
ARTICLE

INTERRUPTING GUN VIOLENCE

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Who protects us from you?

—KRS-One¹

ABSTRACT

Against the backdrop of declining crime rates, gun violence and gun-related homicides have only risen over the last three years. Just as it historically has, the brunt of that violence has been borne by poor Black and brown communities. These communities are especially impacted: they are not only far more likely to be the victims of gun violence, but are also the primary targets of police surveillance and harassment. People of color are disproportionately prosecuted for gun crimes, which, in part, prompted the Black Public Defenders Amicus Brief in support of expanding gun rights in New York State Rifle & Pistol Ass’n v. Bruen.

Recognizing that the carceral approach of policing and prosecution has failed to prevent gun violence and has harmed Black and brown communities, this Article sets forth community violence interruption groups as a promising decarceral alternative. Violence interruption groups address violence by working with the people who are most impacted by cyclical gun violence and intervene by mediating conflicts, defusing imminent violence, and encouraging people to give up their firearms. Building on the work of abolitionist scholars and organizers, this Article centers the role of Violence Interrupters as an important alternative to policing and punitive prosecution. It explores legal changes that might minimize the legal barriers to violence interruption,

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¹ KRS-ONE, WHO PROTECTS US FROM YOU? (Boogie Down Prods. 1989).

including statutory reform, mens rea reform, expansion of the Second Amendment, and recognition of an innocent possession defense.

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INTRODUCTION

Jefferey Simon is panicking because he has just discovered a gun in the car he is driving.² He has a felony conviction and knows that even being in the car with a gun could result in at least five years in prison. The night before, Mr. Simon borrowed a friend's car after his broke down. He needed the car to get to work on the outskirts of Milwaukee. On his way to work on a freezing cold midwestern February morning, Mr. Simon looks through the glove compartment and discovers the gun. Mr. Simon drives to the local community center in hopes that someone there can responsibly dispose of it.

When he arrives, the community center is still closed. Mr. Simon paces back and forth outside. He repeatedly checks the entrance and looks inside for people. He does this for fifteen minutes, but before anyone comes to open the center, police are in the parking lot and arrest him. During the arrest, officers find the gun. He is charged by federal prosecutors for being a felon in possession of a firearm. Even though Mr. Simon never purposely possessed the gun and tried to safely dispose of it, he decides to plead guilty and is sentenced to four years in prison because the Seventh Circuit—like every other Circuit except the D.C. Circuit—does not recognize an innocent possession or temporary lawful defense.³ As his lawyers appeal his case and attempt to move the Seventh Circuit to recognize an innocent possession defense, he sits in a federal prison.⁴

In an emergency room in downtown Milwaukee, Violence Interrupters are meeting with a young man who has just been shot by a rival clique in his neighborhood. Knowing there is immense pressure on the young man to retaliate, the Violence Interrupters patiently work with him to de-escalate the situation. Like many Violence Interrupters, these interrupters have been in similar situations to this young man, ultimately leading to their incarceration. They know from personal experience that retaliation only begets further violence, lengthens the cycles of death and suffering, and leads to years of regret and loss. Over the next twenty-four hours, Violence Interrupters stay with the young man and convince him to avoid a retaliatory shooting. Their own experiences and dedicated intervention defuse the situation. They convince him that getting rid of the gun is the safest course and offer to dispose of it for him. They eventually take the gun from him and drop it off for disposal.

² Names and identifying details have been changed to protect client confidentiality.

³ Mr. Simon entered a conditional guilty plea in the district court and preserved the innocent possession issue for appeal, with the understanding that if the defense were to be recognized, he would withdraw his plea and proceed to trial.

⁴ The inspiration for this Article comes from Mr. Simon's appeal. I had the privilege of writing for amici, a number of community Violence Interruption groups, in support of his motion to recognize the innocent possession defense in the Seventh Circuit.

Had Mr. Simon been in contact with Violence Interrupters, instead of arrested by police, he perhaps could have safely turned in the gun without spending the next four years in a federal prison. However, despite their successful intervention in Milwaukee, a major problem remains: what the Violence Interrupters did was illegal under federal law. Over the last thirty years the federal government, partnering with state prosecutors and police departments, has vastly increased its prosecution of felon-in-possession cases.⁵ As part of a trend of tough-on-crime policies, the federal government enacted Project Exile, a program that funnels state-level gun cases to federal court to leverage harsher punishment.⁶ The program was designed not only to punish people with longer sentences but also to incarcerate them in out-of-state federal prisons far away from their friends and families—to literally exile them.⁷ Working with state-level prosecutors and police officers to identify possible targets, the project especially focused on felon-in-possession charges.⁸ Since the inception of Project Exile and its predecessor, Project Triggerlock, federal felon-in-possession charges have skyrocketed.⁹ Today, thousands of federal felon-in-

⁵ See David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1012 (2020) [hereinafter Patton, *Criminal Justice Reform and Guns*] (discussing widespread federal prosecution of “felon-in-possession cases” based on gun possession charges coupled with criminal history).

⁶ In 2021, the average sentence for a conviction under the federal felon-in-possession of a firearm statute, 18 U.S.C. § 922(g), was five years. For those sentenced under the Armed Career Criminal Act, the average sentence was more than fifteen years, even in situations where no violence or injury was alleged. See U.S. SENT’G COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2021) [hereinafter QUICK FACTS: FELON IN POSSESSION], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf [<https://perma.cc/US3L-BEB2>] (showing data for federal prosecutions made under Felon in Possession of a Firearm Act in 2021); Patton, *Criminal Justice Reform and Guns*, *supra* note 5, at 1012 (detailing instances of people effectively getting life sentences because of stacked sentencing under Armed Career Criminal Act, even in situations where no one was harmed).

⁷ See Patton, *Criminal Justice Reform and Guns*, *supra* note 5, at 1012 (discussing data on increase in federal prosecution of “felon-in-possession” cases since 1991).

⁸ Under federal law, several categories of people are prosecuted for simply possessing a firearm or ammunition, including those with a felony on their record. 18 U.S.C. § 922(g) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

⁹ See Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1675 (2002) (discussing history of these federal prosecutions starting with Operation Triggerlock); Patton, *Criminal Justice Reform and Guns*, *supra* note 5, at 1012 (discussing data on increase in federal prosecution of “felon-in-possession” cases since 1991 with Triggerlock).

possession cases are prosecuted every year.¹⁰ Black people make up a disproportionate percentage of these cases.¹¹ In 2022, 56.2% of people federally convicted under the felon-in-possession statute were Black (despite making up just 12% of the population).¹²

The expansion of policing and prosecution to combat gun violence reflects a carceral logic: the belief that safety is best achieved through state surveillance, prosecution, and incarceration.¹³ This approach has overwhelmingly targeted Black and brown communities.¹⁴ It has led to increased policing and surveillance in communities of color followed by increasingly severe punishment for gun possession.¹⁵ As many have detailed, this approach has failed to make these same communities safer.¹⁶ Nationally, the number of mass shootings has increased, and gun deaths have increased by 75% over the last decade.¹⁷ Meanwhile, the police shoot and kill hundreds of people of color every year.¹⁸ In 2022—only two years after one of the largest uprisings against police brutality

¹⁰ Between 2017 and 2021, there were more than 34,000 convictions for violations of 18 U.S.C. § 922(g). QUICK FACTS: FELON IN POSSESSION, *supra* note 6.

¹¹ See *id.*; U.S. SENT'G COMM'N, QUICK FACTS: 18 U.S.C. § 922(G) FIREARMS OFFENSES (2022) [hereinafter QUICK FACTS: FIREARMS OFFENSES], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf [<https://perma.cc/M98E-HQ77>].

¹² QUICK FACTS: FIREARMS OFFENSES, *supra* note 11.

¹³ Mariame Kaba defines carceral logic as a “punishment mindset” that focuses on retribution and revenge. See MARIAME KABA, WE DO THIS 'TIL WE FREE US 133 (2011); see also JENNIFER CARLSON, POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE 57 (2020) [hereinafter CARLSON, POLICING THE SECOND AMENDMENT]; Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2184 (2016) [hereinafter Levin, *Guns and Drugs*].

¹⁴ See Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 316 (2007).

¹⁵ See *id.* at 317; see also Jacob D. Charles, *Firearms Carceralism*, 108 MINN. L. REV. (forthcoming 2024) (manuscript at 4-6) (detailing criminal legal system's turn to harsh sentencing in gun cases and its effect on mass incarceration).

¹⁶ See, e.g., DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 158-59 (2021); MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE: A CASE FOR ABOLITION 33, 53 (2022); Jennifer E. Cobbina-Dungy & Delores Jones-Brown, *Too Much Policing: Why Calls Are Made To Defund the Police*, 25 PUNISHMENT & SOC'Y 3, 12-14 (2023).

¹⁷ Mass shootings, defined as incidents in which four or more people were killed or injured, not including the shooter, have steadily risen since 2014, when there were 272 incidents. See *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE (Mar. 19, 2024), <https://www.gunviolencearchive.org/past-tolls> [<https://perma.cc/VCZ7-L3XP>] (publishing yearly statistics on mass shootings). Between 2020 and 2023, there were more than 600 mass shootings each year. *Id.*

¹⁸ See KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 208 (2021) (noting police fatally shot 105 Black civilians in first six months of 2020).

in the history of the United States—police killed at least 1,176 people, a record high.¹⁹

Recognizing that policies relying on carceral punishment have, at best, proven ineffective while driving stark racial disparities and overincarceration, there have been increasingly louder calls to find and fund decarceral alternatives.²⁰ Against this backdrop, communities impacted by gun violence have made use of alternatives that better promote safety.²¹ One promising decarceral intervention has been the rise of community violence interruption groups.²² Violence interruption groups take a public-health approach to gun violence that differs from the carceral model in several important ways: the approach to intervention, the people who intervene, and the quality of intervention.²³

First, the model differs in how it approaches the problem of gun violence. Rather than treating communities of color as enemy combatants to be surveilled and policed, the model treats gun violence like a communicable disease, seeks out the people most likely to spread violence, and “intervenes to change their behavior[s] and attitudes.”²⁴ It recognizes that the people most likely to commit gun violence are often those most impacted by violence themselves and that intervening with support will ultimately be more effective than incarcerating

¹⁹ See Sam Levin, *‘It Never Stops’: Killings by US Police Reach Record High in 2022*, GUARDIAN (Jan. 6, 2023, 6:00 AM) [hereinafter Levin, *Police Killings Reach Record High*], <https://www.theguardian.com/us-news/2023/jan/06/us-police-killings-record-number-2022> [https://perma.cc/SA3U-ZMUP]; see also MAPPING POLICE VIOLENCE (Mar. 9, 2024), <https://mappingpoliceviolence.org/?year=2022&location=the+U.S.&race=people> [https://perma.cc/R5FE-TGJ6?type=image] (finding police killed 1,258 people in 2022).

²⁰ See Levin, *Police Killings Reach Record High*, *supra* note 19; see also Amanda Alexander & Danielle Sered, *Making Communities Safe, Without the Police*, BOS. REV. (Nov. 1, 2021), <https://www.bostonreview.net/articles/making-communities-safe-without-the-police> [https://perma.cc/4NFA-SY3F]; JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING CMTY. VIOLENCE, REDUCING VIOLENCE WITHOUT POLICE: A REVIEW OF RESEARCH EVIDENCE 3-7 (2021) [hereinafter REDUCING VIOLENCE WITHOUT POLICE], https://johnjayrec.nyc/wp-content/uploads/2020/11/AV20201109_rev.pdf [https://perma.cc/CVN5-Y62U]; Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 134-37 (2021).

²¹ See Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 551-54 (2022); KABA & RITCHIE, *supra* note 16, at 64-67; Cobbina-Dungy & Jones-Brown, *supra* note 16, at 3, 12-14. Alternatives include community conflict mediation, participatory budgeting, restorative justice campaigns, and environmental justice.

²² KABA & RITCHIE, *supra* note 16, at 66-67; McLeod, *supra* note 21, at 551-52.

²³ See Jeffrey A. Butts, Caterina Gouvis Roman, Lindsay Bostwick & Jeremy R. Porter, *Cure Violence: A Public Health Model To Reduce Gun Violence*, 36 ANN. REV. PUB. HEALTH 39, 40 (2015) (suggesting public-health approach of “changing the social norms that perpetuate violence” will be more effective than carceral approach at reducing gun violence).

²⁴ *Id.* (explaining Cure Violence model as one that focuses on “at-risk” perpetrators in hopes of preventing spread of gun violence).

large swaths of the population.²⁵ Simultaneously, the violence interruption model offers alternative ways to mediate and resolve conflicts.²⁶

Second, community violence interruption groups challenge the notion that law enforcement best resolves violent conflicts.²⁷ Instead of relying on police officers to respond to all situations, the violence interruption model relies on Violence Interrupters: workers chosen because of their credibility among those who might commit violence.²⁸ Part of that credibility stems from the fact that many Violence Interrupters have previously been incarcerated in the criminal legal system.²⁹ They are also trained in mediation, negotiation, and advocacy to prepare them for the difficult task of intervening in potentially violent situations.³⁰ Violence Interrupters do the dangerous work of defusing situations

²⁵ See Jason Corburn, Yael Nidam & Amanda Fukutome-Lopez, *The Art and Science of Urban Gun Violence Reduction: Evidence from the Advance Peace Program in Sacramento, California*, URB. SCI., Feb. 2, 2022, at 1, 2, <https://www.mdpi.com/2413-8851/6/1/6> [<https://perma.cc/2JST-3PZH>] (evaluating public-health approach of offering young people involved in gun violence support and services as applied in Sacramento, California).

²⁶ See Butts et al., *supra* note 23, at 40 (explaining violence interruption model aims to “denormalize” use of gun violence to resolve conflicts and disputes).

²⁷ See Ann Givens, *On Patrol with Chicago’s Last Violence Interrupters*, TRACE (Feb. 6, 2017), <https://www.thetrace.org/2017/02/chicago-homicides-cure-violence-interrupters> [<https://perma.cc/TNT2-GZD3>] (detailing work of Chicago CeaseFire Violence Interrupters to intervene in conflicts without involving police).

²⁸ See KATHRYN BOCANEGRA, NATHAN AGUILAR, JEANETTE LEE, KATHRYN KELLY CARROLL & HYUN-SEOK (EDWARD) CHEON, BETWEEN A BULLET AND ITS TARGET: STREET INTERVENTION, TRAUMA EXPOSURE, AND PROFESSIONAL IMPLICATIONS 1 (2021) (“Street intervention workers are first responders—frequently responding to homicide scenes, mediating conflicts, and attending funerals. And unlike other first responders, they often have shared histories with their clients.”); Givens, *supra* note 27 (“As a violence interrupter in Chicago, [Sanchez’s] job is to use his ties in southwest Chicago—and his credibility as a onetime gang leader—to stop shootings before they multiply.”); Butts et al., *supra* note 23, at 41 (“[V]iolence interrupters (VIs), are selected for their own experiences with crime and violence. They are hired for their ability to establish relationships with the most high-risk young people in the community”); Jennifer M. Whitehill, Daniel W. Webster, Shannon Frattaroli & Elizabeth M. Parker, *Interrupting Violence: How the CeaseFire Program Prevents Imminent Gun Violence Through Conflict Mediation*, 91 J. URB. HEALTH 84, 85 (2013) (explaining Violence Interrupters are often “from the communities in which they work”).

²⁹ See *supra* note 28 and accompanying text.

³⁰ See Jenny Gathright, *Inside the Academy Working To Train D.C.’s Violence Intervention Workforce*, NPR (July 28, 2022), <https://www.npr.org/local/305/2022/07/28/1114230805/inside-the-academy-working-to-train-d-c-s-violence-intervention-workforce> [<https://perma.cc/62HG-WZCZ>] (describing D.C. Peace Academy as training program for violence intervention workers that teaches “mediation, negotiation, and public speaking and advocacy”); see also Emily Davies, *New Academy Will Train Workers Who Mediate Conflict on D.C. Streets*, WASH. POST (May 31, 2022, 6:33 PM), <https://www.washingtonpost.com/dc-md-va/2022/05/31/dc-peace-academy-launch/> (detailing how The D.C. Peace Academy educates violence intervention workers in “mediating conflicts and engaging one-on-one with those most at risk of committing crimes”).

that might lead to spiraling violence, particularly immediately after a shooting.³¹ Occasionally, they convince people at risk of self-harm or interpersonal violence to give up their guns, which they can then safely turn in.³²

Finally, community violence interruption groups work alongside existing social-support networks to promote safety, enrolling at-risk individuals into social services, assisting individuals with food and housing, and connecting individuals with medical treatment.³³ These resources are not contemplated by conventional models of law enforcement intervention.

Despite inconsistent funding, available empirical evidence suggests that violence interruption groups have positively impacted safety in communities where they have been established.³⁴ Violence interruption groups have reduced

³¹ See BRANDON JORDAN ET AL., N.Y.C. OFF. OF THE PUB. ADVOC., REIMAGINING GUN VIOLENCE PREVENTION AND PUBLIC SAFETY FOR NEW YORK CITY 3 (2022) (reporting New York City's use of Violence Interrupters has proved to effectively reduce gun violence).

³² See Interview with Reginald Moore, Dir., Violence Prevention Pol'y and Engagement for the Comprehensive Inj. Ctr., at Med. Coll. of Wis. (2022).

³³ For example, in Sacramento and Richmond, California, outreach workers connect people most at risk of gun violence with therapy, counseling, job trainings, and internships. See Corburn et al., *supra* note 25, at 2 (“[Young people enroll in a program offering] weekly group life skills classes, social service navigation supports, job skills and internships, group travel opportunities, and meetings with a ‘circle of elders’.”). In Milwaukee, Wisconsin, hospital-based Violence Interrupters connect young people at risk of gun violence to resources both within and without the hospital. Kristen Barbares, *Froedtert Program Helps Gunshot Victims Recover from Physical and Mental Injuries*, CBS 58, WDJT MILWAUKEE (July 30, 2021, 10:00 PM CST), <https://www.cbs58.com/news/froedtert-program-helps-gunshot-victims-recover-from-physical-and-mental-injuries> [https://perma.cc/MW39-B7GY] (describing Froedtert Hospital in Wisconsin as adult trauma center treating “post-trauma mental health issues” of gunshot victims); see also *Hospital-Based Violence Interruption Program*, FROEDTERT & MED. COLL. OF WIS., <https://www.froedtert.com/trauma/violence-interruption> [https://perma.cc/WP83-M6BT] (last visited Apr. 3, 2024) (“The [Froedtert] Trauma Center . . . leads efforts for other health systems to develop hospital-based violence interruption programs, creating a network of medical support.”).

³⁴ See JORDAN ET AL., *supra* note 31, at 3 (“From 2010 to 2019, [Crisis Management Systems]-managed areas saw a 40% drop in shootings.”); REDUCING VIOLENCE WITHOUT POLICE, *supra* note 20, at 9-10 (discussing empirical studies finding declines in violence from Cure Violence interventions in Chicago and New York); Olga Pierce, *Studying Gun Violence Is Hard. But Intervention Programs Need Research To Survive*, TRACE (Jan. 9, 2023), <https://www.thetrace.org/2023/01/gun-violence-intervention-research> [https://perma.cc/R7PU-632Y] (describing general effectiveness of violence interruption model when implemented, for example, in Boston and Chicago where youth homicides correspondingly decreased by 63% and 37%, respectively, while also acknowledging that program in Baltimore “appears to be making the problem worse”); DANIEL W. WEBSTER, SHANI A.L. BUGGS & CASSANDRA K. CRIFASI, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, ESTIMATING THE EFFECTS OF LAW ENFORCEMENT AND PUBLIC HEALTH INTERVENTIONS INTENDED TO REDUCE GUN VIOLENCE IN BALTIMORE 14 (2018), <https://search.israelab.org/resources/30241/30241.pdf> [https://perma.cc/B3W2-3G5Z] (“A 2012 evaluation of *Safe Streets* [a program using Violence Interrupters] revealed statistically significant reductions in one or more measures of gun violence in three of the four sites

violence in communities across the country, including affected communities in Chicago, New York, Baltimore, Sacramento, and Milwaukee, among others.³⁵ Interventions in the South Bronx and Brooklyn brought gun injuries down by 37% and 50%, respectively, while shootings in neighborhoods with Violence Interrupters dropped by 40% citywide.³⁶ However, work to encourage people to turn in guns, either to authorities or to Violence Interrupters, has been hampered by the prevalence of federal felon-in-possession prosecutions.³⁷ Because their work to defuse violent situations puts them in close proximity to firearms and because they often have felony records, Violence Interrupters are particularly vulnerable to these charges. The danger of federal prosecution is a substantial barrier to the work of violence interruption.

This Article, focusing on the promise of community violence interruption, explores the different approaches that might be taken to address gun violence and racially disparate policing. Part I reviews the carceral logics embedded in policing and harsh prosecution and argues that neither makes communities safer. Building on the work of abolitionist scholars and organizers, Part II introduces decarceral alternative approaches to safety and argues that violence interruption fits squarely in this model. Part II also reviews the sociological and criminological data on Violence Interrupters and centers violence interruption as a promising alternative to harsh policing and prosecution. Part III examines some of the legal barriers to violence interruption and mechanisms to overcome them. It explores statutory and mens rea reform, expansion of the Second Amendment, and recognition of an innocent possession defense and argues for legal mechanisms that do not reinforce carceral logics or entrench harmful racist norms. Finally, this Article concludes with a call to further explore alternative approaches to safety that do not uncritically center policing or prosecution.

examined as well as evidence that the program was linked to less support among youth for using guns to resolve conflicts.” (footnote omitted)).

³⁵ See *infra* Part II.A.

³⁶ SHEYLA A. DELGADO ET AL., CUNY, THE EFFECTS OF CURE VIOLENCE IN THE SOUTH BRONX AND EAST NEW YORK, BROOKLYN 9 (2017), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1436&context=jj_pubs [<https://perma.cc/7M4P-KKFT>] (“The area of the South Bronx served by Cure Violence experienced strong and significant declines in both measures of gun violence: a 37 percent decline in gun injuries and a 63 percent reduction in shooting victimizations . . .”).

³⁷ Although many States bar gun possession for people with felony records, prosecutors frequently leverage federal felon-in-possession charges under 18 U.S.C. § 922(g) because it entails much longer sentences and incarceration in far-flung facilities. See *e.g.*, ARIZ. REV. STAT. § 13-904(A)(5) (2019); GA. CODE ANN. § 16-11-131(b)-(c) (2022); N.Y. PENAL LAW §§ 400.00(1)(c), 265.01(4) (McKinney 2023). Additionally, many states only bar gun possession for certain types of felonies. See, *e.g.*, ALA. CODE § 13A-11-70(1) (2022); D.C. CODE § 7-2502.03(2); N.J. STAT. ANN. § 2C:39-7 (West 2019). State-level prosecutors have explicitly referred gun possession cases to federal prosecutors because of the higher mandatory sentences in federal court. See Jesse H. Walker, *Bronx DA Defends Self, Office, and His Borough*, DAILY NEWS, Oct. 13, 1990 (quoting then-Bronx DA Robert Johnson as telling reporters “we are sending cases to federal courts where gun and drug convictions have five-year mandatory sentences”).

