicate there was no substantial correlation between the number of stops and shootings taking place in the city, with murder rates continuing to fall even after stop and frisks were reduced.[67]

Beyond failing as a crime control measure, stop and frisk policing has a corrosive effect on the communities most heavily policed.[68] Demographically, the most heavily stopped groups are disproportionally Black and Latinx men in low-income communities.[69] The effects of this kind of racially charged over-policing go beyond criminal sanctions and incarceration.[70] Victims of this abuse are humiliated and placed in a state of constant fear in their own communities, which can have particularly long term impacts on younger residents.[71] Beyond psychological effects these increased interactions with law enforcement can have lethal consequences.[72] In 1999, officers with New York's Street Crimes

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might help the police capture serious felons and that increased contract with the public would help police take more illegal weapons off the street."); Bridge Initiative Team, *supra* note 62.

[64] NIAZ KASRAVI ET AL., NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 11-12 (2014); Richard O. Motley, Jr. & Sean Joe, *Police Use of Force by Ethnicity, Sex, and Socioeconomic Class*, 9 J. SOC'Y SOC. WORK & RSCH. 49, 53, 56 (2018).

[65] CHRISTOPHER DUNN, NYCLU, STOP & FRISK DURING THE BLOOMBERG ADMINISTRATION (2002-2013), 1 (2014), https://www.nyclu.org/sites/default/files/publications/stopandfrisk_briefer_2002-2013_final.pdf .

[66] Dan Merica & Cristina Alesci, *Bloomberg Defended Stop and Frisk, Throwing Minority Kids 'Against the Walls' in 2015 Audio*, CNN (Feb. 11, 2020, 2:47 PM), https://www.cnn.com/2020/02/11/politics/bloomberg-stop-and-frisk-comments/index.html. Former New York City Mayor Michael Bloomberg stated,

> [W]e put all the cops in the minority neighborhoods. Yes, that is true. Why did we do it? Because that's where all the crime is. . . . And the way you get the guns out of the kid's hands is to throw them up against the walls and frisk them.

Id.

[67] *See* DUNN, *supra* note 65, at 1.

[68] KASRAVI ET AL., *supra* note 64, at 13.

[69] *See* DUNN, *supra* note 65, at 4.

[70] KASRAVI ET AL., *supra* note 64, at 13.

[71] *Id.* at 13, 14.

[72] *Id.* at 3, 4.

Unit, which focused on taking illegal guns off the streets, approached a young Black man, Amadou Diallo, in a "high crime" area and, mistaking his wallet for an illegal gun, fired forty-one shots, killing him.[73] Unfortunately, this story is not unique with "police use of force [now] among the leading causes of death" for young men of color.[74] Policing policies aimed at taking illegal guns off the streets often lead to aggressive tactics with little legitimate oversight.[75]

Today, while some of the most problematic stop and frisk policing schemes have ended, stops and searches stemming from suspicion of illegal gun possession remain a prominent aspect of policing throughout the country.[76] As crime rates have again started to rise[77] and murder rates in major cities continue to climb,[78] tough on crime rhetoric has seen a revival, with some calling for a return to stop and frisk practices.[79] The

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[73] Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man is Killed*, N.Y. TIMES (Feb. 5, 1999), https://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html.

[74] Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex,* 116 PNAS 16793, 16793 (2019).

[75] Baltimore's Gun Trace Task Force serves as one such example of a policing strategy centered on investigating violent felonies involving illegal firearms that led to abusive tactics, corruption, and in this extreme example, prosecution of individual officers and millions of dollars in settlements by the city. *See* MICHAEL R. BROMWICH ET AL., STEPTOE, *Anatomy of the Gun Trace Task Force Scandal: Its Origins, Causes, and Consequences* (2022).

[76] *See* Floyd v. City of N.Y., 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (holding that New York City's stop and frisk policy violated the Fourth Amendment).

[77] Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CTR. FOR JUST. (July 12, 2022), https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime.

[78] *Id.* ("[T]he murder rate . . . rose sharply, by nearly 30 percent. . . . More than 75 percent of murders in 2020 were committed with a firearm.").

[79] *E.g.*, Daniel Gallington: *How Do We Get Guns Off Our Streets? With a Tightly Controlled 'Stop-and-Frisk' Program*, CHI. TRIB. (Oct. 11, 2022, 1:58 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-chicago-shootings-stop-and-frisk-20221011-xigpl7zksneyphyc7kewix4wwi-story.html; Jasmine Garsd, *New Yorkers Want Gun Violence to End. A Controversial Police Unit Returns to Help*, NPR (Jan. 22, 2022, 6:00 AM), https://www.npr.org/2022/01/20/1074425809/new-york-return-plain-clothes-police-unit#:~:text=Jasmine%20Garsd-,New%20Yorkers%20want%20gun%20violence%20to%20end.,police%20unit%20returns%20to%20help&text=Seth%20Wenig%2FAP-,New%20York%20City%20Mayor%20Eric%20Adams%20says%20he%20is%20bringing,excessive%20force%20and%20racial%20profiling; and Lauren Mayk & Rudy Chinchilla, *Philly Council President Floats Using Stop and Frisk to Fight Gun Violence*, NBC PHILA.,

changes in how firearms are regulated, and the assumptions that officers can make as a result, will significantly shape the constitutionality of these practices in the future.[80]

C. Firearms and Mass Incarceration

Just as politicians in the late Twentieth Century pushed for stronger police presence to curb illegal firearm use, they also responded to a newfound national appetite for harsher punishment for those convicted, leading to a 400% increase in the incarceration rate between 1970 and 2000.[81] Firearms regulation served to fuel mass incarceration in two core ways: as a pretext for more invasive police investigation, and as an offense itself featuring increasingly more severe penalties.

As discussed in the previous section, firearms regulations have emboldened militant police forces in cities throughout the country to more frequently conduct stops and searches based off vague indications of firearm possession.[82] While the subsequent stop and frisk will not always bear the intended fruit, they may still reveal evidence of other possession related crimes, namely drug possession.[83] In this way, increased searches of residents of "high crime areas," most densely populated with young poor men of color, have allowed possession offenses "to bootstrap themselves, each giving the other a helping hand."[84] This possession-policing model has been one of the largest drivers of mass incarceration, with drug offenses representing the leading source of arrest.[85] As a result, one in five incarcerated people are currently convicted for a drug offense and police still make over one million possession based arrests each year.[86]

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https://www.nbcphiladelphia.com/news/local/philly-council-president-floats-using-stop-and-frisk-to-fight-gun-violence/3292244/ (July 7, 2022, 10:23 PM).

