The Modern Orthodoxy is a Failed Experiment: Toward a Race Sensitive, Hard Look at Firearms Policy and the Black Community

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This article extends the work on firearms and the Black community through an expanded critique of Black allegiance to the progressive gun control agenda. I have argued that this "modern orthodoxy" is at odds with the history of, and longstanding justifications for, Black distrust of the state. This article extends that argument in light of more recent developments. It contends that racially biased enforcement of contemporary gun regulations adds a new layer to the case for Black distrust of the state and further undercuts the modern orthodoxy. It further argues that the shrinking efficacy and relevance of the gun control agenda similarly undercut the modern orthodoxy. This article concludes that the modern orthodoxy is a failed experiment and should be replaced with a race-sensitive, hard-look approach to firearms policy and the Black community.

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INTRODUCTION

This Article extends the work on firearms and the Black community through an expanded critique of Black allegiance to the progressive gun control agenda. In prior work, I argued that this "modern orthodoxy" is at odds with the longstanding justifications for Black distrust of the state.[1] A trustworthy state that supplants the

1. I first used the phrase "modern orthodoxy" in 2013 to describe the conventional wisdom that guns are a scourge on the Black community. *See* Nicholas J. Johnson, *Commentary: Gun Control Policy and the Second Amendment: Lead Article: Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013) [hereinafter Johnson, *Modern Orthodoxy*]. That critique of the modern orthodoxy was the subject of ten responsive articles by various scholars in the same volume. It introduced the modern orthodoxy with two quotations that captured their times. The first was Ida B. Wells' famous declaration from 1892 that the Winchester Rifle deserves a place of honor in every Black home. The second was D.C. Representative Elenore Holmes Norton's criticism endorsing strict gun control. Wells' declaration reflects the Black Tradition of Arms that I elaborated in a subsequent book, Negroes and the Gun: The Black Tradition of Arms. *See* NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014) [hereinafter JOHNSON, NEGROES AND THE GUN]. Norton's position neatly reflects the modern orthodoxy.

The modern orthodoxy translates into broad support among Blacks for aggressive gun controls

like those recently overturned in Washington, D.C., Chicago, and New York City. *See District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that a District of Columbia ban on handgun possession, as well as an effective ban on the use of firearms for defense in the home, violated the Second Amendment right to armed self-defense); *McDonald v. Chicago*, 561 U.S. 742, 750 (2010) (holding that the Second Amendment right to keep and bear arms for the purpose self-defense is applicable to state and local governments); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (affirming that the Second Amendment protects a right to carry arms in public).

The National Association for the Advancement of Colored People (NAACP) has filed amicus briefs arguing against the constitutional right to arms in all of the Supreme Court's recent Second Amendment cases. In an amicus brief in *District of Columbia v. Heller*, the NAACP urged the Supreme Court to uphold the District's gun ban. *See* Brief of *Amicus Curiae* for NAACP Legal Defense & Educ. Fund in Support of Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157192. In the wake of the Court's ruling in *Heller*, the author of the Association's *Heller* brief argued that diminishing *Heller*—e.g., through limitations that enable isolated gun prohibition in Black enclaves—should be part of "any civil rights agenda." Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 137 (2009). The NAACP also filed amicus briefs urging the Supreme Court to uphold challenged restrictions in *McDonald v. Chicago* and *New York State Rifle & Pistol Ass'n v. Bruen*. The NAACP's brief in *McDonald* was technically in support of neither party. *See* Brief of the NAACP Legal Defense & Educ. Fund and the Nat'l Urban League as Amici Curiae in Support of Respondents, New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 4353021. The NAACP's position in *Bruen* is discussed in Part V.

The Black political class has overwhelmingly favored stringent gun regulation and gun bans. D.C. representative Eleanor Holmes Norton argued for "a bureaucracy that makes it difficult to get" guns. Gary Fields, *New Washington Gun Rules Shift Constitutional Debate*, WALL ST. J., May 17, 2010, at A1. New York Congressman Major Owens proposed an amendment to the Constitution of the United States repealing the Second Amendment to the Constitution. H.R.J. Res 438, 102d Cong. (1992). Owens also proposed a separate bill banning handguns and handgun ammunition. Public Health and Safety Act of H.R. 3132, 103d Cong. (1993).But *cf.* 139 Cong. Rec. 28533 (1993) (statement of Rep. Major Owens in support of his legislation banning handguns and handgun ammunition). In 1999, Illinois Congressman Bobby Rush advocated a handgun ban and stringent ammunition regulations. Evan Osnos, *Bobby Rush; Democrat, U.S. House of Representatives*, CHI. TRIB., Dec. 5, 1999, at C3 (quoting Rep. Bobby Rush). The Mayor of Detroit, Dennis Archer, brought suit against a number of firearm manufacturers for negligent oversupply of guns in a manner injurious to the City of Detroit. Archer v. Arms Tech., 2000 WL 35624356 (Mich. Cir. Ct. May 16, 2000). One of Gary's early Black mayors, Richard Hatcher, defended stringent regulation of firearm carry permits in *Kellogg v. City of Gary*, 562 N.E.2d 685, 688 (Ind. 1990).

The National Urban League is a sustaining member of the Coalition to Stop Gun Violence (previously the National Coalition to Ban Handguns). HARRY L. WILSON, GUNS, GUN CONTROL, AND ELECTIONS: THE POLITICS AND POLICY OF FIREARMS 145 (2007) (describing how the Coalition to Stop Gun Violence "was founded in 1974 as the National Coalition to Ban Handguns"); Coal. to Stop Gun Violence, Member Organizations, http://www.csgv.org/about-us/member-organizations. NAACP has supported tort claims against gun makers arguing that they have negligently supplied and marketed firearms that ravage poor Black communities. NAACP. v. AcuSport, Inc., 271 F. Supp. 2d 435, 446–47 (E.D.N.Y. 2003) ("The NAACP contends that . . . large numbers of handguns are available to criminals[,] . . . that their availability endangers the people of New York . . . and that defendants negligently and intentionally failed to take practicable marketing steps that would have avoided or alleviated the nuisance. . . ."). Jessie Jackson and supporters have protested legal gun sales in the suburbs of Chicago. *Rev. Jesse Jackson Arrested at Gun Shop Protest*, CBS NEWS (June 24, 2007, 12:18 AM), https://www.cbsnews.com/news/rev-jesse-jackson-arrested/ [https://perma.cc/7826-NQ2S].

Within the broader Black community support for the gun control agenda can be inferred roughly from party allegiance. The Democratic Party has been a comfortable home for advocates of gun prohibition and stringent controls. No group of voters has been more loyal to the modern Democratic Party than Blacks. Since 1964, the percentage of Blacks identifying with the Democratic Party has been

need for self-help is a core assumption of the gun control agenda that the modern orthodoxy endorses. My prior work focused on the historical case for Black distrust of the state and chronicled the corresponding Black tradition of arms.[2] That work acknowledged that the modern orthodoxy might be explained by the argument that with growing Black access to political power "things have changed" enough to warrant the sort of trust in the state that the modern orthodoxy demands.[3]

This Article expands the critique of the modern orthodoxy through an examination of contemporary gun law enforcement and the demonstrated limits of the gun control agenda. It argues that the "things have changed" argument does not hold up and that the modern orthodoxy is a failed experiment. Three themes drive the critique.

First, the case for distrust of the state is now bolstered by observations that much of modern gun regulation is infected by *racist enforcement* and open to the same types of criticisms leveled against the war on drugs and enforcement practices that fuel mass incarceration.[4]

Second, the *marginal efficacy* of various gun regulations, many of which also impose substantial racial costs, counsels skepticism of those regulations rather than the reflexive support dictated by the modern orthodoxy.

Third, the expected *payoff* of the modern orthodoxy—that gun control would thwart crime in the Black community by banning crime guns—has not materialized.

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consistently over 70%, and well over 80% of Blacks have voted for the Democratic candidate in every presidential election during that time. Brooks Jackson, *Blacks and the Democratic Party*, FACTCHECK.ORG (Apr. 18, 2008), http://www.factcheck.org/2008/04/blacks-and-the-democratic-party [https://perma.cc/ST8W-F8N9].

2. My 2014 book, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS, demonstrates that the modern orthodoxy not only demanded an unwarranted degree of trust in the state but also was at odds with the Black experience historically. *See* JOHNSON, NEGROES AND THE GUN, *supra* note 1. Negroes and the Gun demonstrated how the robust Black Tradition of Arms had been obscured by a glib narrative of non-violence in the modern civil rights movement. The themes of Negroes and the Gun are reinforced in CHARLES E. COBB JR., THIS NON-VIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2014); AKINYELE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (2013).

3. *See* Johnson, *Modern Orthodoxy*, *supra* note 1, at 1567.

4. Other inputs support a more general stance of Black distrust of the state. General distrust of government also might be fueled by the political rhetoric that says trust government as long as progressives are in charge—but if we lose, be aware that the opposition might install the next Adolf Hitler. Devan Cole, *Top House Democrats Compare Trump's Rise to Hitler's*, CNN (Mar. 20, 2019, 4:04 PM), https://www.cnn.com/2019/03/20/politics/james-clyburn-trump-hitler-comparison [https://perma.cc/U6FV-W3TG]; *One Scholar on Similarities, Substantial Differences between Trump and Hitler*, WBUR (Dec. 7, 2016), https://www.wbur.org/hereandnow/2016/12/07/trump-hitler-comparisons [https://perma.cc/B4EZ-GXHV].

Rhetoric of distrust of the state also has generated mainstream reactions that are arguably more remarkable than any views about firearms policy presented in this article. The widely credited idea of police abolition or defunding presents consequences, arguably, far more substantial than even robust Black support of the constitutional right to arms. *See NLG Resolution Supports Police Abolition,* LAPROGRESSIVE (Feb. 19, 2021). https://www.laprogressive.com/law-and-the-justice-system/nlg-resolution-supports-police-abolition [https://perma.cc/CDM5-4NGM] (discussing that the National Lawyers Guild members passed a resolution supporting police abolition).

Moreover, developments over recent decades virtually guarantee that it *will not materialize*. Crime guns are and always have been mainly handguns. The gun control agenda explicitly aimed to ban them. But recent developments have eliminated the possibility of a handgun ban. The Supreme Court has declared handguns explicitly constitutionally protected and forty-four state constitutions bolster that protection. Lawful concealed carry of handguns is a practical and constitutional norm, and Americans have embraced handguns as a core category of the 450 million guns now in circulation.

This Article positions the critique of the modern orthodoxy within the broader criticism of bias in criminal law enforcement.[5] Biased gun law enforcement is a subset of biased criminal law enforcement. But criticism of enforcement bias has been far less robust in the context of firearms regulation. This article deploys the emerging concept of *Second Amendment Frame* both to explain that disparity and to critique the modern orthodoxy.

The Second Amendment Frame blithely distills gun policy debates into blunt questions of support or opposition to guns.[6] This framing can obscure pathologies

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5. *See* Griffin Edwards & Stephen Rushin, *Police Vehicle Search and Racial Profiling: An Empirical Study*, 91 FORDHAM L. REV. 1 (2022); Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471 (2021); Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736–37 (2020); Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United States: *The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 726 (2000); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75–81 (2017); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113 (2012); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1210 (2017); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2033 (2017); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 274, 278–79; Mark Osler, *Short of the Mountaintoip: Race Neutrality, Criminal Law and the Jericho Road Ahead*, 49 U. MEM. L. REV. 77 (2018); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884, 884 n.2, 886 (2015); Jordan Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015); Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 308 (2012); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 33–34 (2011); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1033, 1044 (2002); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95 (2001); Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 597 (1999) ("The primary concern with pretext stops is that they facilitate racial profiling."); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344–54 (1998) (pretextual stops and racial profiling); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545–46 (1997).

6. Benjamin Levin, *Guns and Drugs,* 84 FORDHAM L. REV. 2173, 2220 (2016). That framing offers some insight about how the Black political class might continue to embrace the modern orthodoxy despite its glaring racial loading. The broad Second Amendment framing puts the focus on whether the community is better off with or without guns. That focus obscures (and perhaps allows one to ignore) the legal mechanics—and consequences (and, I would add, the practical viability)—of

of the criminal justice system and cause us to lose sight of the racial costs and marginal efficacy of particular gun regulations. The Second Amendment Frame presents gun regulation as a battle between progressives (including Blacks) and the Second Amendment constituency of rural, white, male conservatives. But that framing obscures the reality that the typical targets of gun law enforcement are urban people of color, not the Second Amendment constituency. The Second Amendment Frame distracts us from the fact that, in practice, the crusade against guns translates into criminal statutes enforced in racially targeted and racially biased ways.[7]

The ultimate prescription of this Article is measured. It does not predict or prescribe wholesale abandonment of Black support for gun regulation. Rather it argues that Blacks should replace the modern orthodoxy's reflexive support of gun control with a *hard-look* approach that considers the practical realities of firearms policy, the dangers of enforcement bias, the demonstrated limits of gun regulation, and the private self-defense interest of Blacks within a system that guarantees the right to keep and bear arms.

This Article proceeds in five parts. Part I supplements the case for distrust of the state with a critique of racial bias in the enforcement of contemporary gun regulation. It argues that biased implementation of gun laws, as well as bias in the willingness of state agents to protect and serve Blacks, cuts against the modern orthodoxy. Part II engages recent scholarship arguing that racist administration of gun laws should prompt Blacks to abjure the right to arms rather than to insist upon it. Part III examines the efficacy of tough-on-crime gun initiatives that have disproportionately targeted minorities, as well as several metastudies of gun regulation efficacy. Part IV argues that the promise of the modern orthodoxy is vastly diminished by the declining fortunes of the gun control movement. Part IV shows how the expansion of gun ownership and gun rights has drastically reduced the potential of the gun control agenda to deliver on the promises that fueled the

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the actual gun control laws that the modern orthodoxy effectively endorses. The mistake here is supposing that the criminal law operates to prevent given forms of conduct. Levin invokes legal philosopher Douglas Husak to emphasize the mistake we make in supposing that the criminal law operates by "*preventing* given forms of conduct." Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437, 469 (2004) (emphasis added). That approach implicitly assumes that the state possesses "a magic wand" that automatically implements contested gun regulations. "In reality, of course, the criminal law functions quite differently; it proscribes [conduct], but [does not] prevent [it]." *Id.* at 469 (emphasis omitted).

7. *See also* Levin, *supra* note 6, at 2222. The people who suffer here are those with criminal records and young men of color in heavily policed areas. The Second Amendment Frame also afflicts gun control more broadly. It implicitly introduces the supply control ideal/Zimring hypothesis into virtually every discussion of gun regulation. But that framing and implicit assumption fails to account for the policy landscape on which we operate. Particularly, it elides the consequences of the inventory problem and defiance impulse. Gun control initially promised to ban crime guns. That is still implicit in conversations about gun control. Supply control policies operate on the model of England, Canada, or other countries like ours that have dramatically limited guns. But the supply control agenda is just a fantasy in the United States because of the number of guns, our cultural attachment to them, and the universal defiance impulse. *See* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem Article and Essay*, 43 WAKE FOREST L. REV. 837 (2008).

modern orthodoxy. Part IV shows how the core agenda of the gun control movement (i.e., constricting the gun supply through gun bans) has been so diminished by constitutional, political, and social developments that it is no longer viable either in practice or in theory. Part V presents the *hard-look* alternative to critique the modern orthodoxy and offers two examples of what a *hard-look* approach might yield in practice.

This Article concludes that the combination of the racial costs of gun regulation and the vastly diminished promise of the gun control agenda counsels abandonment of the modern orthodoxy. Instead, Blacks (and particularly the Black political class) should evaluate firearms policy with a case-by-case, *hard-look* approach that accounts for the demonstrated limits and racial costs of gun regulation. Neither supporters nor opponents of any particular firearms policy should take Black support or opposition for granted.[8]

I. RACIALLY BIASED ENFORCEMENT OF CONTEMPORARY GUN REGULATION COMPOUNDS THE TRADITIONAL CASE FOR DISTRUST OF THE STATE AND UNDERCUTS THE MODERN ORTHODOXY

"You can just take the description, xerox it and pass it out to all the cops. They are male, minorities, 16 to 25 . . . . And the way you get the guns . . . is to throw them up against the wall and frisk them."[9] That was Mayor Michael Bloomberg's rationale for New York City's now infamous stop-and-frisk practice. Michael Bloomberg, as much as any public figure, personifies the modern gun control movement.[10] In his brief bid for the Democratic presidential nomination, Bloomberg apologized for his remarks and repudiated stop and frisk.[11]

If stop and frisk were an isolated example, one might dismiss the tension between contemporary gun law enforcement and the Black community. But the stop-and-frisk saga is just an introduction to the story of racially biased enforcement of gun regulation that has unfolded under the modern orthodoxy.

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8. A note about agency is warranted here. Any discussion of Blacks as a group raises worries about stereotyping and submerging the diversity within the community. The same is true for discussion of subgroups. In various contexts, this critique will reference and contemplate the Black establishment, the Black political and intellectual class, and Black folk at the grass roots. This Article will not attempt to address particular critiques of particular subgroups with any sort of precision. This article acknowledges the diversity of views on guns among Blacks. However, this Article does observe that adherence to the gun control agenda is fairly considered (among Blacks and non-Blacks) the conventional wisdom within the Black community, so much so that it is fair to present it as the modern orthodoxy.

9. Michael Bloomberg made this widely reported statement during a 2015 speech in Aspen Colorado. For an example of the reporting see Bobby Allyn, *"Throw Them Against the Wall and Frisk Them': Bloomberg's 2015 Race Talk Stirs Debate*, NPR, Politics (Feb. 11, 2020), https://www.npr.org/2020/02/11/804795405/throw-them-against-the-wall-and-frisk-them-bloomberg-s-2015-race-talk-stirs-deba [https://perma.cc/M96W-WMSJ] The speech is available on YouTube at https://www.youtube.com/watch?v=1bbjB3jVGRU [https://perma.cc/VV8Z-UD5Q] (last visited Jun. 1, 2024).

10. *See Everytown for Gun Safety*, BLOOMBERG PHILANTHROPIES, https://www.bloomberg.org/founders-projects/everytown-for-gun-safety/ [https://perma.cc/VBY7-8BMT] (last visited Jun. 1, 2024).

11. As discussed below, Blacks were highly targeted but less likely than whites to actually be carrying guns. *See infra* notes 95, 97.

For most of the Black experience in America, the idea of disarming and just trusting the state was laughable. The rich Black tradition of arms was an outgrowth of deep-seated and longstanding reasons for Black distrust of the state.[12] The Black freedom movement respected and endorsed arms for private self-defense, even while urging a commitment to political nonviolence.[13]

With the budding success of the modern civil rights movement, the Black tradition of arms was supplanted by the modern orthodoxy as an emerging Black political class joined a progressive coalition that included the bourgeoning national gun control movement. It was reasonable that the new Black political class would embrace the gun control agenda as a response to the violence that plagued their new domains. But close observers noted tension in the alliance from the outset.

The 1968 Gun Control Act[14] (GCA) is the foundation of gun control in the United States. Robert Sherill, a staunchly anti-gun Washington Post reporter with long experience covering gun issues, observed that the GCA, whose most prominent gun prohibition was a ban on the importation of "Saturday Night Specials,"[15] was passed not to control guns but to "control Blacks."[16] Sherrill provides an illuminating critique of the racial context and impulses that fueled the GCA:[17]

> With the horrendous rioting of 1967 and 1968, Congress again was panicked toward passing some law that would shut off weapons access to Blacks, and since they probably associated cheap guns with ghetto Blacks and thought cheapness was

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12. *See* Johnson, *Modern Orthodoxy*, *supra* note 1; JOHNSON, NEGROES AND THE GUN, *supra* note 1; COBB, *supra* note 2; UMOJA, *supra* note 2; Nicholas J. Johnson, *A Considered African American Philosophy and Practice of Arms*, 107 J. AFR. AM. HIST. 7 (2022) [hereinafter Johnson, *Philosophy and Practice of Arms*]; Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI-KENT L. REV. 1307 (1995); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

13. *Id.*

14. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. § 921).