“No Way To Prevent This,” Says Only Nation Where This Regularly Happens.

—The Onion³⁸

I. THE LIMITS OF POLICING AND PROSECUTION AS THE SOLUTION TO GUN VIOLENCE

A. *The Limits of Carcerality*

Since 2014, *The Onion*, the satirical news outlet, has run the above headline thirty-six times in the wake of mass shootings in the United States.³⁹ The headline is included to underscore the scope of gun violence in America as well as the inability of policymakers to address the root causes of our gun-violence problem. Despite generally declining crime rates over the last three years, the United States has seen an increase in shootings and gun-related incidents.⁴⁰ In 2020, gun violence became the leading cause of death for children and adolescents.⁴¹

Gun violence predominantly harms Black communities. Professors Reva Siegel and Joseph Blocher point out that 37% of shooting homicide victims are

³⁸ *‘No Way To Prevent This, Says Only Nation Where This Regularly Happens*, ONION (May 27, 214), <https://www.theonion.com/no-way-to-prevent-this-says-only-nation-where-this-r-1819576527> [<https://perma.cc/2528-QBHX>].

³⁹ Lisa Tozzi, *He Wrote The Onion’s Famous Mass-Shooting Headline. It Still Haunts Him*, ROLLING STONE (May 25, 2022), <https://www.rollingstone.com/culture/culture-news/onion-mass-shootings-no-way-to-prevent-this-headline-1358539> [<https://perma.cc/K5A9-6FJE>].

⁴⁰ See Neil MacFarquhar, *Murders Spiked in 2020 in Cities Across the United States*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/09/27/us/fbi-murders-2020-cities.html> (discussing statistics on increase in homicides coinciding with pandemic); Aaron Chalfin & John MacDonald, *We Don’t Know Why Violent Crime Is Up. But We Know There’s More than One Cause*, WASH. POST (July 9, 2021, 3:17 PM), https://www.washingtonpost.com/outlook/we-dont-know-why-violent-crime-is-up-but-we-know-theres-more-than-one-cause/2021/07/09/467dd25c-df9a-11eb-ae31-6b7c5c34f0d6_story.html (discussing possible explanations for rise in homicides, including “economic hardship, social disruptions and uncertainty that the pandemic has caused”); see also Bill Hutchinson, *At Least 43 People Shot, 6 Fatally, in Violent Chicago Weekend*, ABC NEWS (Sept. 19, 2021, 4:02 PM), <https://abcnews.go.com/US/43-people-shot-fatally-violent-chicago-weekend/story?id=80110970> [<https://perma.cc/HTG3-VETX>]; Charlie De Mar, *With Gun Violence at Crisis Level in Chicago, Victims Hope Crackdown on Straw Purchases and Gun Trafficking Has an Impact*, CBS CHI. (Sept. 6, 2021, 10:14 PM CDT), <https://www.cbsnews.com/chicago/news/chicago-gun-violence-trafficking-straw-purchase-crackdown> [<https://perma.cc/P5FU-2YVA>] (discussing data showing increases in shootings in Chicago).

⁴¹ Annette Choi, *Children and Teens Are More Likely To Die by Guns than Anything Else*, CNN (Mar. 29, 2023, 8:41 AM), <https://www.cnn.com/2023/03/29/health/us-children-gun-deaths-dg/index.html> [<https://perma.cc/UKV7-XKTG>].

young Black men, even though they only make up 2% of the population in America.⁴² Firearm homicide rates are eight to ten times higher for Black men than white men.⁴³ Over the last decade, 67,488 Black people have been killed by guns, 85% of them were young Black men.⁴⁴ Black and Latinx people, despite accounting for less than a third of the U.S. population, comprise more than 75% of gun homicide victims.⁴⁵ Beyond homicides, gun violence harms communities of color in a myriad of overlapping ways. Gun violence harms the physical and mental health of survivors, witnesses, and their families; the economies of communities that lose workers to death, disability, or caregiver responsibilities; and the quality of life of communities that are left to deal with repercussions of death and injury.⁴⁶ Further, the resulting carceral response to violence leads to family separation, disenfranchisement, and legal estrangement.⁴⁷ All told, the annual cost of gun violence in America is approximately \$557 billion.⁴⁸ Due to

⁴² Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 456-57 (2022).

⁴³ Shirley M. Carswell, *Have We Surrendered to Gun Violence in Urban America? Federal Neglect Stymies Efforts To Stop the Slaughter Among Young Black Men*, 12 RACE & JUST. 126, 127 (2022).

⁴⁴ *Id.* (“67,488 Black people killed by gunfire over the last decade; 85% of them were young men in the prime of life.”).

⁴⁵ *Intervention Strategies*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/intervention-strategies/#> [https://perma.cc/9MVB-AM4A] (last visited Apr. 3, 2024).

⁴⁶ *See Calculate the Economic Cost of Gun Violence*, EVERYTOWN RSCH. & POL’Y (Feb. 9, 2023), <https://everytownresearch.org/report/economic-cost-calculator> [https://perma.cc/J2SU-D3PN] (explaining as of July 2022, United States pays \$557 billion per year in economic costs resulting from gun violence); *see also* GUN VIOLENCE IS A PUBLIC HEALTH CRISIS, AM. PUB. HEALTH ASS’N, https://www.apha.org/-/media/Files/PDF/factsheets/200221_Gun_Violence_Fact_Sheet.ashx [https://perma.cc/Z9EK-J2H2] (last visited Apr. 3, 2024) (discussing various issues created by gun violence, including increases in homicides, suicides, and societal costs such as “work loss, medical/mental health care, emergency transportation, police/criminal justice activities, insurance claims processing, employer costs and decreased quality of life”); Eric Westervelt, *The Toll of America’s Gun Violence Epidemic*, NPR (July 20, 2022, 4:26 PM), <https://www.npr.org/2022/07/20/1112579563/the-toll-of-americas-gun-violence-epidemic> [https://perma.cc/743W-UZ8P] (discussing financial, social, and healthcare costs of gun violence epidemic in United States).

⁴⁷ The costs of supporting systems of involved family members are disproportionately borne by women. SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR., *WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES* 9 (2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-exec-summary.pdf> [https://perma.cc/WD37-QHSG] (discussing negative impacts on family members, especially women, of incarcerated individuals).

⁴⁸ *The Economic Cost of Gun Violence*, EVERYTOWN RSCH. & POL’Y (July 19, 2022), <https://everytownresearch.org/report/the-economic-cost-of-gun-violence> (“This rigorous study finds that gun violence costs America an estimated \$557 billion annually, toward which taxpayers pay an average of \$12.62 billion . . .”).

structural racism and disinvestment, those costs are disproportionately borne by Black communities.⁴⁹

In some ways, the answer to America's gun violence is simple: gun control. Other nations have successfully combatted gun violence by severely restricting the supply of, and access to, guns.⁵⁰ In contrast, in the United States, gun production has soared in the past two decades.⁵¹ There are now more guns than there are people.⁵² Instead of passing laws to limit the supply of guns, or to meaningfully restrict their sale, lawmakers at both the state and city level have repeatedly called for increased policing and police funding.⁵³ Increasing funding

⁴⁹ See Eugenia C. South, David Hemenway & Daniel W. Webster, *Gun Violence Research Is Surging To Inform Solutions to a Devastating Public Health Crisis*, PREVENTIVE MED., Dec. 2022, at 2 (describing consequences of firearm violence in segregated Black neighborhoods); see also Christina Mehrenbad et al., *Historical Redlining and the Epidemiology of Present-Day Firearm Violence in the United States: A Multi-City Analysis*, PREVENTIVE MED., Aug., 2022, at 6-7 (finding correlation between redlined neighborhoods at zip-code level and gun violence across twenty-one cities and 722 zip codes).

⁵⁰ See Julian Santaella-Tenorio, Magdalena Cerdá, Andrés Villaveces & Sandro Galea, *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REV. 140, 152 (2016) (describing efforts restricting access to firearms in Australia, Canada, New Zealand, and Austria); see also Max Fisher, *Other Countries Had Mass Shootings. Then They Changed Their Gun Laws*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/world/europe/gun-laws-australia-britain.html> (detailing how nations like Britain, Australia, Canada, New Zealand, and Norway sharply restricted gun ownership and production, leading to drastic declines in incidents of gun violence). In many of those same countries, regular police officers are not armed with guns. See Rick Noack, *5 Countries Where Most Police Officers Do Not Carry Firearms — and It Works Well*, WASH. POST (July 8, 2016, 2:15 PM), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/18/5-countries-where-police-officers-do-not-carry-firearms-and-it-works-well/> (highlighting unarmed police patrols in Britain, Ireland, New Zealand, and Norway).

⁵¹ See Glenn Thrush, *U.S. Gun Production Triples Since 2000, Fueled by Handgun Purchases*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/05/17/us/politics/gun-manufacturing-atf.html> (documenting annual domestic gun production increased from 3.9 million in 2000 to 11.3 million in 2020); see also McLeod, *supra* note 21, at 528 (illustrating connections between military industrial complex and gun production while pointing out that many weapons used in gun offenses were originally produced by weapons companies funded by military spending).

⁵² Thrush, *supra* note 51 (indicating there are approximately 400 million guns in United States based on statistics collected by Bureau of Alcohol, Tobacco, Firearms and Explosives).

⁵³ See Nick Pinto, *NYPD Was Powerless To Stop Brooklyn Shooting—Yet Mayor Calls for Doubling Cops in Subway*, INTERCEPT (Apr. 13, 2022, 11:24 AM), <https://theintercept.com/2022/04/13/brooklyn-subway-shooting-nypd-police-eric-adams/> [<https://perma.cc/S3W3-TS65>]; Peter Hermann, Michael Brice-Saddler, Julie Zauzmer Weil & Emily Davies, *D.C. Mayor's Budget Would Expand Police Ranks amid Crime Worries*, WASH. POST (Apr. 13, 2022, 3:59 PM), <https://www.washingtonpost.com/dc-md-va/2022/04/04/police-hiring-dc/> (reporting D.C. Mayor Muriel E. Bowser's \$30 million long-term plan to expand D.C. police force); Zolan Kanno-Youngs & Mark Walker, *'Spend This Money': Biden Calls on States To Devote Stimulus Funds to Police*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/>

for carceral solutions like policing and prosecution has arguably been the only consistent policy response to gun violence, regardless of the noneffect it has had on public safety.⁵⁴ Scholars have described the response as a “War on Guns,” that, like the “War on Drugs,” has been characterized not by a focus on increasing public safety, but instead on militarizing the police and racializing the problem of illegal guns as a predominately Black, urban problem.⁵⁵ In contrast to gun control measures in England or Australia, which focused on protecting children from mass shootings, America’s gun regulation efforts focused on training and arming the police for “engagement in urban warfare.”⁵⁶

U.S. gun regulations often come with relatively modest gun restrictions, but always come with increased funding for police militarization.⁵⁷ Police departments have continually leveraged the specter of gun violence to obtain more funding.⁵⁸ This was true with the crime bill that President Bill Clinton signed in 1994.⁵⁹ It was also true of the most recent gun legislation signed by President Joe Biden.⁶⁰ Though it represented the first substantive gun control legislation in the last thirty years, the bill contained modest gun regulation measures—incentives for states to pass red flag laws, expanded background checks for people between the ages of eighteen and twenty-one, and expanded existing laws that deny gun ownership to people convicted of domestic

2022/05/13/us/politics/biden-police-stimulus-funds.html (explaining President Biden’s call for states to use federal stimulus money to “bolster police departments”).

⁵⁴ In many states, the only action state legislatures have taken are to pass preemption laws preventing cities from restricting guns. See Joseph Blocher, *Cities, Preemption, and the Statutory Second Amendment*, 89 U. CHI. L. REV. 557, 559 (2022). In *Bruen*, the Supreme Court also restricted states from passing restrictions on gun ownership that lack an historical antecedent, regardless of whether there is an important safety interest in the regulation. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2155 (2022) (describing which historical antecedents should be considered in this analysis).

⁵⁵ See CARLSON, *POLICING THE SECOND AMENDMENT*, *supra* note 13, at 57 (describing war on guns as avenue to increase proactive policing and aggressive punishments); see also Levin, *Guns and Drugs*, *supra* note 13, at 2173 (asserting people of color bear brunt of criminal gun law enforcement).

⁵⁶ CARLSON, *POLICING THE SECOND AMENDMENT*, *supra* note 13, at 48 (highlighting differences in American approach to gun regulation with approaches of Australia and England).

⁵⁷ *Id.* (discussing California gun laws aimed at enhancing police firepower rather than regulating guns).

⁵⁸ *Id.* (describing police argument for funding to “disarm and overpower the enemy”).

⁵⁹ *Id.* (“[The Violent Crime Control and Law Enforcement Act] provided funds to hire more police officers and created the Office of Community Oriented Policing Services (or, the COPS Office), a program that would ironically expand police militarization in years to come.”).

⁶⁰ See Kanno-Youngs & Walker, *supra* note 53 (describing new gun-detection technology purchased with President Biden’s \$10 billion stimulus bill).

violence⁶¹—but also set aside \$300 million for school security measures like hiring more school safety officers,⁶² despite “no evidence” that the presence of officers at school deters school shootings.⁶³ Since the creation of the Office of Community Oriented Policing Services (“COPS”) in 1994, the government has spent hundreds of millions of dollars funding and arming school security officers.⁶⁴ Over 40% of schools now have police officers assigned to them, with nearly 70% of those officers tasked with school discipline in addition to law enforcement.⁶⁵ The funding has come at the expense of funding for student medical and mental health services.⁶⁶

Outside of the school safety context, the trend in police funding has been even more stark. In Chicago, for example, Professor Robert Vargas and his coauthors discovered that over the last sixty years, the Chicago Police Department (“CPD”) has leveraged increases in homicides to obtain “(1) more police officers, (2) more police-department funding, and (3) more technologies for

⁶¹ Don Clyde & Shauneen Miranda, *Biden Signs Gun Safety Bill Into Law*, NPR (June 25, 2022, 9:19 AM), <https://www.npr.org/2022/06/25/1107626030/biden-signs-gun-safety-law> [<https://perma.cc/X38J-CHVZ>] (highlighting regulations and red flag laws contained in bill).

⁶² Stephanie Lai & Emily Cochrane, *Here’s What Is in the Senate’s Gun Bill — and What Was Left Out*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/us/politics/senate-gun-bill.html> (“The bill grants \$300 million over five years for school safety programs targeting violence that would fund school resource officers and beef up security in schools.”).

⁶³ Char Adams, *More Police Isn’t the Answer After Texas Shooting, Experts Say*, NBC NEWS (May 31, 2022, 3:03 PM), <https://www.nbcnews.com/news/nbcblk/police-arent-answer-texas-shooting-experts-say-rcna30763> [<https://perma.cc/K6T8-A7FV>] (explaining police presence in schools not only fails to stop gun violence, but also negatively affects students’ mental health and academic performance); see also *Scholars Issue Call for Evidence-Based Action To Prevent School Violence*, UCLA LUSKIN SCH. PUB. AFFS. (May 27, 2022), <https://luskin.ucla.edu/scholars-issue-call-for-evidence-based-action-to-prevent-school-violence> [<https://perma.cc/PQE6-JBKU>] (explaining proposed plan for prevention of gun violence in schools calls for more than just security measures in those schools); Brendan Pierson, *Sheriff’s Deputy Charged With Neglect in Florida School Shooting Has Strong Defense: Legal Experts*, REUTERS (June 5, 2019, 8:47 PM), <https://www.reuters.com/article/us-florida-deputy-legal-analysis/sheriffs-deputy-charged-with-neglect-in-florida-school-shooting-has-strong-defense-legal-experts-idUSKCN1T62XS> [<https://perma.cc/V37M-KCFZ>] (finding presence of school security officers did not prevent mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, or at Robb Elementary School in Uvalde, Texas).

⁶⁴ HENNING, *supra* note 18, at 130-31 (noting that, between 1999 and 2005 alone, COPS in Schools program awarded more than \$750 million for police departments to hire school resource officers).

⁶⁵ ALEX S. VITALE, *THE END OF POLICING* 55 (2017) (detailing how these officers serve as “discipline enforcement rather than just maintaining security and enforcing the law”).

⁶⁶ As Professor Kristin Henning has documented: “1.7 million students attend schools with police but no counselors. Six million students attend schools with police but no school psychologist. Ten million students attend schools with police but no social workers.” HENNING, *supra* note 18, at 138 (footnote omitted).

surveilling the same handful of low-income Black communities.”⁶⁷ At every turn, CPD shifted blame for rising homicide rates on: hot weather, civil rights marches, youth gangs, and most recently on Black Lives Matter protests.⁶⁸ That constantly increasing police budgets failed to reduce the gun-related homicide rate did not lead to a questioning of the police, but instead led CPD to argue that even more police were necessary. As recently as 2021, CPD saw a nearly \$200 million increase in police funding.⁶⁹ Similarly, in New York City, Mayor Eric Adams sought to add \$200 million to the New York Police Department (“NYPD”) budget to fund thousands more officers in the subway system in response to incidents that the existing 3,500 assigned officers could not prevent.⁷⁰ At the same time, Adams proposed more than \$33 million dollars in

⁶⁷ Robert Vargas, Chris Williams, Phillip O’Sullivan & Christina Cano, *Capitalizing on Crisis: Chicago Policy Responses to Homicide Waves, 1920-2016*, 89 U. CHI. L. REV. 405, 438 (2022) (asserting CPD justified larger budgets due to these homicide increases).

⁶⁸ *Id.* at 420, 423, 432 (documenting each of CPD’s scapegoats for increasing homicide rates).

⁶⁹ Aziz Huq, Robert Vargas & Caitlin Loftus, *Governing Through Gun Crime: How Chicago Funded Police After the 2020 BLM Protests*, 135 HARV. L. REV. F. 473, 474 (2022) (discussing \$189 million increase in police funding approved by Chicago Mayor and City Council). In 2023, Chicago opened a \$170 million police training academy on Chicago’s West Side, replete with a tactical “indoor scenario village” with fake streets, homes, and a school for the police to train in. Fran Spielman, *Public Safety Training Facility, Once Center of Controversy, Opens Its Doors*, CHI. SUN-TIMES (Jan. 25, 2023, 6:24 PM), <https://chicago.suntimes.com/city-hall/2023/1/25/23571446/public-safety-police-fire-training-facility-opens-west-garfield-park-lightfoot-emanuel-protests> [<https://perma.cc/B636-9MRH>]. Meanwhile, public schools in Chicago’s predominantly Black West Side have been perennially resource starved under the city’s budgeting process. See STEPHANIE FARMER & ASHLEY BABER, THE PROJECT FOR MIDDLE CLASS RENEWAL, STUDENT BASED BUDGETING CONCENTRATES LOW BUDGET SCHOOLS IN CHICAGO’S BLACK NEIGHBORHOODS 1-2 (2019), <https://www.ctulocal1.org/wp-content/uploads/2019/09/Student-Based-Budgeting-report.pdf> [<https://perma.cc/FWD8-3HV5>].

⁷⁰ Marcia Kramer, *Mayor Eric Adams Proposes New \$99.7 Million [sic] Budget that Includes an Additional \$200 Million for NYPD*, CBS NEWS: N.Y. (Apr. 26, 2022, 6:32 PM), <https://www.cbsnews.com/newyork/news/mayor-eric-adams-proposes-new-99-7-million-budget-that-includes-an-additional-200-million-for-nypd/> [<https://perma.cc/3QMW-Q2X5>]. Adams later agreed to a budget without the \$200 million increase, but that still retained \$11 billion to fund the NYPD, while cutting \$215 million from the Department of Education. See *Seven Facts About the NYPD Budget*, CITIZENS BUDGET COMM’N (June 12, 2020), <https://cbcny.org/research/seven-facts-about-nypd-budget> [<https://perma.cc/XY92-6YD2>] (“In fiscal year 2020 New York City’s expenses for the New York City Police Department (NYPD) will total \$10.9 billion . . .”); see also Cayla Bamberger, *Eric Adams Defends Shrinking NYC School Budgets by \$215M*, N.Y. POST (June 20, 2022, 10:34 AM), <https://nypost.com/2022/06/13/nyc-mayor-eric-adams-defends-shrinking-nyc-school-budgets-by-215m/> [<https://perma.cc/9W8Z-XF6H>]. Adams also did not fund violence interruption programs despite touting their importance to curbing gun violence and promising \$500 million in funding during his campaign. Jake Offenhartz, *No New Funding for Violence Interrupter Program, Despite Adams’ Promised Expansion*, GOTHAMIST (June 15, 2022), <https://gothamist.com/news/no-new-funding-for-violence-interrupter-program-despite->

cuts to the City's Public Libraries and \$567 million dollars in cuts to preschool programs.⁷¹ Nationally, despite the widespread protests in the wake of George Floyd's murder and calls to defund the police, a majority of the largest cities in the United States *increased* police budgets.⁷²

The idea that police are the solution to gun violence is ubiquitous, despite the lack of evidence to support it. Organizers and activists have long questioned the efficacy of police in protecting communities, and particularly communities of color.⁷³ Legal scholars and historians have similarly questioned the carceral logic of policing.⁷⁴ Professor Monica Bell points out that police do not deter crime, and that instead of working to solve serious crimes in Black and brown communities, that they work to surveil and control those communities.⁷⁵

adams-promised-expansion (detailing Adams' refusal to increase budget for Crisis Management System).

⁷¹ See Emma G. Fitzsimmons, *Mayor's Proposed Cuts to Libraries Will Hurt New Yorkers, Leaders Say*, N.Y. TIMES (Jan. 11, 2003), <https://www.nytimes.com/2003/01/11/nyregion/library-funding-cuts-eric-adams.html> (detailing concern among families and library leaders about proposed budget cuts); Katie Honan, Stephon Pujols-Johnson, Greg B. Smith & Greg David, *'Fiscal Discipline': Libraries, Schools Would Absorb Cuts in Adams' Preliminary Budget*, CITY (Mar. 14, 2024 2:23 PM), <https://www.thecity.nyc/2023/1/12/23552947/fiscal-discipline-in-mayor-adams-preliminary-budget> [<https://perma.cc/TM4Z-X4VZ>] (describing budget cuts and subsequent reduction of available seats in 3-K preschool programs).

