GUNS EVERYWHERE: INDIVIDUAL RIGHTS AND COMMUNAL HARMS AFTER *NYSRPA V. BRUEN*
Voices from the Criminal Justice Law Review's 2022 Symposium

In October 2022, the UCLA Criminal Justice Law Review, in partnership with the UCLA Law Criminal Justice Program and Giffords Law Center to Prevent Gun Violence, presented the symposium Guns Everywhere: Individual Rights and Communal Harms after NYSRPA v. Bruen. In June 2022, the Supreme Court issued its 6–3 decision in *NYSRPA v. Bruen*, striking down New York's century-old public carry licensing law and announcing a radical new framework for evaluating Second Amendment challenges. This Symposium brought together scholars, practitioners, and community advocates to discuss the implications of *Bruen* on constitutional law, racial and economic justice, public health and safety, and more.

The editors agree that one of the most incredible aspects of this Symposium was the power of community and storytelling. Returning to an in-person event was not just exciting, it was inspiring. This space allowed a range of people from a variety of disciplines and life paths to share stories of pain, frustration, and perseverance in the face of two epidemics—Covid and gun violence. The stories of those who are directly impacted by gun violence are so frequently lost in the legal discourse but who are in all actuality the heart of the movement. A common thread of the Symposium was that now that activists will face "unfriendly faces" in court, it is more important than ever to support the frontline workers who have been doing Community Violence Intervention work for decades with little recognition or funding. It was an honor for the editors to work with the Giffords Law Center and the scholars, activists, and community members to put on this Symposium. It is our collective hope that the discussions had during the Symposium at UCLA School of Law, enshrined in the text below, will inspire, educate, and drive future thought and action in the field.

The passages below feature the most relevant and explanatory discussions that occurred during the Symposium sessions. The Symposium featured a keynote speaker address and five panels. The transcripts have been edited for length and clarity.

Nora Browning, Chief Symposium Editor
Justin Van Ligten & Marena Dieden, Editors-in-Chief

Keynote Speaker:
Eddie Bocanegra, Senior Advisor of Community Violence Intervention at the U.S. Department of Justice

This is a story about two brothers. The older brother got a visit from his younger brother back in 2005, right after the younger brother finished his second deployment in the Iraq War. The younger brother has on his army uniform, and the older brother feels extremely proud of the person his brother has become. His left lapel has ribbons, a brown star, and three stripes on his sleeve, which means he's an E-5 Sergeant. They sit down and exchange stories of war and conflict. The conversation starts very innocently – they talk about childhood stories from growing up in the Westside of Chicago. Some of the stories involve domestic violence they witnessed as kids at home; that's followed by some of the school violence they witnessed; that's followed by the community violence. They laughed at some of those memories and questioned other moments.

These stories become emotionally heavier and heavier. The younger brother talked about how his second tour in Iraq really shook his brain. He had gone on 32 missions, all represented by one of the ribbons that he was displaying. He talked about one of his friends who was shot and died in a Humvee as they were traveling together. They talked about the first Battle of Fallujah in his first deployment. As these stories continue, the older brother tells stories about his involvement in what he felt was a Civil War – having to navigate from one city block to another city block or from his home to the school (about two-and-a-half miles).

As their time wraps up, the younger brother stands up and the older brother gives him a hug. The older brother looks at him again, extremely proud and teary-eyed. He looks at his left lapel, at his last name. Then he looks at himself—he has on dark navy-blue pants, a light blue shirt, and on his lapel he has an ID with his picture on it. It says B-75782, Department of Corrections, State of Illinois. And it has his name – the name is Eddie Bocanegra.

I was sentenced to 29 years in prison, of which I did 14 years and three months, exactly 5200 days. I formally did two years in isolation and segregation but, in reality, half of my time was spent in confinement because most of the time prisons are in lockdown for 23 hours.

I share that story because I want to make a comparison – one that is both simple and complex. When I looked at my brother's left lapel and saw he was awarded all these ribbons for the missions that he was a part of, I asked myself at that moment, as I continue to ask myself now, why our country validates one act of violence versus the other. I will be the first to tell you that as much as I wish I could say that I went to prison for drugs or purse snatching, I went to prison for something very serious. After my friend, Ricardo, was shot and paralyzed, I retaliated. There was no interrupter there, no outreach worker.