[80] *See infra* Part IV.A.

[81] Jacob Kang-Brown et al., *The New Dynamics of Mass Incarceration,* VERA INST. OF JUST., 8 (2018), https://www.vera.org/downloads/publications/the-new-dynamics-of-mass-incarceration-report.pdf.

[82] *See* Dubber, *supra* note 60, at 858 ("Police officers have become experts in detecting 'bulges' in various articles of clothing, each of which signal an item that may be illegally possessed.").

[83] *Id.*

[84] *Id.*

[85] *Drug War Statistics*, DRUG POL'Y ALL., https://drugpolicy.org/issues/drug-war-statistics (last visited Feb. 13, 2023).

[86] Press Release, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html.

Illegal firearm possession and gun-related offenses have also seen increasingly harsh penalties. Federally, firearm offenses were not covered by mandatory minimums until the Armed Career Criminal Act of 1984,[87] which applied a fifteen year penalty for offenders with three of more convictions for certain drug or violent crime offenses.[88] Similarly, 18 U.S.C. § 924(c) created mandatory minimums for possessing or using a firearm in furtherance of drug trafficking or a crime of violence.[89] Representatives from across the political spectrum joined this wave of incarceration-based policy[90] culminating in the passage of the Violent Crime Control and Law Enforcement Act of 1994.[91] This bill not only included limited firearms regulation for assault weapons,[92] but enacted mandatory minimums and fueled the prison industrial complex.[93] According to the most recent report on federal gun mandatory minimum penalties issued by the US Sentencing Commission, 14.9% of all federal inmates are convicted of an offense carrying a firearms mandatory minimum.[94] These mandatory minimum penalties have disproportionately affected Black offenders[95] and carry longer sentences than those for other crimes with mandatory minimum penalties.[96]

As in all incarceration related issues, the largest impact of firearms on mass incarceration comes at the state level.[97] Similar to federal convictions, firearms regulations impact incarcerable outcomes as a possession-based offense, as an enhancement for certain other offenses, and as the result of three-strike or habitual offender laws, which lead to

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87 18 U.S.C. § 924(e) (2022).

88 CHARLES DOYLE, CONG. RSCH. SERV., R41449, ARMED CAREER CRIMINAL ACT (18 U.S.C. § 924(E)): AN OVERVIEW 1 (2022).

89 18 U.S.C. § 924(c) (2022).

90 *See* Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice.

91 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-122, 108 Stat. 1796 (1994). The bill is more often referred to as the "1994 Crime Bill" or the "Omnibus Crime Bill." *See* Eisen, *supra* note 90.

92 *See supra* Part I.A.

93 *See* Eisen, *supra* note 90.

94 U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARM OFFENSES IN THE FED. CRIM. JUST. SYS., 4 (2018).

95 *Id.* at 6 ("Black offenders accounted for 52.6[%] of offenders convicted under section 924(c) . . . Black offenders also generally received longer average sentences for firearms offenses carrying a mandatory minimum penalty than any other racial group.").

96 *Id.* at 62.

97 *See* Press Release, *supra* note 86. State prisons and local jails account for more than 1.5 million of the almost 2 million people incarcerated in United States, compared to Federal prisons which hold only 208,000 people. *Id.*

longer and more severe punishments.[98] The legal criteria for what qualifies as an unlawful firearm possession and the subsequent sanctions for convicted offenders differs by state and the data on sentencing outcomes from firearm offenses is somewhat limited.[99] However, a survey of state and urban community-level sentencing data from 2009 indicates that at least half of those convicted for a felony weapon offense are sentenced to prison.[100]

Significantly, Black individuals are disproportionately represented in both arrests and convictions for these firearm offenses, making up "42% of all people arrested for weapon offenses in the United States" in 2019.[101] State and local officials have used weapons offenses as a proxy for violent crime and frequently passed legislation to that effect, which increases felony penalties for firearm possession.[102] While prison admissions for non-weapon offenses fell twenty-one percent in the five year period between 2014 and 2019, "admissions to prison for these weapons offenses" actually increased in the same period and featured an even higher level of racial disparity than arrests.[103] This trend towards increased incarceration for weapons related offenses was most stark in liberal states like California, New York, and Illinois, which more than doubled the national rate of prison admissions for firearms possession.[104]

II. SECOND AMENDMENT JURISPRUDENCE IN THE COURTS

The Second Amendment provides that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[105] Despite the brevity of the Amendment itself, it has generated a growing amount of political

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98 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. (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/.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* ("Black individuals accounted for the *majority* (55%) of those admitted to prison for weapon offenses in 2019, but Blacks accounted for only 32% of prison admissions for all other offenses.").

104 *Id.* ("[T]he three states . . . accounted for almost one-third (32%) of all prison admissions for weapon offenses in the United States in 2018-2019, but only 22% of the total U.S. population.").

105 U.S. CONST. amend. II.

controversy over the decades and accompanying litigation in the courts.[106] This section will begin by looking at the relative lack of jurisprudence around guns and their regulation before the conservative movement away from a collective theory, it will then summarize the Supreme Court's landmark decision in *District of Columbia v. Heller,*[107] establishing the Second Amendment as an individual right, and conclude by analyzing how federal courts applied *Heller* in the years proceeding *Bruen*.

A. Pre-Heller

For most of early American history the Supreme Court did not substantively address the Second Amendment, and those cases that did often only mentioned it in passing.[108] After the Civil War, the Court heard several cases that, "established for a time that the Amendment was a bar only to federal government action."[109] In 1875, the Supreme Court ruled in *United States v. Cruikshank*,[110] that the Second Amendment merely prevented the federal government from taking action, but had no effect on the actions of private citizens.[111] In the late Nineteenth Century in *Presser v. Illinois*[112] and *Miller v. Texas*,[113] the Court reiterated that the Second Amendment only limits the federal government, and thus has no bearing on actions by individual states.[114]

Supreme Court jurisprudence on the Second Amendment remained sporadic moving into the Twentieth Century until 1939 when the Court heard a challenge to the National Firearms Act, in *United*

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[106] *See* Harmon, *supra* note 1.