⁷² Sarah Holder, Fola Akinnibi & Christopher Cannon, *'We Have Not Defunded Anything': Big Cities Boost Police Budgets*, BLOOMBERG (Sept. 22, 2020), <https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/> [<https://perma.cc/2GJE-77UP>] (finding in Fiscal Year 2021, thirty-four out of fifty biggest U.S. cities increased their police budgets, and majority of cities spent more than 25% of their budgets on policing).

⁷³ See PURNELL, *supra* note 16, at 96 (detailing how members of communities of color felt like police were not in their neighborhoods to protect them); *see also* KABA, *supra* note 13, at 8 (describing how police sexually harass women of color walking on sidewalk during summer); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1819 (2020) (asserting anti-Black violence was fundamentally modernized by power and authority of police).

⁷⁴ See Akbar, *supra* note 73, at 1805 (describing "anti-democratic nature of the carceral state"); VITALE, *supra* note 65, at 56 (describing how carceral state has created school-to-prison pipeline); HENNING, *supra* note 18, at 161 (describing how Black youth are harassed by police for "doing what White kids are free to do all over the world"); SIMON BALTO, *OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER 2* (2019) (detailing how Black citizens have historically lived in constant fear of police harassment).

⁷⁵ See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2117 (2017) (asserting members of racially and socioeconomically isolated communities feel "heavily monitored" for minor crimes). Similarly, Issa Kohler-Hausmann explains the legal system, particularly through its massive volume of nonviolent misdemeanor cases, aims not to provide safety, but to function as a form of surveillance and control over indigent Black and brown communities. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 629 (2014). Further, human rights lawyer and activist Derecka Purnell points out that despite claims that Black communities need police, police function to protect capitalism, not people, and certainly not Black people. *See* PURNELL,

Professor Allegra McLeod demonstrates that “prison-backed” policing has been an ineffective means of managing the complex social problems of “interpersonal violence, addiction, mental illness, or sexual abuse.”⁷⁶ Similarly, Professor Amna Akbar demystifies the reification of the police. Akbar notes, contrary to the myth that police exist to fight serious crime, that police “advance inequality through their distribution of violence and surveillance, death, and debt.”⁷⁷ As Professor Alex Vitale writes, crime control is an incredibly small part of policing, with most uniformed officers making no more than a single felony arrest in a year.⁷⁸ Recent events have illustrated that, specifically in the context of gun violence, police often do not intervene to stop gun violence, but at best,

supra note 16, at 21 (“What’s sad is that people claim that poor, Black communities need the police the most to protect them, but this is not quite true. Capitalists need policing the most—to protect their property, billions, businesses, and borders by arresting the people whom they’ve exploited, excluded, and extracted the most.”).

⁷⁶ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1159 (2015) (describing rampant violence and abuse occurring in U.S. prisons and jails). Leigh Goodmark similarly demonstrates the Violence Against Women Act’s legacy has been to vastly increase funding for police and prosecution. However, the result has not been to improve the safety of intimate partner violence, but to increase the arrest and incarceration of victims—and in some jurisdictions has led to their being jailed to force their testimony at trial. *See* Leigh Goodmark, *Assessing the Impact of the Violence Against Women Act*, 5 ANN. REV. CRIMINOLOGY 115, 123-24 (2022) (“[N]o-drop prosecution policies can lead to victims being subpoenaed to testify, arrested if they fail to comply with subpoenas, and jailed until they provide testimony.” (citation omitted)).

⁷⁷ Akbar, *supra* note 73, at 1786 (describing routine and legal nature of police violence based on race and class). As Professor Brandon Hasbrouck details, this is a logical result of the close history between slavery and slave patrols that developed into the modern police force, particularly in Southern cities like New Orleans, Louisiana and Savannah, Georgia. *See* Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. L. REV. 685, 695 (2022) (“Large Southern cities like New Orleans and Savannah had full-time slave patrols that were often connected to the broader criminal system and developed into modern police forces.”). Professor Paul Butler further explains that most of the racist policing and police violence has been found to be legal and sanctioned by the Supreme Court. *See* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016) (detailing how racially unjust police conduct is feature of criminal justice system).

⁷⁸ VITALE, *supra* note 65, at 30-31 (“Crime control is a small part of policing, and it always has been.”).

respond to its aftermath.⁷⁹ When police do respond to violent incidents, they often fail to solve cases.⁸⁰

⁷⁹ In Monterey Park, California, after a mass shooting in a nightclub, an unarmed civilian disarmed the shooter after he had killed eleven people. See Sanya Mansoor, *It Took a 'Good Guy Without a Gun' To Disarm the Monterey Park Shooter*, TIME (Jan. 25, 2023, 8:45 AM), <https://time.com/6249944/monterey-park-mass-shooting-brandon-tsay/>. In Colorado Springs, a club patron disarmed the shooter after he had killed five people and wounded eighteen more. See Seth Klamann, *Officials Identify Club Q Patrons Who Disarmed, Subdued Colorado Springs Gunman*, DENVER POST (Nov. 21, 2022, 9:27 PM), <https://www.denverpost.com/2022/11/21/club-q-shooting-patron-disarmed-shooter-suspect/> [<https://perma.cc/HB5J-E6LQ>]. In Brooklyn, New York, a man shot into a subway car during rush hour. Despite multiple officers being at the station, the NYPD was unable to stop the shooting, or apprehend the shooter. The NYPD did not find the man until a day later, and only after civilian witnesses notified the police, and after the man himself called the police to let them know where he was. New York City Mayor Eric Adams used the opportunity to call for a doubling of the police presence on the subway. See Morgan Winsor et al., *NYC Subway Shooting Suspect Called Tip Line on Himself, Sources Say*, ABC NEWS (Apr. 13, 2022, 7:25 PM), <https://abcnews.go.com/US/nyc-police-search-gunman-brooklyn-subway-shooting/story?id=84051890> [<https://perma.cc/3C67-XLZY>]; Andrew Stanton, *Brooklyn Subway Shooting Prompts Eric Adams To Double Cops on Trains*, NEWSWEEK (Apr. 13, 2022, 8:17 AM), <https://www.newsweek.com/eric-adams-doubling-police-officers-subway-shooting-new-york-city-1697405> [<https://perma.cc/T8AY-46EY>] (detailing mayor's plan to double number of police officers in New York City's subway system). The more than 3,500 NYPD officers stationed in New York's subway stations, while not serving as a deterrent to violent crime, have increased arrests for fare evasions and arrests of food vendors in the subway station. See Chelsia Rose Marcius, *Adams Defends Police for Handcuffing Vendor Who Sold Mangoes in Subway*, N.Y. TIMES (May 9, 2022), <https://www.nytimes.com/2022/05/09/nyregion/subway-safety-food-vendor-brooklyn.html> (reporting how one food vendor was arrested and placed in handcuffs in front of her daughter); see also Clio Chang, *Fare-Evasion Arrests Are Back with a Vengeance*, CURBED (Apr. 11, 2022), <https://www.curbed.com/2022/04/nypd-fare-evasion-arrest-increase.html> [<https://perma.cc/TKN6-5RW7>] (documenting that fare evasion arrests increased by 51% from 2021-2022).

⁸⁰ Nationally, clearance rates for violent crime have steadily declined since the 1980s. For example, the national clearance rate for murders stands at approximately 50%. See Weihua Li & Jamiles Lartey, *As Murders Spiked, Police Solved About Half in 2020*, MARSHALL PROJECT (Jan. 12, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020> [<https://perma.cc/ZE2S-DYA7>] (explaining how lower clearance rate in 2020 "was an extension of a long, steady drop since the early 1980s, when police cleared about 70% of all homicides"); see also REBECCA RHYNHART, OFF. OF THE CONTROLLER, PHILA., DATA RELEASE: GUN VIOLENCE CLEARANCE RATES AND CASE OUTCOMES (2022), <https://controller.phila.gov/philadelphia-audits/data-release-gun-violence-trends/> [<https://perma.cc/J2RZ-2FJE>] (acknowledging City of Philadelphia saw declining clearance rates in both fatal and nonfatal shootings between 2015-2020); see also Ali Bauman, *A Closer Look at Disparities in NYPD's Homicide Clearance Rates: "It Made Me Feel Like They Didn't Care,"* CBS NEWS: N.Y. (June 29, 2022, 11:43 PM), <https://www.cbsnews.com/newyork/news/crime-without-punishment-new-york/> [<https://perma.cc/J2PB-TVDD>] (documenting declining clearance rates in New York City, and noting racial discrepancies between clearance rates when decedents were white (84%) versus when they were Latinx (61%) or Black (53%)).

The policy choices that fail to question the carceral logic that justifies continual budgetary increases in policing, despite no indication that it promotes safety, overlook the ways that the police actively make communities less safe. The police not only disproportionately harass communities of color on a daily basis, but on average, kill three people a day in America.⁸¹ Tamir Rice,⁸²

⁸¹ See Mark Berman, John Sullivan, Julie Tate & Jennifer Jenkins, *Protests Spread Over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People*, WASH. POST (June 8, 2020, 8:44 AM), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html (detailing disproportionate rates at which Blacks are shot and killed by police). In 2022, police killed at least 1,176 people, a record high. See Levin, *Police Killings Reach Record High*, *supra* note 19 (reporting 2022 was deadliest year on record since 2013, which is when experts began tracking police killings nationwide).

⁸² In 2014 police shot and killed twelve-year-old Tamir Rice as he was standing with a toy gun in a park in Cleveland. Police went to the scene in response to a 911 call that reported that someone, “probably a juvenile,” was randomly pointing a pistol that was “probably fake.” Brandon Blackwell, *Cleveland Police Officer Shot Tamir Rice Immediately After Leaving Moving Patrol Car*, CLEVELAND PLAIN DEALER (Nov. 26, 2014, 5:35 PM), https://www.cleveland.com/metro/2014/11/cleveland_police_officer_shot_1.html [<https://perma.cc/FLU3-J22R>]. Police officers drove their car onto the park grass, jumped out of the car and shot Tamir twice in the chest. The car had not yet stopped before they jumped out and shot him within two seconds. See HENNING, *supra* note 18, at 27; see also Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST. (Nov. 26, 2014, 10:00 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/>.

Philando Castile,⁸³ Jordan Edwards,⁸⁴ Breonna Taylor,⁸⁵ Keenan Anderson.⁸⁶ These were people that the police killed who had committed no crime, and had

⁸³ In 2016 police shot and killed Philando Castile while he was driving his family in the Minneapolis suburbs. Castile had committed no crime or traffic violation. Police audio from before the stop indicates that the police ostensibly stopped him because they believed he fit the description of a robbery suspect. The officer announced that “the driver looks more like one of our suspects, just ‘cause of the wide-set nose.” See Jon Schuppe, *Officer Mistook Philando Castile for a Robbery Suspect, Tapes Show*, NBC NEWS (July 12, 2016, 5:18 PM), <https://www.nbcnews.com/news/us-news/officer-thought-philando-castile-was-robbery-suspect-tapes-show-n607856> [<https://perma.cc/HL36-JMC3>] (describing how police mistakenly identified Castile for robbery suspect); see also Morgan Winsor, *What We Know About Man Police Killed in Minn. Traffic Stop*, ABC NEWS (July 8, 2016), <https://abc7news.com/news/what-we-know-about-man-police-killed-in-minn-traffic-stop/1417049/> [<https://perma.cc/3SSC-YBGF>] (reporting that officer shot Castile even after learning he was licensed to carry).

⁸⁴ In 2017, police shot and killed unarmed fifteen-year-old Jordan Edwards as he was sitting in the front passenger seat of a car. Jordan had been at a pool party with his brother and friends and had committed no crime. See Tasha Tsiaperas, *Videos Show Cop Who Killed 15-Year-Old Jordan Edwards Joking One Moment and Firing Rifle Next*, DALLAS MORNING NEWS (Aug. 16, 2018, 6:45 PM), <https://www.dallasnews.com/news/courts/2018/08/16/videos-show-cop-who-killed-15-year-old-jordan-edwards-joking-one-moment-and-firing-rifle-the-next/> (reporting officer’s trigger-happy reaction during shooting of Edwards); Manny Fernandez & Matthew Haag, *Police Officer Who Fatally Shot 15-Year-Old Texas Boy Is Charged with Murder*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/us/roy-oliver-charged-murder-dallas-police-shooting-jordan-edwards.html>.

⁸⁵ In 2020, Louisville police shot and killed Breonna Taylor while she lay asleep in her bedroom in the middle of the night. The police raided Taylor’s apartment because they had a warrant for the arrest of two people suspected of selling drugs, neither of whom lived at her address. Despite having a no-knock warrant, the police claimed they announced themselves before breaking down the door and entering the apartment. Taylor’s boyfriend, Kenneth Walker woke up, believing they were getting robbed. He fired a shot from his licensed handgun after not getting a response from the people outside the bedroom. In response, the police fired more than thirty rounds, shooting Taylor eight times. There were no drugs in the apartment. See Amina Elahi, *‘Sleeping While Black’: Louisville Police Kill Unarmed Black Woman*, NPR (May 13, 2020, 6:33 PM), <https://www.npr.org/2020/05/13/855705278/sleeping-while-black-louisville-police-kill-unarmed-black-woman> [<https://perma.cc/5TPH-5JKG>] (reporting Breonna Taylor was shot eight times, despite posing no threat); Anna North & Fabiola Cineas, *The Police Shooting Death of Breonna Taylor, Explained*, VOX (July 13, 2020, 12:36 PM), <https://www.vox.com/2020/5/13/21257457/breonna-taylor-louisville-shooting-ahmaud-arbery-justiceforbreonna> [<https://perma.cc/GFA5-F996>]; Breonna Taylor: *What Happened on the Night of Her Death?*, BBC NEWS (Oct 8, 2020) <https://www.bbc.com/news/world-us-canada-54210448> [<https://perma.cc/SHN9-9SKW>] (describing how one officer was fired for “wantonly and blindly firing 10 rounds” during raid).

⁸⁶ Keenan Anderson flagged police down for help after a traffic accident. LAPD officers immediately restrained him and eventually tased him for more than thirty seconds. He was taken to the hospital and died of cardiac arrest hours later. See Emily Olson, *A \$50M claim Is Filed Against LA Over the Death of a Man Who Was Tased by Police*, NPR (Jan. 21, 2023, 11:01 AM), <https://www.npr.org/2023/01/14/1149132089/keenan-anderson-patrisse-cullors->

done nothing illegal. George Floyd,⁸⁷ Michael Brown,⁸⁸ Eric Garner,⁸⁹ Tyre Nichols,⁹⁰ Alton Sterling.⁹¹ These were all people that the police killed for alleged offenses that ranged in seriousness from using a counterfeit \$20 bill to selling CDs outside of a store. In none of these situations did the person killed by police pose any harm to themselves, to the police, or the community.

This is just a small subset of the people that the police have recently killed.⁹² Every year, the police kill nearly one thousand people; they disproportionately kill Black people.⁹³ As Mustafa Ali-Smith writes, “Black people are 3.5 times

lapd-body-cam-footage [<https://perma.cc/S3FX-Y4L5>] (describing how Keenan’s request for help from officers resulted in his death).

⁸⁷ George Floyd was killed by police for allegedly using a fake \$20 bill to buy cigarettes. Bill Chappell, *Cashier Says He Offered To Pay After Realizing Floyd’s \$20 Bill Was Fake*, NPR (Mar. 31, 2021, 12:46 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/03/31/983089623/watch-live-cashier-says-he-offered-to-pay-after-realizing-floyds-20-bill-was-fake> [<https://perma.cc/U64D-4DYV>] (reporting police’s fatal response to George Floyd, despite cashier’s offering to pay for Floyd’s items before police arrived).

⁸⁸ Michael Brown was shot and killed by police in Ferguson, Missouri, after they stopped him for allegedly jaywalking. 95% of the people in Ferguson ticketed for jaywalking are Black, despite only comprising 60% of the population. Max Ehrenfreund, *The Risks of Walking While Black in Ferguson*, WASH. POST (Mar. 4, 2015, 3:33 PM), <https://www.washingtonpost.com/news/wonk/wp/2015/03/04/95-percent-of-people-arrested-for-jaywalking-in-ferguson-were-black/> (describing how police in Ferguson use jaywalking laws to retaliate against Black civilians they feel are being disrespectful).

⁸⁹ Eric Garner was choked to death by police for allegedly selling individual cigarettes. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

⁹⁰ Tyre Nichols was beaten to death by police after being pulled over for an alleged traffic infraction three blocks from his mother’s house in Memphis, Tennessee. Juliana Kim, *Police Experts Say Tyre Nichols’ Arrest Was Filled with Procedural Violations*, NPR (Jan. 28, 2023, 5:15 PM), <https://www.npr.org/2023/01/28/1152319138/tyre-nichols-arrest-what-went-wrong-policing-experts> [<https://perma.cc/R2KF-WJU2>].

⁹¹ Alton Sterling was shot and killed by police while selling CDs and DVDs outside of a convenience store in Baton Rouge, Louisiana. See Emily Lane, *Alton Sterling and His CD-Selling Gig Made Him a Neighborhood Fixture*, TIMES-PICAYUNE (July 7, 2021), https://www.nola.com/news/crime_police/alton-sterling-and-his-cd-selling-gig-made-him-a-neighborhood-fixture/article_314d96b0-3b3c-5df5-a924-56a9d9769404.html [<https://perma.cc/L226-Y6EP>].

⁹² For a longer, but by no means exhaustive, list, see *Jamison v. McClendon*, 476 F. Supp. 3d 386, 414 (S.D. Miss. 2020). In discussing a § 1983 claim by a Black motorist against police who detained him for two hours and searched his car without his consent, Judge Carlton Reeves details a number of the situations where unarmed Black people were killed by police. See *id.*

⁹³ See HENNING, *supra* note 18, at 208 (“In 2018, 994 people were fatally shot by the police; 209 of them were Black. In 2019, 1,004 people were shot by the police; 234 were Black. The rate of fatal police shootings among Black Americans is much higher than that of any other ethnicity. Black Americans were killed by the police at a rate of 31 per million of the population between 2015 and June 2020. White Americans were killed at a rate of 13 fatal

more likely to be killed by police than white people, and more than half of police killings go unreported or misclassified. These are the realities Black people have been forced to live with due to American policing's roots in violence, racism, and white supremacy."⁹⁴

Not only are the thousands of police killings horrific, but they elide the daily harassment wrought by the police on communities of color. Relying on the specter of gun violence, police stop and frisk young men of color with impunity and threaten the well-being of entire communities.⁹⁵ Though many of these encounters are nonfatal, they pose a constant threat to the safety and dignity of communities of color.⁹⁶ As McLeod writes, "[w]e often hear and, increasingly with smartphone footage, see the physical violence that is inflicted by police. But we don't talk as much about the psychological violence of policing: the fear, anxiety, depression, and trauma to citizens."⁹⁷ McLeod goes on to conclude that

police shooting per million of the population." (footnotes omitted)); *see also* Berman et al., *supra* note 81.

⁹⁴ Mustafa Ali-Smith, *More Black Representation on Police Forces Will Not Solve Police Violence*, APPEAL (Mar. 17, 2022), <https://theappeal.org/more-black-cops-will-not-solve-police-violence/> [perma.cc/MVT6-BLMB]; *see also* Cody Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, PLOS ONE, Nov. 5, 2015, at 1, 2 (noting considerable room for structural bias in FBI databases as most police departments in United States only selectively file fatal police shooting reports, or do not file any at all).

⁹⁵ McLeod, *supra* note 21, at 533 (remarking how policing not only fails to prevent violent crime, but also creates conditions for more violence); *see also* Champe Barton, *Police, Power, and the Specter of Guns*, TRACE (June 13, 2020), <https://www.thetrace.org/2020/06/police-power-guns-george-floyd/> [https://perma.cc/QH9G-32F4] (detailing how police stopped Black people six times more often than white people at height of New York City's stop-and-frisk policy, even though whites were more likely to be found armed). In the context of Operation Ceasefire, D.C.'s program to promote pretext stops, then-U.S. Attorney for the District of Columbia, Eric Holder, frankly acknowledged that the program would "overwhelmingly" stop young Black men. Further, the program explicitly excluded the use of pretext stops in the whitest and richest neighborhoods in D.C. *See* JAMES L. FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 200-03 (2017).

⁹⁶ Derecka Purnell explains that the pervasiveness of stops and frisks obscures the harm that it causes to communities:

A stop and frisk is not simply either. It's the spreading of the legs and the groping of the thighs and genitals, without consent. Because cops overwhelmingly grope poor Black and Brown men, I didn't think about it as gender-based violence or sexual violence, but it is both. If we choose to defend ourselves and protect our bodies, then cops have the power to escalate the violence to an arrest. The number of stops and how often police profile are likely underreported, yet they cannot account for the constant threat of either's occurrence.

PURNELL, *supra* note 16, at 66.

⁹⁷ McLeod, *supra* note 21, at 533-34 (recounting statement of police abuse and crime survivor, Public Defender Takenya Nixon Brail: "The city's answer has always been to increase police presence. . . . The police who look at me suspiciously while I'm on my morning run in my neighborhood have made me feel trapped, unwanted, and afraid — and I still hear those gunshots" (alteration in original)).

“the most damaging and enduring consequence of continued investment in the police—despite their proven (and admitted) inability to prevent crime even with the billions we still send their way—is that communities continue to *not* get the kind of investments that truly do prevent violence and promote health.”⁹⁸

Repeated racist police surveillance, harassment, and violence leads to what Bell has deemed “legal estrangement” between communities of color and the police.⁹⁹ Policing can “breed significant mistrust in communities of color without improving public safety or efficiently recovering firearms.”¹⁰⁰ In Philadelphia, a report compiled by the city’s Interagency Research and Public Safety Collaborative found that “74% of the 196,651 motor vehicle stops conducted from January of 2020 through July of 2021 involved Black drivers. But less than ½ of 1 percent of the stops from January of 2020 through March of 2021, resulted in the recovery of a firearm.”¹⁰¹ In New York City, since 2002, the NYPD has conducted at least five million stops, overwhelmingly in Black and Latinx communities.¹⁰² 90% of those stops yielded nothing illegal.¹⁰³ With respect to guns, in 2012, the NYPD made more than 532,000 stops and found guns 715 times—a rate of 0.1%.¹⁰⁴ In Chicago, while there has been a sharp rise in the number of stops and arrests of people with no records, there has been a decline in arrest rates for violent gun crime.¹⁰⁵ Professors Aziz Huq, Robert

⁹⁸ *Id.* at 534 (positing alternatives, such as community-based antiviolence, high school work, therapy, and mentorship programs, that studies show can lead to 45% drop in violence).

⁹⁹ Bell, *supra* note 75, at 2054 (“Legal estrangement is a theory of detachment and eventual alienation from the law’s enforcers, and it reflects the intuition among many people in poor communities of color that the law operates to exclude them from society.”).