15. Various commentators have noted that the term "Saturday Night Special" seems to be a contraction of two slang phrases: (1) "Suicide Special," which refers to handguns so cheaply made that they are dangerous to the user, and (2) "Nigger-town Saturday Night." *See e.g.*, Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT., 37 (1976); NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY at 731 (1st ed. 2012); *see also* Delahanty v. Hinkley, 686 F. Supp. 920, 928–29 (D.D.C. 1986) (recognizing that "Saturday Night Specials" have also been described as "Ghetto Guns").

16. ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL: AND OTHER GUNS WITH WHICH AMERICANS WON THE WEST, PROTECTED BOOTLEG FRANCHISES, SLEW WILDLIFE, ROBBED COUNTLESS BANKS, SHOT HUSBANDS PURPOSELY AND BY MISTAKE AND KILLED PRESIDENTS-TOGETHER WITH THE DEBATE OVER CONTINUING SAME, 280 (1973); *see also* John R. Lott, Jr., MORE GUNS, LESS CRIME 68 (1998) (arguing that increased regulation of guns in the 1960s stemmed from the fear generated by Black Panthers who openly carried guns); Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 80 (1991) (noting that the GCA of 1968 aimed to control Blacks more than guns); J. Baxter Stegall, *The Curse of Ham: Disarmament Through Discrimination*, 11 LIBERTY U. L. REV. 271 (2016).

17. SHERRILL, *supra* note 16. Sherrill notes that based on the Library of Congress bibliography on gun controls, he had "written nearly as much on the subject as anybody around." *Id.* at vii.

> peculiarly the characteristic of imported military surplus and the mail order traffic, they decided to cut off these sources while leaving over the counter purchases open to the affluent . . . .[18]
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> The National commission on the Causes and Prevention of Violence warned that the cities seemed to be on the road to becoming "places of terror" and "fortresses," Black against white with radical groups possessing "tremendous armories of weapons . . . ."
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> The House Un-American activities committee issued a staff report saying that detention camps should be established for the jailing en masse, of urban guerrillas during race conflicts.
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> The Treasury Department [reported] that militant groups in the United States are arming themselves with illegal .45 caliber and .50 caliber machine guns and submachine guns as well as rifles, handguns, hand grenades . . . .[19]
>
> [The] vice president of the deeply liberal Center for the Study of Democratic Institutions . . . a close student of the shifting national mood predicted, "My own judgement is that we're going to have something that is recognizably a race war, civil war. We're going to have it within a year."
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> The 1967 riots were only a warm up for what happened within a few hours of Martin Luther King's death: In the most widespread simultaneous civil disorder in modern American history, riots swept through a hundred and twenty-five cities. Out came [in response] . . . the biggest military force ever assembled, outside the Union Army during the civil war, to deal with civil disturbances in this country. For a brief time, machine guns were in place on the Federal Capitol's steps.[20]

Emma Shreefter's more recent assessment underscores Sherrill's account, highlighting that the GCA was enacted in an environment where "[w]hite America and politicians feared an armed revolution."[21] The GCA, she reminds us, was enacted only months after the Supreme Court's *Terry v. Ohio* decision established

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18. SHERRILL, *supra* note 16, at 283.

19. *Id.* at 287.

20. *Id.* at 280–89. Martin Luther King was killed April 4, 1968, and the GCA signed into law Oct 11, 1968. The race riots of 1967 and 1968 also spurred state gun control legislation. New York required registration of additional classes of guns. 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. 2, 172, n.229–30 (2018). Illinois required that all gun owners obtain a license from the state police. *Id.* at 172 n.230. California criminalized certain possession of loaded firearms in public under certain circumstances. *Id.* at 172 n.231.

21. 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. 2 (2018).

that police could search a person without probable cause on the mere suspicion that they were armed.[22] *Terry*, of course, authorized stop-and-frisk practices that became notorious in New York City and elsewhere. The GCA, Shreefter argues, "was just another part of the government's efforts to intensify law and order, disarm people who threatened this order and in turn, further ensnare Blacks in the criminal justice system."[23]

Harvard historian Elizabeth Hinton highlights the irony that the contemporary carceral state is rooted in the policies of liberals, notably President Lyndon Johnson, who pressed for the 1968 GCA. Johnson's policies, including the hallowed War on Poverty, Hinton argues, are best understood not as a crusade against inequality but "as a manifestation of fear about urban disorder and about the behavior of young people, especially young African Americans."[24] Hinton is particularly critical of the Law Enforcement Assistance Act and Safe Streets Act that Lyndon Johnson presented as companion initiatives to the 1968 GCA. Hinton argues that these tough-on-crime initiatives undercut Johnson's Great Society programs and mobilized policymakers alike to fight the War on Crime.[25] She shows that these War on Crime initiatives were supported by both liberals and conservatives who

> shared a set of assumptions about African Americans, poverty, and crime that in time became a causal and consensus-building force in the domestic urban policy following civil rights legislation. Even if their legislative language never evoked race explicitly, policymakers interpreted black urban poverty as pathological—as the product of individual cultural "deficiencies." This consensus distorted the aims of the War on Poverty and also shaped the rationale, legislation, and programs of the War on Crime. The seemingly neutral statistical and sociological "truth" of black criminality concealed the racist thinking that guided the strategies federal policymakers developed for the war on crime, first in the 1960s, then through the 1970s and beyond.[26]

Sociologists Primm, Regoli, and Hewitt examine the tension between white liberal support of the civil rights movement and the racial critique of GCA advanced by Sherrill and others. The GCA, they argue, was a way for white liberals to reconcile

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22. *Id.* at 173. It also marked a dramatic shift from the 1938 Firearms Act by making it a crime for nonviolent felons to possess firearms. *Id.*

23. *Id.*

24. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2016). The Law Enforcement Assistance Act and Safe Streets Act funneled federal money to local police. Hinton criticizes that this legislation armed officers with military-grade weapons and led to increased occupation and surveillance operations affecting Blacks. *Id.* at 1–4. Lyndon Johnson's remarks upon signing the 1968 GCA touted the Law Enforcement Assistance Act and Safe Streets Act as triumphs of his progressive agenda. *Remarks upon Signing the Gun Control Act of 1968*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-gun-control-act-1968 [https://perma.cc/3NHF-BERK] (last visited Jun. 1, 2024); *see also* Lydialyle Gibson, *Color and Incarceration*, HARV. MAG., Sept.–Oct. 2019, at 40, 40–45.

25. HINTON, *supra* note 24, at 1–4.

26. *Id.* at 2–3.

their sympathy for civil rights with their discomforting beliefs about the inherent criminality of young Black men.[27] Fear of the criminal, they argue, "grated against the anti-racist self-image of white liberals. By projecting that fear onto an object—the gun—white liberals could channel it in a seemingly neutral way."[28]

There is less than unanimous agreement with the racial critiques of the GCA. Robert Sherrill actually anticipated alternative accounts by "the moralists of our federal legislature as well as sentimental editorial writers," who would argue that the GCA was a kind of memorial to Martin Luther King and Robert Kennedy.[29]

Whatever the true, and surely diverse, impulses for the 1968 GCA, the bigger concern is how enforcement of gun regulation has proceeded since then. The core import bans on stigmatized "Ghetto Guns," aka "Saturday Night Specials," remain in place. Many other provisions have been added by amendment. Regulations include restrictions on buying, selling, and transporting firearms and a variety of punishments for possessing or using guns in prohibited contexts.[30] All of these are facially appealing and framed in racially neutral terms. But enforcement drips with bias. This Part chronicles that bias.

This Part proceeds in six sections. Section 1 examines the most common categories of biased gun law enforcement. Section 2 applies the Second Amendment Frame to examine why the racial pathologies surrounding gun law enforcement have not received more critical attention. Section 3 discusses biased enforcement in the context of stop and frisk practices. Section 4 discusses fine-grained enforcement bias in gun licensing. Section 5 examines enforcement bias in targeted gun enforcement initiatives. Section 6 examines enforcement bias in the context of the GCA's prohibition on domestic violence misdemeanants possessing firearms.

A. Where the Action Is: Gun Law Enforcement and the War on Drugs

Jacob Charles and Brandon Garrett's survey of nine decades of gun regulation finds that the vast majority of federal gun prosecutions focus on only two GCA offenses.[31] Possession-by-prohibited-person offenses (18 U.S.C. § 922 (g)) account

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27. Eric Primm, Robert M. Regoli & John D. Hewitt, *Race, Fear, and Firearms: The Roles of Demographics and Guilt Assuagement in the Creation of a Political Partition*, 13 J. AFR. AM. STUD. 63, 69–70 (2009).

28. *Id.*

29. SHERRILL, *supra* note 16, at 280. Sherrill demonstrates that the law would not have prohibited James Earl Ray or Sirhan Sirhan from acquiring the guns they used to kill King and Kennedy. For other accounts of the 1968 GCA, see Maya Itah, *How the Gun Control Act Disarms Black Firearm Owners*, 96 WASH. L. REV. 1191 (2021) (sympathetic to Sherrill's account); William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79 (1999) (providing a chronological account that does not include a racial critique).

30. *See generally* NICHOLAS JOHNSON, E. GREGORY WALLACE, DONALD E. KILMER, GEORGE A. MOCSARY & DAVE KOPAL, FIREARMS LAW AND THE SECOND AMENDMENT, REGULATION, RIGHTS, AND POLICY, 629–739 (3rd ed. 2022).

31. Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637 (2022). I have discussed elsewhere how most gun law enforcement occurs in combination with other infractions. Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion and*

for nearly two-thirds of prosecutions.[32] And for the past decade, violations of § 922(g) and a companion section, § 924(c)[33] (punishing possession in furtherance of violent or drug crimes), have accounted for more than 80%of federal firearm charges.[34]

Drug charges are a substantial source of prior felony convictions fueling § 922(g) prosecutions. The data here suggests bias. By one count, Blacks comprise 14% of drug users and sellers but 34% of those arrested for drug offenses and 45% of the state prisoners serving time for drug offenses.[35] This imbalance feeds into § 922(g) felon-in-possession convictions. In 2015, 51% of those convicted as felons in possession under § 922(g) were Black and 26% were white.[36]

Bias is also evident in the enforcement of § 924(c). The U.S. Sentencing Commission Report from 2018 found stark racial disparities in § 924(c) convictions.[37] Blacks accused of violating § 924(c) "are much more likely to be convicted . . . than other groups, are more likely to be convicted of multiple counts and are more likely to remain subject to . . . mandatory penalties at sentencing."[38] Bonita Gardner questions the choice by prosecutors to focus on possession violations but not the "other twenty major federal gun crimes."[39] She argues that § 924(c) is a recipe for prosecutorial abuse because it allows prosecutors to coerce defendants during plea bargaining.[40] Justice Department guidance acknowledges

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Race, 50 PEPPERDINE L. REV. 1 (2022). The Supreme Court observed in *Simpson v. United States*, 435 U.S. 6, 13 (1978) that in structuring section 18 U.S.C. § 924(c) Congress had created a "combination crime" that punishes the combination of using or carrying a gun and committing a separate federal crime. Charles and Garrett argue that gun laws have been used as a proxy for solving other crimes and social problems. That is how § 924(c) is structured. It serves as an "umbrella" sentence-enhancer for other criminal charges. Guns have been used this way for drug offenses, violent offenses and now, increasingly, for immigration enforcement. Charles & Garrett, *supra* note 31, at 699.

32. Charles & Garrett, *supra* note 31, at 676. A recent study of state prosecutions in Illinois yielded similar results, with illegal possession accounting for 72% of people arrested in Illinois for gun crimes. 69% of those arrested were Black. DAVID E. OLSON, DON STEMEN, KAITLYN FOUST, CYNTHIA GUZMAN, LISA JACOBS, SOPHIA JUAREZ, HOLLY MICHALAK, AVERY PANKRATZ & AMANDA WARD, SENTENCES IMPOSED ON THOSE CONVICTED OF FELONY ILLEGAL POSSESSION OF A FIREARM IN ILLINOIS: EXAMINING THE CHARACTERISTICS AND TRENDS IN SENTENCES FOR ILLEGAL POSSESSION OF A FIREARM 4–5 (2021), https://www.luc.edu/media/lucedu/ccj/pdfs/firearmpossessionsentencinginillinois.pdf [https://perma.cc/PPS7-WVQD]; *see also* Dru Stevenson, *In Defense of Felon-In-Possession Laws*, 43 CARDOZO L. REV. 1573, 1590 (2022). A 2004 study focusing on three years of federal prosecutions reports the same trend. *See* AMS. FOR GUN SAFETY FOUNDATION, THE ENFORCEMENT GAP — FEDERAL GUN LAWS IGNORED 2 (May 2003), https://thirdway.imgix.net/downloads/the-enforcement-gap-federal-gun-laws-ignored/AGS_Report__The_Enforcement_Gap_-_Federal_Gun_Laws_Ignored.pdf [https://perma.cc /DUZ3-GQUK].

33. 18 U.S.C. § 924(c).

34. Charles & Garrett, *supra* note 31, at 676–77

35. Shreefter, *supra* note 21, at 159 n.89.

36. *Id.* at 160 n.92.

37. Charles & Garrett, *supra* note 31, at 685–86.

38. Itah, *supra* note 29, 1207 (2021) (citing Paul J Hofer, *Review of the U.S. Sentencing Commission's Report to Congress: Mandatory Minimums Penalties in the Federal Criminal Justice System*, 24 FED. SENT'G REP. 193, 205 (2012)).

39. Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement,* 12 MICH. J. RACE & L. 305, 312 (2007).

40. Itah, *supra* note 29, at 1223.

that the firearms violations on which it has focused are easy to prove and can be leveraged to gain plea bargains and cooperation from offenders.[41] Bureau of Alcohol, Tobacco, and Firearms (ATF) agents have referred to possession offenses as the Agency's "bread and butter violation."[42]

The mandatory penalties of § 924(c) are a powerful cudgel. Mary Price notes how prosecutors often charge defendants with crimes that carry harsh minimums in order to coerce guilty pleas to lesser charges.[43] Nazgol Ghandnoosh reports that Blacks are twice as likely to be charged with infractions carrying mandatory minimums *compared to similarly situated whites*.[44] Shermer and Johnson attribute disparities in charging decisions against people of color to "prosecutorial reliance on stereotypes about dangerousness."[45]

Charles and Garrett conclude that although the social and economic costs of gun violence are visited disproportionally on poor and minority communities, gun law enforcement "has not addressed inequality but exacerbated it."[46] Gun law enforcement, they contend, reinforces race and class hierarchies through the blunt instrument of incarceration. Harsh gun possession statutes, they argue, exacerbate the same pathologies that afflict the war on drugs:

> The federal felon-in-possession statute works by penalizing gun possession by persons already-convicted of drug, violent felony, and other offenses. We know that those inputs—who gets convicted and for what—are already the result of systematic practices that work against Black Americans. And if Black Americans are more likely to be charged with a crime than White Americans, then they are that much more likely *both* to get a gun-disqualifying conviction *and* to be the one with a gun-disqualifying conviction who gets caught unlawfully possessing a firearm.[47] Further, . . . enforcement priorities can further exacerbate inequality by tending to remove local cases to federal courts where there are less diverse juries, harsher sentencing options, and less overall local political accountability . . . .
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> [F]ederal enforcement . . . visits extremely severe sentences on individuals, often only for tangentially firearm-related reasons,

41. Charles & Garrett, *supra* note 31, at 685.

42. *See* Robert Cottrol & George Mocsary, *Guns, Bird Feathers and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GWU J. L. & PUB. POL'Y 17, 38 (2016).

43. Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty and the Purposes of Punishment*, 31 FED. SENT'G REP. 309, 312 (2019).

44. Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity In The Criminal Justice System*, SENT'G PROJECT (Feb. 3, 2005), https://www.sentencingproject.org/publications/Black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/ [https://perma.cc/4CGD-VJ9Q].

45. Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 421 (2010).

46. Charles & Garrett, *supra* note 31, at 695–96.

47. Shreefter, *supra* note 21, at 157, 159–60.

> but it ignores the underlying causes of firearms violence, which disproportionately burdens underserved and minority communities. Changes in judicial interpretation of statutes, legislative efforts, and enforcement have not addressed this disconnect, and instead may have magnified it.[48]

Dru Stevenson argues that federal drug laws are actually our primary form of gun control:

> [G]iven that most felony convictions are drug-related, *our otherwise-goofy federal drug law ends up being our primary operational form of gun control*—nothing else even comes close, except the age requirement for purchasers. Despite the awful problems with the CSA and the mass incarceration it produces, one could argue that the CSA is our main form of gun control right now."[49]

This is understandable considering the powerful tools that gun laws provide in the prosecution of drug cases.[50] Stevenson explains:

> From a law enforcement perspective, gun control laws . . . facilitate investigations by providing alternative grounds for officers to meet the evidentiary requirements for obtaining warrants or making arrests. From a prosecution standpoint, firearms violations normally function as additional counts in the charges against drug traffickers, and as sentencing enhancements. Gun possession charges can serve as failsafe or "backup" charges for prosecutors in difficult cases, because of the streamlined elements under the statutes and evidence (the mere possession of guns is usually proof in itself).[51]

Douglas Husak criticizes that both gun and drug possession offenses are

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48. Charles & Garrett, *supra* note 31, at 695–96.

49. *See* Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 OHIO ST. J. CRIM. L. 211, 215 (2020) (noting that the felon in possession provisions of the 1968 GCA present a host of disabilities for individuals accused of breaking other laws). "The Controlled Substances Act is actually the main device in our legal system that limits the number of firearms sold, the main device that in practice limits criminals' access to guns, and so on." *Id.* at 215; *see also id.* at 222–23.

50. Stevenson, *supra* note 49, at 215, 222–23. Federal law prohibits both users of controlled substances (including those who have been arrested for drug crimes) and persons with felony drug convictions from purchasing or possessing firearms. *See* 18 U.S.C. § 922 (g)(1)(3); TD ATF-391, DEFINITIONS FOR THE CATEGORIES OF PERSONS PROHIBITED FROM RECEIVING FIREARMS (Jun. 27, 1997), https://www.atf.gov/file/84311/download [https://perma.cc/8YJS-WLV9]; *see also* 27 C.F.R. § 478.11 (2019); Mikos, *infra* note 169, at 1446 (discussing how drug crimes also account for "nearly half of all criminal alien deportations").

51. Stevenson, *supra* note 49, at 214; *see also* Kimberly J. Winbush, Annotation, *Proscription of 18 U.S.C.A. § 922(g)(3) that Persons Who Are Unlawful Users of or Addicted to Any Controlled Substance Cannot Possess Any Firearm or Ammunition in or Affecting Commerce*, 44 A.L.R. Fed. 3d Art. 3, §51 (2019) (sentencing enhancements related to gun possession by drug user—enhancement imposed); Stacey M. Studnicki, *Federal Sentencing Guidelines*, 1998 DET. C.L. REV. 351, 369 (1998) (discussing the sentencing enhancement based on gun possession by a drug user in *United States v. Jarman*, 144 F.3d 912 (6th Cir. 1998)). Charles & Garrett, *supra* note 31, at 692 (noting that the vast majority of federal prosecutions settle in plea bargaining).

worrisome in the respect that they use criminal law "to prevent the risk of harm, even though that harm would materialize in only a tiny fraction of the cases in which persons are subject to punishment."[52]

Benjamin Levin emphasizes that the legal treatment of gun possession is embedded in the same system of criminal law enforcement that has been harshly criticized in the drug context. Levin argues that applying the drug war's critical rubric to gun possession highlights similar pathologies[53] and that critiques of mass incarceration should extend to gun laws, particularly nonviolent possession offenses.