I am the first person in history to serve as the Senior Advisor of the Community Violence Intervention Initiative, but I am here as somebody who is formerly incarcerated and incarcerated for the kind of crime that I committed. When I visit prisons, I share my story and where I am now to provide a bit of hope. I think about all the advocacy, attorneys, front-line staff, the people, companies, and communities that have collectively organized around these issues – for that I am grateful.

I would say that the lessons that I have learned (and there are many) are about the importance of multidisciplinary collaboration. Street outreach workers or social workers are not going to be able to deal with the issue of gun violence by themselves, but for years it has been approached that way. There is promising evidence that multi-disciplinary approaches combining housing, mental health, education, corrections, law enforcement, and legal aid have a larger impact on investment. Part of my role is to be a bridge to the communities and organizations that for too long have been overlooked –most of which are black- and brown-led.

The second thing that I want to point out is the necessity of focusing on high-risk individuals. 78% of gun violence in urban communities is concentrated in certain pockets –most of the time in black and brown communities. Yet city budgets too often focus on young youth programs, after-school programs, sports programs, and art programs. Those are really important, and we should continue to fund them, but it should not be this *or* that. It needs to be both prevention and intervention. There are very few organizations that can support the high-risk population given the intensity of their trauma and needs. For that reason, at the Department of Justice, one of our priorities is to think about how to leverage our resources to build the capacity to support these communities. Just a couple of weeks ago, the Department of Justice awarded $100 million to help communities across the U.S. Our goal is to reduce gun violence and support social services that implement models, programs, initiatives, and collaborations to help reduce gun violence. The award, funded in part by the bipartisan Safer Community Act, marked a historic investment in Community Violence Prevention programs.

Lastly, my role, and the role of the Department of Justice, is to listen to what the community is expressing – it's not to assume that just because I have this experience, I have all the answers, because I don't. Part of what I'm doing here is figuring out how to get involved. It doesn't matter what institution you're coming from or what you look like – we need people engaged in this issue. Until we're able to do that, we're going to continue to take one step forward and two steps backward.

I. Panel 1: Non-Carceral Solutions to Gun Violence: A Focus on Community Violence Intervention

This panel brought together practitioners and researchers of community violence interruption programs who are fighting on the front lines to combat gun violence in the country's most hard-hit communities. The discussion included stories of success and loss from decades of experience in community violence intervention, the promise and impediments of current laws, and the unanimous agreement that given the importance of this work, funding community violence intervention efforts should be a priority. Paul Carrillo, Vice President of the Giffords Center on Community Violence and Founder of Southern California Crossroads, moderated this first panel of the symposium.

Paul Carrillo,
Vice President of the Giffords Center on Community Violence and Founder of Southern California Crossroad:

Community Violence Intervention, for me, has two steps. Essentially, prevention is working with the younger population to try to keep them from ending up in the cycle of violence, either as a victim or producer of violence. In the intervention space, we should be working with those at the highest risk of being shot or doing the shooting—which oftentimes means folks returning from prison. In that intervention space, there has been two lanes: one which includes, for example, Homeboy Industries, which has the social services that folks need if they're willing to seek it, but they don't do the street outreach violence interruption. That's the other lane: homegrown peacemakers, typically folks with lived experience, sometimes the mothers of murdered children or local clergy, but a lot of times folks who have been part of the problem and now want to save their communities. These peacemakers take on the responsibility to interrupt violence through their relationships in the community. Law enforcement is not a part of the intervention.

The second step of intervention is to then try to build that relationship and help change that person's life over the next few months or several years. I told Karen Bass (the recently elected mayor of Los Angeles) a few months ago that Community Violence Intervention is like a startup that has never had significant funding, like if Starbucks never got a billionaire to invest. Until this administration, there hasn't been a strong commitment on a federal level.

I have a quick story. 20 years ago, I had just begun doing community street outreach work and I was being trained. My boss and a couple of coworkers were in the white church van we traveled in, and I was eager to jump right in and start engaging warring gang members and convince them to change.

My boss recognized a young man walking down the street in Compton named Trayvon. He pulls over, and Trayvon recognized the church

van. They start talking for 30–40 minutes. I remember thinking we were wasting time – I was young, eager, and felt like my boss could have just said hi or whistled at him. I'm shaking my head, thinking I could have been at home eating cereal or watching Mad TV.