¹⁰⁰ PHILA. INTERAGENCY RSCH. & PUB. SAFETY COLLABORATIVE, 100 SHOOTING REVIEW COMMITTEE REPORT, 66 (2022); *see also* Amber K. Goodwin & TJ Grayson, *Investing in the Frontlines: Why Trusting and Supporting Communities of Color Will Help Address Gun Violence*, 48 J.L. MED. & ETHICS 164, 165 (2020) (“[C]hildren of color are forced to endure physical or verbal police violence which can lead them to distrust and despise police and the laws they enforce.”).

¹⁰¹ 100 SHOOTING REVIEW COMMITTEE REPORT, *supra* note 100, at 66.

¹⁰² *See Stop, Question and Frisk Data*, NYPD, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page> [<https://perma.cc/C3Z4-CFT8>] (last visited Apr. 3, 2024) (providing police stop-and-frisk data from 2003-2023); *see also Stop-and-Frisk Data*, ACLU OF N.Y., <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/U895-FGL6>] (last visited Apr. 3, 2024).

¹⁰³ *Id.*

¹⁰⁴ Leah Libresco, *It Takes a Lot of Stop-And-Frisks To Find One Gun*, FIVETHIRTYEIGHT (June 3, 2015, 2:36 PM), <https://fivethirtyeight.com/features/it-takes-a-lot-of-stop-and-frisks-to-find-one-gun/> [<https://perma.cc/Z7LE-ZSCN>] (analyzing data that calls into question efficacy of stop and frisks).

¹⁰⁵ Chip Mitchell, *Kim Foxx’s Office Says CPD Is Arresting the Wrong People To Curb Gun Violence*, WBEZ CHI. (June 11, 2021, 6:11 PM CT), <https://www.wbez.org/stories/kim-foxxs-office-says-cpd-is-arresting-the-wrong-people-to-curb-gun-violence/5f78bab4-584e-4188-afc9-9dedfb0565c5> [<https://perma.cc/PW4N-KBG5>] (remarking that arresting large numbers of people without prior criminal convictions for nonviolent gun possession charges does not get at root causes of violence).

Vargas, and Caitlin Loftus conclude that “there is very little reason to believe that policing had a suppressive effect on shootings. Instead, it seems more plausible that policing aimed at suppressing gun crime *increased* the burden of policing for minority communities without any corresponding alleviation of violent crime risk.”¹⁰⁶ Between 2010 and 2022, the Chicago Police Department made more than 38,000 arrests for gun possession (80% of those people were Black).¹⁰⁷ However, despite more than doubling the number of possession arrests in that span, shootings increased and the percentage of arrests in shooting cases declined.¹⁰⁸ The data from these cities not only illustrate the ineffectiveness of increased policing vis-à-vis safety, but also illustrate the ways that the carceral model harms communities of color through expansive surveillance and harassment.

B. *The Expansion of Harsh Federal Sentencing*

Alongside increased policing is ever harsher punishment for gun-related arrests, especially for people of color. Federal gun prosecutions have increased at exponential rates in the thirty years since the government began its efforts to leverage harsher federal sentencing for firearm arrests.¹⁰⁹ Under the programs, federal and state prosecutors work in tandem to prosecute people federally to ensure that people receive harsher sentences for gun possession crimes.¹¹⁰ As Professor Benjamin Levin details, joint efforts by federal and state prosecutors—like Project Exile—work by “funneling all gun arrests made by state and local authorities to federal court, where, if at all possible, defendants were to be prosecuted under federal firearm statutes.”¹¹¹ The initiative worked “to increase the ability of prosecutors to incarcerate more people for more time.”¹¹² All over the country, projects like Project Exile exist to ensure that

¹⁰⁶ Huq et al., *supra* note 69, at 490.

¹⁰⁷ Lakeidra Chavis & Geoff Hing, *The War on Gun Violence Has Failed. And Black Men Are Paying the Price*, MARSHALL PROJECT (Mar. 23, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/03/23/gun-violence-possession-police-chicago> [<https://perma.cc/6P3U-5LD3>].

¹⁰⁸ *Id.* (rebuking officials’ focus on confiscating guns—regardless whether those guns are being fired at anybody—as ineffective).

¹⁰⁹ See David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1429 (2011) [hereinafter Patton, *Systemic Approach to Federal Sentencing*] (detailing federal Project Triggerlock results which sought to leverage harsher federal sentencing for firearm arrests nationwide, leading to “ten-fold increase in the number of federal felon-in-possession prisoners” twenty years after its inception).

¹¹⁰ See PURNELL, *supra* note 16, at 271 (explaining how initiatives like Project ELECT allow states to use federal funding to purchase equipment to surveil Black communities).

¹¹¹ Levin, *Guns and Drugs*, *supra* note 13, at 2208 (quotation omitted).

¹¹² *Id.*

people face the harshest possible sentences.¹¹³ Since their inception, projects like Exile, and its predecessor, Triggerlock, have proliferated despite the lack of behavioral or empirical evidence that severe sentences serve any deterrent effect.¹¹⁴

The result is that thousands of people are prosecuted federally for gun crimes. In 2019, there were more than 8,000 federal gun convictions.¹¹⁵ Federal gun convictions represented more than 11% of the over 76,000 federal convictions that year, which comprised the third most common type of conviction after immigration and drug convictions.¹¹⁶ Federal gun prosecutions also continue to increase. In 2020, the Department of Justice charged more than 14,200 people for firearms-related crimes.¹¹⁷ Still, state prosecutions for gun crimes continue to dwarf federal prosecutions. In 2006, there were over four times the number of felony convictions for weapon offenses in state courts than in federal court.¹¹⁸

Unsurprisingly, these federal prosecutions of a subset of people exacerbate the racial disparities endemic in the criminal legal system. In 2018, more than 50% of people convicted of federal gun crimes were Black, despite making up just 12% of the population.¹¹⁹ As Professor Bonita Gardner details, programs

¹¹³ See *id.* (noting prosecutors are allowed to “stack” charges with multiple counts to address same underlying conduct); see also Patton, *Systemic Approach to Federal Sentencing*, *supra* note 109, at 1429.

¹¹⁴ See Patton, *Systemic Approach to Federal Sentencing*, *supra* note 109, at 1432, 1453 (contending recent behavioral studies show that those most likely to offend are less swayed by risk of uncertain future harm).

¹¹⁵ U.S. SENT’G COMM’N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 46 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> [perma.cc/J4B7-7CDP] (finding 8,481 federal offenders for firearms-related crimes in 2019).

¹¹⁶ *Id.*; see 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, 1431 (2021) (remarking that roughly one in ten federal convictions involves felon-in-possession ban violation).

¹¹⁷ Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., DOJ Charges More than 14,200 Defendants with Firearms-Related Crimes in FY20 (Oct. 13, 2020), <https://www.justice.gov/usao-mdpa/pr/doj-charges-more-14200-defendants-firearms-related-crimes-fy20> [https://perma.cc/H6VT-XEKZ].

¹¹⁸ See SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUST. STATS., FELONY SENTENCES IN STATE COURTS, 2006-STATISTICAL TABLES 9 (2010), <https://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> [https://perma.cc/GT9N-ARXN] (finding 38,010 weapon offenses in state courts and 8,831 weapons offenses in federal courts).

¹¹⁹ See U.S. SENT’G COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 48 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> [https://perma.cc/NPT3-7D4U] (finding Black offenders comprised 52.8% of federal firearms-related crimes in 2018). These numbers have remained remarkably stable for decades. Benjamin Levin writes that “[i]n 2004, these statistics for state courts were nearly identical—55 percent of defendants convicted of weapons offenses were [B]lack, a higher percentage than for drug offenses (46 percent) and all offenses (38 percent).” Levin, *Guns*

like Project Safe Neighborhoods—predicated on the contours of Project Exile—purposely targeted Black people.¹²⁰ These federal prosecutions were almost exclusively for street-level gun possession, but not for gun dealers, gun traffickers, or gun manufacturers—the parties primarily responsible for the proliferation of guns in the nation.¹²¹

Just as they questioned punitive policing, organizers and scholars have also questioned the efficacy of increasingly harsh prosecutions. The government has long acknowledged that harsher sentencing fails to either deter crime or to prevent recidivism.¹²² In 1967, the President’s Commission on Law Enforcement and Administration of Justice acknowledged that: “The criminal justice system . . . was not designed to eliminate the conditions in which most crime breeds. . . . [A] community’s most enduring protection against crime is to right the wrongs and cure the illnesses that tempt men to harm their neighbors.”¹²³ Despite the mainstream claims that long prison sentences produce safety, there is no causal link between severe sentences and the deterrence of violent crime.¹²⁴ Evidence suggests that the proliferation of severe and unjust sentences may exacerbate crime rates,¹²⁵ particularly given incarceration’s

and Drugs, *supra* note 13, at 2194. As David Patton explains, the racial disparities are by design: the Triggerlock initiative “largely targets inner-city, high-crime, minority-populated areas, and is active in every one of the thirty cities with the largest African American populations.” Patton, *Systemic Approach to Federal Sentencing*, *supra* note 109, at 1443; *see also* CARLSON, *POLICING THE SECOND AMENDMENT*, *supra* note 13, at 59 (“[I]n 2016, a startling 51.3 percent of those convicted of federal gun crimes . . . were African American. That’s a larger concentration than for any other federal crime . . .” (footnote omitted)).

¹²⁰ Gardner, *supra* note 14, at 316 (detailing development of Project Safe Neighborhoods as expansion of Richmond’s Project Exile, despite fact that 90% of people targeted were Black, resulting in program that cost nearly one billion dollars and funded at least 200 new assistant United States attorneys); *see also* FORMAN, *supra* note 95, at 77 (describing how criminalization and harsh punishment of gun possession in Black communities without simultaneous action “to curb the vibrant national gun market or to address crime’s root causes, has led to the worst of all possible worlds”).

¹²¹ Gardner, *supra* note 14, at 312 (noting if not directed at “end-users,” many major federal gun crimes will almost never be prosecuted).

¹²² PURNELL, *supra* note 16, at 192 (contending that crime and victimization rates do not deter people from committing crime).

¹²³ THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 6, 284 (1967)

¹²⁴ *See* ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* 153 (2019) (denouncing American punishment system’s core pathology that caging people is ideal way for community to reduce violent crime); *see also* Levin, *Guns and Drugs*, *supra* note 13, at 2222-23 (recognizing that even if policing and incarceration could prevent gun violence, it still would not justify costs to communities as resulting autonomy loss would “ultimately shift power away from the community and into the hands of police and prosecutors”).

¹²⁵ Patton, *Systemic Approach to Federal Sentencing*, *supra* note 109, at 1438-39 (remarking on how sentences that conflict with notions of justice make people less likely to internalize criminal law rules’ desired effects, leading to decreased compliance).

criminogenic effect.¹²⁶ Reflecting the idea of “legal estrangement,” disillusionment with unfair sentencing makes people less likely to cooperate with courts and police and less likely to give credence to the criminal legal system’s moral authority.¹²⁷

II. VIOLENCE INTERRUPTION AS A DECARCERAL ALTERNATIVE

Community violence interruption groups have proven to be successful alternatives to policing and prosecution in creating community safety. This Part examines how Violence Interruption organizations promote community safety without reinforcing the carceral state. It reviews the models that Violence Interruption organizations use to address gun violence, evaluates their success, and highlights their limits.

Violence interruption organizations grew out of a vision for safety that does not primarily rely on carceral intervention.¹²⁸ This vision instead responds to marginalized communities’ understandings of safety. Participatory research suggests that communities most affected by violence desire safety that encompasses freedom from harm alongside positivist conceptions of safety that include things like clean streets, lighting, food, housing, and healthy social networks.¹²⁹ Cognizant of the fact that the safest communities are those with the

¹²⁶ See Michael Serota, *How Criminal Law Lost Its Mind*, BOS. REV. (Oct. 27, 2020), <https://www.bostonreview.net/articles/michael-serota-mens-rea-reform/> [<https://perma.cc/JC9G-9PJE>] (positing prison life’s harsh realities may leave people more likely to commit crime upon completing their prison sentence); see also DON STEMEN, VERA INST. OF JUST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 2* (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/5DFY-T48N>] (hypothesizing that incarceration’s criminogenic effect may stem from people learning criminal habits, developing criminal networks, or failing to maintain employment and family ties while incarcerated).

¹²⁷ See Bell, *supra* note 75, at 2117 (noting policing’s history in socioeconomically isolated communities left community members feeling abandoned and heavily monitored over minor crimes, leading to estrangement); see also Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2007 (2010) (finding clear benefits to just sentencing including greater assistance and cooperation with criminal legal system).

¹²⁸ Wesley Lowery & Steven Rich, *In Sacramento, Trying To Stop a Killing Before It Happens*, WASH. POST (Nov. 9, 2018, 9:00 AM), https://www.washingtonpost.com/investigations/in-sacramento-trying-to-stop-a-killing-before-it-happens/2018/11/08/482be50e-dadd-11e8-b732-3c72cbf131f2_story.html (finding offering mentoring, job placement prospects, addiction treatment, and financial incentives to offenders led to dramatic decreases in violent activity).

¹²⁹ In surveys of participants in Cincinnati, Ohio, people overwhelmingly listed clean streets, lighting, and social networks as important parts of feeling safe. Very few sought increased policing of their community. See Lauren Johnson et al., *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. 191, 199-200 (2022). In Illinois, hundreds of people were surveyed about their thoughts on legislation that would introduce more punitive mandatory minimums for gun possession. Not only did most respondents disagree with the proposition that adults who

most resources, not the ones with the most policing, community violence interruption groups seek to connect those at risk of committing gun violence to treatment, counseling, and employment opportunities.¹³⁰

A. *Interrupting Gun Violence*

In contrast to law enforcement models which rely on punishment, subjugation, and harassment,¹³¹ violence interruption groups take a public health approach to violence reduction which emphasizes “changing the social norms that perpetuate violence and the use of guns.”¹³² Groups throughout the United States have adopted the public health framework based on the Cure Violence initiative.¹³³

Cure Violence conceptualizes gun violence not as a problem of individual criminality, but as a contagious problem best addressed by “interrupting transmission directly, identifying and changing the thinking of potential transmitters (i.e., those at highest risk of perpetrating violence), and changing group norms regarding violence.”¹³⁴

In their approach, community violence interruption groups like Cure Violence align with abolitionist notions of safety by emphasizing accountability for state and interpersonal violence without relying on policing and prisons.¹³⁵

illegally carry a gun should be sentenced to prison, but when given alternative choices, respondents overwhelmingly favored rehabilitative and community-based programs like vocation training and job skills, restorative justice programs, and employment programs. For young people, respondents favored programs that would help youth obtain a high school diploma or GED, provide mentoring, or provide restorative justice. *See* JULIAN IGNACIO & MARIAME KABA, PROJECT NIA, MANDATORY MINIMUMS & GUNS: OPINIONS FROM ILLINOIS 2 (2013). In New York City, 62,000 people were surveyed about public safety, and the two most important factors (comprising 70% of responses) were affordable housing and proper mental health services. Joseph Konig, *Survey of 62,000 New Yorkers Reveals Policy Priorities*, SPECTRUM NEWS NY1 (Apr. 6, 2022, 9:01 PM), <https://www.nyl.com/nyc/all-boroughs/inside-city-hall/2022/04/07/survey-of-62-000-new-yorkers-reveals-policy-priorities> [<https://perma.cc/X2JJ-KB7S>].

¹³⁰ Lowery & Rich, *supra* note 128.

¹³¹ *See* Butts et al., *supra* note 23, at 40 (denouncing suppression models’ reliance on aggressive law enforcement alone to extinguish violent behavior); *see also* VITALE, *supra* note 65, at 157 (noting proliferation of police gang units that used heavy-handed tactics for crime suppression starting in 1980s).

¹³² Butts et al., *supra* note 23, at 40.

¹³³ JENNIFER CARLSON, BEYOND LAW AND ORDER IN THE GUN DEBATE 6 (2021), https://www.brennancenter.org/sites/default/files/2021-06/Carlson_final.pdf [<https://perma.cc/W9CA-GM76>] [hereinafter CARLSON, BEYOND LAW AND ORDER] (indicating implementation of Cure Violence initiatives led to dramatic drops in shootings and gun homicides).

¹³⁴ *Id.* (quoting Butts et al., *supra* note 23, at 40).

¹³⁵ Professor Akbar explains that abolition does not mean instantaneously dismissing police without alternatives, but instead that “even as organizers demand abolition and shrinkage, they build—and experiment with modes of building—experiments and projects, including forms of mutual aid, to meet collective needs.” Akbar, *supra* note 73, at 1834-35

Key to the Cure Violence model are members who directly intervene to prevent violence.¹³⁶ Known as Violence Interrupters, these members are often “former high-level or popular gang members who have changed their lives—often after a stint in prison.”¹³⁷ Their lived experience in the criminal legal system is important to ensure credibility with people at risk for violence in the community.¹³⁸ While some programs are funded in part by governmental contracts, many—like Chicago’s Violence Interrupters, Safe Streets Baltimore, and Advance Peace (various cities)—take pains to distance themselves from the police to maintain confidence with the community.¹³⁹

Violence Interrupters focus their attention on the neighborhoods and actors that disproportionately drive gun violence.¹⁴⁰ Because urban gun violence is concentrated, violence interruption focuses on the people most likely to use guns. In New York City, for example, precinct-level data shows that the majority of shootings occurred in just a few neighborhoods in the Bronx and Brooklyn.¹⁴¹ Furthermore, there is growing recognition that only a small number of individuals are involved in shootings. The New York City Public Advocate writes that “most gun-violence in NYC is perpetuated by a small number of individuals, who are most likely victims of violence and may often engage in gun violence as a result of the environmental and economic stress factors.”¹⁴² Similarly, research shows that in cities across the nation, less than 1% of the population is responsible for more than 60% of gun violence and more than 50%

(observing sentiment within communities that police and punishment do not solve their problems).

¹³⁶ Butts et al., *supra* note 23, at 41 (demonstrating direct intervention techniques such as establishing relationships with high-risk young people, learning about potential acts of retaliation before they happen, and persuading people to negotiate conflict nonviolently).

¹³⁷ *Id.*

¹³⁸ *See id.* (observing Violence Interrupters cannot be perceived as outsiders or police informants and should demonstrate to their communities that it is possible to be both law-abiding and respected in their neighborhood in order for Cure Violence model to be effective); *see also* Whitehill et al., *supra* note 28, at 88 (noting outreach staff while out on streets generally maintain respectful distance from police officers).

¹³⁹ *See* CARLSON, BEYOND LAW AND ORDER, *supra* note 133, at 6 (quoting Charles Ransford, Cure Violence, Director of Science of Policy: “If we were to be talking to the police, our workers would no longer have the trust and faith of the people they work with, and it would put their lives in danger”). *But see* U.S. DEP’T OF JUST., REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT’S OPERATION CEASEFIRE, 42-43 (2001), <https://www.ojp.gov/pdffiles1/nij/188741.pdf> (detailing findings of Boston Gun Project, which, in contrast to programs like Cure Violence and Advance Peace, explicitly works with police to leverage threat of arrest against people they identify as likely targets).

¹⁴⁰ *See* JORDAN ET AL., *supra* note 31, at 6 (acknowledging underserved communities that see most gun violence are same communities that have highest unemployment rates, highest barriers to education, and therefore need more resources to address underlying problems).

¹⁴¹ *See id.* (indicating in 2021, out of 1,562 total reported shootings, “the average City precinct reported 11 shootings in 2021, [but] the precinct with the highest number of shootings in 2021 reported over seven times more”).

¹⁴² *Id.* at 16.

of violence more generally.¹⁴³ Focused efforts on those at-risk not only provides more safety but reduces the impetus for racial profiling that indifferently targets and conceptualizes large parts of a community as dangerous.¹⁴⁴

Another promising community violence interruption model is the Advance Peace program. Started in Richmond, California by Devone Boggan, then-director of the city's Office of Neighborhood City, the program aims to reduce gun violence by intervening in the lives of those most impacted by cyclical gun violence.¹⁴⁵ Key to the program is the enrollment of those most impacted by, and likely to engage in, gun violence into its Peacemaker Fellowship.¹⁴⁶ During the eighteen-month Fellowship, individuals receive intensive mentorship from outreach workers, known as Neighborhood Change Agents, who are system involved and formerly incarcerated. They also receive "supportive services, such as cognitive behavioral therapy and substance abuse and anger management counseling."¹⁴⁷ In addition to connecting fellows with classes and services, the Neighborhood Change Agents "mediate street conflicts, interrupt imminent violence, and respond to shootings."¹⁴⁸

Notions of abolitionist safety also require a critical look at the roots of violence, eschewing moralistic views that focus on individual criminality for a deeper examination of the conditions that foster and promote violence.¹⁴⁹

¹⁴³ Stephen Lurie, Alexis Acevedo & Kyle Ott, Nat'l Network for Safe Cmty's., Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence (Nov. 14, 2018), in ATLANTIC, https://cdn.theatlantic.com/assets/media/files/npsc_gmi_concentration_asc_v1.91.pdf, at 17, 23 [<https://perma.cc/GHT3-MF2K>].

¹⁴⁴ See James Forman Jr., *The Society of Fugitives*, ATLANTIC (Oct. 2014), <https://www.theatlantic.com/magazine/archive/2014/10/the-society-of-fugitives/379328/> [<https://perma.cc/9LRW-C5N4>] (arguing costs of New York City's stop-and-frisk policies, which indiscriminately profiled people of color, far outweighed benefits, given violent crime is vast exception, even in low-income communities of color); see also Huq et al., *supra* note 69, at 474 (documenting racialized policing of Black and Latinx communities in Chicago without evidence of providing public safety benefit).

¹⁴⁵ JASON CORBURN & AMANDA FUKUTOME, ADVANCE PEACE SACRAMENTO, LEARNING & EVALUATION: 2018 YEAR-END PROGRESS REPORT 3 (2019), <https://www.advancepeace.org/wp-content/uploads/2020/02/Advance-Peace-Sacramento-2018-Progress-Report-final.pdf> [<https://perma.cc/987X-CVBG>] (showcasing organization's effort to assist at-risk Richmond residents through eighteen-month life and mentoring program).

¹⁴⁶ Corburn et al., *supra* note 25, at 2 (explaining how Advanced Peace targets those at risk of gun use in cities and enrolls them in Peacemaker Fellowship).

¹⁴⁷ *Id.*

¹⁴⁸ JASON CORBURN & AMANDA FUKUTOME-LOPEZ, BERKELEY INST. OF URB. & REG'L DEV., OUTCOME EVALUATION OF ADVANCE PEACE SACRAMENTO, 2018-19, at 2 (2020), <https://www.advancepeace.org/wp-content/uploads/2020/04/Corburn-and-F-Lopez-Advance-Peace-Sacramento-2-Year-Evaluation-03-2020.pdf> [<https://perma.cc/4HFE-WDBD>].