Anders Walker observes that "[d]rug convictions often serve as predicates for felon in possession gun crimes, and both contribute to mass incarceration of Black men."[54] Walker argues that progressive political initiatives and policy preferences contributed to constitutionally protected stop-and-frisk strategies and that federal gun laws, popular among liberals, have contributed to the entrapment of Black defendants.[55] Markus Dubber argues that gun possession crimes are modern analogs to vagrancy laws in the sense that they expand police power to round up undesirables.[56]

Although he is staunchly anti-gun,[57] liberal commentator Eli Mystal acknowledges that similar pathologies afflict drug and gun law enforcement in his critique of the recent challenge to New York's restrictive gun laws in *New York State Rifle & Pistol Ass'n v. Bruen*.[58] Similarly, James Forman argues, "guns and drugs—and our response to them—have commonalities that we rarely acknowledge. Those commonalities help[ed] shape the direction of American crime policy at the dawn of the era of mass incarceration."[59]

Despite the growing acknowledgment that drug and gun law enforcement present similar racial costs, movement to address the pathologies afflicting gun laws has been far less robust. Charles and Garrett observe that racial critiques of drug

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52. Husak, *supra* note 6, at 476 ("The net of criminal liability is deliberately cast far and wide to catch enormous numbers of offenders, fully aware that only a small percentage of those who are punished would ever have caused the harm to be prevented.").

53. Levin, *supra* note 6, at 2176. Indeed, in scholarly literature, judicial opinions, and political rhetoric, drugs and violent gun crime are often treated as inextricably tied. *Id.* at n.168; *see, e.g.*, Smith v. United States, 508 U.S. 223, 240 (1993); United States v. Carter, 669 F.3d 411, 419 (4th Cir. 2012); Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015).

54. Levin, *supra* note 6, at 2177 (citing Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L. Q. 845, 845 (2014)).

55. Walker, *infra* note 66, at 3.

56. Marcus Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. AND CRIMINOLOGY 829, 832 (2001).

57. Mystal does not consider "private gun ownership as a constitutional right" but agrees that if you do, "gating access to that right behind a $400 fee and an enormous time sink [the potential for many hours of lost wages fighting through the permitting bureaucracy that is a real deterrent for working class people] is not something we do for other constitutional principles." 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/3FFX-VFKH].

58. *Id.* ("Everything that has been said about the need to liberalize drug laws is being said by the public defenders about the need to liberalize gun laws. And the statistics totally back them up.").

59. JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 51 (2017).

sentencing disparities and mandatory minimums overlap with gun law enforcement, but movement to address these disparities "has not occurred with the same urgency" for gun offenses.[60] More pointedly, for our purposes here, Benjamin Levin notes that adherents of the modern orthodoxy, in particular, may find the overlapping criticism of drug and gun laws troubling.[61]

Criticism of biased enforcement and sentencing for drug offenses is now commonplace. But similar and overlapping biases surrounding gun laws, especially nonviolent possessory offenses that dominate firearms prosecutions, has generated far less criticism. The next section considers the reasons why.

B. The Second Amendment Frame and the Reluctance to Engage Bias in The Enforcement of Gun Laws

Reluctance to extend the criticisms of the war on drugs to gun possession offenses is ironic given that gun possession, unlike the possession and use of controlled substances, is generally lawful and constitutionally protected.[62] Benjamin Levin attributes this contradiction to the *Second Amendment Frame* that animates our national conversation about gun policy. Levin argues that racial bias afflicts drug and gun law enforcement in very similar ways, but criticism of that bias resonates differently because of the Second Amendment Frame.[63]

The Second Amendment Frame presents gun policy issues in blunt, binary terms that obscure important details. This framing is typical in national polling that informs discussion of gun policy. Questions like this one from the Pew Research Center illustrate the Second Amendment Frame: "What do you think is more important-to protect the right of Americans to own guns, OR to control gun ownership?"[64]

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60. Charles & Garrett, *supra* note 31, at 696. One illustration, they contend, is the Obama administration's rejection of the opportunity to allow prosecutors to charge below a mandatory minimum in gun cases. "When prosecutorial leniency options expanded, even the Obama Administration made sure that guns were treated differently: gun possession remained an exclusionary factor for the criteria announced by Attorney General Holder allowing prosecutors to charge below a mandatory minimum in certain drug cases." *Id.* at n.419.

61. *See* Levin *supra* note 6, at 2191 n.105 (citing Nicholas J. Johnson, *Firearms and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013)) (engaging the modern orthodoxy).

62. One blunt objection is that guns are different from drugs because guns kill. But drug overdose deaths generally exceed firearm deaths. In 2020, for example, overdose deaths from opioids exceeded firearm deaths by a substantial margin. *See* CTRS. FOR DISEASE CONTROL, NAT'L CTR. FOR HEALTH STATISTICS, ALL INJURIES, https://www.cdc.gov/nchs/fastats/injury.htm [https://perma.cc/H85E-QC4E] (last visited Jun. 2, 2024).

63. Levin, *supra* note 6, at 2191. Douglas Husak criticizes assumptions that gun regulation is self-executing and that the obstructionists who block more gun regulations are to blame for gun crime. Husak explains that this fails to acknowledge that criminal laws only proscribe conduct but do not actually prevent it. Husak, *supra* note 6, at 469.

64. *Gun Rights and Gun Control*, PEW RES. CTR. (Aug. 2010). In a more recent example, the mayor of Washington D.C. responded to a February 1, 2023 shooting in the District with a generic call for gun control. This occurred before any details were available about the gunman, the source or type of gun, or other details that would drive a concrete policy proposal. *See, e.g.*, Associated Press, *Passengers Disarm Gunman Who Killed DC Employee, Shot Others*, U.S. NEWS & WORLD REPORT (Feb. 1, 2023),

The Second Amendment Frame remains a common, and perhaps dominant, way of presenting and thinking about firearms policy. The result, Levin argues, is that complex gun policy issues are glibly distilled into the question of whether having guns is a bad idea.[65] That blunt focus obscures important details of policy implementation that undercuts viability.

The Second Amendment frame also obscures racial costs of biased gun law enforcement by presenting the gun debate as a conflict between progressives and stereotypically rural, white, male, conservative gun rights constituents. This framing elides the reality of gun law enforcement. The prototypical defendant in a gun infraction is *not* a rural, white, male gun rights constituent. Rather, urban people of color "bear the brunt" of enforcement for gun possession crimes.[66] National data shows arrests for weapons are five times greater for Blacks than for whites.[67] Other state-level data shows that 54% of state court defendants convicted for weapons crimes were Black (44% were white).

In New York City in 2012, 73% of arrestees for firearm charges were Black while 4% were white, and the balance was Hispanic.[68] New York data is salient because New York is a paradigm blue jurisdiction with strict gun control policies. It has a relatively large Black population and includes the sort of "high crime urban areas" that Justice Stephen Breyer argued in *District of Columbia v. Heller* may justify stringent gun control.[69]

It is well chronicled that implementation of New York's tough gun laws has

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https://www.usnews.com/news/politics/articles/2023-02-01/passengers-disarm-gunman-who-killed-dc-employee-shot-others [https://perma.cc/QD2Y-CV3V]. The mayor said that the shootings "highlight the need for serious gun control," and that "[w]e're focused on how we get guns out of our city." *Id.*

The framing problem also afflicts the work of social scientists. As early as 1983, political scientist Paula McClain criticized "the reliability of one item indicator studies as a measure of gun control attitudes." Paula D. McClain, *Firearms Ownership, Gun Control Attitudes, and Neighborhood Environment*, 5 LAW & POL'Y Q. 299, 300 (1983). For a discussion of McClain's work in the context of the modern orthodoxy, see Johnson, *Modern Orthodoxy*, *supra* note 1, at 1578–81. McClain's fine-grained study of attitudes about firearm regulation in Detroit neighborhoods across different race and class categories demonstrated that the number and specificity of questions made crucial differences in study results. *Id.*; *see also* Pauline Gasdow Brennan, Alan J. Lizotte & David McDowall, *Guns, Southernness, and Gun Control*, 9 J. QUANTITATIVE CRIMINOLOGY 289, 304 (1993) (finding important differences in Black support of different sorts of firearms restrictions, with Blacks disfavoring gun bans at higher levels than whites).

65. Levin, *supra* note 6, at 2194.

66. *Id.* at 2193; Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 868–72 (2014).

67. *Weapons Offenses and Offenders: Firearms, Crime, and Criminal Justice*, BUREAU OF JUSTICE STATISTICS 122 (Nov. 12, 1995), http://www.bjs.gov/index.cfm?ty= pbdetail&iid=711 [https://perma.cc/JE22-G2XP]. SOURCEBOOK OF CRIMINAL JUSTICE STATISTIC. Levin, *supra* note 6, at 2194.

68. Levin, *supra* note 6, at 2195; RAYMOND W. KELLY, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 12 (2012), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2012_year_end_enforcement_report.pdf [https://perma.cc/SG7D-HJMB]; WILLIAM J. BRATTON, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 12 (2013), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2013_year_end_enforcement_report.pdf [https://perma.cc/CUF9-EU3C].

69. *See* District of Columbia v. Heller, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting).

generated racially biased abuses of the stop-and-frisk prerogative authorized in *Terry v. Ohio*.[70] We also now have a detailed critique of enforcement bias by Black lawyers who routinely represent the Black defendants who are disproportionately snared by New York's gun laws.

The Amicus Brief of the Black Legal Aid Lawyers and Public Defenders in *NYSRPA v. Bruen* ("Black Defenders Brief") demonstrates how New York's restrictive permitting scheme for both public carry and simple possession of firearms discriminated against Blacks and Browns who often have the greatest need for self-protection.[71] Despite the Supreme Court's decisions in *Heller* and *McDonald v. Chicago*, New York effectively limited lawful gun possession to those "select few" who managed to navigate an expensive, time-consuming permitting process that hinged on the discretion of the New York Police Department. For people without the resources to navigate the bureaucratic labyrinth, mere possession of a firearm is a "violent felony" punishable by 3.5 to 15 years in prison."[72]

The Black Defenders argue that the bias in administering the system is an outgrowth of explicit government intent to criminalize gun ownership by racial and ethnic minorities. The Sullivan Law[73] that grounds the challenged regulations was passed in response to early twentieth-century ruling class paranoia "about organized labor . . . and hysteria over violence that the media and the establishment attributed to racial and ethnic minorities—particularly Black people and Italian immigrants."[74]

The Black Defenders present wrenching examples of Black lives up-ended by New York's byzantine firearms rules. The list includes Jasmine Phillips, a decorated combat veteran, who brought her legal gun from Texas to New York without realizing that the simple possession of a gun in New York was subject to severe criminal penalties unless one first navigated a forbidding regulatory maze.[75] Sophia Johnson moved to New York from the Midwest and brought along her legally purchased gun.[76] Several years later when an abusive partner stole the gun, she reported the theft to New York authorities.[77] She was arrested and prosecuted.[78] Gary Smith, a retired city employee, was away from home when police appeared at his door and threatened to "bust [it] down" unless Smith's friend "'consent[ed]' to a search."[79] They found a small handgun in a closed pouch under Smith's bed and ammunition in a separate pouch.[80] Prosecutors charged

70. Terry v. Ohio, 392 U.S. 1, 14 (1968).

71. Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4173477 [hereinafter Black Defenders' Brief].

72. *Id.* at 28.

73. *See* 1911 N.Y. Laws 443.

74. Black Defenders' Brief, *supra* note 71, at 9.

75. *Id.* at 17–20.

76. *Id.* at 25.

77. *Id.* at 26.

78. *Id.*

79. *Id.* at 27.

80. *Id.*

him with possessing a loaded firearm with intent to use it unlawfully.[81]

Gary Smith's case underscores the practical operation of tough-on-crime, enhanced punishments. New York punishes possession of a loaded gun more severely than possession of an unloaded gun. By fiat, New York considers a firearm "loaded" if a person possesses it "at the same time" they possess ammunition regardless of whether the firearm is, in fact, loaded.[82] Gary Smith was subject to enhanced punishment because his unloaded gun was "deemed" loaded.[83]

The Black Defenders criticize that "[t]he NYPD routinely grants licenses to well-guarded and well-resourced celebrities."[84] But when "working-class Black and Hispanic families marched through their Bronx neighborhoods, calling for the NYPD to grant them firearm licenses so they could protect their families, the NYPD 'scoffed,' telling them that '[i]t's the policy of this department not to give out permits for people who want to protect themselves.'" The NYPD does take care of its own though. Former NYPD officers have application fees waived and receive a special certification—that NYPD's licensing division calls a "Good Guy letter"—that virtually assures that they will be granted a permit to carry.[85]

The Black Defender's Brief was a notable departure from the modern orthodoxy.[86] Major Black civil rights organizations like the NAACP and Urban League strongly defended New York's stringent laws.[87] Within the Second Amendment Frame, it would be odd if the NAACP and Urban League had done otherwise. Their stance is consistent with the blunt view that guns are a scourge on the community. A *hard-look* approach would acknowledge that *Bruen* focused on the much sharper question of the distribution of legal guns and lawful carry of them. Part IV will describe how abandoning the modern orthodoxy would prompt a more nuanced consideration of the issues raised in *Bruen*.

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81. *Id.* at 28.

82. *See* N.Y. PENAL LAW § 265.00(15) (McKinney 2022).

83. Black Defenders' Brief, *supra* note 71, at 28.

84. Black Defenders' Brief, *supra* note 71, at 12.

85. *See* Murray Weiss, *NYPD 'Good Guy' Note Let Suspect Pack Heat*, N.Y. POST (May 18, 2006), https://nypost.com/2006/05/18/nypd-good-guy-note-let-suspect-pack-heat/ [https://perma.cc/D32Q-PDZ4] ("The letter—which is given virtually automatically to all retiring full-duty cops—is . . . basically all a former cop needs to get a permit as a civilian.").

86. This departure from the conventional wisdom drew significant attention from commentators. *See, e.g.*, Mystal, *supra* note 57; Cam Newton, *The New York Times Is Surprised to Find Public Defenders Championing the Second Amendment*, REASON (Aug. 1, 2022, 1:23 PM), https://reason.com/2022/08/01/the-new-york-times-is-surprised-to-find-public-defenders-championing-the-second-amendment [https://perma.cc/S952-2SV2]; Editorial Board, *Progressive Gun-Control Crackup: Defense Lawyers Ask the Supreme Court to Affirm Gun Rights*, WALL ST. J. (July 23, 2021, 6:43 PM), https://www.wsj.com/articles/progressives-gun-control-Black-attorneys-of-legal-aid-supreme-court-amicus-brief-11627078928 [https://perma.cc/QNP2-ZTTV].

87. *See* Brief of the NAACP Legal Defense & Educ. Fund and the Nat'l Urban League as Amici Curiae in Support of Respondents, New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 4353021.

C. A Lesson about Bias and Enforcement Discretion: Remembering Stop and Frisk.

One objection to the illustrations of enforcement bias in the Black Defenders' Brief is that they are anecdotal. That objection also applied to New York's now infamous Stop and Frisk practice until activists and litigants dragged it into the spotlight. Like most contemporary gun policies and practices, Stop and Frisk was facially neutral.[88] It permitted an investigatory stop, based on reasonable suspicion, short of probable cause for arrest. And more consequentially, it authorized a frisk of outer clothing to detect weapons.[89] In litigation, that ultimately deemed New York City's stop and frisk practice unconstitutional, NYPD acknowledged targeting young Black males.[90]

New York's biased Stop and Frisk practice grew from the reality that gun law enforcement often involves a degree of street logic where officers exercise discretion over how to engage diverse situations. Stop and Frisk began as a street practice by officers under pressure from bosses to increase enforcement activity. Jeffery Bellin explains that Stop and Frisk was "not a 'program' at all, but rather a widespread reaction of individual officers and midlevel supervisors to a variety of incentives . . . [and] was [] gradually and incidentally enforced by high-level officials."[91] The result was an "'unwritten policy' of conducting race-conscious stops" and "'deliberate indifference' [of policy makers] to [the] 'constitutional depravations caused by'" officers on the street.[92]

Some commentators ground New York's Stop and Frisk practice in James Q. Wilson's "Broken Windows" crime control formula.[93] But Bellin objects that

88. The Supreme Court in *Terry* did acknowledge that minority groups, "particularly Negroes frequently complain" that tactics like stop and frisk have been a tool of harassment by "certain elements of the police community." Terry v. Ohio, 392 U.S. 1, 14 (1968).

89. 392 U.S. 1 (1968).

90. Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk"*, 94 B.U. L. REV. 1495, 1519 (2014). The presiding judge highlighted the testimony of senior NYPD officers acknowledging that within the pool of suspects "those who fit the general race, gender and age profile of criminal suspects in the area" were targeted for stops. *Id.* at 1542.

91. *Id.* at 1502.

92. *Id.* at 1501.

93. *Id.* at 1504. These results are not surprising given the intellectual lineage of these stop-and-frisk policies. While opinions differ about the precise lineage of stop and frisk, the practice plainly reflects the ideas of James Q. Wilson, who argued that aggressive stop-and-frisk policies could be used to combat illegal guns. Wilson candidly acknowledged the racially discriminatory aspects of the policy. "Innocent people will be stopped. Young Black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race." James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG. (Mar. 20, 1994), http://www.nytimes.com/1994/03/20/magazine/just-take-away-their-guns.html [https://perma.cc/8JEU-MYJ9]. Wilson concluded that the costs are worth it. Other commentators argue forcefully that this decision requires incorporating the racial costs of such tactics.

Anders Walker contends that New York's stop and frisk policies are rooted in progressive legislation from 1965, designed to respond to police abuses of Blacks that followed the Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). *See* Walker, *supra* note 66, at 13–20. *Mapp* protected citizens from warrantless searches by extending the exclusionary rule to the states. Burdened with more restrictive warrant protocols, police responded with an array of aggressive questioning and evidence gathering on the street. *Id.* at 12–18. Walker concludes, "[t]hough stop and frisk would contribute to

Broken Windows focused on maintaining a perception of community order. Stop and frisk, on the other hand, created disorder by stopping people regardless of whether they were breaching public order.[94] Still, the rhetorical embrace of Broken Windows created the conditions under which Stop and Frisk would thrive.

The consequences are well chronicled. Over two decades, the NYPD engaged in a steadily escalating number of coercive encounters with citizens. That pattern crested in 2011 when NYPD recorded almost 700,000 "stops." Almost all of those stopped (90%) were minority males. And the vast majority of the stops (88%) uncovered no evidence of wrongdoing—no guns and no other contraband.[95]

Talking abstractly about the racial costs of Stop and Frisk fails to capture the full impact. Interviews with people who experienced Stop and Frisk add important texture:[96]

> These weren't just police pat-downs, as Bloomberg implied in his comments about throwing kids against walls. Police were often very aggressive. A common story was that cops would jump out of cars, round up entire groups of Black and brown kids, curse at them, throw them against the wall or ground, and thoroughly frisk them — going under their clothes at times . . . .
>
> One teenager, identified only as Alvin, recorded one of the stops against him. The police were aggressive, never explained why they stopped him and used racist language. When Alvin asked why he was being threatened with arrest, one officer said, "For being a fucking mutt." Holding Alvin's arm behind his back, a cop said, "Dude, I'm gonna break your fuckin' arm, then I'm gonna punch you in the fuckin' face. " . . .
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> These kinds of stops happened hundreds of times a day, particularly in Black and brown neighborhoods.[97]

The Stop and Frisk story extends beyond New York. *Terry v. Ohio* obviously applies nationwide.[98] David Harris explains that New York became a focus partly

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mass incarceration, the formalization of the procedure emerged as a moderate solution to post Mapp confusion, a corrective to an unforeseen development not of reactionary racism, but the Warren Court's criminal procedure revolution." *Id.* at 18.

94. Bellin, *supra* note 90, at 1505.

95. *Id.* at 1498.

96. "'Stop and frisk was this low-intensity warfare that people didn't see unless they were right in it — [sic] unless you lived in those few blocks where people were constantly harassed,' Monifa Bandele, who's on the steering committee for the Communities United for Police Reform Action Fund, told me. 'Stop and frisk was killing our young people in a different kind of way — [sic] very deeply emotional, mental health, causing people to lose jobs, to be late to school. I called it the death by a thousand cuts.'" German Lopez, *Mike Bloomberg's Stop-and-Frisk Problem, Explained*, VOX (Feb. 25, 2020, 8:19 PM), https://www.vox.com/policy-and-politics/2020/2/21/21144559/mike-bloomberg-stop-and-frisk-criminal-justice-record [https://perma.cc/F5M8-EFQ3].