[107] 554 U.S. 570 (2008).

[108] *See,* Houston v. Moore, 18 U.S. 1, 52 (1820) (Story, J., dissenting) ("If, therefore, the present case turned upon the question, whether a State might organize, arm, and discipline its own militia in the absence of or subordinate to, the regulations of Congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority.") *See also,* Dredd Scott v. Sandford, 60 U.S. 393, 417 (1857) (holding that affording Black Americans citizenship status would include the right, "to keep and carry arms wherever they went.").

[109] *Amdt2.3 Early Second Amendment Jurisprudence*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt2-3/ALDE_00013263/#ALDF_00021616 (last visited Jan. 30, 2023) [hereinafter Constitution Annotated].

[110] 92 U.S. 542 (1875).

[111] *Id.* at 553.

[112] 116 U.S. 252 (1886).

[113] 153 U.S. 535 (1894).

[114] *Id.* at 538; *Presser*, 116 U.S. at 264-65.

States v. Miller.[115] *Miller* marked the first time the Court explicitly evaluated the right to bear arms in conflict with federal firearms legislation, although its implications were far from clear.[116] Justice McReynolds, writing for a unanimous court, concluded possession of a sawed off shotgun was not protected by the Second Amendment.[117]

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[118]

While the opinion lacked any clarity on the scope of the Second Amendment, scholars largely interpreted the opinion to mean that the Second Amendment protects weapons reasonably related to militia service.[119]

Following *Miller*, the Court largely failed to clarify the scope and application of the Second Amendment, constraining any further thoughts to dicta.[120] This created a debate among academics and in the lower federal courts, about whether the Second Amendment protects an individual right to bear arms or a collective right of the states to maintain a militia.[121] In the years proceeding *Heller*, the majority of circuit courts endorsed the collective rights view of the Amendment,[122] with only the Fifth Circuit in *United States v. Emerson*,[123] finding an individual right.[124] The United States Court of Appeals for the District of Columbia would become the second federal appellate court to support the

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[115] 307 U.S. 174 (1939). *Miller* originated in the Western District of Arkansas and involved the transport of a sawed-off shotgun in interstate commerce from Claremore, Oklahoma to Siloam Springs, Arkansas, which was not registered in violation of the National Firearms Act. *Id.* at 175.

[116] Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & Liberty 48, 49 (2008) ("Second Amendment scholars have largely ignored *Miller*. While individual and collective right theorists alike claim *Miller* supports their position, most provide only a perfunctory account of the case. . . . All conclude *Miller* is an impenetrable mess.").

[117] *Miller*, 307 U.S. at 178.

[118] *Id.*

[119] Frye, *supra* note 116, at 75.

[120] Constitution Annotated*, supra* note 109.

[121] SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 1 (2019).

[122] *Id.*

[123] 270 F.3d 203 (5th Cir. 2001).

[124] *Id.* at 260.

individual rights theory of the Second Amendment in *Parker v. District of Columbia,* [125] a case that would eventually make it to the Supreme Court.[126]

B. Heller

In the years leading up to *Heller,* Washington D.C. had amassed a series of overlapping regulations that created a near total ban on handgun possession anywhere in the city.[127] In 2003, Dick Heller and five other individuals sued the District over these restrictive laws and "[a]s the case made its way through the courts, Heller became the sole plaintiff."[128] Backed by the libertarian CATO Institute, the lawsuit was the culmination of decades of lobbying by the NRA and other gun-rights groups to allow an increasingly more conservative Supreme Court to redefine the scope of *Miller* and declare an individual right to bear arms.[129]

The district court which initially heard the case rejected the plaintiff's assertion that the Second Amendment provided an individual right to bear arms and dismissed the lawsuit for failing to state a claim for relief under the Second Amendment given the majority of circuit courts read *Miller* to provide only a collective right.[130] On appeal the court ruled that this ban was not a reasonable restriction of the right to bear arms and found the regulation unconstitutional,[131] overruling the district court.[132] The Supreme Court granted certiorari, and in a 5-4 decision, authored by Justice Scalia, affirmed the appellate court's decision, holding that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[133]

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[125] 478 F.3d 370, 395 (D.C. Cir. 2007).

[126] PECK, *supra* note 121, at 4-5; District of Columbia v. Heller, 554 U.S. 570 (2008).

[127] Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1553 (2009).

[128] Scott Neuman, *The 'Gun Dude' and a Supreme Court Case That Changed Who Can Own Firearms in the U.S.,* NPR (Aug. 14, 2022, 9:00 AM), https://www.npr.org/2022/08/14/1113705501/second-amendment-supreme-court-dick-heller-gun-rights.

[129] *Id.*

[130] PECK, *supra* note 121, at 3-4.

[131] *Parker v. District of Columbia*, 478 F.3d 370, 399-401 (D.C. Cir. 2007).

[132] PECK, *supra* note 121, at 3-4.

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

To reach this conclusion Justice Scalia conducted an in-depth analysis of the text of the Second Amendment by evaluating the original meaning of the Amendment's prefatory and operative clauses.[134] The majority concluded that because "the right of the people" in the operative clause created an individual right and the phrase "to keep and bear Arms" had non-military connotations, the Second Amendment is not limited to military purposes.[135] Scalia went on to hold that the prefatory clause merely explains why the right is enshrined in the Constitution, but does not constrain its reach.[136] The Court underscored that this decision was not in conflict with *Miller,* because *Miller* simply established that certain weapons were not eligible for Second Amendment protection and nothing more.[137] However, the Court did conclude that *Miller* did not extend Second Amendment protections to, "those weapons not typically possessed by law-abiding citizens for lawful purposes[.]"[138] The majority was reluctant to explicitly define the scope of the Second Amendment, saying only that "the right secured by the Second Amendment is not unlimited."[139]

Dissents by both Justice Stevens and Justice Breyer were noteworthy in that they mirrored Scalia's originalist analysis, even if they came to different conclusions.[140] Justice Stevens' dissent adopted a collective rights interpretation of the Second Amendment, arguing that the operative clause indicated an exclusively military purpose.[141] Justice Breyer agreed with Stevens's conclusion of a collective right, but argued that D.C.'s handgun regulations were constitutional under an individual rights theory as well.[142] Breyer suggested a balancing test to determine if a regulation impermissibly burdens interests protected by the

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134 PECK, *supra* note 121, at 5-6.