¹⁴⁹ See McLeod, *supra* note 21, at 527 ("An abolitionist critique of violence begins from the premise that, in order to stop violence, we must expand our understanding of violence beyond individualized disorder and the immediate scene of interpersonal harm. Consequently,

Similarly, abolitionist notions of safety question the false dichotomy between individual liberty and community safety.¹⁵⁰ This more nuanced view of violence has implications for its prevention. Amber Goodwin and TJ Grayson conclude that solutions to prevent violence must depart from reactionary policing and instead “see violence in inner cities as a symptom of underlying issues and incorporate solutions geared towards reforming the perpetrator, interrupting violent acts before they occur, and directing resources toward eliminating the conditions that breed violence.”¹⁵¹ Violence Interrupters eschew the moralistic, stark notions of criminality, and work to interrupt violence by working with individuals most at risk of committing gun violence. This work is key to the success of programs like Cure Violence and Advance Peace. Violence Interrupters are essential because they defuse “the very type of violent confrontations that often lead to retaliatory shootings.”¹⁵² They do so through de-escalation training, their personal networks, and often direct intervention.¹⁵³

Finally, in exploring alternatives to safety, it is vital that the alternatives not simply “repackage mass incarceration” by making minor reforms that uphold our current forms of policing and prosecution.¹⁵⁴ In their function and design, community violence interruption groups like Cure Violence and Advance Peace can provide safety without replicating or reinforcing carceral logics.¹⁵⁵

an abolitionist critique of violence focuses on the racialized political, economic, militarist, and environmental roots and manifestations of violence.”).

¹⁵⁰ See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 274-75 (2019) (questioning assumption that public’s interest is opposed to defendant’s interest and exploring reality that in many cases, public has demonstrated interests in defendant’s liberty).

¹⁵¹ Goodwin & Grayson, *supra* note 100, at 166 (quoting Craig Muhammad, co-founder of Project Emancipation Now).

¹⁵² Butts et al., *supra* note 23, at 43.

¹⁵³ Davies, *supra* note 30 (illustrating D.C. Peace Academy’s strategy in hiring individuals with deep roots in community who are trained in negotiation and conflict resolution skills).

¹⁵⁴ James Kilgore, *Repackaging Mass Incarceration*, COUNTERPUNCH (June 6, 2014), <https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration/> [<https://perma.cc/C9N5-FDVG>] (describing carceral humanism and nonalternative alternatives to incarceration, two ideas that fail to properly remedy mass incarceration).

¹⁵⁵ A number of scholars have detailed the ways in which the carceral logic of the criminal legal system is replicated in the juvenile, healthcare, immigration, family regulation, and education systems. See Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 305 (2015) (illustrating carceral treatment in juvenile systems); Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2649 (2021) (illustrating police’s sphere of influence in emergency room and healthcare more broadly); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107-08 (2012) (detailing convergence of criminal and immigration law in recent decades); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1103 (2022) (showcasing surveillance apparatus present in family regulation system); Marietta Kosma, *Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World*, TRANSATLANTICA, Nov. 2022, at 1380, 1384 (reviewing DOROTHY

Organizations like Critical Resistance analyze proposals by asking whether they are reformist or nonreformist reforms: that is, whether they neutralize radical change or whether they bring communities closer to freedom and justice.¹⁵⁶ In the context of policing, their framework asks whether proposals: (1) reduce funding to the police; (2) challenge the notion that police increase safety; (3) reduce police tools and resources; and (4) reduce the scale of policing?¹⁵⁷ Community violence interruption groups thwart the logic of policing by introducing the notion that Violence Interrupters and social service providers should be the ones to deter and intervene when violence is present.¹⁵⁸ Additionally, groups like Cure Violence and Advance Peace do not work with the police, rely on police funding, or threaten individuals with punishment; instead they seek to build up the people at risk of gun violence and provide them with offramps from violence.¹⁵⁹

B. *Promising Empirical Success*

Although establishing a causal connection between program interventions and crime rates is difficult, community violence interruption has repeatedly been

ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022)) (illustrating impact carceral logic in child welfare systems has had in tearing apart Black families); Fanna Gamal, *The Miseducation of Carceral Reform*, 69 UCLA L. REV. 928, 933 (2022) (explaining investments in public education place more emphasis on carceral ideas than on building up broader community).

¹⁵⁶ INTERRUPTING CRIMINALIZATION, PROJECT NIA & CRITICAL RESISTANCE, SO IS THIS ACTUALLY AN ABOLITIONIST PROPOSAL OR STRATEGY? 27 (2019), CRITICAL RESISTANCE 27 (2019), <https://criticalresistance.org/resources/actually-an-abolitionist-strategy-binder/> [<https://perma.cc/92TN-JYRG>] (providing chart of reformist reforms and abolitionist steps to illustrate how former continues and expands policing while latter reduces its impact).

¹⁵⁷ *Id.* (illustrating how Critical Resistance examines policing proposals, such as body cameras, more police training, and civilian oversight boards, based on these four criteria).

¹⁵⁸ See Maria Cramer, *What Happened When a Brooklyn Neighborhood Policed Itself for Five Days*, N.Y. TIMES, (June 12, 2023), <https://www.nytimes.com/2023/06/04/nyregion/brooklyn-brownsville-no-police.html> (finding success of Brownsville In Violence Out workers; specifically, that, absent police intervention, workers “have persuaded people to turn in illegal guns, prevented shoplifting, kept a man from robbing a bodega and stopped a pregnant woman from hitting a boyfriend who had not bought a car seat and a stroller as he had promised”).

¹⁵⁹ See CARLSON, BEYOND LAW AND ORDER, *supra* note 133, at 6 (illustrating Cure Violence’s view of gun violence as public health problem best addressed by interrupting transmission, changing thinking of potential transmitters, and changing group norms regarding violence); see also Tim Murphy, *One City Tried Something Radical To Stop Gun Violence. This Report Suggests It’s Working.*, MOTHER JONES (July 27, 2015), <https://www.motherjones.com/politics/2015/07/richmond-office-neighborhood-safety-report/> [<https://perma.cc/7XB6-SP9M>] (describing Richmond’s reduced reliance on police and emphasis on stipend programs for most at risk of gun violence).

associated with a decrease in shootings and gun-related homicides.¹⁶⁰ This Article engages with the sociological and criminological literature on violence interruption to bring focus to Violence Interrupters as a decarceral alternative to safety. A 2014 study of violence interruption in Chicago demonstrated a “31% reduction in homicide, a 7% reduction in total violent crime, and a 19% reduction in shootings in the targeted districts.”¹⁶¹ Although these declines occurred in the context of declining crime rates citywide, researchers concluded that the violence interruption “effects are significantly greater than the effects that would be expected given the declining trends in crime in the city as a whole.”¹⁶²

In 2017, researchers at John Jay College examined the effects of Cure Violence programs in the South Bronx and in East New York, Brooklyn.¹⁶³ When comparing these program sites to similarly situated neighborhoods, they concluded that the programs led to statistically significant reductions in violence. In the South Bronx, gun injuries trended down by 37% and shootings declined by 63%.¹⁶⁴

In Brooklyn, gun injuries declined by 50% and shootings by 15%.¹⁶⁵ Building on the success of pilot programs, New York City’s Crisis Management Systems (“CMS”), employed Violence Interrupters to “enter areas with high rates of violence, identify conflicts, and create strategies to reduce crime.”¹⁶⁶ Between 2010-2019, CMS-managed areas saw shootings drop by 40%.¹⁶⁷

In 2012, researchers at Johns Hopkins University documented statistically significant reductions in shootings or gun-related homicides in a majority of the sites run by Safe Streets Baltimore. Although over time, many of the sites were shut down due to unstable funding, its long-standing Cherry Hill site continues to be associated with lower rates of gun violence and gun-related homicides.¹⁶⁸

¹⁶⁰ See CARLSON, BEYOND LAW AND ORDER, *supra* note 133, at 6 (“[A]lthough crime rates are notoriously difficult to trace back to a particular intervention, the Cure Violence initiative has been associated with dramatic drops in shootings and gun homicides.”).

¹⁶¹ DAVID B. HENRY, SHANNON KNOBLAUCH & RANNVEIG SIGURVINSDDOTTIR, THE EFFECT OF INTENSIVE CEASEFIRE INTERVENTION ON CRIME IN FOUR CHICAGO POLICE BEATS: QUANTITATIVE ASSESSMENT 9 (2014), https://cvg.org/wp-content/uploads/2019/09/McCormick_CeaseFire_Quantitative_Report_091114.pdf [<https://perma.cc/8RWX-XKPF>].

¹⁶² *Id.*

¹⁶³ See DELGADO ET AL., *supra* note 36, at 1 (“This report examines two [Cure Violence programs]: Man Up! Inc. in East New York, Brooklyn; and Save Our Streets South Bronx.”).

¹⁶⁴ *Id.* at 9 (“The area of the South Bronx served by Cure Violence experienced strong and significant declines in both measures of gun violence: a 37 percent decline in gun injuries and a 63 percent reduction in shooting victimizations . . .”).

¹⁶⁵ *Id.* (noting caveat that shooting reduction declines in East New York site were not statistically significant).

¹⁶⁶ JORDAN ET AL., *supra* note 31, at 3.

¹⁶⁷ *Id.*

¹⁶⁸ WEBSTER ET AL., *supra* note 34, at 11 (“[H]owever, Cherry Hill’s program was associated with a 30% reduction in nonfatal shootings since the program was implemented in 2008.”).

In 2020, the Cherry Hill Safe Street area saw a full year without a single homicide, and another Safe Streets area went more than 500 days without a homicide.¹⁶⁹ By contrast, researchers concluded that police departments' use of drug law enforcement to combat gun-related crime in Baltimore "rarely had lasting impacts on violence."¹⁷⁰

Research on Advance Peace interventions over the past two decades has shown promising reductions in gun violence. The Advance Peace program in Richmond has garnered attention, but its interventions in other cities have demonstrated that its results can be replicable elsewhere.¹⁷¹ When the Advance Peace program was brought to Sacramento, it was one of the most violent cities in California.¹⁷² Advance Peace enrolled people into its Peacemaker Fellowship in three different Sacramento neighborhoods.¹⁷³ An evaluation at the end of the eighteen-month Fellowship period showed that there were 18.2% less gun homicides and assaults in the program areas, and 8.3% less gun violence citywide.¹⁷⁴ At the end of the Fellowship, fellows showed signs of improved health and healing. All fellows received assistance for food and housing, 84% reported improved mental health, 98% reported having a trusted adult to speak with during stressful situations, and 90% reported the peaceful mediation of conflict that previously could have resulted in gun violence.¹⁷⁵ Based on the success of its programs in Richmond and Sacramento, the program is being implemented in other cities throughout the United States.

More generally, Professors Patrick Sharkey, Gerrard Torratts-Espinosa, and Delaram Takyar found that for "every 10 additional organizations focusing on crime and community life in a city with 100,000 residents leads to a 9 percent reduction in the murder rate, a 6 percent reduction in the violent crime rate, and

¹⁶⁹ Jessica Anderson & Phillip Jackson, *Safe Streets Celebrates a Year with No Homicides in a South Baltimore Area They Serve, with Hope for Rest of the City*, BALTIMORE SUN (June 26, 2021, 9:00 AM), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-cherry-hill-safe-streets-20210626-z55wta67mnht7b2y424ewuycv4-story.html>.

¹⁷⁰ WEBSTER ET AL., *supra* note 34, at 14 (detailing how drug-related arrests are more likely to spur gun violence and generate violence more generally).

¹⁷¹ A twenty-year study of Advance Peace in Richmond yielded a 55% reduction in firearm-related deaths and hospitalizations and 43% fewer gun-related crimes. Ellicott C. Matthey et al., *Firearm and Nonfirearm Violence After Operation Peacemaker Fellowship in Richmond, California, 1996-2016*, 109 AM. J. PUB. HEALTH 1605, 1610 (2019) ("Replications are being conducted in other cities nationally and internationally.").

¹⁷² Corburn et al., *supra* note 25, at 3 ("Sacramento is the capital of California and was one of the most violent cities in California in 2015; gun homicides had increased more than 39% from 2014 to 2015." (footnote omitted)).

¹⁷³ *Id.* (describing Advanced Peace's focus on Del Paso Heights, Oak Park, and South Sacramento).

¹⁷⁴ *Id.* at 12 (using data from National Institute of Criminal Justice Reform for cost of shooting injury (\$888,000) and cost of homicide (\$2.4 million) to estimate that program saved anywhere from \$51-223 million).

¹⁷⁵ *Id.* at 10 (signifying Advances Peace's impact in improving lives and increasing peaceful resolutions amongst program fellows).

a 4 percent reduction in the property crime rate.”¹⁷⁶ They concluded that the “establishment of community nonprofits had a substantively meaningful negative effect on murder, violent crime, and property crime.”¹⁷⁷ Their findings suggest that funding community violence interruption and other community nonprofits could reduce violence more so than continuing to swell already large police budgets.¹⁷⁸

C. *Epistemic Value*

Violence Interruption programs also accord with the values espoused by communities most affected by gun violence. Mindful of critiques that evidence-based paradigms can entrench neoliberal conceptions of safety by elevating data over the experiences of affected communities, the data here support the viewpoints of communities eager for decarceral approaches to safety. Professor Erin Collins explains that focusing too much on quantitative evidence causes political and epistemological harm by eliding “lived experience and qualitative, community-focused methodologies.”¹⁷⁹ When evaluating proposed reforms, she reminds us to look past the question of “what works” and to further ask “[w]hat works for what? For whom? To what end?”¹⁸⁰

Regarding attempts to reform the criminal legal system, popular notions of public safety that lionize incarceration, policing, and cost savings can be reductive and exclusionary. Studies focusing on arrest rates, recidivism, and crime rates provide viewpoints that entrench police power and justify surveillance and intrusion into communities of color.¹⁸¹ These studies make normative assumptions about whose safety matters and who should be considered part of the community. In the case of violence interruption, the data

¹⁷⁶ See Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214, 1214 (2017).

¹⁷⁷ *Id.* at 1234.

¹⁷⁸ Some cities are beginning to take note. Minneapolis’s Office of Violence Prevention founded a violence interruption program in 2021. In six months’ time the city’s violence interrupters mediated 1,500 incidents before they resulted in violence. Jay Kolls, *Minneapolis Violence Interrupters Report on 1st Year of Progress*, KSTP (June 8, 2022, 11:55 PM), <https://kstp.com/kstp-news/top-news/minneapolis-violence-interrupters-report-on-1st-year-of-progress/> [<https://perma.cc/PV2P-ZZ32>] (showcasing over 8,900 public contacts and 1,500 mediated incidents that Minneapolis violence interrupters engaged in their first year); Nina Moini, *Meet the Minneapolis ‘Violence Interrupters’*, MPRARCHIVE, at 01:55 (Oct. 14, 2020), <https://archive.mpr.org/stories/2020/10/14/meet-the-minneapolis-violence-interrupters> [<https://perma.cc/2U7U-94U2>] (illustrating success and growing neighborhood support Minneapolis violence interrupters have had since their creation).

¹⁷⁹ Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 410 (2022) (showcasing how quantitative criminal legal studies often are biased and fail to capture other forms of expertise from communities themselves).

¹⁸⁰ *Id.* at 418.

¹⁸¹ *Id.* at 432 (explaining how evidence-based paradigm conceives of public safety in ways that are reductive and exclusionary).

support the narratives of communities that have suffered the twin harms of gun violence and policing. Beyond just the numbers, community violence interruption programs provide alternative paths to achieving safety. In ways that accord with more holistic notions of safety defined by affected communities and not by the police.¹⁸² Violence interruption groups address notions of safety that include economic independence, safety from police, and safety from incarceration. In that vein, they can also serve to decenter carceral responses and uplift community voices. Because violence interruption programs address acute and systemic causes of violence, changing those underlying conditions may take longer to unroot.¹⁸³ For those reasons, even where the data do not yet demonstrate that community violence interruption interventions have decreased gun violence, they may still be important projects to pursue.

D. *The Limits of Violence Interruption*

Despite the success of violence interruption organizations, they are not a panacea for gun violence. They are limited in size and scope and cannot be expected to reduce the sheer number of guns in America.¹⁸⁴ While Violence Interrupters often report to calls of violence to try to intervene, or to hospitals to mediate retaliatory violence, they are not first responders that can stop a shooting that is underway. Furthermore, the limited number of Violence Interrupters, coupled with the difficult nature of the work and the fact that most of them receive scant pay and benefits, can lead to frustration and burnout.¹⁸⁵ Violence Interrupters face high levels of acute exposure to trauma and violence when they respond to incidents and their aftermath; because their work requires building long-term relationships with community members, they face prolonged

¹⁸² See, e.g., Johnson et al., *supra* note 129, at 219-22 (detailing participatory research of affected community members and their desire for safety premised on relationships and social groups rather than policing).

¹⁸³ Cristian Farias, *On Both Sides of the Gun*, INQUEST (July 13, 2023) <https://inquest.org/on-both-sides-of-the-gun/> [<https://perma.cc/35CH-Y2LH>] (quoting Sharlyn Grace, senior policy advisor at Cook County Public Defender's office: "Part of the issue in developing real solutions to end all forms of violence, including gun violence, is that we expect quick solutions There are things we can and should do immediately, but we should acknowledge it's actually going to take a long time to change the conditions in which violence thrives.").

¹⁸⁴ The United States is the only country with more civilian-owned firearms than people. There are approximately 393 million guns in the United States and 330 million people. Thomas Black, *Americans Have More Guns than Anywhere Else in the World and They Keep Buying More*, BLOOMBERG (May 25, 2022, 2:03 PM), <https://www.bloomberg.com/news/articles/2022-05-25/how-many-guns-in-the-us-buying-spree-bolsters-lead-as-most-armed-country> [<https://perma.cc/CK6P-6U66>] (describing vast number of guns in United States and rising gun ownership levels after mass shootings).

¹⁸⁵ See Givens, *supra* note 27 (illustrating budgetary and personnel struggles of Chicago Ceasefire).

exposure to trauma as well.¹⁸⁶ The combination makes Violence Interrupters vulnerable to the impacts of direct violence as well as primary and secondary stress.¹⁸⁷

Community violence interruption groups have been further hampered by inconsistent funding and support.¹⁸⁸ Safe Streets Baltimore—a violence interruption program—has repeatedly been suspended by the city because its workers refuse to provide confidential information to the police.¹⁸⁹ Despite the success of violence interruption programs in New York City, Mayor Eric Adams refused to increase any funding, despite campaign promises to the contrary.¹⁹⁰ Professor Wesley Skogan has detailed how the City of Chicago and the Chicago Police Department have hollowed out the funding and support for community safety programs while repeatedly increasing police budgets.¹⁹¹ Similarly, the Chicago Police Department has historically leveraged the specter of gun violence to pursue coercive policing at the expense of gun regulation and other alternatives to policing.¹⁹²

Beyond individual and structural funding constraints, Violence Interrupters face legal barriers that frustrate their work. One such barrier involves the recruitment of Violence Interrupters who can serve as credible messengers to populations likely to engage in gun violence. As noted above, Violence

¹⁸⁶ David M. Hureau, Theodore Wilson, Wayne Rivera-Cuadrado & Andrew V. Papachristos, *The Experience of Secondary Traumatic Stress Among Community Violence Interventionists in Chicago*, PREVENTIVE MEDICINE, Aug. 6, 2022, at 1, 5 (explaining important predictor of Secondary Traumatic Stress among clinicians is proportion of clients that have experienced trauma).

¹⁸⁷ *Id.* (detailing how both exposure to violence and client relationships can harm clinicians).

¹⁸⁸ Even where successfully implemented, violence interruption budgets are dwarfed by police budgets. Minneapolis's violence interruption program was allotted \$3.9 million in 2021 and 2022. Its police department budget for 2023 was estimated to be \$195 million. Kolls, *supra* note 178; see also Jon Collins, *New Minneapolis Police Chief Concerned After City Cuts 0.5 Percent of Police Budget*, MPR NEWS (Dec. 2, 2022, 10:40 AM), <https://www.mprnews.org/story/2022/12/02/amendments-to-mpls-budget-concern-new-police-chief> [<https://perma.cc/NDH9-THGF>] (discussing response to proposed budget which cut police funding but increased other social welfare budgets).

¹⁸⁹ Goodwin & Grayson, *supra* note 100, at 167 (explaining why support given to violence interruption programs is inconsistent and under frequent attack).

¹⁹⁰ Offenhartz, *supra* note 70 (discussing Mayor Eric Adams's failed promise to increase prevention programs' budget).

¹⁹¹ Wesley G. Skogan, *Prospects for Reform? The Collapse of Community Policing in Chicago*, 89 U. CHI. L. REV. 383, 384 (2022) ("[M]ore projects are hollowed out but kept around so that mayors and chiefs have something to point to when questioned. While other priorities come and go, aggressive enforcement always lurks in the wings, waiting for a call when crime spikes."); see also Givens, *supra* note 27 (explaining challenge Cure Violence is facing in reducing violent crime with decreased funding).

¹⁹² See Huq et al., *supra* note 69, at 490 ("The Chicago response to the 2020 crisis of policing exacerbated the cost of public safety for racial minorities, likely without any corresponding benefit.").

Interrupters are typically recruited because of their criminal system involvement, and the expertise and credibility it lends them in mediating conflicts and de-escalating potentially violent situations. However, system involvement leaves many having to bear the burden of community supervision in the form of parole or probation.¹⁹³ The burdens of supervision are extensive. As just one example, people under supervision have restrictions on: where they can live, who they can live with, when they can leave the home, where they work, what they consume, how they can dress.¹⁹⁴ People on supervision are directed “not [to] associate with non-law abiding individuals, violence-prone individuals, or anyone actively using drugs or alcohol.”¹⁹⁵ The punishment for violating any one of these technical conditions can lead to someone being incarcerated, sometimes for years at a time.¹⁹⁶ These conditions make it impossible for a previously incarcerated Violence Interrupter to respond to violent, armed situations—the intervention work that is the hallmark of violence interruption.

For those Violence Interrupters not saddled with onerous conditions of supervision, another legal barrier looms: the threat of federal prosecution as felons in possession.¹⁹⁷ Under 18 U.S.C. § 922(g)(1), the federal statute that governs felon-in-possession culpability:

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.¹⁹⁸

As Patton has detailed, for the first two decades after enactment of the federal felon-in-possession statute, prosecutions were relatively rare.¹⁹⁹ Since 1991 and the inception of Project Triggerlock and then Project Exile, federal gun prosecutions for felon-in-possession cases, once thought of as purely local

¹⁹³ See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292 (2016).