97. *Id.*

98. David Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. OF LEGIS. & PUB. POL'Y 853, 870 (2013) (noting that there are roughly 18,000 police agencies in the U.S., about half of which have fewer than ten sworn officers).

because data collection allowed critics to demonstrate racial bias in the administration of Stop and Frisk. Harris identifies scores of other police agencies whose size or circumstances have facilitated some degree of data collection about stop-and-frisk practices.[99]

Philadelphia is one of the most notable for our purposes because it provides a fair and worrisome example of the modern orthodoxy in operation. In 2008, Michael Nutter, Philadelphia's second-ever Black Mayor, ordered the Philadelphia Police Department to increase stop and frisk activity. On two measures the results were more dramatic than in New York. Philadelphia conducted even more Stop and Frisks per capita than New York and stopped a similarly high percentage of innocent people.[100]

Amidst growing complaints, the ACLU of Pennsylvania sued the city, alleging that the Philadelphia Police Department (PPD) used Stop and Frisk against pedestrians without legal justification and disproportionately against people of color.[101] The litigation led to a 2011 consent decree in which the PPD promised to cease certain practices and collect data about those that continued.[102] A 2013 report required by the consent decree reported that Blacks and Latinos continued to be stopped at disproportionately higher rates, "with 76% of the stops and 85% of the frisks targeting minorities."[103] Philadelphia's Stop and Frisk suggests how reflexive alignment with the gun control agenda that is dictated by the modern orthodoxy might lure well-meaning Black officials to adopt marginally effective policies that carry palpable racial costs.

Stop-and-frisk practices provide dramatic evidence of the biased exercise of gun policy enforcement discretion. The next section shows how gun law enforcement bias can be far more subtle.

D. Fine Grained Bias in Enforcement Discretion: Stories and Studies

Some risk of bias is inherent in the enforcement discretion granted to frontline officers.[104] James Q. Wilson's multijurisdictional study of policing explains that the

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99. *Id.* at 856.

100. The NYPD stopped and frisked one in fourteen people. The PPD stopped and frisked one in six. *Id.* at 872.

101. Bailey, et al. v. City of Philadelphia, et al., ACLU PHILA. https://www.aclupa.org/en/cases/bailey-et-al-v-city-philadelphia-et-al [https://perma.cc/CG4U-RZSF] (last visited Jun. 2, 2024); *Latest Court Filing Shows Race Still Plays a Role in Stops and Frisks by Police in Philadelphia*, ACLU PHILA. (Nov. 27, 2018), https://www.aclupa.org/en/press-releases/latest-court-filing-shows-race-still-plays-role-stops-and-frisks-police-philadelphia [https://perma.cc/HR5V-WGLT] ("'The PPD's aggressive use of stop-and-frisk was racially biased from the moment it started, and it seems the department is still unfairly targeting people of color,' said Reggie Shuford, executive director of the ACLU of Pennsylvania . . . .").

102. Harris, *supra* note 98, at 873.

103. *Civil Rights Groups Say Problems Persist with Philadelphia Police Department's Stop-And-Frisk Practices*, ACLU PHILA. (Mar. 19, 2013), https://www.aclupa.org/en/press-releases/civil-rights-groups-say-problems-persist-philadelphia-police-departments-stop-and [https://perma.cc/P8JU-ZFDN].

104. Nicholas J. Johnson, *Lawful Gun Carriers (Police and Armed Citizens): License, Escalation*

enforcement "discretion granted to individual officers 'increases as one moves down the hierarchy.'"[105] Wilson concluded that it is impossible for bosses to "prescribe in advance the correct course of action" in the many different situations officers face.[106]

Barbara Armacost concludes that street-level police "operate under more ambiguous and less precise rules than other low-level employees."[107] She found that "day-to-day decisions that police officers make . . . are determined more by the informal norms of street level police culture than by formal administrative rules."[108] Armacost shows how police discretion, detached from formal policy, presents an opening for biased enforcement at the street level:

> [P]olice culture is defined not so much by officially-proclaimed goals and rules, but by the sometimes very different messages that circulate at the operational level. Police socialization involves a whole range of complex and conflicting messages. For example, there is the "hard-nosed" organizational message that emphasizes crime-fighting and proactivity, the message that says, "'Let's go get 'em.'" . . . [T]he official organizational messages are selectively affirmed or undermined by informal messages about what kinds of conduct are actually tolerated or rewarded. It is these informal expectations—that officers learn from fellow officers on the street and in the locker rooms—that determine the institutional culture that ultimately governs and shapes the discretionary decisions of street level [sic] cops.[109]

Fine-grained enforcement bias can take many forms including reduced benefit of the doubt, increased aggression, hostile *ad hoc* commands ("hands up," "sit down," "don't move"), and threat questions like, "Are we going to have a problem."[110]

Stories of fine-grained bias are often anecdotal.[111] Jennifer Carlson answers

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and Race, 80 LAW & CONTEMP. PROBS. 209 (2017) (discussing the broad discretion of police to use and escalate violence).

105. *Id.* at 211 (quoting JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 7 (1978)).

106. *Id.* at 211–12 (quoting JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 279 (1978)).

107. *Id.* at 212 (quoting Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 510 (2004)).

108. *Id.*

109. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 516–17 (2004).

110. I still have a vivid recollection of this tactic from my now decades-old *walking while Black* arrest in New York City. The threat question signaled, that despite my complete innocence, my encounter with the NYPD might result in physical injury.

111. Consider again the examples of bias in the NYPD licensing process from the Black Defenders' Brief. Skeptics will raise a variety of fair questions about whether these examples represent a larger problem. A similar example comes from my former student and now casebook coauthor Professor George Mocsary. As a nineteen-year-old, he engaged the New York City gun bureaucracy to register a long gun. In line at the registration office, he witnessed the NYPD permit administrator tell a minority applicant, who spoke limited English, that registering his gun required a notarized statement

this concern in a recent book detailing fine-grained racial bias in the administration of licenses to carry concealed firearms. Carlson argues that

> "gun law enforcement—and its racially disparate impacts—cannot be fully captured by acts of police detention, arrest, and violence . . . [it also occurs where] police and other administrators have the power to profoundly shape the social, cultural and even legal norms and expectations attached to the practice of gun carrying for those private civilians who choose to engage in it legally."[112]

Decision-makers in Carlson's study were "almost entirely white, middle-aged men with former or current law enforcement experience."[113] Bias manifested in various ways including "lectur[ing] African Americans (as compared to white claimants) regarding their behavior . . . [and use of] stereotypes of [B]lack masculinity."[114]

Carlson argues that state agents who support gun rights but take a tough-on-crime stance against bad guys with guns often deploy racialized conceptions of the good guys and bad guys. Carlson shows that people of color who reflect certain stereotypes have good reason to expect biased treatment. She demonstrates that when Blacks sought gun licenses "they did not do so on the same terms" as others.[115] Black men especially were exposed to "a different set of racialized demands."[116]

Some applicants had "blemishes" on their records, including unpaid parking tickets, unpaid child support, or warrants for petty offenses.[117] To clear their records, applicants had to navigate a "game of maneuvers"[118] in which paperwork became a way to ration administrative goods.[119] Sometimes paperwork was rejected because the information was on the wrong color form. Gun board members randomly demanded "the yellow paper."[120] One Black woman, instead of getting

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from the seller verifying the sale. The applicant exited bewildered and disappointed. (At the time, long guns in New York City had to be registered within seven days of purchase to avoid becoming contraband. Today, all long guns brought into the City by residents must immediately be surrendered to the NYPD unless and until the owner can obtain a permit.)

George was next in line to register a gun and the officer told him the same thing. The cautious son of immigrants, George produced the New York City regulations and explained to the officer that nothing in the law or published regulations required the notarized statement. The officer became visibly angry but grudgingly completed the registration for this precocious young white man. Interview with Professor George Mocsary, Professor of L., Wyo. L. Sch. (Aug. 15, 2022).

Over many years of working in the intersection of gun policy and race, I have been privy to countless stories like this. Some of them were told in confidence by members of law enforcement who had learned of, witnessed, and even been party to racial bias in the exercise of enforcement discretion. Many others were communicated by Black and brown people who experienced it.

112. JENIFER CARLSON, POLICING THE SECOND AMENDMENT 144 (2020).
113. *Id.* at 145.
114. Sociologists call these "controlling images." *Id.*
115. *Id.* at 169.
116. *Id.*
117. *Id.* at 146.
118. *Id.* at 148.
119. *Id.* at 148, nn.17–18.
120. *Id.* at 148.

the yellow paper, appeared with a "clearance letter" from a police precinct.[121] Carlson presents the exchange where the board rejected the clearance letter and reiterated the "specific instructions" that the woman had failed to follow. They were unmoved by the claimant's explanation that there was no yellow paper because the matter never made it to court. "I have been everywhere," the woman pleaded, "No one will give me that letter." The board was dismissive. "It's your arrest," said one officer, "you have to take care of it."[122]

Carlson details the case of Rachel Simpson, a Black woman, to show how fickle the exercise of discretion can be. Simpson's gun carry license was suspended because of an outstanding warrant. Simpson could only guess that the suspension was related to a matter that had been dropped. She brought the paperwork, but the board rejected it because it had no case number. She asked the board for the case number, and one officer said, "We can't give you that." Rachel Simpson was visibly deflated. Then, "in a seeming snap decision," another board member gave her the case number that allowed her to clear her record.[123]

Carlson identified the same sort of submerged costs and consequences that the Black Defenders Brief criticized surrounding the New York permitting System.[124]

> "Claimants at gun board experience procedural pains associated with having to account for records that were erroneous or incomplete. These procedural pains also affected claimants more concretely through the loss of goods, services and security . . . Repeated gun board visits cost them time and lost wages. Claimants at times protested that they could not afford to take off work to continue coming to gun board."[125]

Carlson demonstrates many other versions of "paperwork and bureaucratic hurdles deployed as a penal mechanism."[126] Officials sometimes prevented applicants from solving these problems through "selective withholding of information." Blacks were particularly vulnerable to this because of a "greater likelihood of interaction with law enforcement and poorly funded, poorly trained, poorly interfacing government agents."[127] With more criminal justice contacts than whites, Blacks disproportionally experienced the "records run around." Blacks were more likely to be called to gun board to address paperwork.

> "Once they arrived there, they were subject to a distinct kind of processing compared to their white peers—one that punished and disciplined claimants of color, especially African American men, according to controlling images of Black masculinity [and

121. *Id.*
122. *Id.* at 149.
123. *Id.* at 146.
124. Black Defenders' Brief, *supra* note 71.
125. CARLSON, *supra* note 112, at 150.
126. Id. at 147
127. *Id.* at 147.

> communicated] the racialized terms on which their licenses were issued—and could be revoked."[128]

Bias also appeared in the form of discretionary policing. Gun board applicants sometimes appeared because of outstanding warrants (e.g., for minor traffic offenses).[129] The board had the discretion in such cases to coordinate arrests on the warrants. The threat of such arrests was used as a racialized policing tool. Officials leveraged the threat of arrest in what sociologists call degradation ceremonies to "integrate shame, embarrassment and accusation as a means of disciplining claimants."[130] These degradation ceremonies "impart[ed] punitive lessons through which racial divisions [are encoded]."[131] They dramatize racial hierarchies as people are publicly subjected to different treatments that communicate race specific social expectations.[132]

Karl Muth compliments Jennifer Carlson's study of fine-grained enforcement bias through a critique of structural bias in the operation of tough on guns policies in Chicago.[133] He notes how Chicago's facially neutral gun laws track discriminatory laws of earlier eras by using practical inconveniences, embedded costs, and the "pecuniary inequality of whites and Blacks to disadvantage, disarm and imperil the latter."[134] Even after Chicago, under litigation pressure, created a shall issue gun carry licensing system, permitting was biased against Blacks.

> *Chicago created a shall-issue framework ensuring nearly everyone with a concealed carry permit was white* by forbidding concealed carry of firearms on public transportation, limiting firearms training and firearms practice sites to majority-white suburbs difficult to reach by public transportation (and half an hour or more by car from the city center), and ensuring that there was nowhere in the City of Chicago to legally purchase a firearm of any kind."[135]
>
> Because non-white residents of Chicago are less able to pay for taxis, less likely to own reliable vehicles, and less likely to live short distances from their workplaces, these residents are reliant on public transportation to an extent and in a way that white people are not. This substantially restricts both their ability to obtain a concealed carry permit (because there are no firearms training facilities served by the bus or train routes provided by the Chicago Transit Authority and no gun shops within the city limit) and their

128. *Id.* at 152.
129. *Id.* at 154.
130. *Id.* at 160, n.45.
131. *Id.* at 160.
132. *Id.* at 160.
133. Karl T. Muth, *The Panther Declawed: How Black Mayors Disarmed Black Men*, 37 HARV. BLACKLETTER L.J. 7 (2021).
134. *Id.* at 13–14.
135. *Id.* at 15.

> ability to exercise their Second Amendment rights and their concealed carry privileges.[136]

Muth argues that "enjoying ones Second Amendment Rights as a Black person in American cities is materially different from the comparatively easier process of enjoying those same rights as a white person."[137] Chicago's approach, he concluded, is emblematic of "the sanctioned disarmament of Black populations in violation of their Second Amendment rights in cities under coincident with Democratic control."[138]

E. Bias in Special Federal Enforcement Programs

Law and order politics has generated a series of special gun law enforcement initiatives and enhanced punishments. Various critics identify bias in the implementation of these initiatives. Targeted enforcement programs like Project Exile and Project Safe Neighborhoods are high profile examples.

Project Exile channeled state gun possession offenses to federal court where federal charges would permit harsher sentences. Critics show that the shift to federal court also decreased the number of potential Black jurors versus state court.[139] The data suggests that prosecutors selectively targeted Black defendants. 90% of the defendants in the project Exile pilot program were Black.[140] In litigation challenging the program on equal protection grounds, prosecutors were chastised for the inability to show a neutral procedure that accounted for these results.[141]

Similar issues afflicted the Project Safe Neighborhood (PSN) program, which expanded Project Exile nationwide.[142] Targeting of PSN concentrated on minority communities and "assured a stark racial imbalance" of prosecutions. Depending on the year, seventy to ninety percent of enhanced federal prosecutions captured Black defendants.[143] Emma Shreefter criticizes that the places where PSN is implemented are disproportionately Black. She shows that PSN "targets every single one of [the] thirty metropolitan areas, which have the largest Black populations of all metropolitan areas."[144] David Patton observes an aspect of the PSN prosecutions

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136. *Id.* at 18.

137. *Id.*

138. *Id.* at 8.

139. Levin, *supra* note 6, at 2212 (citing United States v. Jones, 36 F. Supp. 2d 304 (E.D. Va. 1999) (noting that Richmond, Virginia, is 75% Black, while the federal Eastern District of Virginia, which encompasses Richmond, is only 10% Black and that federal prosecutors candidly admitted their goal of avoiding Richmond juries).

140. David E. Patton, *Criminal Justice and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1021 (2020).

141. *Id.* at 1022, n.63; *see also* United States v. Jones, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999); United States v. Thorpe, 471 F.3d 652, 658 (6th Cir. 2006). For a full discussion of the case, see Dominique Camm, *Reversing the Standard: The Difficulty in Proving Selective Prosecution*, 31 N.C. CENT. L. REV. 93, 94–95 (2008).

142. Patton, *supra* note 140, at 1019.

143. *Id.* at 1022.

144. Shreefter, *supra* note 21, at 163.

that underscores the tie to criticisms of mass incarceration; most of the PSN prosecution cases are felon in possession cases.[145]

Criticisms of enhanced sentencing and targeted prosecution are not arguments against punishment. Rather they focus on prosecutorial discretion over *which* defendants are targeted by initiatives that *maximize* punishment. Project Exile and PSN involved exercise of discretion that "specifically targets communities of color for punishment above and beyond what would already be significant punishment in state court."[146]

Another example of this sort of bias surrounds gun law enforcement through "stash house sting" operations. These stings involve government agents inducing informants to spread false rumors about a drug house that contains a large amount of cash. The informant convinces others to gather with guns to rob the stash house. Agents then arrest those who show up on robbery, drug, and gun charges that often include harsh, minimum sentences.[147]

Selective enforcement challenges to these stings show that virtually all of the targets have been Black or Latino,[148] even in urban districts where whites outnumber Blacks and Latinos.[149] Critics argue that stash house stings do little to jail dangerous criminals and mainly capture impoverished Black men who can be enticed into taking a risk to make big money quickly.[150]

Anders Walker provides a detailed critique of federal sting operations in St. Louis where big money inducements prompted some residents to buy guns legally from retailers and resell them at enormous mark-ups to undercover agents. Other stings involved government agents making fantastically high offers (more than $150,000) for participation in phony stash house robberies.[151] Judge Richard Posner criticized this sort of "extraordinary" inducement made to financially desperate young

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145. These sorts of combination cases—where a gun infraction occurs in combination with or because of a separate crime, often a drug crime—are distinct from standalone gun violations. Standalone gun violations of any type (trafficking, straw purchases, obliterating serial numbers, etc.) are relatively rare. Bonita Gardner questions the choice of prosecutors to focus on felon in possession violations but not other crimes like illegal trafficking. Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 312 (2007). One explanation on the trafficking count may be that trafficking occurs on a relatively small scale. *See* Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233 (2009).

146. "The point of the prosecutions as stated by the originators of the programs, is to impose harsher sentences than would otherwise by imposed in state court and to drive up state court sentences by using the threat of federal prosecution as leverage . . . . Although the vast majority of criminal cases, and therefore the vast source of mass incarceration, come from state systems, the federal prosecutions impact those systems tremendously by providing state prosecutors greater power to negotiate tougher pleas." Patton, *supra* note 140, at 1023.

147. *Id.*

148. *Id.*

149. *Id.* at 1024.

150. United States v. Flowers, 712 F. App'x 492, 508–09 (Stranch, J., concurring) (discussing her discomfort with the tactic for those reasons).

151. Walker, *supra* note 66, at 25.

men, who showed no prior inclination to rob a stash house, as a "disreputable tactic" employed by law enforcement against minorities to "jack up their sentences."[152]

Critiques of the stash house stings, and other undercover operations, show how bias emerges out of enforcement discretion. Elizbeth Gudgel argues that law enforcement discretion to manipulate sentencing guidelines in small weapons and drug cases has been weaponized against racially marginalized communities.[153] Gudgel describes law enforcers designing operations to trigger enhancements under the federal sentencing guidelines[154] and overtly bypassing whites to target Black and Brown suspects.[155] Andres Taslitz attributes biased exercise of discretion in crafting investigations to a cyclical "blinders effect" where police believe criminal activity is more likely in communities of color and recruit informants from those neighborhoods, who in turn target people of the same demographic.[156]

The Armed Career Criminal provisions of the GCA also present concerns about biased exercise of enforcement discretion.[157] These provisions impose harsh mandatory sentences for certain gun use and possession crimes. One combination is an intuitively appealing mandatory minimum for gun possession by a felon with three prior violent crime convictions. But the enhanced mandatory sentence also applies where the defendant has three prior nonviolent drug offenses.[158]

Critics observe that American Career Criminal Act (ACCA) gives prosecutors unwarranted discretion over who will get harsh treatment and who will not.[159] Benjamin Levin criticizes that this broad discretion elevates often biased intuitions perceptions about who is a bad guy and who is not. And those intuitions determine who walks free and who spends decades or life behind bars.[160] The exercise of this discretion has tilted sharply against Black men.[161]

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152. United States v. Kindle, 698 F.3d 401 (2012) (Posner, J., concurring and dissenting) (citing Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401 (2013)).

153. *Id.* at 223–24. Gudgel laments that precise measurement of biased exercise of enforcement discretion is difficult. *Id.* at 224.

154. *Id.* at 218 (describing common ATF and DEA tactic of approaching young black men in difficult financial circumstances and encouraging them to obtain weapons and recruit friends for a stash house raid where agents and prosecutors craft weapon, cash, and drug amounts to correspond to sentencing guidelines and statutory mandatory minimums).

155. *Id.* at 223.

156. Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 101, 136–37 (2008).