135 Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1348 (2009).

136 *Id.*

137 *Heller*, 554 U.S. at 622-23 ("It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment.").

138 *Id.* at 625.

139 *Id*. at 626. However, the Court did clarify that regulations prohibiting possession of forearms by certain classes of people, such as the mentally ill or felons, and laws outlawing firearm possession in "sensitive spaces" should not be disturbed by this opinion. *Id.* at 626-27.

140 Winkler, *supra* note 127, at 1558 ("*Heller* was characterized as a triumph of originalism in part because even the dissenters adopt this approach in arguing that the Second Amendment was restricted to the militia.").

141 PECK, *supra* note 121, at 8.

142 *Id.* at 9.

Second Amendment in furthering a government's public safety concerns.[143]

C. Post-Heller

Two years after *Heller*, the Court decided *McDonald v. City of Chicago*[144] and held that the Second Amendment is fully applicable to the states.[145] A four Justice plurality opinion authored by Justice Alito held that under the Due Process Clause of the Fourteenth Amendment the right to bear arms was fundamental to our system of ordered liberty, "deeply rooted in this Nation's history and tradition."[146] Justice Thomas, in a concurring opinion, agreed that the Second Amendment should be applied to the states, but under the Privileges or Immunities Clause of the Fourteenth Amendment.[147] In dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, responded that nothing in the text and history of the Amendment made the right to bear arms fundamental to the nation's history and traditions.[148] In a separate dissent, Justice Stevens argued that under a federalist analysis the Second Amendment should not be enforceable against the states because the Amendment is "directed at preserving the autonomy of the sovereign States[.]"[149]

Following the Court's landmark decisions in *Heller* and *McDonald*, the circuit courts were left to apply a new rule in the absence of the Supreme Court providing an explicit test.[150] To determine if a law is constitutional post-*Heller*, most circuit courts applied a two-step analysis.[151] First, courts must evaluate if the challenged restriction "burdens

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143 *Heller*, 554 U.S. at 693 (Breyer, J., dissenting).

144 561 U.S. 742 (2010). The case was brought by Otis McDonald, and other residents from Chicago and nearby suburbs, who were prohibited under Chicago law from possessing handguns due to restrictive registration and possession codes. They argued that under *Heller* these ordinances violated the Second and Fourteenth Amendments. *Id.* at 750-52.

145 *Id.* at 750 ("[W]e hold that the Second Amendment is fully applicable to the States.").

146 PECK, *supra* note 121, at 11 (quoting *McDonald*, 561 U.S. at 767-68).

147 *McDonald*, 561 U.S. at 806 (Thomas, J., concurring) ("Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

148 PECK, *supra* note 121, at 11 (quoting *McDonald*, 561 U.S. at 913 (Breyer, J., dissenting)).

149 *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting).

150 In *McDonald*, the Court more clearly stated *Heller*'s central holding, "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *Id.* at 780 (majority opinion).

151 *See* New York State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015).

conduct protected by the Second Amendment."[152] The analysis ended there if a court determined that the regulation did not implicate conduct protected by the Second Amendment.[153] To determine if the challenged restriction implicates the Second Amendment, courts generally looked to the original meaning of the right as determined by the text and history.[154] However, if the Second Amendment was implicated the second prong of the analysis required some form of means-end scrutiny to determine if the regulation advanced a sufficient public interest.[155]

While *Heller* failed to include any explicit standard of scrutiny for firearms regulations generally, the majority opinion did explicitly announce that certain "longstanding prohibitions"[156] would inexplicably not be affected by *Heller*'s ruling.[157] The result of this aside was a category of prohibitions that lower courts could easily affirm, despite legal commentary skeptical of the undergirding reasoning.[158] In *Caetano v. Massachusetts*,[159] one of the only Second Amendment cases directly implicating the *Heller* decision, the Court did little to substantively define the scope of the rule.[160] In a per curiam opinion, the Court overturned the Supreme Court of Massachusetts, which ruled that a stun gun was not protected under *Heller* because it was not in common use at the time of the Second Amendment's enactment, holding this logic "inconsistent with *Heller*."[161] Notwithstanding this brief aside, the Court has left *Heller* largely unchanged before granting cert in *Bruen*.[162]

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[152] *Id.*

[153] *Id.*

[154] PECK, *supra* note 121, at 13.

[155] *Cuomo*, 804 F.3d at 254. Courts varied on how to determine what level of scrutiny (strict, intermediate, rational basis, etc.) often looking to other Amendments referenced in *Heller* as a benchmark for the appropriate level of scrutiny in a specific case. PECK, *supra* note 121, at 15-17.

[156] District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

[157] Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009).

[158] *Id.*

[159] 577 U.S. 411 (2016) (challenging a Massachusetts law prohibiting the possession of stun guns).

[160] PECK, *supra* note 121, at 2.

[161] *Caetano,* 577 U.S. at 412.

[162] The Supreme Court initially granted cert in 2019 to *New York State Rifle & Pistol Association, Inc. v. City of New York*, but the state of New York and New York City each amended the relevant rules rendering the petitioner's claim for declaratory and injunctive relief moot. 140 S. Ct. 1525, 1526-27 (2020).

III. *BRUEN* AND THE NEW SECOND AMENDMENT

In 2022, the same conservative movement that successfully rebuilt the judiciary leading up to *Heller*,[163] created an opportunity to present a new case to a six-justice conservative majority, many of which it had handpicked for an occasion like this, that would upend a hundred-year-old firearm licensing law.[164] This section will summarize the Court's decision in *Bruen* and evaluate its effect on modern firearm regulations.