¹⁹⁴ See Priscilla A. Ocen, *Awakening to a Mass-Supervision Crisis*, ATLANTIC (Dec. 30, 2019, 12:18 PM), <https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108/> (“While on parole, individuals must report to a parole officer and follow a list of often-onerous conditions or risk being sent back to prison.”).

¹⁹⁵ See Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879, 1898 (internal quotations omitted).

¹⁹⁶ See Doherty, *supra* note 193, at 295 (“Any violation of a probation condition is an act of recidivism that can result in a custodial sentence . . .”).

¹⁹⁷ See 18 U.S.C. § 922(g)(1).

¹⁹⁸ *Id.*

¹⁹⁹ Patton, *Criminal Justice Reform and Guns*, *supra* note 5, at 1015 (“The federal law criminalizing gun possession for anyone with a prior felony conviction was passed in 1968, and for twenty years it remained lightly enforced.”).

offenses, increased precipitously.²⁰⁰ In the first twenty years after Project Triggerlock, the number of people incarcerated in federal prison for weapons possession crimes increased ten-fold.²⁰¹ Federal prosecutions for felon-in-possession charges remain among the highest proportion of federal cases brought each year.²⁰² The volume of prosecutions under § 922(g)(1) are easy for the government to sustain because of the ease of convicting people under the statute. To convict someone, prosecutors need only show that: (1) the defendant possessed a firearm or ammunition; and (2) the defendant has previously been convicted of a felony.²⁰³ Although the statute requires that the firearm or ammunition be transported through interstate commerce, courts have so broadly interpreted the requirement as to make it meaningless.²⁰⁴ Convictions under the statute typically have longer mandatory prison terms than similar state possession statutes, and result in incarceration in federal correctional facilities anywhere across the country, causing incarcerated individuals to be sent far away from their communities. These convictions disproportionately fall upon people of color.²⁰⁵

While neither racially targeted prosecution—which comes with the threat of severe federal sentences—nor incarceration in far-flung federal facilities have reduced gun crime or promoted public safety; they have demonstrated the potential of a chilling effect on the work of violence interruption. Because Violence Interrupters respond to potentially violent situations, they are necessarily in contact with people who are armed. Under theories of constructive possession, even being in the vicinity of a gun can lead to prosecution for gun possession.²⁰⁶ Despite the threat, Violence Interrupters have safely and

²⁰⁰ *Id.* at 1017-18 (describing each project and explaining how Project Exile was functionally “Triggerlock on steroids”).

²⁰¹ *Id.* at 1012 (showing change from 3,400 people serving time in federal prison for weapons possession in 1990 to over 32,000 in 2011); *see also* Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 674 fig.1 (2021) (demonstrating Project Safe Neighborhoods, successor to Exile, led to nearly 200% increase in annual gun charges brought against defendants between 2001 and 2020).

²⁰² Over the last ten years, prosecutions under § 922(g) have consistently comprised more than 60% of federal gun charges commenced against defendants. Charles & Garrett, *supra* note 201, at 677 fig.3 (showing, for past two decades, charges under § 922(g) have accounted for large portion of all federal firearm charges); *see also* Matthew L. Mizel, Michael Serota, Jonathan Cantor & Joshua Russell-Fritch, *Does Mens Rea Matter?*, 2023 WIS. L. REV. 287, 293.

²⁰³ *See* 18 U.S.C. § 922(g)(1).

²⁰⁴ Courts have repeatedly held that in determining interstate commerce, the government can take account of the firearm or ammunition’s place of manufacture, regardless of whether a defendant transported it at all. *See* Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 370 n.4 (2001).

²⁰⁵ *See supra* Part I.B.

²⁰⁶ Levin recounts the case of Edward Young, who received a fifteen-year sentence for possessing shotgun shells in a drawer. Young only “came into possession of the shells while helping a neighbor sell her late husband’s possessions. When he eventually discovered them,

successfully taken guns from at-risk individuals and turned them in for disposal.²⁰⁷ However, because of the risk of arrest and prosecution, Violence Interrupters are warned against taking possession of firearms, even if it would be the safest way to dispose of them.²⁰⁸ Similarly, Violence Interrupters are apprehensive about advising people to turn in their guns to the police, even in situations where they want to, because they are cognizant of the threat of police violence against Black or brown people with guns, and because of the potential threat for arrest and prosecution.²⁰⁹ Because legal barriers frustrate the efficacy of community violence interruption groups, this Article next considers some of the mechanisms to overcome or mitigate the legal limits on violence interruption.

III. OVERCOMING LEGAL BARRIERS TO VIOLENCE INTERRUPTION

Violence Interrupters create safety by de-escalating conflicts, mediating disputes, and sometimes by volunteering to dispose of owners' guns, or by encouraging owners to dispose of their guns themselves. These efforts have been hamstrung, not only by budgetary cuts that privilege policing over community safety, but also by strict federal gun laws that criminalize instantaneous firearm possession, particularly for people—like Violence Interrupters—who have criminal records. This Section evaluates the legal mechanisms that may prove fruitful in overcoming barriers to violence interruption. It considers in turn: (1) statutory reform; (2) prosecutorial discretion; (3) expansive gun rights; and (4) an affirmative innocent possession defense.

A. Statutory Reform

Challenges to the strict liability nature of federal firearm possession statutes have been dismissed by courts claiming deference to the statutory language.²¹⁰ While Congress could draft affirmative defenses, safe harbor provisions, or limit the strict liability nature of the felon-in-possession statute, given the current state of Congress and the difficulty in securing gun-related legislation after the most recent 2022 bill, it is doubtful that we will soon see any such legislation.

he did not realize that his legal disability against possessing firearms—resulting from felonies committed some twenty years earlier—extended to ammunition. Under the [Armed Career Criminal Act], Young received a mandatory fifteen-year sentence.” Levin, *Guns and Drugs*, *supra* note 13, at 2211 (quoting *United States v. Young*, 766 F.3d 621, 623 (6th Cir. 2014) (per curiam)). Recall also the story of Jefferey Simon who was convicted for possessing a gun that he unwittingly found in the glove compartment of a borrowed car. *See supra* Introduction.

²⁰⁷ Interview with Reginald Moore, *supra* note 32; Interview with Ben Owens, Exec. Dir., Detours Mentoring Grp. (2022) (on file with author); *see also* Maria Cramer, *supra* note 158 (detailing outreach worker persuading man to give up gun instead of entering bodega with it).

²⁰⁸ Interview with Reginald Moore, *supra* note 32.

²⁰⁹ Interview with Ben Owens, *supra* note 207.

²¹⁰ For example, in *United States v. Jackson* the Seventh Circuit declined to recognize an innocent possession defense because it lacked a statutory basis in the Federal Code. 598 F.3d 340, 351 (7th Cir. 2010).

Notwithstanding the short-term improbability of a political breakthrough on any gun-related legislation, gun violence remains an issue that cuts across the political spectrum and legislative reforms provide a possible path to tackle the issue.²¹¹

1. Mens Rea Reform

One avenue for reducing the quantity and punitiveness of gun convictions is mens rea reform. Scholars, attorneys, and judges have repeatedly critiqued the fact that offenses involving guns, drugs, and sex crimes are effectively strict liability offenses and therefore abandon any requirement that the government prove that someone knew or should have known that their conduct was illegal.²¹² For a wide swath of behaviors, “our nation’s lawmakers have disregarded traditional mens rea principles in favor of a tough-on-crime approach that sacrifices our intuitive sense of fairness in pursuit of an amorphous idea of ‘public safety.’”²¹³ The drafters of the Model Penal Code believed strict liability policies that risked convicting the morally blameless were “indefensible.”²¹⁴ Critics from across the political spectrum point out that disregarding mens rea removes an important check on “overcriminalization and threatens government overreach”²¹⁵ and contravenes centuries of Anglo-American legal canon.²¹⁶ Notwithstanding the criticism of strict liability crimes by the Model Penal Code’s drafters, scholars, and defense attorneys, federal criminal statutes related to the possession of guns, drugs, and pornography effectively hold people strictly liable.²¹⁷

²¹¹ See Mugambi Jouet, *Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization*, 55 ARIZ. ST. L.J. 239, 246 (discussing possibilities of political consensus on gun control reform despite hyperpolarization).

²¹² Mizel et al., *supra* note 202, at 290-92 (considering foundational yet controversial nature of mens rea).

²¹³ Serota, *supra* note 126.

²¹⁴ *Id.* (explaining Model Penal Code drafters believed criminal law’s commitment to guilty mind was “too fundamental to be compromised”).

²¹⁵ Mizel et al., *supra* note 202, at 292 (“[O]pponents of strict liability argue that in a world of overzealous prosecution fueled by expansive criminal codes the application of culpable mental state requirements limits the number—or at least the kinds—of cases brought by the government.”).

²¹⁶ ZACK SMITH & NATHAN PYSNO, THE HERITAGE FOUND. & NAT’L ASS’N OF CRIM. DEF. LAWS., *WITHOUT INTENT REVISITED: ASSESSING THE INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW 10 YEARS LATER* 6 (2021) (evaluating criminal statutes enacted in last ten years and reporting that Congress has failed to enact default rules of interpretation and failed to codify rule of lenity, among other steps to strengthen intent requirement in new criminal offenses).

²¹⁷ Mizel et al., *supra* note 202, at 290 (“In numerous areas of criminal regulation—from drug crimes to gun crimes to sex crimes—the law holds actors strictly liable for their conduct without regard to whether they knew or even should have known about the wrongfulness of their conduct.”); see also Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081 (1997) (distinguishing between “pure” and “impure”

Specifically with respect to gun convictions under 18 U.S.C. § 922(g), until 2019, courts would find defendants guilty if they had (1) possessed a firearm; and (2) fell into one of the categories proscribed by the statute, regardless of whether they knew about their inclusion.²¹⁸ However, in *Rehaif v. United States*²¹⁹, the Supreme Court, for the first time, held that the knowledge requirement of the statute applied to both provisions of the statute.²²⁰ In a 7-2 decision authored by Justice Stephen Breyer, the court decided:

We hold that the word “knowingly” applies both to the defendant’s conduct and to the defendant’s status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.²²¹

As a result of the Court’s finding that mens rea applied to both provisions of the statute, there was a statistically significant decline in the number of people charged under 18 U.S.C. § 922(g)(1).²²² In an eight-month period post-*Rehaif*, the charging decisions resulted in approximately 2,350 fewer convictions, and eliminated over 8,400 years in prison sentences for § 922(g)(1) violations.²²³

Despite the significant decline in charging, convictions, and sentence time for violations of § 922(g)(1), federal prosecutors were still able to charge and convict thousands of people under the statute. What’s more, once charged, defendants were just as likely to be convicted after *Rehaif* as they were before.²²⁴ Further limiting the efficacy of mens rea reform in the context of violence interruption and § 922(g)(1) violations is the fact that unlike the appellant in *Rehaif*—who was unaware of his expired visa status—most Violence Interrupters are typically all too aware of their felony convictions.²²⁵ Indeed, most are hired specifically because their experience with the criminal legal system provides credibility when working within communities experiencing gun violence. As Patton writes about *Rehaif*:

strict liability, and in turn demonstrating that strict liability issues can arise with respect to any material elements of offenses).

²¹⁸ Mizel et al., *supra* note 202, at 293 (explaining federal prosecutors for decades were able to secure convictions without having to prove accused knew, or even should have known, they satisfied criteria for categories sufficient to trigger § 922(g)’s lifelong ban on guns and ammunition).

²¹⁹ 139 S. Ct. 2191 (2019).

²²⁰ *See id.* at 2194.

²²¹ *Id.*

²²² Mizel et al., *supra* note 202, at 293 (claiming changed mens rea requirement constrained prosecutorial discretion, lowered convictions, and reduced punishment).

²²³ *Id.*

²²⁴ *Id.* (arguing all changes occurred without bringing criminal administration to halt).

²²⁵ *See* Safia Samee Ali, *Many Cities Are Putting Hopes in Violence Interrupters, but Few Understand Their Challenges*, NBC NEWS (May 10, 2022, 7:33 PM), <https://www.nbcnews.com/news/us-news/many-cities-are-putting-hopes-violence-interrupters-understand-challen-rcna28118> [<https://perma.cc/A2UC-79DR>].

Although the decision adds to the government's burden and will help some defendants, it is not likely to impact the vast majority of cases in which prosecutors will have a relatively easy time proving a person's knowledge of their own prior felony conviction.²²⁶

While the application of mens rea requirements broadly and in the context of § 922(g)(1) violations, in particular, is a move toward procedural fairness, because of the ease of proving knowledge of a defendant's felony status, mens rea reform will unfortunately not apply to the overwhelming majority of cases that involve Violence Interrupters—or anyone else with a qualifying record—charged as felons-in-possession.

2. Safe Harbor Provisions

Another legislative approach could include the addition of Safe Harbor provisions to gun possession statutes. Safe Harbors provide protection from culpability under certain circumscribed conditions.²²⁷ They can be especially important where “harm is not intended, or a person might in good faith be uncertain about whether a certain type of conduct is lawful or not.”²²⁸ Washington, D.C.'s 2020 Safe Harbor Act provides a viable blueprint.²²⁹ The D.C. Code protects people who turn in their illegal guns to the police. By statute, the police cannot ask the person for identification, photographs, or fingerprints.²³⁰ People seeking to turn in their guns can have attorneys facilitate the transaction, and attorneys who have safely completed gun safety training can act as Safe Harbors.²³¹ Safe Harbor provisions provide an alternative to aggressive stop-and-frisk tactics that police departments have historically deployed to recover guns from communities.²³² Not only have these tactics been inefficient at recovering guns,²³³ but the reliance on aggressive, often

²²⁶ Patton, *Criminal Justice Reform and Guns*, *supra* note 5, at 1036.

²²⁷ SMITH & PYSNO, *supra* note 216, at 4 (“[A] proper and adequate mens rea requirement should reflect the differences in culpability that result when individuals with different mental states engage in the same prohibited conduct.”).

²²⁸ *See id.* at 29.

²²⁹ D.C. CODE § 7-2507.05 (2023).

²³⁰ *See id.* § 7-2507.05(4) (“No person who delivers and abandons a firearm, destructive device, or ammunition under this section shall be required to furnish identification, photographs, or fingerprints.”).

²³¹ D.C. CODE § 22-4504.02 (explaining who may transport firearms and how).

²³² GEORGETOWN L. CTR. FOR INNOVATION IN CMTY. SAFETY, REIMAGINING THE ROLE OF POLICE STOPS IN PUBLIC SAFETY: A WHITE PAPER INFORMED BY A WORKSHOP SERIES ON REDUCING HARM THROUGH RESEARCH, POLICY, AND PRACTICE 538 (2022).

²³³ In Philadelphia, car stops yielded a firearm in just 0.5% of stops. *See* 100 SHOOTING REVIEW COMMITTEE REPORT, *supra* note 100, at 66. In New York City, in 2012, pedestrian stop and frisks yielded guns in 0.1% of stops. *See* Leah Libresco, *supra* note 104. In Washington, D.C. stops only turned up firearms 2.5% of the time. GOV'T OF THE D.C. METROPOLITAN POLICE DEP'T, RESPONSE TO COMMITTEE QUESTIONS 142 (Mar. 14, 2023),

unconstitutional, stops has harmed the people targeted by them, and has sown further mistrust of the police in communities of color.²³⁴ Congress could follow D.C.’s lead and enact a Safe Harbor provision that would incentivize the disposal of firearms. To further promote violence interruption, Congress could explicitly recognize Violence Interrupters as a class of people with Safe Harbor protections.²³⁵

B. *Prosecutorial Discretion*

Prosecutors have unfettered discretion in deciding what charges to bring and against whom.²³⁶ One measure that may offer promise at the federal level is prosecutorial discretion that explicitly excludes Violence Interrupters from gun possession charges or felon in possession charges or that excludes people with viable innocent possession claims. Directives from Attorneys General can have wide-reaching effects, as evinced by the fact that Project Triggerlock, which precipitously expanded the federal prosecution of felon-in-possession violations, was a directive from Attorney General Richard Thornburgh.²³⁷

However, an examination of recent prosecutorial guidance may temper its promise as a long-term solution to protect community violence interruption groups. First, despite the discretion afforded to prosecutors, they often do not exercise that discretion in ways that benefit defendants, and particularly

https://dccouncil.gov/wp-content/uploads/2023/03/SUBMITTED_MPD-Perf-Hearing-Responses_03-14-23-signed.pdf.

²³⁴ JENNIFER FRATELLO, ANDRÉS F. RENGIFO, JENNIFER TRONE & BRENDA VELAZQUEZ, VERA INSTIT. OF JUST., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 1-6 (2013).

²³⁵ To do so might require a licensing scheme for Violence Interrupters. Some municipalities, like Minneapolis, MN, and Washington, D.C., have begun their own violence interruption training programs. These could serve as models for licensing or certification. See Moini, *supra* note 178; see also Gathright, *supra* note 30.

²³⁶ See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (“Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official. The most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable.” (footnote omitted)); see also I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1565 (2020) (explaining prosecutors cull and choose cases they want to pursue).

²³⁷ See Press Release, Dep’t of Just., Thornburgh Announces New Federal Programs Against Firearms Offenders (Mar. 26, 1991) (revealing Attorney General Richard Thornburgh announced Project Triggerlock as “a comprehensive effort to use federal laws pertaining to firearm violence to target the most dangerous violent criminals in each community and put them away for hard time in federal prisons”); see also Richman, *supra* note 204, at 374 (depicting Attorney General Richard Thornburgh’s explanation that idea of Project Triggerlock “was to work with local police agencies to identify repeat and violent offenders who used guns and to prosecute them in federal court”).

defendants of color.²³⁸ On the front end, countless prosecutors have convicted individuals despite possessing evidence that would have shed doubt on their guilt; in many of those cases, rather than decline to prosecute those people, prosecutors hid evidence from defense attorneys.²³⁹ On the back end, even in states where prosecutors have the power to resentence individuals with extreme sentences, very few do.²⁴⁰

Even when prosecutors run on platforms of equity that promise not to charge certain people, or certain types of crimes, political pressure can lead them to waiver in those promises.²⁴¹ By way of example, in 2021, Alvin Bragg ran to

²³⁸ See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxv (2019) (“American prosecutors have breathtaking power, leading to disastrous results for millions of people churning through the criminal justice system. Over the last forty years, prosecutors have amassed more power than our system was designed for. And they have mostly used it to put more people in prison, contributing to the scourge of mass incarceration, which continues to rip apart poor communities, especially if they are mostly black or brown . . .”); see also DAVIS, *supra* note 236, at 4-5 (revealing public defender’s experiences that prosecutors “seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim” and “[t]he very few white defendants represented by [her] office sometimes appeared to receive preferential treatment from prosecutors”).

²³⁹ See Jolie McCullough, *Texas Supreme Court Rules Alfred Dewayne Brown Must Be Compensated for His Wrongful Imprisonment*, TEX. TRIB. (Dec. 18, 2020, 9:00 AM CST), <https://www.texastribune.org/2020/12/18/alfred-dewayne-brown-wrongful-imprisonment-texas/> [<https://perma.cc/4V6S-5MQM>] (revealing prosecutors had text messages showing Alfred Dewayne Brown could not have committed murder of police officer, but hid them from Brown’s defense attorneys at trial, so Brown subsequently spent twelve years on death row before being exonerated); see also Marie Fazio, *Ex-Prosecutor Who Withheld Evidence in Murder Case Gives Up Law License*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/05/18/us/rick-jackson-disbarred-texas.html> (disclosing lead prosecutor Richard E. Jackson withheld trial evidence demonstrating innocence of Stanley Mozee and Dennis Allen, both of whom spent fifteen years in prison before being exonerated). See generally INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* (2016) (reviewing 660 cases of prosecutorial misconduct from five states over five-year period).

²⁴⁰ Matt Nadel & Charlie Lee, *Prosecutors in These States Can Review Sentences They Deem Extreme. Few Do.*, MARSHALL PROJECT (Nov. 11, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/11/11/prosecutors-in-these-states-can-review-sentences-they-deem-extreme-few-do-it> [<https://perma.cc/2U59-GGTC>] (revealing one notable exception is Orleans Parish, Louisiana, where District Attorney Jason Williams’s office has agreed to shorten excessive sentences of nearly 170 people).

²⁴¹ See Mariah Timms, *Tennessee Lawmakers Approve New Check on Powers of ‘Rogue’ Local Prosecutors*, TENNESSEAN (Oct. 31, 2023, 10:30 AM), <https://www.tennessean.com/story/news/politics/2021/10/28/tennessee-lawmakers-advance-bill-check-powers-local-prosecutors/6177872001/> [<https://perma.cc/7LGK-CQ4W>] (explaining even when prosecutors do not falter in their promises of categorical prosecution bans, some states like Tennessee have passed laws allowing Attorney General to install temporary prosecutor when local prosecutor proposes enforcement ban on certain categories of cases).

succeed Cyrus Vance as Manhattan District Attorney, and running as a “progressive prosecutor,” Bragg promised to decline to prosecute certain low-level crimes and to seek lower charges for crimes that did not harm people.²⁴² Bragg also expressed solidarity with Tracy McCarter, a domestic violence survivor who was being prosecuted by Vance’s office.²⁴³ McCarter, a nurse, was charged with murdering her estranged husband after killing him in self-defense.²⁴⁴ Then-candidate Bragg declared: “I #StandWithTracy. Prosecuting a domestic violence survivor who acted in self-defense is unjust.”²⁴⁵ District Attorney Bragg’s administration illustrates some of the limits of “progressive” prosecution. Soon after taking office, Bragg initially instructed prosecutors in his office to avoid requesting jail time in anything but the most serious cases.²⁴⁶ Police officers and public officials decried Bragg’s policies as soft on crime,²⁴⁷ and Bragg rolled back his policies just one month after taking office.²⁴⁸ With respect to McCarter, Bragg continued to prosecute her after taking the case over from Vance.²⁴⁹ It was only after months of organizing and activism by groups

²⁴² Wendy N. Davis, *Progressive Prosecutors Are Encountering Pushback*, AM. BAR ASS’N J. (July 21, 2022, 3:50 PM CDT), <https://www.abajournal.com/web/article/progressive-prosecutor-pushback> [<https://perma.cc/D8KM-RSJC>] (“[H]e broadly promised to decline prosecuting some defendants arrested for low-level crimes, prioritize treatment for mental illness and drug abuse, and to end the use of cash bail.”).

²⁴³ See Ben Kessler & Elizabeth Rosner, *Despite Bragg’s Campaign Promise, NYC Nurse Tracy McCarter To Be Tried for Murder*, N.Y. POST (Oct. 24, 2022, 3:24 PM), <https://nypost.com/2022/08/30/nyc-nurse-tracy-mccarter-who-claims-she-killed-husband-in-self-defense-to-be-tried-for-murder/> [<https://perma.cc/3PHK-DY7E>] (“Bragg promised on the campaign trail not to prosecute victims of abuse.”).