157. Charles & Garrett, *supra* note 31, at 658–64.

158. 18 U.S.C. § 924(e)(1). Five-year minimum for gun possession in combination with drug trafficking. 18 U.S.C. § 924(c)(1)(a)(i).

159. Levin, *supra* note 6, at 2207–12 (describing stacking and trial penalties); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 30 (2013).

160. Levin, *supra* note 6, at 2212.

161. United States v. Holloway, 68 F. Supp. 3d 310, 313 (E.D.N.Y. 2014) (citing U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 90 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [https://perma.cc/DE2R-U9QY] at 90) ("Black defendants . . . have [long] been disproportionately subjected to the "stacking" of § 924(c) counts . . . . The Sentencing

David Patton demonstrates that ACCA results in sentences for possessory gun infractions that exceed the average punishment for murderers.[162] One stark example is the widely criticized prosecution of Weldon Angelos who was sentenced to fifty-five years in prison for three convictions of selling marijuana while possessing a gun.[163]

Broader critiques argue that "possessory gun offenses by their nature reinscribe the power dynamics prejudices and suspicions that have led critics to decry drug policing."[164] Levin argues that "searching for guns—like searching for drugs—can easily become pretextual, a proxy for some general prediction of risk, danger or lawlessness."[165] Many of the erosions and carve outs in Fourth Amendment jurisprudence that are often attributed to the War on Drugs are actually traceable to criminal regulation and policing of guns.[166] The results, argues Benjamin Levin, are very much what James Q. Wilson predicted, "[m]any searches yield little evidence of wrongdoing, but increase a system of hyper-policing for individuals (particularly men of color) who are deemed 'suspicious.'"[167]

F. Biased Exercise of Enforcement Surrounding Another Core Provision of Federal Gun Law—The Lautenberg Amendment.

The Lautenberg Amendment added domestic violence misdemeanants to the list of persons prohibited from possessing firearms by the 1968 Gun Control Act.[168] It engages the problem of domestic abusers evading felon-in-possession prohibitions because of prosecutors' treating domestic violence as a misdemeanor, even though it would be a felony if committed between strangers.[169] The bias story

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Commission's Fifteen Year Report in 2004 stated that black defendants accounted for 48% of offenders who qualified for a charge under § 924(c), but they represented 56% of those charged under the statute and 64% of those convicted under it.").

162. *See* Patton, *supra* note 140, at 1026. Stacking of sentences under § 924(c) can mean basically a life sentence. *See* Danielle Kaeble, *Time Served in State Prison, 2016*, BUREAU OF JUST. STATS. (2018), https://bjs.ojp.gov/content/pub/pdf/tssp16.pdf [https://perma.cc/LY4U-U6M9] (showing the median time served for all degrees of murder nationwide is 13.4 years).

163. Patton, *supra* note 140, at 1027, 1027 n.93. Ultimately, media coverage resulted in Angelos' resentencing and release. Jason Kitchen, *After 13 Years in Prison, Weldon Angelos Is a Free Man*, HUFFPOST (June 8, 2016, 8:14 AM), https://www.huffpost.com/entry/ after-13-years-in-prison-_b_10322000 [https://perma.cc/4M7K-NK2D]. For a more extensive criticism of ACCA sentencing, see U.S. SENT'G COMM'N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011), https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system [https://perma.cc/CXT6-2YR5]. The First Step Act aims to diminish the harshness of stacking charges. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

164. Levin, *supra* note 6, at 2206.

165. *Id.*

166. *Id.* at 2202.

167. *Id.* at 2206.

168. 18 U.S.C. § 922. The list of prohibited persons includes felons, illegal drug users, and others deemed untrustworthy.

169. Tom Lininger argues that the Lautenberg Amendment has been "egregiously ineffective" because the charging practices of local prosecutors have minimized the opportunities to apply the federal firearms disability for convicted abusers." Tom Liniger, *An Ethical Duty to Charge Batterers*

here is more complicated than some other versions. But ultimately the bias appears.

Carol Ramsey notes that prosecutions for violation of the Lautenberg Amendment are a fraction of what proponents expected.[170] She shows that police, prosecutors, and judges often exercise discretion to thwart its enforcement. Ramsey posits that "[l]aw enforcers may . . . be motivated by resentment, or at least skepticism, toward such laws . . . and officers dislike the Lautenberg Amendment for a variety of reasons," including strong beliefs about the Second Amendment and sympathy for defendants who claim to need guns for work or hunting.[171]

Primary evidence of bias appears in the form of favoritism toward police accused of domestic violence. Police defendants enjoy an insider's privilege where prosecutors and judges make nonenforcement decisions in their favor. Police are also more likely to commit domestic violence.[172] "At least 40 percent of police officer families experience domestic violence, in contrast to 10 percent of families in the general population."[173] Philip Stinson and Johns Leiderbach chronicle many cases where police "received professional courtesies" in charging and plea bargains to avoid triggering the firearms prohibitions of the Lautenberg Amendment.[174]

The corollary to favoritism toward insiders is bias against outsiders.[175] Carol

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Appropriately, 22 DUKE J. OF GENDER L. & POL'Y. 173 (2015). Linger explains that "local prosecutors undercharge domestic violence—by sidestepping charges that would clearly signal the defendant's disability, or by consenting to charges that would likely result in expunction—[and] thwart the intent of Congress to disarm convicted batterers." *Id.* at 174 ("[T]he federal government has rarely enforced [the Lautenberg Amendment], prosecuting approximately thirty to seventy each year among hundreds of thousands of potentially eligible defendants."). Prosecutors have candidly acknowledged crafting charges to evade the federal prohibition. Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1461 (2005). State and local gatekeepers have thwarted operation of the prohibition for a variety of reasons, including the perception that the prohibition constitutes federal overreach into state affairs and trenches on individual rights. *See* Ramsey, *infra* note 170, at 1330.

170. *See* Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1329 (2017); *see also* Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 177–82 (2015); Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 575 (2020).

171. Ramsey, *supra* note 170, at 1330–31. Survey data show both victims and abusers on a police force disagreeing with the provision due to fear that spouses would use the law to take advantage of their partners. *See* SUZANNE WALTON & MARK ZELIG, *"Whatever He Does, Don't Fight Back or You'll Lose Your Gun": Strategies Police Officer Victims Use to Cope with Spousal Abuse*, DOMESTIC VIOLENCE BY POLICE OFFICERS 365–67 (Donald C. Sheehan ed., 2000); *see also* Laura Lee Gildengorin, Note, *Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims*, 67 HASTINGS L.J. 807, 828–29 (2016); JAMES B. JACOBS, CAN GUN CONTROL WORK 164 (2002) (citing Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability*, 83 VA. L. REV. 983 (1997)).

172. *See* Ramsey, *supra* note 170, at 1330, 1336.

173. Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, ATLANTIC (Sept. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ [https://perma.cc/5S35-4Z9W]; Arlene Levinson, *When Law, Love Collide in Violence: Evidence Suggests That Spousal Abuse Among Police Officers is Not Uncommon and That Departments Often Are Reluctant to Punish Offenders*, L.A. TIMES, July 6, 1997, at A1.

174. Philip M. Stinson & John Liederbach, *Fox in the Henhouse: A Study of Police Officers Arrested for Crimes Associated with Domestic and/or Family Violence*, 24 CRIM. JUST. POL'Y REV. 601, 618 (2013).

175. Carol Ramsey concludes that the "hushing of cases to prevent prosecution is perhaps the

Ramsey emphasizes that "despite the political association of gun ownership with rural, white working-class males," men of color constitute the majority of weapons possession defendants.[176] In jurisdictions with large minority populations Black and Brown men are the majority of domestic violence defendants.[177] Lacking the insiders privilege accorded to police, these men will readily plead to misdemeanors and instantly be barred from possessing firearms. Ramsey argues that this prohibited person status subjects these offenders to a higher-than-normal chance of apprehension under urban policing practices and contributes "to the further destabilization of precarious social and family relationships in poor minority communities."[178]

II. SHOULD ENFORCEMENT BIAS PROMPT BLACKS TO ABJURE THE RIGHT TO ARMS RATHER THAN INSIST UPON IT?

This article posits that biased enforcement of gun laws undercuts the modern orthodoxy. But perhaps that is a mistake. Perhaps the best reaction by Blacks to a racially biased criminal justice system and racially biased enforcement of gun laws is to abjure the right to arms. Historian Carol Anderson presses this view in her recent book THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA.[179] Anderson claims that the Second Amendment was aimed at suppressing slave insurrection and is thus uniquely and irredeemably compromised by racism.

Anderson does not deny that racism infects other constitutional provisions.[180]

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inevitable product of a police culture that erects a 'blue wall of silence' to shield comrades from scrutiny and even places blame on victims." Ramsey, *supra* note 170, at 1335.

176. *Id.* at 1340.

177. One study shows that 80% of men arrested for domestic violence in Manhattan were Black or Hispanic. *Id.* at 1341 (citing Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 60 (2006)).

178. *Id.* at 1342; *see also* Alicia Granse, *Gun Control and the Color of the Law*, 37 LAW & INEQ. 387, 398 (2019) (arguing more broadly that crimes of possession result in bias). "There is no data, however, to suggest that people of color are more likely to carry guns than are White people. Instead, that simple possession is a crime means that minorities, especially Black men, are more likely to be stopped, arrested, charged, and convicted under the statutory scheme. Selective enforcement of drug laws, higher rates of criminal convictions of all kinds for minorities and the increased likelihood of being stopped by police in the first place create an environment in which people of color do not enjoy the same protections under the Second Amendment as do Whites . . . ." Granse, *supra* note 178, at 405–06 (footnotes omitted).

179. CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021). Elie Mystal presents a similar argument in his criticism of the ultimate outcome sought by the Black Defenders' Brief: "We could ask Philando Castile about his thoughts on this brief if he hadn't been gunned down in his car trying to show his license. His murderer, of course, was acquitted of all charges." Mystal, *supra* note 57; *see also* Scott Charles, *Blacks Should Break with the Second Amendment: It Works Against Black People*, ST. LOUIS AM. (March 19, 2022), http://www.stlamerican.com/news/columnists/guest_columnists/Black-people-should-break-with-second-amendment/article_3a535306-a57b-11ec-88f7-872c8b3bb123.html [https://perma.cc/6TYL-PYCS] (embracing Anderson's prescription).

180. THE SECOND is not structured to actually prove the core proposition that the Second Amendment is uniquely infected by racism. Why for example is the Second Amendment more infected by racism than administration of the Fourth Amendment where racist bias is legendary and ongoing? *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017). Answering that question requires critical comparative analysis of both provisions. One cannot answer it, as Anderson purports to, by critiquing

But for the Second Amendment, Anderson claims, racial bias is uniquely fatal. "The Second Amendment is so inherently structurally flawed," she says, "so based on Black exclusion and debasement, that, unlike the other amendments, it can never be a pathway to civil and human rights for 47.5 million African Americans."[181] Even worse, she says, "[t]he current-day veneration of the Second Amendment . . . is frankly akin to holding the three-fifths clause sacrosanct. They were both designed to deny African Americans humanity and rights while carrying the aura of constitutional legitimacy."[182]

Anderson and I have worked through the same historical record but reached dramatically different conclusions about the legitimacy and utility of the right to arms generally, and for Blacks particularly.[183] Where I find a proud, vital, Black tradition of arms,[184] Anderson concludes that armed self-defense for Black people is "ephemeral and white-dependent." She uses various historical and contemporary episodes of failed self-defense to argue "the irrelevance of being armed or unarmed, because the key variable in the way that the Second Amendment operates is not guns but anti-Blackness."[185] Racist government malefactors cannot be trusted to administer the right to arms fairly, Anderson says. Just like Philando Castile, armed

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the Second Amendment in isolation.

181. ANDERSON, *supra* note 179, at 9.

182. *Id.* at 164–65. Anderson presents the Second Amendment as a proxy for the much more textured American right to arms. This allows her to focus on a narrow slice of the eighteenth-century federal constitution story and extrapolate forward to argue that the broader American right to arms is irretrievably infected by racism. The initial concern here is what she omits—namely the lessons from the American revolution, including British attempts to disarm colonists as the rebellion came to a boil. Those conflicts provided plenty of incentives for the framing generation to think about and advocate a robust private right to arms, separate from concerns about slavery. THE SECOND also does not acknowledge the right to arms dynamic in the places where most government action on guns has always occurred, places with actual police powers—the states. The first federal gun control law did not appear until the 1930s. Gun regulation prior to that point was a function of state and local law.

THE SECOND does not engage the independent protections of the right to arms established in forty-four of fifty state constitutions. Integrating that information seriously compromises the claim that the American right to arms is joined at the hip with and should be disdained in the same fashion as the infamous Three-Fifths Clause of the original federal constitution. Anderson slices the history of the federal right to facilitate a damning dismissal of the Second Amendment as rooted in slave control. But the broader right to arms enshrined in the state constitutions defies that technique.

Many of the state arms guarantees were first enacted in the twentieth century. The most recent state arms guarantee, Wisconsin's 1998 constitutional amendment, was a direct response to municipal efforts to ban handguns. Another cohort consists of twentieth century amendments designed to underscore the individual nature earlier provisions. These had nothing to do with slave control. Fourteen arms guarantees appear in states that were admitted to the Union after the Civil War. These also were not motivated by the fear of slave insurrections. For a detailed chronology (as of 2005) and evaluation of the state arms provisions, see Nicholas Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715 (2006).

A current list appears in *Firearms Law and the Second Amendment: Regulation, Rights, and Policy*, FIREARMS REGULATION, http://firearmsregulation.org/ [https://perma.cc/D7RB-44G4] (last visited Jun. 2, 2024).

183. Anderson cites my work more than two dozen times. *See* ANDERSON, *supra* note 179, at 177–208.

184. *See generally* JOHNSON, NEGROES AND THE GUN, *supra* note 1.

185. ANDERSON, *supra* note 179, at 79.

Blacks will succumb to the violent whims of the warrior cop.

So, is Anderson correct? Should Blacks view the Second Amendment with the same disdain as the three-fifths clause and stake their personal security on the modern orthodoxy with its dependency on state administered gun control and policing? Is the sordid history of racist infringement of the right to arms a reason for Blacks to abjure the right rather than insist upon it?

The fundamental problem with Anderson's prescription is that it leaves Blacks dependent for their security on the very same government malefactors she says cannot be trusted to administer the right to arms fairly. It is a perplexing formula. The warrior cops, who Anderson says should cause Blacks to disdain the constitutional right to arms,[186] are also the state agents she would have Blacks rely upon for their personal security. Anderson fails to address or even acknowledge this paradox.

Broad critiques of criminal law enforcement bias argue that "racially disproportionate policing is endemic" in America.[187] Those assessments belie Anderson's contention that the Second Amendment presents a unique problem and raises doubts about the wisdom of her implicit prescription that Blacks rely for their security on the very state agents who cannot be trusted to administer the right to arms.[188]

Separately, Anderson's dismissive treatment of armed self-defense also ignores vital details. She argues that Black self-defense cannot work because the legitimacy of Black gun use depends on validation by inevitably racist, white authorities who control the aftermath of Black self-defense.[189] But that argument rests on an overly glib view of self-defense.

Effective self-defense presents a primary and sometimes a subsidiary contingency. The primary contingency is that the victim must escape from or prevail physically against a deadly threat. The subsidiary contingency involves the navigation of a subsequent process that deems the act of self-defense lawful (or not) by some government authority.

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186. Commentators trace the rise of the Warrior Cop to the war on drugs. Levin, *supra* note 6, at 2184; *see* James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 373–74 (2009); *cf.* BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 40–44, 147–49 (2011) (arguing that "neoliberal penalty"—an interdependence between laissez-faire economic policies and harsh punitive measures—has become a hallmark of post-industrial capitalist states); Max Hauptman, *Warrior Mindset' Police Training Proliferated. Then, High-Profile Deaths Put It Under Scrutiny*, WASH. POST (August 12, 2021, 6:01 AM), https://www.washingtonpost.com/nation/2021/08/11/police-training-warrior-mindset-killology/ [https://perma.cc/CYW3-BSHM].

187. Carbado, *supra* note 180, at 128. *See also supra* note 5 (citing multiple works in support of this proposition).

188. Elizabeth Hinton summarizes one aspect of the long story of Blacks responding to abusive policing by making the "conscious decision not to involve law enforcement and the criminal justice system in their lives and the lives of their neighbors[,] [] today [] referred to as the 'stop snitching' movement." Hinton highlights polling showing that the "majority of African Americans remain suspicious of law enforcement and cynical about the criminal justice system." HINTON *supra* note 24, at 9.

189. ANDERSON, *supra* note 179, at 79.

Racism certainly can and has infected after-the-fact government determinations of self-defense legitimacy. By contrast, the efficacy of the initial physical act of self-defense is far less contingent on racist variables. Armed self-defenders will prevail or not depending on the circumstances of the confrontation. Contrary to Anderson's claim, it is indeed the gun (not race) and the other physical circumstances of the confrontation that dictate the initial effectiveness of self-defense.[190]

Anderson is also wrong about the subsidiary contingency. Many armed self-defenders will avoid racist, *ex post* determinations of self-defense legitimacy altogether. Contemporary studies of defensive gun uses (DGU's) illustrate the point. In the vast majority of DGU's (a number that multiple surveys say is in the millions and dissenting sources say is between 100,000 and 650,000) *no shots are fired*.[191] Actual shootings are a thin slice of total DGU's. Deadly shootings are a fraction of that thin slice.[192] Many DGU's are not reported to authorities. Rather, the self-defender simply escapes the threat after brandishing or pointing her gun.

Even in cases where Black self-defenders actually shoot someone, the violence is likely to be intraracial.[193] Yes, interracial violence strikes the most fear. But threats to self-defenders of all races are mostly from members of their own race.[194] A great deal of Black self-defense will occur in jurisdictions with large Black populations and Black officials in the criminal justice system. Government determinations of lawfulness of Black self-defense claims in those places will be less "white dependent" than Anderson claims.

On the historical front, Anderson gives short shrift to the monumentally

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190. Researchers also have recorded substantially lower injury and property-loss rates among gun-using crime victims. PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15–16 (Alan I. Leshner et al. eds., 2013); *see, e.g.*, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 115–16 (Charles F. Wellford et al. eds., 2005) (stating that defending with a gun reduces the probability of injury in assaults and robberies by 49% and 46%, respectively, and property loss in robberies by 83%, versus not defending, and that resisting without a gun is substantially more likely to lead to injury than not resisting at all). The former report was ordered by President Barack Obama and commissioned by the Centers for Disease Control and Prevention (CDC). PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, *supra*, at 11–12. "The latter report was developed by the National Academies at the request of a consortium of federal agencies and private foundations, including the CDC and the Joyce Foundation, both of which have historically 'taken positions strongly favoring increased gun control.'" George Mocsary, *Insuring Against Guns?* 46 CONN. L. REV. 1209, n.237 (2014).

191. JOHNSON ET AL., *supra* note 15, at 1–68.

192. *Id.*

193. *Id.*

194. Modern examples are suggestive. Several years ago, I had an assistant gather media reports of defensive gun uses. That work included stories reported at The Armed Citizen, YOUTUBE (Apr. 18, 2022), https://www.youtube.com/playlist?list=PLrmnUOD-8hfvU2SOP59d4tUFoy47La3ph [https://perma.cc/4JL7-HZ92]. These reports include Black people, for whom the right to self-defense seemed to work. These examples hint at the complexity of the self-defense calculation. This complexity helps explain the millions of lawful Black gun owners who have a manifestly different view about armed self-defense than Anderson urges in THE SECOND. This divergence suggests not only that racism impacts different Black people differently but also that many other factors beyond race (e.g., gender, age, disability, relationship status, living situation, geographical location, occupation) may affect decisions about owning and carrying guns for self-defense.

important and transformative right to arms developments surrounding the Fourteenth Amendment. The post-Civil War efforts to extend the right to arms as a limitation on the states were a response to racist gun controls enacted by defeated Confederates.[195] The debate surrounding the Fourteenth Amendment demonstrates an explicit aim to extend federal constitutional guarantees including the right to arms to freedmen. There is rich evidence that freedmen considered the right to arms to be a crucial private resource.[196]

Anderson concludes that the evolution of the right to arms after the Civil War was still structurally infected by racism. She claims that arms during this period were ultimately useless to Blacks because racist whites dictated the outcome of Black self-defense claims.[197] This prompts two responses.