A. New York State Rifle & Pistol Association, Inc. v. Bruen

The law at the center of the dispute concerns a 108-year-old law, originally enacted in 1911, which prohibited public carrying of a handgun in New York without a license.[165] The "proper cause" requirement under this scheme required applicants for a license who wanted to carry a concealed firearm outside of the home, "demonstrate a special need for self-protection distinguishable from that of the general community."[166] The plaintiffs in *Bruen* argued that the state's denial of their applications for concealed-carry licenses for the purpose of self-defense violated the Second Amendment.[167] The district court initially assigned to the case granted New York's motion to dismiss the suit,[168] a decision that was later affirmed by the Second Circuit Court of Appeals.[169]

The Supreme Court granted certiorari in June 2022, and in a 6-3 decision, struck down New York's "proper cause" requirement, and

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[163] *See* Adam Liptak, *Supreme Court to Hear Case on Carrying Guns in Public*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2021/04/26/us/supreme-court-gun.html.

[164] *Id.*

[165] *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022) ("New York later amended the Sullivan Law to clarify the licensing standard: Magistrates could 'issue to [a] person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon' only if that person proved 'good moral character' and 'proper cause.'") (citations omitted).

[166] *Id.* at 2123.

[167] *Id.* at 2124-25. Robert Nash and Brandon Koch were New York residents who had applied for a license to carry a handgun but were denied for failing to show a special need for self-defense. Ariane de Vogue & Devan Cole, *Supreme Court Agrees to Take Up Major Second Amendment Case*, CNN (Apr. 26, 2021, 11:21 AM), https://www.cnn.com/2021/04/26/politics/supreme-court-second-amendment-case/index.html.

[168] *New York State Rifle & Pistol Ass'n. v. Beach*, 354 F. Supp. 3d 143, 148-49 (N.D. N.Y. 2018) ("[B]ecause the Second Circuit has expressly upheld the constitutionality of New York State Penal Law § 400.00 (2)(f), Plaintiffs' claims must fail.").

[169] *New York State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x 99, 100 (2d Cir. 2020).

explicitly rejected the two-prong test used by most lower courts to review regulations implicating the Second Amendment in the years after *Heller*.[170] In a majority opinion written by Justice Thomas, the Court created a new two prong test, first requiring the courts to look to the "plain text" of the Second Amendment to determine if the challenged regulation is covered, and second placing the burden on the government to, "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[171] Justice Thomas went on to explain that the state must find a "well-established and representative historical *analogue*, not a historical *twin*" to prove that their regulation was rooted in the nation's history of regulation.[172]

To determine if the modern firearm regulation in New York met this test the Court undertook a strenuous review of historical sources dating as far back as the Thirteenth Century.[173] They first discarded the notion that New York's law fell into the "sensitive places" cutout,[174] before establishing that the plain text of the Second Amendment clearly includes public carriage for the purpose of self-defense.[175] The Court then attempted to distinguish the preferred historical evidence, with an emphasis on analogues in the period directly after the ratification of the Second Amendment in 1791 to the ratification of the Fourteenth Amendment in 1868.[176] Having failed to find an appropriate historical comparison, the Court concluded that the government failed to meet its burden and the law was unconstitutional.[177]

In a concurring opinion, Justice Alito declared that the decision does not decide, "who may lawfully possess a firearm or the requirements that must be met to buy a gun…[or] the kinds of weapons that

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170 *Bruen*, 142 S. Ct. at 2125-26.

171 *Id.* at 2126.

172 *Id.* at 2133.

173 *Id.* at 2135-56.

174 *Id*. at 2133-34 ("[T]he historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited–*e.g.*, legislative assemblies, polling places, and courthouses[.]").

175 *Id.* at 2134-35 ("The Second Amendment's plain text thus presumptively guarantees petitioners Kock and Nash a right to 'bear' arms in public for self-defense.").

176 *Id.* at 2136 ("Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years.").

177 *Id.* at 2138. The Court acknowledged that some limited cases in Texas, and a statute, supported New York's position, but determined that the Court would "not give disproportionate weight to a single state statute and a pair of state-court decisions." *Id.* at 2153. Similarly, the uncovering of Nineteenth Century statutes was deemed unconvincing. *Id.* at 2154 ("[T]he bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.").

people may possess."[178] Similarly, a concurrence authored by Justice Kavanaugh and joined by Chief Justice Roberts, underscored that the majority decision did not outlaw licensing requirements as a concept and did not disturb prior precedent prohibiting the possession of firearms by certain dangerous classes of people or the carrying of "dangerous and unusual" weapons.[179] Justice Barrett also filed a separate concurrence noting methodological standards the Court had yet to resolve.[180] The dissent, authored by Justice Breyer and joined by Justices Sotomayor and Kagan, began by citing statistics on gun-related killings in recent years to argue that the majority burdens the ability of states to solve the problem of gun violence through limiting, "who may purchase, carry, or use firearms of different kinds."[181] In addition, Justice Breyer argued that New York should have had an opportunity to develop an evidentiary record to show a compelling interest before the Court made a decision.[182]

B. Second Amendment Regulation in Flux

While *Bruen* was a New York case, the law at the heart of the issue closely resembles regulatory schemes in a number of different states, including California, Hawaii, Maryland, Massachusetts, Washington, D.C., and New Jersey.[183] In the months after *Bruen*, states and municipalities across the country revised their laws to comport with the new standard.[184] For example, in California, days after the *Bruen* ruling, the Attorney General circulated a memorandum that the state's "good cause" standard for concealed carry permits was unconstitutional, and ordered law enforcement agencies to discard that requirement and inquire only on the remaining components of the regulation.[185] Similarly,

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178 *Id.* at 2157 (Alito, J., concurring).

179 *Id.* at 2161-62 (Kavanaugh, J., concurring) (citations omitted).

180 *Id.* at 2162-63 (Barrett, J., concurring).

181 *Id.* at 2163 (Breyer, J., dissenting).

182 *Id.* at 2172.

183 Amy Howe, *In Major Second Amendment Case, Court will Review Limits on Carrying a Concealed Gun in Public*, SCOTUSBLOG (Oct. 27, 2021, 10:51 AM), https://www.scotusblog.com/2021/10/in-major-second-amendment-case-court-will-review-limits-on-carrying-a-concealed-gun-in-public/.

184 Jennifer Mascia, *Tracking the Effects of the Supreme Court's Gun Ruling,* THE TRACE, https://www.thetrace.org/2022/08/nysrpa-v-bruen-challenge-gun-regulations/ (Oct. 14, 2022).