Anyway, my boss said bye to Trayvon, who had been in our program before. My boss invited him to come back to our Community Center because he had dropped out. As my boss was saying bye to Trayvon, he stands up and pulls a 9-millimeter out of his pants. He then says, "God must have sent you all, because I was on my way to go shoot this guy who disrespected me, and after talking to you for 45 minutes, I'm just gonna go home." That day I learned the lesson that even the smallest act of intervention can have a profound effect. Who knows if he would have found the guy or if he would have actually pulled the trigger if he did find him; but that day we felt we had an impact simply by engaging these individuals and talking to them about what's important to them and potentially changing their lives.

Claudia Bracho,
Peace Fellow at the Urban Peace Institute

For me, it's really important that intervention gets the whole family, not just the individual. We work in the most vulnerable communities that have a lot of violence, drugs, and gangs. Our approach is that we wrap our arms around the family, not just the individual who is impacted by that violence as a perpetrator or the victim. If somebody is promoting violence and we work with them, we're sending them back home at the end of the day, but that might be where the stress lies. That's why we incorporate the whole family. But we're also working in communities that are completely traumatized: they are system-impacted, their neighborhoods are being gentrified, their school system doesn't work, and there is unemployment. A lot of us that do this work have lived that experience. Beyond outreach, we want to pull people in and be able to provide something for them—programming, life skills, leadership, gang awareness, drug awareness—things that can start to change the way they think and the way they react to violence when it's happening with them. We are that resource: we mediate conflicts and make nonaggression agreements between gangs, but we also provide something for their families as well – food banks and other survival needs.

For me, this is who I am—it's how I breathe. I've had young people I've worked with who have been killed or have passed away from an overdose, but they're not just people I work with. Those are like my kids, and I love them. One time we were having our leadership group session and these guys all used to come, have pizza, and go through exercises that I had for them. One exercise was we each had to go around and say something nice about the next person (they like to tease each other and put each other down, but this was to do something to uplift each

other). When it was my turn, a young man, Jose, turned to me and said, "You never give up on us." I just I can't give up. These communities are filled with hope, resilience, and love. We do have vicarious trauma, get burnt out, and sometimes have to change positions – but there is a great amount of love in this work.

Dr. Talib Hudson,
Director of Research and Innovation at the National Network for Safer Communities at City University of New York John Jay College of Criminal Justice

The violence that we see in our communities—some of it is policy choices. At one point when violence was centered around European immigrants who became racialized as white, there were broader efforts both from the philanthropic sector and from the federal government to have pathways of opportunity and mobility for them to move up into the middle class. Irving Spergel wrote about when violence, particularly in central cities, became a black and brown problem, violence became viewed as an individualistic problem—those are violent *people*. When it was the white immigrants, it was a structural issue or a community issue, meaning that they need more resources. When it was black and brown people, it became, "those folks have broken families." Daniel Patrick Moynihan wrote a report about "the crisis of the n**** family" and its disintegration because there are not enough fathers in their homes. Then over the past 40 to 50 years, we have seen very deliberate shifts in policy to reduce investments in our communities – whether it's from public housing to education. There are things that are out of our control, but they're not uncontrollable. They are changeable.

From my perspective, this work is about survival. The work that Claudia, Paul, Ben, and all the people around the country who are doing Community Violence Invention work (particularly the Black and brown people doing this work) are part of a lineage of trying to survive underneath the system that is trying to kill us. From my perspective, we don't have a choice, because the only other option is death. It's life or it's death. I'm in New York City—it's very dense, and when I walk around and see bullet holes in the signs in the bodega window, I remember how Dr. King talked about the "ever-present specter of death." From my perspective, this isn't just about doing good work in the world. This is about survival.

However, I have this memory of one time when I printed out these flyers on my mother's printer (because I had no money) and we all went to a peace rally. At first, I was a little unsure about going and handing it out to people because I had these visions of "this person is dangerous." But I got to a point where I realized that I can't serve the people and fear the people at the same time. If I'm not operating from a place of love, then I have no business doing this work. To do this work, the driver is not the fear, it's the love.

Ben "Taco" Owens,
Safety Fellow and Instructor at the Urban Peace Institute.