²⁴⁴ See *id.* (explaining her lawyers highlighted that DA’s office had not properly informed grand jury of her husband’s history of violence or his intoxication levels).

²⁴⁵ *Id.*

²⁴⁶ See Memorandum from Alvin L. Bragg, Jr., Dist. Att’y, Day One Policies & Procedures, to All Dist. Att’y Staff 5 (Jan. 3, 2022) (“The Office will not seek a carceral sentence other than for homicide or other cases involving the death of a victim, a class B violent felony in which a deadly weapon causes serious physical injury, domestic violence felonies, sex offenses in Article 130 of the Penal Law, public corruption, rackets, or major economic crimes . . .”).

²⁴⁷ See Jonah E. Bromwich, *Manhattan D.A. Sharpens Crime Policies That Led to Weeks of Backlash*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/nyregion/manhattan-da-alvin-bragg-memo-prosecution.html> (explaining Bragg’s stance “had been fiercely criticized as too lenient” and “prompted weeks of pushback from police officers, small business owners and public officials, making Mr. Bragg a political target”).

²⁴⁸ See Memorandum from Alvin L. Bragg, Jr., Dist. Att’y, Work of the Office, to All Dist. Att’y Staff 1 (Feb. 4, 2022) (“The January 3rd Memorandum did not create any rights, substantive or procedural, in favor of any person, organization, or party, nor did it place any limitations on the lawful prosecutorial prerogatives or discretion of the District Attorney and his Assistants.”).

²⁴⁹ Desheania Andrews & Gabrielle Fonrouge, *Alvin Bragg Ripped for Prosecuting Domestic Violence Victim Who Claims She Killed Husband in Self Defense*, N.Y. POST (Oct. 24, 2022, 5:04 PM), <https://nypost.com/2022/10/24/activists-protest-da-bragg-for->

like Survived & Punished and Court Watch NYC that Bragg finally agreed to drop the charges against McCarter.²⁵⁰ Bragg's declination came more than eleven months after taking office, and more than two-and-a-half years after McCarter's arrest.²⁵¹

Second, even when prosecutors enact policies that promote leniency, their guidance is only as durable as the administration under which they serve. The 2013 Memorandum issued by U.S. Attorney General Eric Holder ("Holder Memo") to reduce mandatory minimum sentencing proves instructive in this regard. Recognizing that mandatory minimum charges in drug trafficking cases led to excessive sentences for low-level defendants, in August 2013, Attorney General Holder instructed federal prosecutors to cease charging "mandatory minimums for certain nonviolent, low-level drug offenders."²⁵² Holder recognized that "[l]ong sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation."²⁵³ The Holder Memo had an expansive scope: estimates show that approximately half of all drug defendants were potentially eligible for charging leniency under the memo's guidance.²⁵⁴ However, whatever potential charging leniency instructed by the Holder Memo was undone in May 2017, soon after Attorney General Jeff Sessions's tenure began under the Trump Administration. Sessions rescinded the guidance of the Holder Memo, and instead instructed federal prosecutors to

prosecuting-dv-victim-tracy-mccarter/ [https://perma.cc/95B4-LVW8] (showing advocates were "furious with Bragg for reneging on the campaign promise" to "#StandWithTracy").

²⁵⁰ See Molly Crane-Newman, *Manhattan DA Bragg Will Not Prosecute Tracy McCarter, a Nurse Charged with Her Husband's Murder*, N.Y. DAILY NEWS (Nov. 19, 2022, 1:17 AM), <https://www.nydailynews.com/2022/11/18/manhattan-da-bragg-will-not-prosecute-tracy-mccarter-a-nurse-charged-with-her-husbands-murder/> [https://perma.cc/GQ9V-DVNR] (explaining Bragg only dropped charges "after New York-based advocacy groups for survivors of domestic violence mounted a steadfast campaign demanding Bragg's office drop all the charges—leading some lawmakers to urge the DA to drop the case").

²⁵¹ See Elizabeth Rosner & Natalie O'Neill, *NYC Nurse Tracy McCarter, Who Says She Killed Husband in Self-Defense, Has Murder Case Dropped*, N.Y. POST (Dec. 2, 2022, 10:09 PM), <https://nypost.com/2022/12/02/manhattan-judge-drops-murder-case-against-nurse-tracy-mccarter/> [https://perma.cc/E4BC-3FHL] (revealing Diane Kiesel, judge overseeing case, made it known she saw no reason to drop case against Ms. McCarter on its merits).

²⁵² Memorandum from Eric Holder, U.S. Att'y Gen., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases, to the U.S. Att'ys & Assistant Att'y Gen. for the Crim. Div. 1 (Aug. 12, 2013) ("We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution.").

²⁵³ *Id.*

²⁵⁴ Stephanie Holmes Didwania, *Charging Leniency and Federal Sentences* 3, 8 n.19, (Univ. Wis. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 1746) (estimating 47% of defendants are likely to be eligible for sentencing treatment based on their charges, and mandatory minimum charging fell by approximately 24% for likely eligible defendants, but sentences for eligible defendants fell by only 1%).

“charge and pursue the most serious, readily provable offense” with the goal of charging “the most substantial guidelines sentence, including mandatory minimum sentences.”²⁵⁵ In 2021, under the Administration of Joe Biden, Attorney General Merrick Garland rescinded the Sessions Memo and reinstated the guidance espoused by the Holder Memo.²⁵⁶

Could Attorney General guidance that instructs federal prosecutors to cease charging Violence Interrupters for violations of § 922(g)(1) prove helpful in promoting violence interruption? Certainly. Will that guidance hold under its successor? Less certainly. In the drug-sentencing context, the whiplash effect of enactment and rescission to reenactment from one administration to the next demonstrates the limits of prosecutorial discretion as a durable solution. Still, Attorney General guidance can have very real and expansive effects on charging decisions and can provide an important step in promoting violence interruption, even if it does not prove to be the long-term solution.

C. *An Expansive Second Amendment*

In light of the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n v. Bruen*,²⁵⁷ expanded gun rights might provide protection from gun prosecution for Violence Interrupters. An expansive Second Amendment could recognize the right of people of color to freely own and bear arms in the manner that white Americans do. That was the hope of the Black Attorneys of Legal Aid Caucus when it filed an amicus brief in support of the petitioners in *Bruen* to invalidate New York State’s gun licensing law.²⁵⁸ The brief argued that New York’s may-issue licensing regime, disproportionately excluded people of color, with the result that “each year, [public defenders] represent hundreds of indigent people whom New York criminally charges for exercising their right to keep and bear arms.”²⁵⁹ The brief thoroughly detailed the inequitable policing of Black and brown clients attempting to exercise their Second Amendment rights, and highlighted the arbitrariness of New York’s licensing system, which relied on

²⁵⁵ Memorandum from Jeff Sessions, U.S. Att’y Gen., Department Charging and Sentencing Policy, to All Fed. Prosecutors 1 (May 10, 2017) (describing policy as moral and just and arguing it affirms responsibility to enforce law and produces consistent results).

²⁵⁶ Memorandum from Merrick Garland, U.S. Att’y Gen., Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing, to All Fed. Prosecutors 1 (Jan. 29, 2021) (explaining goal of this step was to ensure decisions are based on merits of each case and individualized assessment of facts).

²⁵⁷ 597 U.S. 1 (2022).

²⁵⁸ See Brief for Black Att’y’s of Legal Aid, Bronx Defs., Brooklyn Def. Servs., et al. as Amici Curiae Supporting Petitioners at 5, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843) (“[E]ach year, we represent hundreds of indigent people whom New York criminally charges for exercising their right to keep and bear arms. For our clients, New York’s licensing regime renders the Second Amendment a legal fiction. Worse, virtually all our clients whom New York prosecutes for exercising their Second Amendment right are Black or Hispanic. And that is no accident. New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities.”).

²⁵⁹ *Id.* at 5.

the police to issue licenses to the very same people that it surveils and arrests.²⁶⁰ Ultimately, the Black Public Defenders argued that the Court should strike down New York's licensing regime as a way to protect their clients from the racialized and selective prosecution of gun offenses.²⁶¹

Using the same logic espoused by the Black Public Defenders, could an expansive Second Amendment provide relief to Violence Interrupters in communities of color that are disproportionately targeted by the police for gun possession offenses? The hope is that an expansive Second Amendment could protect them from prosecution and arrest in a way that the Equal Protection Clause has repeatedly failed to. However, many scholars have expressed doubt that the Second Amendment can effectively protect the rights or safety of people of color.²⁶² Looking to the history of the Second Amendment, the impetus for its passage was to arm militias, not to fight the English, but to put down slave uprisings.²⁶³ At the time of the passage of the Second Amendment, it remained illegal in most states for a Black person, free or enslaved, to own a gun.²⁶⁴ From its inception, the Second Amendment espoused a carceral politic that divided people into "criminals" and "law abiding, responsible citizens" to justify the racialized violence against people of color.²⁶⁵

²⁶⁰ See *id.* at 4-5 (arguing New York's licensing regime deprives everyone of right to keep and bear arms, except for select few who manage to secure firearm license from police).

²⁶¹ See *id.* at 6 (asking Court to protect Second Amendment for all people by holding Petitioners' license denials as violating Second Amendment and New York's licensing regime unconstitutional).

²⁶² CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 84 (2021) (showing danger of Second Amendment by explaining that, once free Black people asserted their right to bear arms, America responded with its right to kill them); see Blocher & Seigel, *supra* note 42, at 451 (arguing path to racial justice goals is through protecting communities' democratic experiments with inclusive approaches to public safety); see also Alice Ristorph, *The Second Amendment in a Carceral State*, 116 NW. L. REV. 203, 213-15 (2021) (warning, unless carceral assumptions underlying Second Amendment are rejected, newly recognized right to bear arms is likely to increase racial inequality).

²⁶³ ANDERSON, *supra* note 262, at 5 (explaining militias after War of Independence were unreliable and ill-equipped to "fend off a tyrannical president or foreign aggressor," but they were adept at "buttressing slave patrols to hunt down, capture, and return back to their owners Blacks who had fled bondage" as well as quashing slave rebellions).

²⁶⁴ *Id.* (detailing number of state laws that restricted Black gun ownership, including militia power to search Black people and homes for firearms and ammunition); see also Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 537 (2022); NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 114-15 (2014) (detailing number of state laws that restricted Black gun ownership, such as in southern states, where laws were passed for explicit creation of slave patrols tasked with searching Black people and homes for firearms and ammunition); *District of Columbia v. Heller*, 554 U.S. 570, 609 (2008) (noting right to bear arms was often not extended to Black people, either free or enslaved).

²⁶⁵ See Ristorph, *supra* note 262, at 222-24 ("Second Amendment doctrine has been launched with a carceral logic: the right to bear arms is not simply a right that belongs to some

The Court's decision in *Bruen* follows the carceral political theory inherent in the Second Amendment. Leading up to the decision in *Bruen*, Professors Blocher and Siegel predicted that "[t]he decision in *Bruen* might provide interim relief from New York's licensing regime, but it will not address racial bias in the criminal justice system."²⁶⁶ They warned that expanding gun rights would ultimately hurt communities of color by taking away the ability of those communities to regulate gun possession.²⁶⁷ The opinion in *Bruen* vindicated those concerns. As predicted, the Court struck down New York's gun licensing regime, and, for the first time, set forth a test that only recognized gun regulations "consistent with this Nation's historical tradition of firearm regulation."²⁶⁸ Casting aside the two-part test that courts had widely followed after *District of Columbia v. Heller*,²⁶⁹ Justice Thomas, writing for the majority, explained that the only gun regulations that can stand are those that would have been acceptable at the founding or far back enough in America's history, regardless of the governmental interest in regulating firearms.²⁷⁰ In its aftermath, not only did the Court strike down New York's gun licensing law, but gun laws across the country were invalidated.²⁷¹

members of the political community but not others. It is a right that some individuals possess *for the purpose of* doing violence to other members of the community—those labeled 'criminals.'").

²⁶⁶ Blocher & Siegel, *supra* note 42, at 451.

²⁶⁷ *Id.* at 452 (arguing "elimination of gun licensing for public carry" will consequently "restrict the democratic authority of communities to protect themselves"); *see also* Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1828 (2023) (arguing expansive Second Amendment subordinates communities of color, and calling for "[a]ntisubordinating the Second Amendment" to make room for solutions put forth by most-affected marginalized communities).

²⁶⁸ N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'").

²⁶⁹ *Heller*, 554 U.S. at 689 (Breyer, J., dissenting) ("Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."). After *Heller* courts analyzed gun laws by questioning (1) whether the regulated conduct implicated the Second Amendment, and if so, (2) whether the state's reasons outweighed the burden on the core right of the Second Amendment. *See Bruen*, 597 U.S. at 18.

²⁷⁰ *Bruen*, 597 U.S. at 46 (contending, however, public carry regulations enacted by colonial Massachusetts, New Hampshire, and New Jersey were insufficient "to show a tradition of public-carry regulation," to say nothing of New York's more than century-old statute).

²⁷¹ *See* Christian v. Nigrelli, 642 F. Supp. 3d 393, 405-08 (W.D.N.Y. 2022) (invalidating regulation that would exclude firearms on private property without permission of property owners); United States v. Perez-Gallan, 640 F. Supp. 3d 697, 716 (W.D. Tex. 2022) (invalidating 18 U.S.C. § 922(g)(8)'s prohibition on firearms for individuals subject to domestic violence restraining order); Hardaway, Jr. v. Nigrelli, 693 F. Supp. 3d 422, 426 (W.D.N.Y. 2022) (invalidating law barring guns in places of worship); Rocky Mountain Gun

While gun rights expanded for many across the country, the people of color who comprised the majority of those prosecuted for gun crimes in New York, and for whom the Black Public Defenders wrote in support, were afforded no benefit. To date no one in New York City has escaped prosecution because of the Court's decision in *Bruen*.²⁷² Strikingly, while courts have rejected the reasoning in *Bruen*, they have also used the same racialized othering language from Justice Thomas's majority opinion in rejecting the Second Amendment claims of defendants.²⁷³ In decisions rejecting those claims, trial courts have implicitly contrasted Black and brown defendants from the "law-abiding, responsible citizen" identified in *Bruen*—even using the defendant's alleged possession of a firearm as proof of their criminality, and, thus, circularly reasoning that the fact of their gun possession made them undeserving of the Second Amendment's protection.²⁷⁴ These decisions illustrate the dangers of the *Bruen* court's disingenuous invocation of race. Professor Daniel Harawa writes that "*Bruen* invokes racial justice without considering the full picture of America's racial injustice."²⁷⁵ The result is that even with a capacious Second Amendment "if a Black person *does* decide to carry a gun as freely as a white person, it will be at their peril."²⁷⁶

Owners v. Bd. of Cnty. Comm'rs of Boulder Cnty., No. 22-cv-02113, 2022 WL 4098998, at *3 (D. Colo. Aug. 30, 2022) (invalidating assault weapons ban); Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 758 (N.D. Tex. 2022) (invalidating prohibition of gun possession for people eighteen- to twenty-years-old based solely on their age).

²⁷² See, e.g., *People v. Tarazona*, No. 2023-00577, 2023 WL 2607294, at *2 (N.Y. Sup. Ct. Sept. 22, 2022) (finding against eighteen-year-old defendant who argued that age-based ban on firearms possession is unconstitutional under *Bruen* test); *People v. Wallace*, Ind. Nos. 70872/22 & 72515/22, at *2 (N.Y. Sup. Ct. Sept. 16, 2022) (finding against defendant by differentiating his situation from that in *Bruen* and describing him as not "law-abiding, responsible citizen"); *People v. Ocampos*, Ind. No. 290/2021, at *2 (N.Y. Sup. Ct. Aug. 17, 2022) ("This Court joins the chorus of other judges in holding that the *Bruen* decision does not preclude the prosecution for unlawful possession of a firearm of a defendant who did not previously apply for, and was denied, a license."); *People v. Maldonado*, Ind. No. 71803-22, at *2 (N.Y. Sup. Ct. Aug. 29, 2022) ("*Bruen* did not invalidate all of New York's carry-permit licensing requirements or hold that States cannot require gun licenses."). But see *People v. Sovey*, 77 Misc. 3d 518, 524 (N.Y. Sup. Ct. Nov. 1, 2022) (allowing Sovey, who was traveling from Vermont to New York, to reopen probable cause hearing "to show that he was an 'ordinary, law-abiding, adult citizen' . . . and would have been able to obtain a license for his weapon but for the unconstitutional aspect of the licensing statute.").

²⁷³ See *Tarazona*, 2023 WL 2607294, at *2 (characterizing *Bruen* as "poorly reasoned decision"). In effect, courts applying *Bruen* have carved out categories of people from Second Amendment protection. For a critique of overbroad person-based prohibitions, see Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS. 53, 55 (2020).

²⁷⁴ See *Wallace*, Ind. Nos. 70872/22 & 72515/22, at *2 (describing defendant as not "law-abiding, responsible citizen," while highlighting defendant "possessed two loaded, operable, and unlicensed firearms on the streets of Bronx County").

²⁷⁵ Daniel S. Harawa, *NYSRPA v. Bruen: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 165 (2022).

²⁷⁶ *Id.*

An expansive Second Amendment could theoretically be applied to protect Violence Interrupters who seek to possess guns for the purpose of safe disposal. However, this Article questions whether expanding gun rights can protect Violence Interrupters, or the affected communities in which they work. The history of the Second Amendment has been the subordination of communities of color.²⁷⁷ Despite hopes to the contrary, *Bruen* continues that tradition. By making gun regulation more difficult, but also ensuring that any protections for gun ownership do not apply to communities of color, further expanding the Second Amendment only exacerbates the challenge of interrupting gun violence in marginalized communities.

D. *The Promise of a Federal Innocent Possession Defense*

The innocent possession or temporary lawful defense offers a potential opportunity to help Violence Interrupters perform their work without fear of prosecution for felon-in-possession charges. The defense, recognized by several states, excuses a person who comes upon a firearm and then possesses it for the purpose of disposing or surrendering it from liability.²⁷⁸ Despite the innocent possession defense's recognition at common law, only one Federal Circuit has fully recognized it.²⁷⁹

1. At Common Law

At common law, many states recognize the need for an innocent or temporary lawful possession defense for firearms. The rationale behind the defense is twofold. First, that statutes should be interpreted to avoid absurd results and second, that criminal sanctions should not attach to prosocial behavior.²⁸⁰

²⁷⁷ See CARLSON, POLICING THE SECOND AMENDMENT, *supra* note 13, at 61 (tracing racialized history of gun laws that “equated freedom, citizenship, and arms-bearing with whiteness” best exemplified by NRA’s endorsement of 1967 Mulford Act, which banned public carry of firearms—directly responding to Black Panther Party’s armed observation of police); see also LI, *supra* note 267, at 1830 (“[T]he disparate harm that gun violence inflicts on Black communities is a form of racial subordination—and gun regulation is a necessary antisubordination strategy.”).

²⁷⁸ See *People v. Williams*, 409 N.E.2d 1372, 1373 (N.Y. 1980) (noting possibility of innocent possession and desirability of this idea “to foster a civic duty on the part of citizens to surrender dangerous weapons to the police”); see also *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974) (describing test for innocent or temporary possession defense); *People v. Hurtado*, 47 Cal. App. 4th 805, 814 (1996) (extending “momentary possession defense” to “firearm by a felon offenses”).

²⁷⁹ See *United States v. Mason*, 233 F.3d 619, 621 (D.C. Cir. 2000) (“In appropriate circumstances, a defense of *innocent possession* may be asserted.”).

²⁸⁰ See *Williams*, 409 N.E.2d at 1373 (explaining underlying purpose of innocent possession defense is to encourage citizens to bring dangerous weapons to police); see also *Hines*, 326 A.2d at 248 (describing innocent possession as linked to “altruistic motive either to protect the finder or others from harm, to turn [the gun] over to the police, or to otherwise secure [the gun]”); *Hurtado*, 47 Cal. App. 4th at 814 (explaining purpose of momentary possession defense is to encourage disposal and discourage retention of dangerous items).

Numerous courts have held, for example, that people should not be punished for trying to safely dispose of a gun.²⁸¹ In New York, jurors are required to consider “whether the defendant had a reasonable opportunity to turn the [weapon] over to the police or other appropriate authority; and if and when the defendant did have such opportunity, whether the defendant did so.”²⁸² Similarly, in California, people can demonstrate their innocence by proving, by a preponderance of evidence, that they possessed a firearm only for a momentary or transitory period; that they possessed the firearm in order to abandon, dispose of, or destroy it; and that they did not intend to prevent law enforcement from seizing the firearm.²⁸³

More than half a dozen states and the District of Columbia recognize an innocent possession defense for firearms, and although details of the innocent possession defense differ from state to state, broadly states have recognized the defense where people (1) have transitory possession of a firearm and (2) intend to take action to get rid of the weapon.²⁸⁴ Notably, states that recognize the

²⁸¹ See *Williams*, 409 N.E.2d at 1373 (explaining it is societal interest to foster civic duty to surrender dangerous weapons to police); *Hines*, 326 A.2d at 248 (explaining those with altruistic motive to turn weapons over to police should have innocent possession excuse available); *Hurtado*, 47 Cal. App. 4th at 814 (explaining disposal of dangerous items, such as firearms, is encouraged under momentary possession defense).

²⁸² NEW YORK STATE CRIMINAL JURY INSTRUCTIONS: TEMPORARY AND LAWFUL POSSESSION 2 (2021); see also *Hines*, 326 A.2d at 248 (explaining, to assert innocent possession defense, defendant’s possession must stem from “affirmative effort to aid and enhance social policy underlying law enforcement”); *Hurtado*, 47 Cal. App. 4th at 814 (finding defendant who continued to maintain “dominion and control over [a] weapon for days” lost possibility of relying on temporary possession for disposal defense); *State v. Phinis*, 430 P.2d 251, 259 (Kan. 1967) (finding defendant who kept pistol in table drawer close to where she slept and then used it with intent to scare unwanted guest did not merely innocently handle pistol); *State v. Cartwright*, 418 P.2d 822, 829 (Or. 1966) (“[C]arrying a weapon by an exconvict for the purpose of delivery to the police was not a crime.”); *Fuller v. State*, 126 S.W. 569, 569 (Tex. Crim. App. 1910) (holding jury instructions should have been given to explain “if the defendant took the pistol from the buggy and carried it to the gallery, and only had it in his possession about a minute, and that his purpose was to carry the pistol and hand it to the marshall, and that as soon as he reached the gallery he did deliver it to him, the defendant would not be guilty”); *People v. LaPella*, 4 N.E.2d 943, 943 (N.Y. 1936) (holding jury instructions should have been given to explain “if this defendant found this pistol as claimed by him, and . . . thereafter took this gun for the purpose of delivering it to an officer or to a police station, that he was performing a civic duty, and that such possession was not the possession intended by section 1897”); *State v. Williams*, 29 N.W. 801, 801 (Iowa 1886) (“If the weapon was carried upon the person through restraint, or in ignorance of its real character, or for any innocent or lawful purpose, without a doubt this would be a good defense to the prosecution.”).