185 CAL. DEP'T OF JUST., OFF. OF THE ATT'Y GEN, LEGAL ALERT No. OAG-2022-02, U.S. SUPREME COURT'S DEICISION IN *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*, NO. 20-843 at 2 (June 24, 2022), https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf. The order from the Attorney General specifically provided

in the weeks following *Bruen*, officials in Maryland, New Jersey, and Massachusetts issued guidance dismantling their own "may issue" regulations and in some cases quickly retooling legislation to reflect the more permissive "shall issue" alternative.[186] These hasty revisions are likely to invite further litigation to determine if they adhere to the spirit of the new ruling as opposed to mere artificial appeasements.[187]

In jurisdictions across the country courts are now ordering parties to supplement their briefs in light of *Bruen* and re-argue cases on a wide variety of Second Amendment issues.[188] Additionally, new litigation has started as interest groups and gun rights activists seek to clarify the scope of *Bruen* and apply it to existing restrictions.[189] These new challenges feature a wide variety of popular regulations, ranging from assault rifle bans and magazine capacity restrictions to location-based bans on public carry in city transit systems.[190] In the years after *Heller*, "about 90 percent of gun regulations that faced challenges ha[d] been upheld," but this new test is unlikely to similarly favor that status quo.[191]

With this uncertainty, there are already indications of inconsistency among the lower courts as they parse the appropriate application of a "strictly historical" test.[192] District courts have attempted to evaluate the first step outlined in *Bruen,* but in at least one case have incorrectly shifted the burden to prove that a weapon is covered by the plain text of the Second Amendment to the defense.[193] Similarly, when applying the first step Courts have struggled to determine who qualified

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that issuing authorities may continue to require proof of other requirements, including "good moral character" and suggested agents conduct thorough investigations into social media histories, references, and interviews. *Id.* at 1, 3. However, impending litigation, in light of *Bruen,* is likely to challenge these onerous requirements.

186 Mascia, *supra* note 184.

187 *See* Chip Brownlee, *The Real Significance of the Supreme Court's Gun Decision*, THE TRACE (July 19, 2022), https://www.thetrace.org/2022/07/the-real-significance-of-the-supreme-courts-gun-decision/.

188 *See e.g.,* Rhode v. Bonta, No. 20-55437, 2022 U.S. App. LEXIS 32554 (9th Cir. Nov. 17, 2022) (remanding a case restricting the purchase of ammunition for reconsideration in light of *Bruen*); Bianchi v. Frosh, 142 S. Ct. 2898 (2022) (remanded to the Maryland district court for reconsideration of an assault weapons ban).

189 *See* Mascia*, supra* note 184.

190 *Id.*

191 Brownlee, *supra* note 187. For a comprehensive review of more than one thousand Second Amendment challenges post-*Heller* and how they fared, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L. J. 1433 (2018).

192 Jake Charles, *Worrying Trends in the Lower Courts After* Bruen, DUKE CTR. FOR FIREARMS L. (Sept. 30, 2022), https://firearmslaw.duke.edu/2022/09/worrying-trends-in-the-lower-courts-after-bruen/ [hereinafter Jake Charles].

193 *Id.*

as "the people" protected by the amendment and how to decode the Court's "sensitive places" language.[194] There have also been early discrepancies with part two of the *Bruen* test, as the lower courts were left with little guidance on how to determine the geographic and temporal scope of the historical tradition component of the test.[195] These recent rulings indicate that given the pliability of a test based in historic analogues, lower courts are likely to issue inconsistent rulings that function more as a reflection of an individual judge's personal politics then a bright line rule with predictable outcomes.[196]

IV. DECRIMINALIZATION POST-*BRUEN*

Many of the legal challenges stemming from *Bruen* have come from conservative groups seeking to expand their Second Amendment rights to firearm possession and public carry.[197] However, the Second Amendment right to bear arms is not the only right implicated by the decision.[198] This section will explore the implications of *Bruen*, by evaluating the Fourth Amendment consequences for police tactics, the potential for downstream decarceral outcomes, and the policy alternatives to address the very real problems surrounding gun violence moving forward.

A. Policing Post-Bruen

Bruen creates a potential conflict between the Fourth and Second Amendments. The Supreme Court's decision in *Terry v. Ohio* requires an officer conducting a stop have reasonable suspicion that a crime is taking place and that the suspect is armed and dangerous.[199] As a result, when officers conduct stops, one of the most often listed suspected crimes is "weapons possession," with suspicions bulges in a

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194 *Id.*

195 *Id. See also* Firearms Policy Coal., Inc. v. McCraw, No. 4:21-cv-1245-P, 2022 U.S. Dist. LEXIS 152834 (N.D. Tex. Aug. 25, 2022) (striking a Texas law prohibiting handgun carrying by those eighteen to twenty years old because similar age restrictions were not part of the nation's historical tradition because the historical analogues in more than twenty states were not sufficiently widespread), *contra*, Nat'l Ass'n for Gun Rights, Inc. v. City of San Jose, No. 22-cv-00501-BLF, 2022 U.S. Dist. LEXIS 138385 (N.D. Cal. Aug. 3, 2022) (denying a motion for preliminary injunction of a California requirement for firearms liability insurance based on an analogue to a "relevantly similar" historical analogue without addressing how widespread the practice was).

196 Jake Charles, *supra* note 192.

197 *See supra* Part III.B.

198 *See supra* Part I.B.

199 392 U.S. 1, 20-22 (1968).

suspect's jacket or waistband making consistent appearances in police reports.[200] These stops, while not always leading to arrests for illegal gun possession, can uncover evidence of other crimes and have concerning consequences for high crime communities.[201] However, *Bruen* puts this heavily used policing technique in jeopardy.