The first rebuttal appears in the words and actions of Black folk who actually lived through the nightmare times. Contrary to Anderson's depictions, the history of the freedom movement spills over with Blacks using arms to fight off racist threats and embracing arms as a crucial private resource in the face of government failure, neglect, and overt hostility.[198]

The considerable literature from Blacks who lived through the terror,

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195. JOHNSON, NEGROES AND THE GUN, *supra* note 1.

196. *See, e.g.*, *id.* at 276.

197. THE SECOND also deploys the notorious *Dred Scott* decision to advance the theme that racist decision-making in early America renders the Second Amendment uniquely and fatally compromised. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. *Dred Scott* infamously ruled that even free Blacks were not citizens and had no rights that a white man was bound to respect. *Id.* at 411–12. Among other arguments, the odious Justice Roger Taney offered a parade of horribles of potential Black citizenship—things like the right to arms that Blacks simply could not be allowed to exercise. *Id.* at 417.

Dred Scott is an important marker in the right to arms story. I and others have used it as an example of the early understanding that the constitutional right to arms was individual in nature. Anderson deploys it to argue that the racism infecting the Second Amendment is so uniquely pernicious that we moderns should eschew the right to arms. She writes that "[i]f Blacks were citizens, he [Taney] wrote they would have the right to 'enter every other state whenever they pleased . . . hold meetings on political affairs, or worse, [italics mine] to "keep and carry arms wherever they went."'" Anderson, *supra* note 179, at 83 (quoting Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857)).

This treatment subtly bolsters the claim that the concern about armed Blacks stands out as especially troubling to nineteenth century racists like Taney. But the quotation presented is not what Justice Taney wrote. Justice Taney does not highlight the right to arms by saying "or worse" as the quote suggests. He simply lists the right to arms as one of the privileges and immunities of citizenship after freedom of travel, speech, and assembly. Initially I thought this might just be the sort of editing snafu that horrifies all scholars and that coincidentally aids the claim that the Second Amendment was peculiarly infected by American racism. A closer look revealed that the quote, which the text attributes to Justice Taney, is footnoted to Kellie Jackson's book Force and Freedom. The phrase "or worse" is sourced to Jackson. The punctuation and footnoting accurately present the passage as a quote from Force and Freedom with a subquote to *Dred Scott*.

The ostensible misquote of *Dred Scott* stood out to me because I am familiar with the passage. Most readers will breeze through this paragraph nodding yes, subtly influenced by the damning illustration that the Second Amendment is uniquely infected by early American racism. The reality is not quite as damning as the treatment suggests.

198. JOHNSON, NEGROES AND THE GUN, *supra* note 1; Johnson, *Philosophy and Practice of Arms*, *supra* note 12.

overwhelmingly endorses armed self-defense and is dramatically at odds with Anderson's prescription that Blacks abjure armed self-defense. Fighters in the freedom movement developed a philosophy and practice of arms rooted in the sort of critique that Ida B. Wells presented in support of her famous endorsement of the assault rifle of her day, the Winchester lever action repeater.[199] W.E.B. DuBois not only urged armed self-defense as a practical deterrent he also pressed it as a moral imperative. Writing as editor of the NAACP flagship *Crisis* magazine, DuBois argued that even failed acts of self-defense established a cultural norm of resistance that discouraged attacks on the race.[200]

The NAACP cut its teeth as an organization defending Blacks who used guns in self-defense and, to different degrees, vindicated men like Pink Franklin, Steve Green, and Ossian Sweet. The Sweet case is particularly evocative. NAACP hired Clarence Darrow to defend Sweet. After Darrow won an acquittal, Sweet went on a hero's tour of NAACP branches and the resulting fundraising seeded the storied NAACP Legal Defense Fund. The list of freedom fighters who used guns, carried guns, were protected by guns, and embraced and advocated armed self-defense as an important resource for Blacks has filled volumes.[201]

A second rebuttal to Anderson's claim about the historical disutility of arms appears in recent empirical work. A 2022 study by economists Michael Makowsky and Patrick Warren seems to affirm the intuition of generations of Blacks that arming and defending themselves was better than just submitting to whatever fate racist terrorists and racist governments consigned them. Makowsky and Warren (1) corroborate historical claims that facially neutral state firearms regulations during the Jim Crow era "served as mechanisms to disarm Blacks, while having no comparable effect on White firearms" and (2) show that "rates of Black lynching

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199. "Of the many inhuman outrages of this present year, the only case where the proposed lynching did not occur, was where the men armed themselves in Jacksonville, Fla., and Paducah, Ky, and prevented it. The only times an Afro-American who was assaulted got away has been when he had a gun and used it in self-defense.

The lesson this teaches and which every Afro-American should ponder well, is that a Winchester rifle should have a place of honor in every Black home, and it should be used for that protection which the law refuses to give. When the white man who is always the aggressor knows he runs as great risk of biting the dust every time his Afro-American victim does, he will have greater respect for Afro-American life. The more the Afro-American yields and cringes and begs, the more he has to do so, the more he is insulted, outraged and lynched."

IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892).

200. Nicholas J. Johnson, *Firearms and Protest: Lessons from the Black Tradition of Arms*, 54 CONN. L. REV. 953 (2022).

201. *See, e.g.*, JOHNSON, NEGROES AND THE GUN, *supra* note 1; COBB JR., *supra* note 2; UMOJA, *supra* note 2. Some of the familiar names include Fredrick Douglass, Henry Highland Garnett, T. Thomas Fortune, Bishop Henry Turner, Edwin McCabe, Roy Wilkins, Walter White, James Weldon Johnson, Medgar Evers, Rosa Parks, Roy Innis, Fred Shuttlesworth, Daisy Bates, A. Philip Randolph, Marcus Garvey, John Hope Franklin, TRM Howard, Fannie Lou Hamer, Hartman Turnbow, Winson Hudson, E.W. Steptoe, Vernon Dahmer, Robert Williams, James Farmer, Bob Hicks, and yes, Martin Luther King, Jr.

decreased with greater Black firearms access."[202]

Government failure and overt malice—things Anderson says should repel Blacks from the right to arms—are reasons Black folk might choose the option for self-help that guns promise. The killings of George Floyd, Michael Brown, Philando Castille, and others underscore the continuing case for Black distrust of police. In recent polling, 48% of Blacks have very little or no confidence that police will treat Black and white people equally. This compares with twelve percent of whites who have the same view.[203]

In practice, Blacks have not followed Anderson's call to abjure the gun. Quite the contrary. There has been a tremendous rise in the purchase of firearms by Blacks in the United States. Various reports claim that Blacks are the fastest growing group of gun owners with Black women making up a substantial segment of, and perhaps leading, this growth.[204]

The impulses for the evident rise in Black gun ownership are surely diverse. Reporting suggests that some new Black gun owners are driven by a heightened distrust of the state. Indeed, when prominent Black politicians suggest that the new Republican president might be the next Adolf Hitler, Blacks (and many others) might understandably begin to withhold the trust in government that the gun control agenda demands.[205] Rhetoric surrounding progressive calls for police abolition might fuel a similar response.[206]

New national organizations are giving voice to Black gun owners. The largest group, the National African American Gun Association (NAAGA) has grown to roughly 50,000 members.[207] NAAGA and similar groups show that abandoning the modern orthodoxy need not mean leaping into the arms of the NRA. Anecdotally, many NAAGA members disdain the NRA, objecting to its link with the Republican

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202. Michael Makowsky & Patrick Warren, *Firearms and Violence under Jim Crow*, (Sept. 2, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727462 [https://perma.cc/JU7E-4R8Z].

203. Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do*, PBS NEWSHOUR (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-Black-americans-dont-trust-the-police-to-treatthem-equally-most-white-americans-do [https://perma.cc/2NHT-JQ8L]. Emma Shreefter chronicles some of the familiar reasons why. Black drivers are more likely to be stopped by police than white drivers and once stopped they are twice as likely to be searched and more likely to be stopped and frisked. Shreefter, *supra* note 21, at 174–75.

204. *See, e.g.*, Scott Detrow, Alana Wise & Domenico Montanaro, *Black People Are the Fastest-Growing Group of Gun Owners in the U.S.*, NPR POLITICS PODCAST (July 18, 2022, 4:49 PM), https://www.npr.org/2022/07/18/1112095634/black-people-are-the-fastest-growing-group-of-gun-owners-in-the-u-s [https://perma.cc/GAZ2-QBNP].

205. Cole, *supra* note 4; *One Scholar on Similarities, Substantial Differences between Trump and Hitler*, *supra* note 4.

206. The mainstream idea of police abolition or defunding presents consequences arguably far more substantial than even robust Black support of the constitutional right to arms. *See NLG Resolution Supports Police Abolition, supra* note 4.

207. *See* Personal telephone and email communications with Phillip Smith, President NAAGA, and Douglass Jefferson, Vice President NAAGA. Records on file with the author. Other national groups with an online presence include the Black Gun Owners Association and the African American Second Amendment Movement.

party and support of Donald Trump.[208] The NAAGA constituency signals the existence of a political space that defies the liberal/ conservative dichotomy that now characterizes the gun debate.[209]

Ultimately Anderson is unserious about proving that the right to arms, unlike other constitutional provisions, is fatally infected by racism. THE SECOND is not even structured to prove this core proposition. Why, for example, is the Second Amendment more infected by racism than the Fourth Amendment, where racist bias is legendary and ongoing?[210] Answering that question requires critique and comparison of both provisions. One cannot answer it, as Anderson purports to, by discussing the Second Amendment in isolation.

Anderson invokes police shootings of armed Blacks Philando Castille, Alton Sterling, Breonna Taylor, and Marissa Alexander as object lessons for why Blacks should abjure the right to arms.[211] By comparison, Devon Carbado's recent critique of Fourth Amendment bias invokes the shootings of unarmed Blacks Michael Brown, Walter Scott, Eric Garner, Terence Crutcher, Keith Scot, Alfred Olango, Alexia Christian, Sheneque Proctor, and Kendra James.[212] Carbado argues that "every encounter police officers have with African Americans is a potential killing field [and] it is crucial that we understand how Fourth Amendment law effectively 'pushes' police officers to target African Americans and pulls African Americans into contact with the police."[213] Carbado contends that Blacks "often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures."[214] Rather than a reasonable expectation of privacy and security, Carbado argues Fourth Amendment doctrine gives blacks "a reasonable expectation of unbridled police discretion that allows police to engage African Americans in public almost whenever they want."[215] In a similar vein, Paul Butler coined the phrase "white Fourth Amendment" to connote the very different way that the Fourth Amendment functions for whites versus Blacks.[216]

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208. *Id.*

209. Black gun buying may indicate many things. It does not automatically translate into voting preferences. Precise support for the modern orthodoxy is contestable. One indicator of widespread community support for the modern orthodoxy is the fact that Blacks continue to vote overwhelmingly for Democrats—the party of gun control. On the other hand, recent polling, gun buying, and growth of Black gun organizations cut the other way. However, the indications that NAGGA members may resist voting for Republicans, suggests that Black support of Democrats does not directly reflect embrace of the modern orthodoxy.

210. *See, e.g.*, Carbado, *supra* note 180. *See also* work cited *supra* note 5.

211. ANDERSON, *supra* note 179, at 143–50.

212. Carbado, *supra* note 180, at 163.

213. *Id.* at 129.

214. *Id.* at 130. Carbado presents a series of scenarios illustrating aspects of Fourth Amendment doctrine to show how the Fourth Amendment "underprotects" Blacks and "overprotects" police. *Id.* at 131, 13–64.

215. *Id.* at 162.

216. *Id.* at 142 (citing Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV 245, 250 (2010)).

Bias surely afflicts state administration of the Fourth Amendment and Second Amendment and arguably much of the rest of the Constitution. But Anderson fails to convince that biased administration of right to arms is a special case that should cause blacks to abjure the right rather than insist upon it.

III. CRITIQUES OF GUN CONTROL EFFICACY UNDERCUT THE MODERN ORTHODOXY

Criminals using guns impose tremendous costs on the Black Community. The modern orthodoxy was and is a response to those costs. Implicitly, the modern orthodoxy demands that Blacks tolerate transient racist enforcement in order reap the benefits of gun regulation. This calculation demands a closer look at the claimed benefits.

The Second Amendment Frame tempts us to elide questions of efficacy. It focuses on blunt questions of support for, or opposition to, gun control and submerges efficacy. James Jacobs's detailed examination of United States gun control efficacy underscores the hazard of that approach.[217] "Gun control," Jacobs observes, "is something that people *believe in*. It is embraced in principle without attention to practicalities, implementation and enforcement problems, and costs."[218] Jacobs demonstrates a range of problems beyond race that make "gun controls, at best . . . an indirect, difficult to implement and enforce, and marginally productive remedy" for interpersonal violence.[219]

Jacobs echoes Douglas Husak's criticism of the "magic wand" assumption of criminal law efficacy.[220] Jacobs observes that "[m]any people assume that effective, cost-efficient gun controls are available for the taking, if only the opposition of the evil gun lobby could be overcome."[221] He argues that

> "it is . . . easier, and certainly more satisfying, to debate gun control *in principle*, to locate oneself on the moral high ground and to demonize those who take the opposite position, than to deal with the extraordinarily difficult problems of designing, implementing, and enforcing a regulatory regime that would successfully deny access to firearms to some or all civilians, or keep track of the whereabouts and ownership of every weapon." [222]

Jacobs's critique neatly articulates the problem of the Second Amendment Frame. The question we must address, says Jacobs, "is not whether an armed citizenry is a good or bad idea." Rather, our challenge is to determine "what options

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217. JAMES B. JACOBS, CAN GUN CONTROL WORK (2002). Jacobs's 2002 book appeared before anyone used the term Second Amendment frame, but his critique solidly prefigures the theme.

218. *Id.* at vi.

219. *Id.* at xi. James Jacob's critique of the NY SAFE Act makes a similar general observation. The "passage of the SAFE Act was more important than the implementation," (which proved to be very difficult at many levels). *See* James James Jacobs & Zoe Fuhr, THE TOUGHEST GUN LAW IN THE NATION: THE UNFULFILLED PROMISE OF NEW YORK'S SAFE ACT (2019).

220. *See* Husak, *supra* note 6, at 469.

221. JACOBS, CAN GUN CONTROL WORK?, *supra* note 217, at vii.

222. *Id.* at viii.

are available at this point in our history, to confront the "brute reality . . . that private citizens in the year 2002 possess at least 250 million [now 450 million] firearms."[223]

This article contends that the racial costs of gun law enforcement counsel against the modern orthodoxy and favor a case-by-case, race-sensitive *hard look* at firearms policy and the Black community. Analysis of special policing policies and meta studies of gun regulation show no compelling, offsetting efficacy. This counsels against the modern orthodoxy's unreflective embrace of the gun control agenda. Various commentators highlight the dubious efficacy of tough on crime, enhanced prosecutorial initiatives like Project Exile and Project Safe Neighborhoods. Those critiques undercut the argument that the racial costs of these initiatives are "worth it." David Patton distills the empirical work assessing the effect of Project Exile and Project Safe Neighborhoods. Both were touted as interventions that would dramatically reduce gun crime. But empirical assessments conclude that the efficacy was marginal at best. Peter Greenwood, head of the RAND Corporation's Criminal Justice Policy Center, summarized the data with the conclusion that Project Exile "[was] a bust. It ha[d] no impact. It d[id] not work."[224] The DOJ's own study showed a modest single digit impact with no direct connection to enhanced gun prosecutions.[225] A separate more detailed study found enhanced prosecution aspect of PSN "not to have a significant effect."[226]

Four metastudies examining the efficacy of broad range of gun legislation are largely agnostic about the crime reduction effects of gun controls. The National Research Council's 2005 study and a 2003 CDC supported study by the Task Force on Community Preventive Services of existing gun control measures concluded that there was insufficient evidence to determine whether any existing gun control measures were effective in reducing crime or violence.[227] Studies by the RAND Corporation in 2018 and 2020 found that child access prevention laws (e.g., safe storage laws) reduced self-inflicted harm or death among youth and reduced accidental injuries or death among children.[228] Both RAND studies found that

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223. *Id.* at viii.

224. Patton, *supra* note 140, at 1020 (citing Peter Greenwood, Comment in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 280 (Ludwig and Cook eds., 2003)).

225. *Id.* at 1021.

226. Patton, *supra* note 140, at 1021 (citing Andrew v. Papachristos, Tracy L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 231–32 (2007)); *See also* David Kennedy, DETERRENCE AND CRIME PREVENTION 4, 11 (2009); Richard Rosenfeld et al., *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419, 437–438 (2005) (finding lesser reductions in gun crime than initially reported); Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 254 (Jens Ludwig & Philip J. Cook eds., 2003) (reported decreases in crime were attributed to a regression in the mean caused by a spike in homicides the year before Exile was implemented).

227. JOHNSON ET. AL., *supra* note 15, at 2–3, discussing NAT'L RSRCH. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005) and ROBERT A. HAHN ET. AL., FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS, 52 MORBIDITY AND MORTALITY WEEKLY REPORT: RECOMMENDATIONS AND REPORTS 11 (2003).

228. RAND CORP., THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH

evidence on the effectiveness of other firearms polices was only moderate, limited, inconclusive, or nonexistent.[229]

Critiques of efficacy from the perspective of criminal justice reform bolster the conclusions of the comprehensive studies. Criminological research shows that likelihood of detection is the most important factor in crime deterrence.[230] David Patton observes that gun possession prosecutions are particularly suspect on this count "because they do nothing to increase the perceived odds of detection."[231]

The modern orthodoxy generates a presumption in favor of whatever gun control can be pushed through the political process. Critiques of gun control efficacy challenge that view. They suggest that gun control initiatives are not automatic, net gains for the Black community and counsel a *hard-look* assessment that is sensitive to racial costs.

IV. THE VASTLY DIMINISHED POTENTIAL OF THE GUN CONTROL AGENDA TO PRODUCE BENEFITS IN THE BLACK COMMUNITY UNDERCUTS THE MODERN ORTHODOXY

This Part shows how the promise of the gun control agenda induced the modern orthodoxy and how the diminished potential of that agenda now counsels rejection of the modern orthodoxy. The modern orthodoxy is rooted in the early promise that the gun control movement would attack crime by banning "crime guns." Crime guns were (and still are) overwhelmingly handguns. At its inception, the modern gun control movement aimed to ban them.[232] That formula was appealing in theory. And it is understandable that the new Black political class,

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EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES (2018); ROSANNA SMART, ANDREW R. MORRAL, SIERRA SMUCKER, SAMANTHA CHERNEY, TERRY L. SCHELL, SAMUEL PETERSON, SANGEETA C. AHLUWALIA, MATTHEW CEFALU, LEA XENAKIS & RAJEEV RAMCHAND, THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES (2d ed. 2020). For a summary and discussion of these studies, see JOHNSON ET AL., *supra* note 15, at 2–3, 59–66. There is however a substantial literature showing correlations and associations between gun control laws and crime rates. For a summary of various studies showing correlations with changes in crime rates see, JOHNSON ET AL., *supra* note 15, at 38–66.

One factor that confounds supply controls (e.g., gun and magazine bans) is that the existing inventory of guns is so large that we have passed the point where many "common sense" (rooted in the simple logic that no guns equal no gun crime) supply controls can be effective. Not only is the legitimate pool of guns immense but the pool of contraband guns probably exceeds the total number of guns in countries whose policies some urge that we adopt. It is conservatively estimated that between 600,000 and 1.2 million guns are stolen each year. Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 U.C.L.A. L. Rev. 1233, 1242–43 (2009). This indicates that there are many millions of stolen guns in the illicit market.

229. "In many cases we were unable to identify any research that met our criteria for considering a study as providing minimally persuasive evidence for a policy's effects." Rand Corp., THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES, xvii (2018).