²⁸³ CALIFORNIA CRIMINAL JURY INSTRUCTIONS: POSSESSION OF FIREARM BY PERSON PROHIBITED 370 (2023) (“If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession.”).

²⁸⁴ See *Hines*, 326 A.2d at 248 (holding taking gun in order to show girlfriend does not fit into innocent possession excuse); *Hurtado*, 47 Cal. App. 4th at 814 (finding defendant lost

defense do not always expressly require that the firearm be taken to law enforcement personnel to qualify for the defense.²⁸⁵

In recognizing the innocent possession defense, courts have explained that the defense promotes safety and prosocial behavior. The California Court of Appeals explained: “Recognition of the ‘momentary possession’ defense serves the purpose of encouraging disposal and discouraging retention of dangerous items such as controlled substances and firearms.”²⁸⁶ Similarly, the D.C. Court of Appeals, in acknowledging the concept of innocent possession, held that it “stem[s] from an affirmative effort to aid and enhance social policy underlying law enforcement.”²⁸⁷ Violence Interrupters, in acting to defuse violent situations and aiding in the disposal of guns, promote those same concepts of safety and prosocial behavior.

2. In Federal Circuits

By contrast, at the federal level, only the D.C. Circuit fully recognizes the innocent possession defense.²⁸⁸ In *United States v. Mason*, the court held that the innocent possession defense applies where (1) a firearm is obtained innocently; and (2) the possession is transitory.²⁸⁹ The court explained that innocent possession could be shown where a person’s actions demonstrate “[b]oth that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.”²⁹⁰ In *Mason*, the appellant, a delivery driver, found a gun inside of a

entitlement to temporary possession for disposal defense after maintaining control of gun for at least two days); *Phinis*, 430 P.2d at 259 (explaining possession requires “more than an innocent handling of the pistol without intent to have, possess or control the same”); *Cartwright*, 418 P.2d at 829 (explaining it is not crime for someone, even with criminal record, to carry gun if purpose is to deliver it to police); *Fuller*, 126 S.W. at 569 (“[I]n this case appellant’s contention is that his possession was momentary, and for an innocent purpose, and in aid of a person authorized to carry same, and this view of the case should have been submitted to the jury.”); *LaPella*, 4 N.E.2d at 943 (ordering jury should have been instructed on innocent possession defense when defendant found gun in public restroom and surrendered it to detective twenty minutes later); *Williams*, 29 N.W. at 801 (recognizing possibility of innocent or lawful purpose defense to carrying weapon, while revealing there is no evidence for that in this case).

²⁸⁵ See CAL. PENAL CODE § 29850 (West 2023) (confirming two defense elements, including transitory possession and intention to abandon or destroy weapon); see also NEW YORK STATE CRIMINAL JURY INSTRUCTION, *supra* note 282, at 2.

²⁸⁶ *Hurtado*, 47 Cal. App. 4th at 814.

²⁸⁷ *Hines*, 326 A.2d at 248.

²⁸⁸ See *United States v. Mason*, 233 F.3d 619, 621 (D.C. Cir. 2000) (“We agree that, in appropriate circumstances, a defense of *innocent possession* may be asserted in a criminal prosecution . . .”).

²⁸⁹ *Id.* at 624 (“The record must reveal that (1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory . . .”).

²⁹⁰ *Id.* at 624 (quoting *Logan v. United States*, 402 A. 2d 822, 827 (D.C. 1979)).

paper bag near a school where he was making deliveries.²⁹¹ Worried that a child might happen on the gun, Mason took the gun, and removed the ammunition.²⁹² He brought the gun with him to the Library of Congress, his next delivery stop, where he sought to turn it into an officer he knew there.²⁹³ He was stopped and arrested before he could turn the firearm over to the officer.²⁹⁴

In holding that Mason should be entitled to an innocent possession defense, the court relied on established principles of statutory interpretation. First, the court explained that the federal gun possession statute should not be interpreted in ways that lead to absurd results:

[I]f Mason did indeed innocently pick up a bag containing a gun (not knowing what was in the bag), he would be guilty the moment he was seen holding the bag knowing of its contents, even if he had every intention of relinquishing possession immediately. There is nothing to indicate that Congress intended such a harsh and absurd result . . . § 922(g)(1) should not be read this broadly.²⁹⁵

Second, the Court explained that allowing for an innocent possession defense would further the purpose of the statute, because “‘it is the retention of [a firearm], rather than the brief possession for disposal . . . , which poses the danger which is criminalized’ by felon-in-possession statutes.”²⁹⁶

To date, no other Federal Circuit has embraced a standalone innocent possession defense. Five Courts of Appeal have rejected outright an innocent possession defense to gun possession.²⁹⁷ The Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that defendants charged with gun possession may not assert the defense that they did so solely for the purpose of disposing of it.²⁹⁸

²⁹¹ See *id.* at 620.

²⁹² *Id.* (“[Mason] claimed that he took possession of the gun only to keep it out of the reach of the young children at the school . . .”).

²⁹³ See *id.*

²⁹⁴ *Id.* (“A law enforcement officer discovered the gun in Mason’s possession, however, before Mason acted on his own to relinquish possession.”).

²⁹⁵ *Id.* at 623.

²⁹⁶ *Id.* at 625 (alternations in original) (quoting *California v. Hurtado*, 47 Cal. App. 4th 805, 858 (1996)).

²⁹⁷ See *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005); *United States v. Becerra*, 958 F.3d 725, 727-31 (8th Cir. 2020); *United States v. Johnson*, 459 F.3d 990, 996 (9th Cir. 2006); *United States v. Baker*, 508 F.3d 1321, 1325 (10th Cir. 2007); *United States v. Vereen*, 920 F.3d 1300, 1306 (11th Cir. 2019).

²⁹⁸ See *Gilbert*, 430 F.3d at 218 (“We decline to adopt such an [innocent possession] exception.”); *Becerra*, 958 F.3d at 727 (“Whether this so-called innocent-possessor defense is available has long been an open question. We now join a number of other courts in declining to recognize it.”); *Johnson*, 459 F.3d at 996 (9th Cir. 2006) (“[W]e observe that there is no clearly expressed legislative intent that the proposed [innocent possession] defense apply to the felon-in-possession statute.”); *Baker*, 508 F.3d at 1325 (“[D]efendant was not entitled to an ‘innocent possession’ defense, as long as the defendant knew it was ammunition he possessed.”); *Vereen*, 920 F.3d at 1309 (“We now join the overwhelming majority of our

Two Courts of Appeal have acknowledged that an affirmative innocent possession defense theoretically exists but have never reached the issue. While the First Circuit has held that the innocent possession defense may be available in the “the occasional extraordinary case,” it has never found such a case to articulate or apply the defense.²⁹⁹ Meanwhile, the Sixth Circuit has recognized that an innocent possession defense exists, but for a defendant to assert an innocent possession defense, they must meet a five-part test that in essence, requires them to prove duress, in addition to innocent possession.³⁰⁰

Finally, four Courts of Appeal have yet to decisively rule on the issue. The Second Circuit has yet to rule on the existence of an innocent possession defense, though it has made clear that any rule would not apply “where the possession was not momentary or only for as long as necessary to deal with a justifying necessity of some kind.”³⁰¹ The Third Circuit has analyzed the innocent possession defense using the test set forth by the D.C. Circuit but failed to adopt the defense.³⁰² The Fifth Circuit has acknowledged that common-law defenses can apply to firearm possession charges, but it has yet to recognize an innocent possession defense.³⁰³ The Seventh Circuit has twice considered the innocent possession defense but has thus far refused to recognize it, unless justified by necessity or duress.³⁰⁴ In considering the possibility of its recognition, the Seventh Circuit has signaled that were it to recognize the defense, it would only

sister circuits that have declined to recognize the theory of ‘temporary innocent possession.’”).

²⁹⁹ See *United States v. Baird*, 712 F.3d 623, 631 (1st Cir. 2013) (holding innocent possession defense may apply in “extraordinary case” but does not apply to current facts); see also *United States v. Teemer*, 394 F.3d 59, 64-65 (1st Cir. 2005) (“[C]ommon sense is the touchstone in situations of innocent contact, and the occasions that might warrant leniency are myriad and hard to cabin in advance.”).

³⁰⁰ Under the court’s test, to qualify for its conception of the innocent possession defense, a defendant must prove: “that he or another was under an unlawful and imminent threat of death or serious bodily injury, that he had not placed himself recklessly in that situation, that he had no reasonable alternative to violating the law, that a direct causal relationship existed between possessing the firearm and avoiding the threat, and that he did not maintain the illegal conduct any longer than necessary.” *United States v. DeJohn*, 368 F.3d 533, 546 (6th Cir. 2004).

³⁰¹ See *United States v. Johnson*, 816 F. App’x 604, 609 (2d Cir. 2020) (quoting *United States v. Miles*, 748 F.3d 485, 490 (2d Cir. 2014)).

³⁰² See *United States v. Jackson*, 282 F. App’x 999, 1001-02 (3d Cir. 2008) (holding Jackson who had thrown two firearms out of apartment building following chase did not present sufficient evidence to support innocent possession defense and therefore did not consider whether to recognize defense generally).

³⁰³ See *United States v. Ortiz*, 927 F.3d 868, 874-77 (5th Cir. 2019) (“As later cases have recognized, *Panter* stands for the ‘general availability of common-law defenses’ to a felon-in-possession charge.”).

³⁰⁴ See *United States v. Jackson*, 598 F.3d 340, 349-50 (7th Cir. 2010) (declining to recognize innocent possession defense); see also *United States v. Cherry*, 921 F.3d 690 (7th Cir. 2019) (“[W]e have never recognized the innocent possession defense outside situations in which the defendant can establish a justification like necessity or duress.”).

do so if a defendant immediately sought to turn a firearm over to law enforcement.³⁰⁵

3. Toward a Federal Innocent Possession Defense

This Section describes how a federally recognized innocent possession defense supports the work of Violence Interrupters and groups that similarly work towards community safety. First, Section A discusses the doctrinal foundations on which courts can base their recognition of the defense. Despite the lack of statutory language, courts have long held common-law affirmative defenses apply to federal statutes. Second, Section B discusses whether a federal innocent possession defense can be reconciled with abolitionist ideas of safety, or whether it would instead entrench carceral logics. It concludes by cautioning courts to avoid any requirement that people need bring guns directly to the police to qualify for the defense. Such a requirement would endanger people, entrench the carceral state, and would ultimately undermine community safety.

a. *Justifications for an Innocent Possession Defense*

In rejecting the innocent possession defense, many courts have pointed out that it lacks a federal statutory basis.³⁰⁶ However, had Congress sought to limit the judiciary's ability to recognize a defense, it would have explicitly done so by statute.³⁰⁷ As the Fifth Circuit has observed, "statutes rarely enumerate the defenses to the crimes they describe."³⁰⁸

Despite the lack of statutory language for affirmative defenses in the United States Code, federal courts have repeatedly recognized the availability of several other affirmative common-law defenses, including justification,³⁰⁹ duress,³¹⁰

³⁰⁵ See *Jackson*, 598 F.3d at 350 ("Where a . . . defendant does not immediately seek to turn a firearm over to law enforcement, an innocent possession instruction is not warranted.").

³⁰⁶ See *United States v. Becerra*, 958 F.3d 725, 730 (2020) ("There is no innocent-possessor defense because there is no statutory basis for it."); *United States v. Vereen*, 920 F.3d 1300, 1306 (2019) ("Most critically, we can find nothing in the text to suggest the availability of an [innocent transitory possession] defense . . ."); *United States v. Baker*, 508 F.3d 1321, 1331 (2007) ("[C]ourts . . . have rejected the innocent possession defense based on a strict statutory construction . . .").

³⁰⁷ *United States v. Panter*, 688 F.2d 268, 271-72 (5th Cir. 1982) (finding 18 U.S.C. § 1202(a)(1), predecessor statute to § 922(g), permitted affirmative defense of self-defense).

³⁰⁸ *Id.* at 271.

³⁰⁹ *United States v. Jackson*, 282 F. App'x 999, 1002 (3d Cir. 2008) ("The court of appeals, however, including this one, have recognized that a 'justification' defense is available under the statute.").

³¹⁰ *Dixon v. United States*, 548 U.S. 1, 13-14 (2006) (allowing duress as affirmative defense despite lack of statutory basis); see also *id.* at 19 (Alito, J., concurring) ("Duress was an established defense at common law. When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense." (citation omitted)).

and necessity³¹¹ in the context of firearm offenses. In recognizing affirmative defenses, the circuit courts have looked to common law,³¹² common sense,³¹³ and state-court practice.³¹⁴ Further, courts have explicitly recognized the need to apply common-law canons of interpretation to avoid “injustice, oppression, or an absurd consequence.”³¹⁵

In *Mason*, the D.C. Circuit relied on those principles of interpretation to find that the innocent possession defense could be reconciled with the language of the federal felon-in-possession statute.³¹⁶ There, the court noted, that in enacting the felon-in-possession statute, “[t]here is nothing to indicate that Congress intended such a harsh and absurd result” as rendering someone guilty the second they picked up a gun, even if they “had every intention of relinquishing possession immediately.”³¹⁷ The court further looked to state-court rulings that allowed for an innocent possession defense to firearms possession.³¹⁸ The court’s reasoning demonstrates that the innocent possession defense, like other affirmative defenses, can be reconciled with the felon-in-possession statute.

b. *Who Gets To Be Innocent?*

This Section cautions that a federally recognized innocent possession defense must be crafted in a way that does not lead to further entrenchment of whiteness and white supremacy. A rule—like the one contemplated by the Seventh Circuit in *Jackson*—that requires someone to turn a gun directly to the police to qualify for the defense, not only ignores the violence wrought upon Black and Latinx people by the police, but further empowers the police to pretextually stop and harass Black and Latinx people under the guise of gun safety. Finally, such a

³¹¹ See *United States v. Mahalick*, 498 F.3d 475, 479 (7th Cir. 2007) (“Courts, including this court, have recognized in this context a defense of justification, which encompasses duress, necessity, and self-defense.”); see also *Panter*, 688 F.2d at 272 (reversing felon-in-possession conviction under 18 U.S.C. § 1202(a)(1), where appellant was precluded from raising necessity defense).

³¹² *United States v. Waldman*, 835 F.3d 751, 754 (7th Cir. 2016) (“At common law, self-defense is the use of force necessary to defend against the imminent use of unlawful force.”); see also Anuj C. Desai, *Text Is Not Enough*, 83 U. COLO. L. REV. 1, 13 (2022) (noting even most textualist-dependent interpretations require “judgement about similarities and differences in the real world” which is “the bread and butter of the common law”).

³¹³ *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990) (“[C]ommon sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life.”).

³¹⁴ *Mason*, 233 F.3d at 623-24 (“There are reported state court judgments, however, that have allowed an innocent possession defense to a weapons possession charge.”).

³¹⁵ *Baender v. Barnett*, 255 U.S. 224, 226 (1921) (“General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.”).

³¹⁶ See *United States v. Mason*, 233 F.3d 619, 623 (D.C. Cir. 2000) (“[T]he District Court erred in refusing to give an innocent possession instruction.”).

³¹⁷ *Id.*

³¹⁸ *Id.* (citing *Bieder v. United States*, 707 A.2d 781, 783-84 (D.C. 1998)) (analyzing state court decisions regarding “innocent possession defense to a weapons possession charge”).

rule disincentives safe gun disposal and increases the likelihood of officers shooting a civilian.³¹⁹

Scholars like Daniel Harawa, India Thusi, and Alexis Hoag-Fordjour have written about the ways that whiteness and white supremacy are entrenched in the criminal legal process. Professor Hoag-Fordjour has examined the ways that post-Reconstruction laws were written to allow police to selectively harass and target Black people.³²⁰ The result is that Blackness in the criminal legal system was increasingly used as a proxy for criminality.³²¹ Similarly, in writing about the role that whiteness plays in evaluations of progressive prosecutors, Professor Thusi examines the ways in which white supremacy drives bias in the criminal legal system.³²² Through the lens of Critical White Studies, Thusi demonstrates how a lack of consciousness of whiteness “facilitat[es] mass criminalization and incarceration provid[ing] a ‘building block in the edifice of [W]hite supremacy.’”³²³ Specifically, laws that fail to account for the whiteness tend to encode and protect the white normative perspective.³²⁴

An innocent possession defense that only recognizes innocence when people bring guns directly to the police both entrenches the policing power over communities of color (whom are disproportionately harassed, arrested, and killed) and, despite the facially race-neutral language of the Seventh Circuit’s proposal,³²⁵ protects the normative white experience. In contemplating such a rule, it seems clear that the court was not accounting for the dangers that Black and brown people face when approaching the police.³²⁶ To say nothing of approaching the police with a firearm. As discussed above, police kill people of color for doing far less dangerous things.

³¹⁹ See CHRIS HAYES, *A COLONY IN A NATION* 52-54 (2017) (highlighting how mere theoretical presence of guns exacerbates police interactions and can lead police to shoot unarmed civilians).

³²⁰ Alexis Hoag-Fordjour, *White Is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 792 (2023) (“False allegations of Black men raping white women served as pretext for lynchings in which mobs exacted punishment amid far more innocuous circumstances, such as an economic dispute, a consensual interracial relationship, or merely, a perceived social transgression.” (footnotes omitted)).

³²¹ *Id.* at 785 (expounding that Black people have unjustly become “associated with dangerousness and criminality”).

³²² I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 820-21 (2022) (asserting how white supremacy systemically underlies American jurisprudence).

³²³ *Id.* at 800 (alteration in original) (quoting Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 956-57 (1993)).

³²⁴ *Id.* at 818 (explaining how certain laws “effectively encode or protect a default ‘[W]hite’ normative perspective” (alteration in original)).

³²⁵ *United States v. Jackson*, 598 F.3d 340, 350 (7th Cir. 2010) (“Where a . . . defendant does not immediately seek to turn a firearm over to law enforcement, an innocent possession instruction is not warranted.”).

³²⁶ See Harawa, *supra* note 275, at 165.

Such a requirement only makes sense if based on an unexamined assumption that innocence maps onto whiteness. In contrast to numerous cases of the police shooting unarmed, innocent people of color, we have seen instances where police treated white people who have openly shot and killed others with dignity and respect.³²⁷ An innocent possession defense that requires a person to approach the police with a firearm contemplates the experience that a white person with a gun would have, and ignores the lived reality of people of color. Perhaps unsurprisingly, the Seventh Circuit Panel in *Jackson* was comprised only of white judges.³²⁸

This Article questions the norms of whiteness inherent in the logic of *Jackson*, and invites courts and advocates to take into account the lived experiences of the communities of color that are disproportionately targeted for gun possession crimes. Courts and scholars have begun accounting for the way that people of color experience policing.³²⁹ The hope is for a similar accounting in the context of gun possession crimes. Courts should craft an innocent possession defense that accounts for the ways that policing and safety look on the ground outside of a white normative perspective.

Community violence interruption groups promote safety in ways that show more promise than the combination of punitive policing and incarceration that have defined the last thirty years. In crafting a defense, it would be valuable for

³²⁷ See Adam Rogan, *Police in Kenosha Shared Water, Said They 'Appreciate' Armed Group Before Two Killed*, J. TIMES (Aug. 26, 2020), https://journaltimes.com/news/local/police-in-kenosha-shared-water-said-they-appreciate-armed-group-before-two-killed/article_728054b3-363e-50da-9e70-326310588879.html (describing supportive actions taken by Kenosha police just before Kyle Rittenhouse killed two people); see also Andrew Dunn, Mark Washburn & Michael Gordon, *Shelby Police Chief Describes Arrest of Charleston Shooting Suspect*, CHARLOTTE OBSERVER (June 24, 2015, 6:26 AM), <https://www.charlotteobserver.com/news/local/article24952345.html> (describing how officers bought Dylan Roof food from Burger King after he shot and killed nine Black parishioners in Mother Emmanuel Church, and how local police chief said “[h]e was very quiet, very calm. He didn’t talk . . . He sat down here very quietly. He was not problematic”); Adam Serwer, *The System Only Worked Because It Was Pushed*, ATLANTIC (Nov. 24, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/ahmaud-arbery-verdict-guilty/620817/> (explaining how local District Attorney in Brunswick, Georgia, actively prevented police from arresting William Bryan and Travis and Gregory McMichael following their murder of Ahmaud Arbery).

³²⁸ The panel in *Jackson* included the Hons. Kenneth F. Ripple, Ilana D. Rovner, and Amy J. St. Eve. *Jackson*, 598 F.3d at 342.

³²⁹ See generally *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (detailing history of white supremacist policing in postreconstruction era, and racial terror wrought by police detaining plaintiff for two-and-a-half hours by side of road with no legal pretext); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018) (arguing Fourth Amendment reasonableness should account for adolescent development, implicit racial bias, and contemporary relationships between police and Black adolescents); see also *Massachusetts v. Warren*, 58 N.E.3d 333, 341-42 (Mass. 2016) (recognizing, in context of flight from police, history of police targeting Black men must be considered).

courts to account for the work of Violence Interrupters who risk personal safety and incarceration to get guns off the streets. Similarly, it would be valuable to look at the work of community groups like Detours Mentoring Group in South Los Angeles, which works with third parties to coordinate turning guns in. Cognizant of the dangers that people face when interacting the police, Detours works with lawyers and churches to coordinate gun disposal.

The threat of federal prosecution is a significant legal barrier to the work of Violence Interrupters. Because of their promise as a decarceral alternative to policing, it is worth attempting to mitigate the legal barriers to violence interruption on several fronts. This Article examined statutory reform, prosecutorial discretion, expansive gun rights, and the innocent possession defense as possible solutions. It hopes to be the beginning of a discussion on mechanisms that can support the efficacy of violence interruption.

CONCLUSION

Gun violence in the United States is an enduring epidemic. Mass shootings and gun-related homicides have only continued to increase in the last few years. Historically, the response has been a carceral one. However, disproportionately policing and prosecuting communities of color has not only failed to stem the tide of gun violence, but has subjected those communities to racist policing, harassment, and all too frequently death, at the hands of police. The United States cannot incarcerate itself out of its gun violence problem. In searching for alternatives to safety, this Article centers community violence interruption, and is the first to examine the legal barriers to their success. In so doing, it invites future exploration of alternatives to safety. Community violence interruption has proven successful in reducing gun violence without reproducing the carceral logics of policing. While solving the problem of gun violence in America will require structural changes to policing and to gun control laws, substantially investing in decarceral alternatives like violence interruption will be an important step towards making communities safer.