In previous years, stop and frisk style searches based on suspicion of possession of a concealed handgun were largely upheld by lower courts as a reasonable indication that the suspect was committing a crime.[202] The key component in the legal analysis relied on the notion that reasonable articulable suspicion is not an exact science and the analysis is not concerned with "hard certainties, but with probabilities."[203] In cities and states with strict gun regulations, where concealed carry permits are exceedingly rare, officers were arguably justified in assuming that a member of the public carrying a concealed weapon was doing so illegally.[204] However, by abandoning "may issue" gun regulations, *Bruen* has already opened up concealed carry licenses to a much wider base of potential applicants.[205] As a result, it can no longer be presumed that because an individual may be carrying a concealed handgun that they are more likely than not committing a crime.[206] The Fourth Amendment requires more than a mere "inarticula[ble] hunch" to condone invasive police action[207] and in a post-*Bruen* world officers will struggle to find any articulable facts to distinguish between potentially licensed and unlicensed carriers.[208]

This Fourth Amendment predicament could drastically impact how police conduct themselves, especially in high crime communities.[209] For years law enforcement have treated "high crime" areas with heavy-handed oppressive tactics, often with the overt goal of getting guns off the streets.[210] However, this has resulted in an unequal allotment of who receives the protections of the Second Amendment and a public perception of what the country considers a law-abiding gun

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200 Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 15 (2015) ("[I]n the hundreds of thousands of stop-and-frisks documented by the NYPD, officers most often list 'weapons possession' as the suspected crime.").

201 *See supra* Part I.B.

202 Bellin, *supra* note 200, at 25.

203 *Id.* at 28 (citation omitted).

204 *See, e.g.*, United States v. Lewis, 674 F.3d 1298, 1304-05 (11th Cir. 2012).

205 *See supra* Part III.B.

206 Bellin, *supra* note 200, at 26.

207 Terry v. Ohio, 392 U.S. 1, 22 (1968).

208 Bellin, *supra* note 200, at 43.

209 *See infra* Part IV C.

210 *See supra* Part I.B.

owner.[211] The Supreme Court itself, in oral arguments and in the *Bruen* opinion, trafficked in many of these same harmful tropes, touting the needs of the "ordinary, law-abiding citizen" who wants protection on his commute home from illegally armed criminals.[212] A move away from corrosive policing tactics forced by *Bruen*'s downstream conflicts will hopefully force policy makers to move away from ineffective broken windows policing towards policies that achieve gun safety without, "creat[ing] more victims in the process."[213]

B. Potential Decarceral Effects

The policing implications from *Bruen* could potentially have significant decarceral effects as well. At present this decision has already allowed defense attorneys access to new strategies and provided an avenue to challenge criminal statutes, albeit with underwhelming results.[214] As previously discussed, firearms have made contributions to mass incarceration largely due to accompanying offenses and statutory firearm penalties.[215] However, any reduction in mass incarceration stemming from accompanying offenses would be most notable in cases resulting from the very police tactics this paper argues *Bruen* could help to dismantle.[216] Additionally, this would have a significant impact on the amount of time people are spending incarcerated, as many of the firearm and related drug offenses carry steep mandatory minimum penalties.[217]

While on its face *Bruen* did not directly implicate sentencing, increasing the pool of citizens eligible for a license would consequently reduce the criminal sanctions associated with unlicensed gun ownership. As an example, in New York, anyone who did not qualify for a license charged with possession of a firearm was vulnerable to a

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[211] *See* Mitchell, Jr., *supra* note 4 ("Guns in the hands of Black and brown people are seen as a threat to public safety, while in the hands of white gun owners they are viewed as an essential means of self-defense[.]").

[212] *Id.* New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[213] *See* Mitchell, Jr., *supra* note 4.

[214] George Joseph, *City Defense Attorneys Use Supreme Court Gun Decision to Challenge Possession Charges*, THE CITY (July 26, 2022, 5:52 PM), https://www.thecity.nyc/2022/7/26/23279790/city-defense-attorneys-use-supreme-court-gun-decision-to-challenge-possession-charges.

[215] *See supra* Part I.C.

[216] *See supra* Part IV.A.

[217] *See supra* Part I.C.

"'violent felony,' punishable by 3.5 to 15 years in prison."[218] This second-degree charge of criminal possession of a weapon indiscriminately incarcerates regardless of an offender's actual intent, with possession alone working as "presumptive evidence of intent to use the same unlawfully against another" leading to charges of a violent felony in cases regardless of the circumstances.[219] The strongest defense against charges like these and the significant carceral consequences that accompany them, is licensure which was previously restricted to the select few that the New York Police Department determined had the requisite moral character and good cause.[220] Should New York institute a "shall issue" regime, which the court has signaled meets their new test, it could result in substantially fewer prosecutions for "violent" firearm possession.[221]

The true extent of *Bruen*'s decarceral effects will largely depend on issues implicated by *Bruen* that have yet to be litigated, such as the constitutionality of felon in possession laws, and the licensure requirements states choose to include.[222] Nevertheless, it is impossible to ignore the racial implications of a penal system potentially less focused on firearm possession, a charge where Black offenders are astronomically overrepresented.[223] Similarly, any reduction in stop and frisk policing may have consequences beyond gun convictions, as low level drug offenses and other possession-based crimes will no longer be able to bootstrap themselves to investigations of suspected gun possession.[224]

C. Collateral Consequences and Policy Recommendations

Possession-policing has largely failed to control gun violence and the long sentences that accompany gun convictions have done little

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[218] *See* Black Attorneys of Legal Aid, *supra* note 5, at 4-5 (citing N.Y. Penal Law §§ 265.03; 70.02(1)(b)).

[219] *Id.* at 7-8 (citations omitted).

[220] *Id.* at 10-12.

[221] New York State Rifle & Pistol Association. v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022); Mascia, *supra* note 184.

[222] In his concurrence, Justice Kavanaugh specifically referred to background checks, firearm training, and similar requirements that may be included in the licensure process. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J. concurring). However, the disadvantaged communities that are already at most risk of incarceration from criminalization under the current licensing regime would also have more hurdles completing any time consuming or expensive requirements. *See* Mitchell, Jr., *supra* note 4.

[223] *See, e.g.*, Black Attorneys of Legal Aid, *supra* note 5, at 14. ("In 2020, while Black people made up 18% of New York's population, they accounted for 78% of the state's felony gun possession cases.").