230. Patton, *supra* note 140, at 1030.

231. *Id.* at 1030–31; David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1460 (2011).

232. Johnson, *supra* note 182.

coming to power at the end of the 1960s, embraced the gun control agenda to combat crime in their new domains.

James Forman describes the early Black political embrace of the gun control agenda. The handgun ban overturned by the Supreme Court's 2008 *Heller* decision was the work of the District of Columbia's first majority Black city council. Elizabeth Hinton summarizes recent work chronicling how the Black establishment of that era "responded to disorder by demanding tougher crime control measures in urban communities."[233] The rise of the modern orthodoxy fits squarely within that milieu.

James Forman notes the underacknowledged intersection between gun and drug regulation.[234] He describes Black community leaders, grasping for solutions to violent crime, embracing gun control and tough drug laws as the answer.[235] Early advocate of the D.C. gun ban, Councilman John Wilson was candid about the control agenda, declaring, "People think I want to take their guns. They are right."[236]

Councilman Wilson's supply-side gun control logic was impeccable. No guns equal no gun crime. Criminologist Franklin Zimring gave early support to this theme with studies showing how places with fewer guns had less gun crime.[237] That was the common-sense, philosophical foundation of the gun control agenda.[238] The Coalition to Ban Handguns reflected in its name the clear goal of the movement. Handgun Control Inc. founder, and President, Pete Shields articulated the strategy:

> We're going to have to take one step at a time, and the first step is necessarily—given the political realities—going to be very modest . . . Our ultimate goal—total control of handguns in the United States—is going to take time . . . The first problem is to slow down the increasing number of handguns being produced sold in

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233. HINTON, *supra* note 24, at 8; *see also* Michael Javen Fortner, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 5–9 (2015); Michael J. Fortner, *The Carceral State and the Crucible of Black Politics: An Urban History of the Rockefeller Drug Laws*, *in* STUDIES IN AMERICAN POLITICAL DEVELOPMENT 14, 27 (2013).

234. "Guns and Drugs—and our response to them—have commonalities that we rarely acknowledge. Those commonalties would help shape the direction of American crime policy at the dawn of the era of mass incarceration." FORMAN, *supra* note 59, at 51.

235. *Id.* at 47–57.

236. *Id.* at 55–56. Forman implicitly acknowledges the diminished relevance of gun control agenda today, comparing the robust supply control agenda touted by councilman Wilson to the marginalia of magazine bans, etc., that now define the gun control agenda.

237. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA, 122–23 (1997) ("Current evidence suggests that a combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the high U.S. death rate from violence"). Subsequent data shows that connection between gun supply and gun crime is not absolute. Indeed, for nearly two decades, starting in the early 1990s, gun crime in every category declined even as the number of guns per 100,000 people nearly tripled. *See* JOHNSON ET AL., *supra* note 15, at 32 (Diagram 1.1.).

238. The relationship between gun ownership and gun crimes as been erratic. For many years, gun crime declined even as United States gun ownership dramatically increased. *See* JOHNSON ET. AL., *supra* note 15, at 31–33, and Diagram 1.1.
Attempts to explain this trend are broad ranging. *Id.* at 43–46.

> this country. The second problem is to get handguns registered. And the final problem is to make the possession of all handguns and all handgun ammunition—except for the military, police, [security guards, licensed clubs and collectors]—totally illegal.[239]

California Governor Pat Brown reflected the same ambition in a view that the Robert Sherrill characterized as "increasingly popular in Officialdom."[240] Brown urged that "we should take the general position that handguns should be barred except by police officials and other authorized people, and then try to find out how to seize them in the days ahead."[241]

By the mid-1980s, the crusade against handguns was buoyed by several municipal bans.[242] But a statewide handgun ban remained elusive. Disappointed by the pace of legislators, prohibitionists went straight to the people. The result was failed handgun ban referenda in Massachusetts and California.

Massachusetts seemed the most promising. It was one of the most liberal states in the union. Gun ownership rates were relatively low. 86% of voters went to the polls. 69% voted against the Massachusetts handgun ban.[243] In California, 72% percent of voters turned out, and the handgun ban failed 63% to 37%.[244]

By 1989 the Violence Policy Center's Josh Sugarmann produced a policy paper lamenting the declining support for handgun bans. He urged a shift in focus that would re-energize the gun control movement:

> Although handguns claim more than 20,000 lives a year, the issue of handgun restriction consistently remains a non-issue with the vast majority of legislators, the press, and public. . . . Assault weapons . . . are a *new* topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase

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239. Johnson, *supra* note 182, at 774 (citing Richard Harris, *Handguns*, NEW YORKER, (July 26, 1976) at 57–58; *see also* Don B. Kates, Henry E. Schaffer, John K. Lattimer, George B. Murray & Edwin H. Cassem, *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 514 n.4, 515 n.5, 516 n.8 (1995) (pointing out scores of statements and official positions advocating a total ban on handguns and all firearms).

240. SHERRILL, *supra* note 16, at 272.

241. *See id.* Sherrill notes that Ferdinand Marcos draconian effort to confiscate guns in the Philippines under martial law (with penalties that included death by firing squad) resulted in roughly fifty percent compliance. In other work, I show that less severe efforts to enact gun registration around the globe or confiscation have resulted in far lower rates of compliance. Fledging efforts at to ban assault weapons in some U.S. states have resulted in single digit rates of compliance. *See* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837 (2008).

242. *See* JOHNSON ET AL., *supra* note 15, at 639–41.

243. David J. Bordua, *Adversary Polling and the Construction of Social Meaning: Implications in Gun Control Elections in Massachusetts and California*, 5 LAW & POL'Y Q. 345, 355–56, 364 (1983).

244. *Id.* at 359–60. The California proposition was configured as a "freeze" on new handguns. Existing guns would have been grandfathered. *Id.*

the chance of public support for restrictions on these weapons.[245]

The assault weapon focus would keep the gun control movement relevant, but the handgun ban crusade was in steep decline. By 2008, when the Supreme Court affirmed the constitutional right to possess a handgun for self-defense in *Heller,* only a handful of municipal bans remained for litigants to challenge.[246] The practical viability of sweeping handgun prohibition was nil.

The supply control agenda that induced the modern orthodoxy with the idea and ambition of eliminating the supply of crime guns is now exhausted. Americans own more guns than there are Americans. Handguns, elimination of which was the core goal of the gun control movement, are explicitly constitutionally protected. Supply controls (true gun bans) are now plausible only within a narrow category of "dangerous and unusual" firearms.[247]

Looking forward, even if *Heller, McDonald*, and *Bruen* were all reversed, there are too many guns, tightly held by Americans, for supply controls to work.[248] The existing inventory, combined with the near universal impulse of populations to defy gun registration and confiscation, means that we are stuck with guns.[249]

The vestigial gun control agenda might or might not produce particular polices that are a net gain for the Black community. Blacks (and particularly the Black political class) should, therefore, withdraw reflexive allegiance to the gun control agenda in favor of a *hard-look* approach that evaluates gun regulation with the same critical lens applied to the War on Drugs. Part V suggests how that *hard-look* approach might operate.

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245. VIOLENCE POL'Y CTR., ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (1988), http://www.vpc.org/studies/awacont.htm [https://perma.cc/QF34-26ES].

246. Cass Sunstein compared the *Heller* decision to *Griswold v. Connecticut*. In both cases, Sunstein argued the Court affirmed policies that reflected a national consensus and invalidated restrictions that were national outliers.

Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

On the more contested question of public carry, shall-issue concealed carry laws swept the nation and became the dominant approach well before the Court affirmed the constitutional right to bear arms in *Bruen*. By the time *Bruen* was decided, the national trend put New York and a few other jurisdictions a slim minority. *See* New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (discussing the concealed carry license landscape).

247. *Heller* framed these with the example of fully automatic firearms, a few hundred thousand of which remain legal to own under the provisions of the National Firearms Act. There is some argument that "military style" semiautomatic firearms aka assault weapons also qualify. But there is a powerful counter argument that these guns, of which there are tens of millions in circulation, are constitutionally protected firearms in common use. Moreover, if one ignores the political definitions and hews to technical distinctions, assault weapons are just one part of the vastly larger (well over one hundred million) class of semiautomatic firearms. *See* Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263 (2010).

248. Supply controls are now just artifacts of an earlier political dynamic, irrelevant except in fights at the margins over assault weapons and or restrictions on some potentially new class of "dangerous and unusual" weapons that are not constitutionally protected.

249. *See* Johnson, *supra* note 7.

V. REPLACING THE MODERN ORTHODOXY, WITH A RACIALLY SENSITIVE HARD LOOK APPROACH TO GUN REGULATION

This Part argues that Blacks should abandon the modern orthodoxy in favor of an approach to firearms policy that re-integrates the longstanding Black distrust of the state that fueled the Black tradition of arms and takes a case-by-case *hard look* at the costs and benefits of gun regulation.[250] This Part will present the appeal of *hard look* and provide two examples of how it might operate in practice.

Abandoning the modern orthodoxy in favor of *hard look* involves the same kind of pragmatism that fueled the Black tradition of arms. Leaders of the freedom movement acknowledged that state failure made arms a vital private resource for Blacks.[251] But their endorsement of private self-defense was framed carefully to reject political violence.[252]

They also were pragmatic about the evolving options for protecting the community. This pragmatism is demonstrated in the openness of transitional leaders to ideas that led to the modern orthodoxy. Roy Wilkins, for example, famously supported the right to arms during the freedom movement. But he also expressed openness to the gun control experiment that was emerging in the late 1960s.[253] Wilkins's pragmatism is a lesson for moderns about shifting strategies in the face of change.

Hard look would acknowledge that much of contemporary gun regulation is rooted in the narrow patch of overlap between conservative, tough on crime politics, and progressive desperation for some sort of gun control (tinged by fear of seeming soft on crime). Daniel Richman details this political dynamic where tough on crime gun policies present a rare intersection of agreement between liberals and conservatives.

> Gun control minimalists," "support offender-specific criminal enforcement as an alternative to broader regulation of trafficking and access. And advocates

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250. A shift away from the modern orthodoxy would dictate more critical engagement of those sorts of racial costs.

251. Johnson, *Philosophy and Practice of Arms*, *supra* note 12, at 156.

252. *See* Johnson, *supra* note 200.

253. One of the first signals of the rising modern orthodoxy is Roy Wilkins's apparent allusion in 1967 to the push for the Gun Control Act of 1968. Wilkins was asked by journalist Robert Novak, "Would you be in favor of a massive effort to disarm the Negroes in the ghettoes, just to try to prevent these open-shooting wars such as occurred in Newark last night?" *Meet the Press*, NBC, (Aug. 21, 1966), https://www.crmvet.org/info/660821_mtp_ckmmwy.pdf [https://perma.cc/QGM8-PEAL].

Wilkins's principle response reflected the longstanding Black tradition of arms: "I wouldn't disarm the Negroes and leave them helpless prey to the people who wanted to go in and shoot them up. . . . Every American wants to own a rifle. Why shouldn't the Negroes own rifles." *Id.* But this response came after Novak pressed him about gun prohibition targeted specifically at Blacks. His first parry, seemingly consistent with Lyndon Johnson's push for new federal gun controls, suggested a nascent support for the program of gun regulation that had been stirring in progressive circles: "I would be in favor of disarming everybody, not just the Negroes." *Id.* It is unclear whether Wilkins was referring to nationwide disarmament or disarming everyone in riot torn cities. Either way, the statement seems in tension with his many pronouncements in support of armed self-defense and is an early signal of potential support in the Black leadership for stringent gun control. For Wilkins's support of the Black tradition of arms, see JOHNSON, NEGROES AND THE GUN, *supra* note 1, at 181–296.

> of broader regulation embrace such enforcement programs as well, both as a shield against minimalist criticism [that they are soft on crime] and because their regulatory scheme naturally includes this sort of criminal enforcement.[254]

David Patton describes this "small area of overlap in the Venn diagram of gun control politics" as hazardous for Blacks:

> Conservative tough-on-crime policies and efforts to stave off broader regulation cross[ed] paths with the liberal desire to *take action where possible* and ward off criticism from the right about enforcing the laws already on the books. *That bipartisan agreement led to a dramatic, and largely unquestioned, increase in prison sentences for poor people of color.*[255]

Charles and Garrett similarly highlight the "legislative dynamic, in which . . . compromise between otherwise antagonistic parties leads to agreement on harsher penalties and more severe punishment[256] . . . that helps to explain the steady growth in prosecutions and the stark racial disparities among gun offenders in federal prisons today."[257] Tony Proveda adds detail, noting that the 1994 Crime Bill,[258] pressed by progressives, resulted in a deal where "both conservatives and liberals attempt[ed] to outdo each other in their posturing and proposals to be increasingly punitive toward criminals."[259] Gone was the 1960s liberal-conservative divide on crime (a focus on root causes versus harsh punishment).[260]

Black political support seems taken for granted in these tough on crime, gun control compromises. Indeed, by reflexively embracing the gun control agenda, the modern orthodoxy has sometimes generated an effective Black alliance with tough on crime conservatives resulting in over policing and disproportionate Black incarceration. [261]

Consider again Mayor Michael Nutter's aggressive push of Stop and Frisk in

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254. Patton, *supra* note 140, at 1017 (citing Daniel Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 410 (2001)).

255. *Id.* at 1017, 1038. Charles and Garrett's survey of decades of gun regulation identifies a "remarkable legislative dynamic, in which powerful interest are arrayed on both sides. A compromise between otherwise antagonistic parties leads to agreement on harsher penalties and more severe punishment." Charles & Garrett, *supra* note 31, at 645. This approach "helps to explain the steady growth in prosecutions and the stark racial disparities among gun offenders in federal prisons today." *Id.* at 639.

256. *Id.* at 645.

257. First citing *id.* at 645, then citing *id.* at 639.

258. The 1994 Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. (1994).

259. Charles & Garrett, *supra* note 31, at 669 (citing Tony G. Poveda, *Clinton, Crime, and the Justice Department*, 21 SOC. JUST. 73, 73 (1994)).

260. *Id.*; *see also* HINTON, *supra* note 24, at 12 ("[I]ncidents of collective violence during the second half of the 1960's moved liberal sympathizers away from structural critiques of poverty and support for community action programs . . . and fueled [tough on crime measures].").

261. The liberal-conservative divide on guns was part of the milieu in the 1960s when the modern orthodoxy emerged. James Forman documents how Black leaders, consistent with the modern orthodoxy, supported many of the tough on crime harsh mandatory sentencing. FORMAN, *Locking up Our Own,* at 60–63 (2017); HINTON, *supra* note 24, at 8; MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015).

Philadelphia.[262] Nutter stood on the shoulders of Wilson Goode, Philadelphia's first black mayor. Goode succeeded the notorious Frank Rizzo who cajoled supporters in his quest for a third mayoral term with the slogan, "Vote White."[263] Under Rizzo's tenure as Police Commissioner and Mayor the Philadelphia Police Department earned a reputation for brutality and disregard for constitutional rights particularly in interactions with the Black community.[264] Mayor Nutter, under the sway of the modern orthodoxy, took a page out of Frank Rizzo's tough on crime playbook. Mayor Nutter's approach illustrates the hazard that David Patton and others describe. It illuminates how the interests of Blacks in the formation of firearms policy might not automatically align with the traditional gun control agenda or the political compromises that it demands.

The modern orthodoxy is no doubt rooted in a good faith desire to address gun crime in the Black community.[265] But critiques of U.S. firearms policy increasingly find offsetting racial costs embedded in gun regulations. Charles and Garrett, for example, acknowledge that the social and economic costs of gun violence are visited disproportionately on poor and minority communities but argue that practical enforcement "has not addressed inequality but instead exacerbates it."[266] Elizbeth Hinton argues that the War on Crime and the War on Drugs have left Black neighborhoods overpoliced and under protected and are two of the largest policy failures in the history of the United States.[267] Alicia Granse argues that policing of nonviolent gun possession offenses is especially suspect. Granse criticizes that, while the data does not indicate that Blacks are more likely to carry guns illegally, biased policing of firearms possession crimes means that minorities, especially Black men, are more likely to be stopped, arrested, charged, and convicted under provisions that criminalize nonviolent possession.[268]

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262. *See supra* text accompanying notes 100–103.

263. Gregory Jaynes, *Philadelphia's Message to Rizzo: 'Enough'*, N.Y. TIMES, Nov. 9, 1978, at A23, https://www.nytimes.com/1978/11/09/archives/philadelphias-message-to-rizzo-enough-predicted-greatest-victory.html [https://perma.cc/DY4P-YXBW].

264. Rizzo served as Philadelphia's police commissioner from 1968 to 1971 and mayor from 1972 to 1980. He was a member of the Democratic Party until 1986, when he switched to the Republican Party. Rizzo was barred from running for a third term as mayor by the Philadelphia City Charter. He pressed for a charter amendment that would allow him to run again, urging his supporters to "vote white." Before, during, and after his tenure as police commissioner, the PPD engaged in patterns of police brutality, intimidation, coercion, and disregard for constitutional rights, in particular toward the black community.

The patterns of police brutality were documented in a Pulitzer Prize-winning *Philadelphia Inquirer* series by William K. Marimow and Jon Neuman. Jake Blumgart, *The Brutal Legacy of Frank Rizzo, the Most Notorious Cop in Philadelphia History*, VICE (Oct. 22, 2015, 3:00 PM), https://www.vice.com/en/article/kwxp3m/remembering-frank-rizzo-the-most-notorious-cop-in-philadelphia-history-1022 [https://perma.cc/8V5S-D5US].

265. Charles & Garrett, *supra* note 31, at 695–96.

266. *Id.*

267. HINTON, *supra* note 24; Gibson, *supra* note 24, at 42.

268. Alicia Granse, *Gun Control and the Color of the Law*, 37 LAW & INEQ. 387, 405 (2019) ("Selective enforcement of drug laws, higher rates of criminal convictions of all kinds for minorities, and the increased likelihood of being stopped by police in the first place create an environment in which people

Hard look prompts closer examination of the racial impacts of disparate gun policies and yields insights that are obscured under the modern orthodoxy. Existing scholarship has already highlighted how tough on crime policies, especially gun possession crimes intersecting with drug infractions, deserve closer evaluation.[269] Sections A and B below present two additional examples of the richer racial critique generated by the *hard-look* approach. Section A presents a critique of concealed carry policies that focuses on the comparative risks of private gun carriers and police. Section B discusses racial costs embedded in some versions of assault weapon legislation.

A. Hard Look and Concealed Carry

Amicus briefs filed in *NYSRPA v. Bruen* (affirming the constitutional right to carry firearms) are a foothold for considering *hard look* versus the modern orthodoxy. The joint NAACP/National Urban League amicus brief is a good representation of the modern orthodoxy. It operates solidly within the Second Amendment Frame. It argues broadly that guns are a scourge on the community and makes classic arguments for tight restrictions on carrying guns. The Black Defenders brief, on the other hand, pushes against the modern orthodoxy with nontraditional arguments that emphasize the practical racial costs and enforcement bias embedded in the New York permitting scheme.

Hard look would give a fair hearing to both approaches as well as other aspects of the concealed carry story that should be included in a race sensitive critique. Those additional considerations include the national experience with lawful private gun carriers and the distribution of legal firearms in the Black community.

The New York system challenged in *Bruen* pushed the distribution of firearms

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of color do not enjoy the same protections under the Second Amendment as do whites . . . .")