[224] Dubber, *supra* note 60, at 858.

to deter future violent crime.[225] Even in cities with the strictest gun control measures, illegal firearms are readily accessible, and the violence associated with them is currently on the rise, especially in areas already known to have a history of gun violence.[226] With this fear of crime has come a rise in harsh penalties and tough on crime policies, but *Bruen* should force policy makers to tackle the problem of gun violence without compromising on core Constitutional rights.[227]

Bruen has made clear that guns are here to stay, but localities can still reduce violence in their communities without criminal sanctions. The reality of a wide ranging freedom to carry is that in the short run gun violence in cities with previously restrictive licensing regimes may go up.[228] However, while Justice Breyer's dissent emphasized that "the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular," it failed to note how mass incarceration and aggressive possession-based policing have similarly decimated these very same communities.[229] Without the perceived protection that came with criminalization, states should look instead to the root causes of this violence and the needs of communities most impacted when crafting their responses.[230]

States and cities have already seen success in limited programs that focus on Community Violence Intervention (CVI) or ceasefire programs which, when properly funded and implemented, can have dramatic impacts on gun violence.[231] Significantly, these community-based models go beyond merely "getting guns off the streets" to build stronger relationships between historically overpoliced communities and law

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225 *Firearm Deaths Grow, Disparities Widen*, CDC (June 6, 2022), https://www.cdc.gov/vitalsigns/firearm-deaths/index.html (last visited Feb. 13, 2023).

226 DW Rowlands & Hanna Love, *Mapping gun violence: A closer look at the intersection between place and gun homicides in four cities*, BROOKINGS (Apr. 21, 2022), https://www.brookings.edu/2022/04/21/mapping-gun-violence-a-closer-look-at-the-intersection-between-place-and-gun-homicides-in-four-cities/.

227 *Id.*

228 *See* New York State Rifle & Pistol Association, v. Bruen, 142 S. Ct. 2111, 2165 (2022) (Breyer, J. dissenting) (citing statistics that demonstrate that gun violence is on the rise). *See also*, Michael Siegel et al., *The Impact of State Firearm Laws on Homicide Rates in Suburban and Rural Areas Compared to Large Cities in the United States*, *1991-2016*, 36 J. RURAL HEALTH, 255, 262 (2020) (discussing the efficacy of various firearm restrictions on gun violence in rural and urban settings).

229 *Bruen*, 142 S. Ct. at 2165 (Breyer, J. dissenting).

230 *See* Mitchell, Jr., *supra* note 4.

231 Daniel W. Webster, *Public Health Approaches to Reducing Community Gun Violence*, 151 DAEDALUS: J. AM. ACAD. ARTS & SCI. 38, 41 (2022) ("Researchers have estimated that Oakland's Ceasefire Strategy has contributed to a citywide 31 percent drop in gun homicides and a 20 percent drop in nonfatal shootings.").

enforcement.[232] In Oakland, a city with a long history of conflict between communities of color and the police, a CVI program was able to achieve dramatic reductions in shootings while also reducing arrests, a concept that is anathema to policies seeking to incarcerate their way out of gun violence.[233]

The stop and frisk era has contributed to a profound distrust between communities of color and the police forces that are ostensibly entrusted with their protection, but a transition to CVI programs can work towards repairing that relationship by emphasizing procedural justice.[234] When bonds between communities and the police become stronger police become more effective in investigating violent crime and communities are more likely to accept the carceral sanctions that go along with that investigation as legitimate.[235]

Beyond CVI programs communities should also look towards public health-oriented approaches that do not implicate criminal sanctions.[236] Research has indicated that strategies focused on everything from improving the physical environment in communities besieged by gun violence to reducing substance abuse have shown promising results.[237] Similarly, hospital-based violence intervention programs identify survivors of gun violence and work directly with them to discourage retaliation and reduce future risks.[238] As new litigation continues to challenge any restriction on firearms, localities should take the *Bruen* decision as an opportunity to take stock in the decades of evidence on failed gun violence policy to transition towards creative community-based programs outside of the constraints of the criminal law.[239]

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[232] Mike McLively & Brittany Nieto, *Faith in Action, and Black and Brown Gun Violence Prevention Consortium. A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, 72 (2019), https://policingequity.org/images/pdfs-doc/reports/A-Case-Study-in-Hope.pdf.

[233] *Id*. at 72-73.

[234] *Procedural Justice*, YALE L. SCH.: JUST. COLLABORATORY https://law.yale.edu/justice-collaboratory/procedural-justice (last visited Feb. 12, 2023) ("Procedural justice speaks to the idea of fair processes, and how people's perception of fairness is strongly impacted by the quality of their experiences and not only the end result of these experiences.").

[235] McLively & Nieto, *supra* note 233, at 72-73.

[236] JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING CMTY. VIOLENCE, REDUCING VIOLENCE WITHOUT POLICE: A REVIEW OF RESEARCH EVIDENCE 1 (2020), https://johnjayrec.nyc/wp-content/uploads/2020/11/AV20201109_rev.pdf.

[237] *Id.* at 3.

[238] *See generally*, Carnell Cooper et al., *Hospital-Based Violence Intervention Programs Work*, 61 J. TRAUMA: INJ., INFECTION, & CRITICAL CARE 534 (2006).

[239] Mascia, *supra* note 184.

CONCLUSION

Over the past twenty-five years the Second Amendment has undergone a dramatic transformation from a narrow collective right into an individual right, limited only by the nation's history and traditions. Courts will now be forced to grapple with the ramifications of *Bruen* in both Second and Fourth Amendment contexts, which will challenge a commitment to deregulation of firearms possession when it comes into conflict with police practices the Court has historically been reluctant to constrain. This post-*Bruen* legal atmosphere will give defense attorneys an opportunity to challenge policies that have empowered discriminatory policing and consequently increased mass incarceration. More research will be needed to test the limits of an individual rights reading of the Second Amendment and challenge the legitimacy of criminal prohibitions on everything from the possession of firearms by formerly incarcerated people, to sentencing enhancements for high-capacity magazines and other augmentations.

The Supreme Court has made it clear that restricting widespread access to firearms is no longer a realistic solution to gun violence. Instead of treating the decision as a defeat, this should create room for a shift away from aggressive possession-based policing, towards non-punishment-oriented solutions to gun violence, including violence interrupters and public investments that tackle the root causes of the violence. At a time when rising crime rates are turning political rhetoric once again towards incarceration as the solution, *Bruen* may serve as an important restraint on a nation with a history of choosing punitive responses over proactive action.