269. *See, e.g.*, Dubber, *supra* note 56; Levin, *supra* note 6, at 2204 (noting that enforcement of possession crimes invite erosion of the Fourth Amendment); Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L.J. 1429 (2021) (arguing that felon-in-possession laws are overly punitive); Kari Lorentson, Note, *Under Attack: The Case for As-Applied Challenges to the Felon-in-Possession Ban*, 93 NOTRE DAME L. REV. 1723 (2018) (the case for nonviolent felons challenges to firearm disqualification); Carly Lagrotteria, Note, Heller*'s Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 FORDHAM L. REV. 1963 (2018) (same); Jeffrey Giancana, Note, *The "Scourge" of Armed Check Fraud: A Constitutional Framework for Prohibited Possessor Laws*, 51 U. MICH. J.L. REFORM 409 (2018) (finding felon-in-possession laws overbroad); Zack Thompson, Note, *Is It Fair to Criminalize Possession of Firearms By Ex-felons?*, 9 WASH. U. JURIS. REV. 151 (2016) (cost-benefit analysis of the felon-in-possession laws); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*?, 32 HARV. J.L. & PUB. POL'Y 695 (2009) (arguing that white-collar criminals are not dangerous and should not lose gun rights). *But see* Anthony J. Zarillo III, Comment, *Going Off Half-Cocked: Opposing As-Applied Challenges to the "Felon-in-Possession" Prohibition of 18 U.S.C. § 922(g)(1)*, 126 Penn St. L. Rev. 211 (2021) (arguing that as-applied challenges to the felon-in-possession ban should always fail under the theory that the Second Amendment can only be exercised by "virtuous" citizens); Dru Stevenson, *In Defense of Felon-In-Possession Laws*, 43 CARDOZO L. REV. 1573 (2022). Stevenson defends the federal felon-in-possession prohibition on the grounds inter alia that "it is currently one of our only ways to limit the supply of guns streaming into vulnerable, poverty-stricken communities, where most of our country's gun violence occurs." *Id.* at 1577. He also contends that sentences for felons in possession are too long and urges forfeiture and administrative inspections instead of incarceration. *Id.*

toward (1) police and (2) people willing to carry guns illegally. The most risk-averse and law-abiding citizens were disarmed by New York's permitting policy. A race-sensitive *hard look* at this distribution would consider what we have learned about lawful private gun carriers over the decades since lawful gun carrying has become the national norm.

One of the controversies in the debate about lawful gun carrying is the claim that armed good guys deter crime. That proposition is famously advanced by economist John Lott in the book MORE GUNS LESS CRIME. Lott's thesis has been rebutted by other economists, prompting responses by Lott and further rebuttals by critics.[270] Most of that work tracks correlations between gun carrying and changes in crime rates. It also generates myriad contestable theories about possible causation.

The debate about the impact of lawful gun carrying on crime rates has the unfortunate consequence of obscuring important, uncontested data about the basic behavior of lawful private gun carriers. Especially salient is how that behavior compares to the behavior of police. That comparison is an important component of a race-sensitive *hard look* at gun carry policies.

There is no real controversy about the very low rate at which lawful, private gun carriers are arrested for gun crimes. In the recent case of *Moore v. Madigan*, which struck down Illinois' ban on concealed carry, Judge Richard Posner adopted the following summary of the literature:

> The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders. Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.[271]

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270. JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 11–12 (2d ed. 2000) (Lott's second edition acknowledges and addresses various critics.).

271. Moore v. Madigan, 702 F.3d 933, 938–39 (2012) (quoting Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control after* Heller: *Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009)); *see also* John J. Donohue, *The Impact of Concealed-Carry Laws*, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 287, 314–21 (Jens Ludwig & Philip J. Cook eds., 2003) (providing state-by-state estimates on the effect of shall-issue laws on various crimes); H. Sterling Burnett, *Texas Concealed Handgun Carriers; Law-Abiding Public Benefactors*, NAT'L CTR. FOR POL'Y ANALYSIS (June 2, 2010), www.ncpa.org/pdfs/ba324.pdf (reviewing the impact of concealed-carry laws on violent crime).

John Lott, progenitor of the contested "more guns less crime" thesis, details the uncontested data surrounding the behavior of concealed carry licensees:

> Between October 1, 1987, when Florida's "concealed-carry" law took effect, and the end of 1996, over 380,000 licenses had been issued, and only 72 had been revoked because of crimes committed by license holders (most of which did not involve the permitted gun). . . .
>
> In Virginia, "not a single Virginia permit-holder has been involved in violent crime." In the first year following the enactment of concealed-carry legislation in Texas, more than 114,000 licenses were issued, and only 17 have so far been

In terms of trustworthiness, lawful, private gun carriers compare favorably to police officers. In Florida, private carriers have been sanctioned for firearms crimes at a lower rate than police.[272] In Texas, 120 out of 584,000 active license holders were convicted of any sort of misdemeanor or felony—a rate of 0.021%. Fewer than one-quarter of those convictions involved firearms.[273] By comparison, the rate of all crimes by Texas police officers was 0.124%.[274]

As a descriptive matter, divorced from any claims of causation, the limited *license* granted to lawful private gun carriers is a sound predictor of their behavior. By "license" I mean the rules, implicit permissions, and customs that guide and constrain behavior. For private gun carriers this license is defined by the boundaries of the traditional self-defense claim. This license provides a narrow excuse for using deadly force where an innocent person faces imminent threat of death or serious bodily harm.

By contrast, the license granted to police, whom the modern orthodoxy deems trustworthy arms-bearers in the Black community, is far broader. It can be understood along a spectrum from *express license*[275] (formal rules of engagement) to

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> revoked by the Department of Public Safety (reasons not specified). After Nevada's first year, "Law enforcement officials throughout the state could not document one case of a fatality that resulted from irresponsible gun use by someone who obtained a permit under the new law." Speaking for the Kentucky Chiefs of Police Association, Lt. Col. Bill Dorsey, Covington assistant police chief, concluded that after the law had been in effect for nine months, "We haven't seen any cases where a [concealed-carry] permit holder has committed an offense with a firearm." In North Carolina, "Permit-holding gun owners have not had a single permit revoked as a result of use of a gun in a crime." Similarly, for South Carolina, "only one person who has received a pistol permit since 1989 has been indicted on a felony charge . . . .
>
> During state legislative hearings on concealed handgun laws, the most commonly raised concerns involved fears that armed citizens would attack each other in the heat of the moment following car accidents or accidentally shoot a police officer. The evidence shows that such fears are unfounded . . . .

Id.

Lott's more contested claim is that concealed handgun laws actually dramatically reduce crime. He projects the broader social consequences of concealed carry and rests on the thesis that "[c]riminals respond to the threat of being shot while committing such crimes as robbery by choosing to commit less risky crimes that involve minimal contact with the victim." LOTT, *supra* note 270, at 47, 54.

272. *See* Concealed Carry Permit Holders Across the United States, CRIME PREVENTION RSRCH. CTR. 7–8 (July 9, 2014), http://crimeresearch.org/wp-content/uploads/2014/07/Concealed-Carry-Permit-Holders-Across-the-United-States.pdf [https://perma.cc/BR3U-F9BK] ("Over the last 77 months from January 2008 through May 2014, just 4 permits have been revoked for firearms related violations. With an average of about 875,000 active permit holders per year during those years, the annual revocation rate for firearms related violations is 0.00007% – 7 one hundred thousandths of one percentage point . . . ."). "The Florida numbers can easily be compared to data on firearms violations by police officers during the three years from January 1, 2005 through December 31, 2007. During that time period, the annual rate of such violations by police was at least 0.007%. That is higher than the rate for permit holders in Florida." *Id.*

273. *Id.* at 7–8.

274. *Id.*

275. Express police license is well distilled by Police Executive Research Forum (PERF) Executive Director, Chuck Wexler. Discussing the realities of the explicit license to use violence, Wexler commented:

> Over the past year, the nation has seen, with their own eyes, video recordings of

tacit license[276] (drawn by implication from the implementation and enforcement of formal rules) to *perceived license* [277] (the permission that officers fairly discern from the surrounding culture, including the consequences for alleged violations of formal rules and tacit standards).

The claim that license is a better predictor of behavior than the mere act carrying of a gun, squares with what occurs across the two categories of lawful gun

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> a number of incidents that simply do not look right to them. In many of these cases, the officers' use of force has already been deemed 'justified,' and prosecutors have declined to press criminal charges. But that does not mean that the uses of force are considered justified by many people in the community. One reason for this 'disconnect' is that under the legal standard for judging a police action, the U.S. Supreme Court's 1989 precedent in *Graham v. Connor*, an officer's use of force is considered constitutional if it would be considered 'reasonable,' considering the facts and circumstances of the case, 'from the perspective of a reasonable officer on the scene.' And the Court added that 'the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' *Thus, it is a rare case in which the courts will find an officer's use of force unconstitutional, or a prosecutor will bring charges against an officer.*

Re-Engineering Training on Police Use of Force, POLICE EXEC. RSRCH. FORUM (2015) [hereinafter 'PERF Report']. *Id.* at 3 (emphasis added); *see also* Graham v. Connor, 490 U.S. 386, 398–99 (1989).

276. *Tacit license* is multifaceted. The Supreme Court implicitly recognized the phenomenon in *St. Louis v. Praprotnik* (discussing the requirements for proving entity liability in officer misconduct cases) where a plurality of the Court held that "official policy" includes not only written laws and other legal materials, but, in certain cases, "policy [can] be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business."

Examples of tacit license can be drawn from liability standards that are not explicitly framed as license. Indeed, these rules are nominally configured as sanctions. But the manner in which they are administered communicates license. Consider the civil sanctions that nominally constrain police behavior. Commentators lament the difficulty of winning § 1983 actions against police. The risk of losing is so slim, and the ultimate consequences so meager, that even officers who lose § 1983 lawsuits might fairly walk away thinking that they behaved properly.

277. The sources of perceived license are difficult to fully catalogue. A multitude of variables affect officers' discernment of the actual boundaries on their permission to use violence. The inputs include the practical demands of "the patrolman's task" and the culture that grows out of those demands. JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 11 (1978). One example of perceived license and its amorphous roots is the "twenty-one-foot rule." Discussion of the twenty-one-foot rule by police executives demonstrates how nebulous the evolution of perceived license can be. The origin of the "rule" is loosely attributed to a 1983 article in *SWAT Magazine* by Salt Lake City Police Officer, Dennis Tueller. Tueller performed a series of loose experiments and concluded that an attacker could cover twenty-one feet in the time it took most officers to draw and fire their weapon. So even a contact weapon could be a deadly threat to police at a distance of twenty-one feet. "Many police officers in the United States have heard about the twenty-one-foot rule in their training . . . . *Many officers have said the 21-foot rule is part of police culture, handed down informally from one officer to another, or mentioned in training, over the generations*." POLICE EXEC. RES. FORUM, RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 5 (2015) [hereinafter "PERF Report"]. The videotaped shooting by police of Kajieme Powell in St. Louis seems to be an example of the 21-foot rule in operation. The full episode was captured on video. *See* Taylor Wofford, *New Video Emerges of Police Shooting Kajieme Powell in St. Louis*, NEWSWEEK.COM, Aug. 20, 2014, http://www.newsweek.com/new-video-police-shooting-2nd-man-st-louis-emerges-266041 [https://perma.cc/8QKK-XGM6].

carriers. Experience refutes the dire predictions that guns on the hips of lawful private gun carriers would automatically transform shopping cart bumps between ordinary, previously law-abiding people into shootouts.[278]

Now compare police who operate under a broad license to carry, draw, point, and fire guns. Police deploy guns in a wide range of scenarios where they do not face an imminent deadly threat. Police may issue a multitude of *ad hoc* commands in various situations and may enforce those commands by drawing, pointing, and firing guns. Police draw, point, and fire guns in scenarios that sometimes start with relatively trivial things involving unarmed citizens.

Within police culture, license to escalate violence can morph into a sense of duty with officers who fail to escalate deemed to have failed on one of their fundamental obligations. Under the discussion heading "Never back down. Move in and take charge," the 2015 Police Executive Research Forum Report notes that:

> *[D]e-escalating, and disengaging tactically are sometimes seen as antithetical to a traditional police culture.* Some officers, with the best intentions, think that their job is to go into a situation, take charge of it, and resolve it as quickly as you can. Sometimes there is a feeling of competitiveness about it. If an officer slows a situation down and calls for assistance, there is sometimes a feeling that other responding officers will think, 'What, you couldn't handle this yourself?[279]

Police scholars note that it is easy to understand why police officers, immersed in the culture and training of "command presence," might earnestly contend that they have done nothing wrong in scenarios where trivial encounters with citizens escalate into violence, including guns drawn and fired.[280] Concern about this sort attitude has prompted calls for retraining police in de-escalation tactics.[281] But these suggestions fail to acknowledge the dynamics of the police assignment and the power of police culture.[282] Curbing police discretion is a herculean task. And the

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278. *See* Johnson, *Lawful Gun Carriers*, *supra* note 104, at 217–22 (distilling data from multiple states that details the landscape summarized by Judge Richard Posner, including the data showing that LPGC's are arrested for criminal gun infractions at lower rates than off duty police).

279. PERF Report, *supra* note 275, at 5.

280. *See* Armacost, *supra* note 109, at 495 (discussing a how Los Angeles Police Department's "[o]fficers were instructed to maintain a 'command presence,' which required aggressive identification and investigation of potential suspects and generated a high level of confrontations on the street. The combination of aggressive training, coupled with a heavy emphasis on high citation and arrest statistics as a measure of success, meant that officers were habituated into commanding and confronting, rather than communicating.").

281. CARL B. KLOCKARS, A THEORY OF EXCESSIVE FORCE AND ITS CONTROL, IN POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 10–11 (William A Geller & Hans Toch eds., 1996) (de-escalation hierarchy is standard in police training and criminology).

282. David Lester captures the phenomenon with this summary of the research: "rookies soon learn that what is taught in the police academy is somewhat irrelevant to their work on the street . . . . They . . . learn that their colleagues reward them for aggressive and forceful action and punish them for caution. Cautious police officers are seen as unreliable and as risky partners." David Lester, *Officer*

persistence of the problem leaves one skeptical about the possibility of changing police behavior in any substantial way.[283]

Given the respective histories and structural risks, it is not clear why lawful private gun carriers should be less welcome in the community than police? Good people with guns have been part of the Black community for a very long time.[284] A race sensitive, *hard look* would consider the prospect that lawful private gun carriers might actually present lower racial costs to the community than do police.

B. A Hard Look at Assault Weapons Restrictions

Hard look prompts openness to arguments about assault weapon restrictions that get no hearing under the modern orthodoxy. Assault weapon bans are an article of faith of the gun control movement. The associated racial costs of such legislation are not evident on the face of things. They only emerge from consideration of the push back from state and local governments that assault weapon legislation (actual and threatened) has generated.

Many of the most ardent gun rights jurisdictions have implemented Second Amendment Sanctuary policies, in part, to thwart assault weapon legislation.[285] By statute, ordinance, resolution, and informal policy, states, counties, municipalities, and various public officials have committed to resist enforcement of offending federal and state gun regulations. The *de jure* legitimacy of these sanctuary policies varies. But there is plain opportunity for *de facto* implementation of Second Amendment Sanctuary policies through the exercise of enforcement discretion—or, more precisely, *discretionary nonenforcement*. This is where the embedded racial costs emerge. There is a rich literature demonstrating the various ways that biased exercise of enforcement discretion afflicts criminal law.[286] I have shown in other

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Attitudes Toward Police Use of Force, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 186 (William Geller & Hans Toch eds., 1996).

283. *See e.g.*, JOHNSON, NEGROES AND THE GUN, *supra* note 1, at 81, 91, 97, 106–110, 115, 152, 161, 170, 174, 183, 187, 200, 211, 227. *See also* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); RODNEY STARK, POLICE RIOTS: COLLECTIVE VIOLENCE AND LAW ENFORCEMENT (1972).

284. *See* JOHNSON, NEGROES AND THE GUN, *supra* note 1.

285. Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion and Race*, 50 PEPP. L. REV. 1 (2023).

286. There is a rich literature describing the racial impact of biased exercise of enforcement discretion. *See, e.g.*, Griffin Edwards & Stephen Rushin, *Police Vehicle Searches and Racial Profiling: An Empirical Study*, 91 FORDHAM L. REV. 1 (2022) (critiquing biased exercise of enforcement discretion surrounding police traffic stops and vehicle searches); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1188 (2018) (showing that white defendants are more likely than Blacks to have charges dropped or reduced in plea bargaining); Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223, 223, 245 (2018) (finding racial disparities in plea bargaining affecting Black males). L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75–81 (2017) (examining the explanations for biased stop and frisk decisions); Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 490 (2011) (finding that racial minorities faced increased probability of arrest); Marvin D. Free, J., *Race and Presentencing Decisions in the United States: A*

work that this bias threatens to operate equally, if not more powerfully, where enforcement discretion is used to implement Second Amendment Sanctuary policies.[287] So, for example, a sheriff might effectuate sanctuary polices by refusing to enforce offending assault weapon legislation against his familiar local constituency. But there are many reasons and powerful incentives for him to reverse field and enforce that same legislation against outsiders.[288]

One might still ask whether these submerged racial costs are offset by the benefits of an assault weapons ban. This is where one must put assault weapon legislation in context to illuminate its actual value. A significant function of the assault weapon issue is keeping the gun control movement relevant following the decimation of its core goal, the handgun ban. Viewed independently, as a response to mass shootings, or school shootings, or crime generally, assault weapon restrictions are manifestly nonresponsive.[289] Inconveniencing homicidal maniacs by nominally banning military style guns that have countless easy substitutes is not a serious response to the mass shootings. Political efforts to ban guns with pistol grips, flash hiders, and heat shields, while leaving functionally identical, or more lethal, guns unmolested, are best explained as security theater and vestigial battles of a long-lost war.[290]

One still might say that at least assault weapon bans do no harm. But that is where a race sensitive *hard look* adds value by showing that certain renditions of assault weapon legislation carry more potential racial costs than others. I have demonstrated elsewhere that assault weapon bans are most effective as prospective blocks on the manufacture of new assault weapons. On the other hand, attempts to ban guns already owned promises widespread state and local resistance through

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Summary and Critique of the Research, 27 CRIM JUST. REV. 203, 210–14 (2002) (listing studies showing the impact of race on exercise of prosecutorial discretion).

287. Ideally, sanctuary policies both explicitly and implicitly extend primarily to individuals whose only infraction is a gun law that the sanctuary jurisdiction opposes. As a practical matter the operation of assault weapons will occur in combination cases where the assault weapon infraction occurs in combination with other charges. Those defendants as we have seen are disproportionately minorities. For combination crimes, the non-gun infraction puts increasing pressure on law enforcers to exercise their discretion in favor of enforcement. With discretion operating on this spectrum, Blacks and Browns should expect to experience the same sort of bias that is evident in the other discretionary aspects of gun law enforcement. *See* Johnson, *supra* note 285.

288. *Id.* In other work, I showed how the same dynamic might unfold in the context of concealed carry restrictions. *See* Nicholas J. Johnson, *Defiance, Concealed Carry, and Race*, 83 L. & CONTEMP. PROBS. 159, 161–63 (2020).

289. In 1994, I critiqued the "bad gun formula" that undergirds assault weapons restrictions. *See* Nicholas J. Johnson, *Shots Across No Man's Land*, 22 FORDHAM U. L. J. 441 (1995). I extended this critique in other work. *See, e.g.*, Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285 (2009); Nicholas J. Johnson, *Sen. Dianne Feinstein's Gun Control Alchemy*, LAW & LIBERTY (Jan. 6, 2013), https://lawliberty.org/sen-dianne-feinsteins-gun-control-alchemy/ [https://perma.cc/2G8B-QXWG].

290. For a discussion of the different types of utilities/risks posed by different types of firearms and discussion of where assault weapons fall on different measures of utility/risk/lethality, see Johnson, *Supply Restrictions*, *supra* note 289.

discretionary nonenforcement that invites bias.[291]

While the gun control movement probably will take any restrictions it can get on assault weapons, a race sensitive *hard look* suggests that Blacks might support prospective bans but raise concerns about the racial costs of discretionary nonenforcement policies that arise in response to bans on guns currently owned. This illustrates how the *hard-look* approach would depart both from the traditional gun control perspective (where advocates will take whatever they can get in terms of controls) and the traditional gun rights approach characterized by blanket opposition to assault weapon bans.

CONCLUSION

Contemporary gun regulation presents significant racial costs and marginal efficacy. The promise of a handgun ban that prompted the modern orthodoxy has withered. These developments counsel against the modern orthodoxy and in favor of a case-by-case, race sensitive *hard look* at the impact of gun regulation on the Black community. Neither proponents nor opponents of any particular gun regulation should take Black support or opposition for granted.

291. Johnson, *supra* note 285.