I work primarily in South LA. On Vermont and 135th, there is a young man by the name of Larry – we call him Little Larry because his dad is Big Larry. Little Larry loves his dad, they hang out all the time and ride mopeds up and down Vermont. One day I got a call, and there was a bad accident down on Vermont and 135th. I go down and find out that Big Larry got hit on his moped and he had already been taken to the hospital.

Little Larry's apartment is right on the corner. He looks out the window, sees there is a wreck, comes outside, and is told that it's his father. He sees the moped broken into pieces. I'm standing with him near the scene and Little Larry is just crying—and then he said, "I need a gun." I said, "why do you need a gun?" He said, "I need somebody to feel my pain." In his mind, he needed to go shoot somebody or hurt somebody, and that would be a form of relief for him.

I talked him off the ledge and let him know that if he hurt somebody else, it was not going to make his father well, it was going to put him in jail. I spent about an hour there talking to him, and he turned out to be okay. He didn't do it. His father recovered. Community Violence Intervention is situations like that: being there in the moment, communicating, and having a level of empathy because you come from the same environment where if someone hurt somebody that you love, you need to hurt that person back. Little Larry is doing okay, he hasn't shot anyone to this day, and I think that message resonated with him.

People in this field are expected to die at the plow—there is no retirement. It's 90 percent volunteer service, and we need folks to be compensated for the great work that they do. Hopefully, at some point, we can identify this work as a measure of public safety since we are keeping the public safe at the risk of putting our own lives on the line. We're in very violent environments without a gun ourselves – nothing to defend ourselves with but our level of influence and our license to operate. Our willpower comes from inside. The next time you hear about an opportunity to fund peace or public safety, consider that there are some people who may not be in the limelight, but they're doing great work. We have a lot of great peacemakers in this city and in this country – so consider funding peace.

II. Panel 2: The History of the Second Amendment: How We Got to Bruen – and Where We Go from Here

This panel analyzed the history of the Second Amendment and the doctrinal expression of that history. Beginning with the Supreme Court's decision in *District of Columbia v. Heller*, and particularly in light of the recent opinion in *NYSRPA v. Bruen*, modern gun laws have been tested for constitutionality by their comparability to 18th- and 19th-century American laws. The panelists discussed this standard and how it raises important concerns such as: who passed these historical laws, and for whose benefit? This panel was moderated by Esther Sanchez-Gomez, the Litigation Director of Giffords Law Center.

Prof. Jake Charles,
Pepperdine Caruso School of Law

The Second Amendment was ratified in 1791 and for 217 years, it was basically inert as a matter of federal constitutional law. It wasn't until 2008 when the Supreme Court decided *District of Columbia v. Heller* that the Second Amendment actually did work as a matter of constitutional law. There wasn't much going on for the first 100 years or so, and at least some of that was due to the fact that the Supreme Court was operating under the assumption that the Bill of Rights was not incorporated against the states. The states weren't bound by the Bill of Rights, and we didn't have federal regulation of firearms in the way that we do today, so there weren't Second Amendment challenges bubbling up in lower courts.

Once there was federal regulation in the 1930s, we saw the first Supreme Court case, *U.S. v. Miller*. There, the Court wasn't entirely clear about what the Second Amendment was doing. The Court said that the Second Amendment didn't block a conviction of someone who had a sawed-off shotgun under a federal regulation that made it unlawful to possess one without paying a tax stamp. So, from 1791 up to *Miller*, and then even after *Miller*, federal courts of appeals were still unanimous that the Second Amendment was not a right that was held by individuals unconnected from any kind of militia service. That was the big debate.

Heller was the "individual rights reading" versus the "militia reading"—and decided on the "individual rights reading." *Heller* said the Second Amendment protects a right unconnected to militia service that, at its core, is to have a handgun in your home for self-defense. But *Heller* didn't tell courts what they should do when evaluating new claims under the Second Amendment. It said they can't use pure interest balancing and can't use rational basis, but other than that, *Heller* didn't give any advice. So, in the time between *Heller* and *Bruen*, lower courts tried to develop ways to assess Second Amendment claims. What occurred was 12 years of litigation in which courts again coalesced around a common view: a two-step framework that is borrowed from how First Amendment

claims are analyzed. First, courts consider whether the challenged law burdens conduct that's protected by the Second Amendment; if it does, then courts apply some form of heightened scrutiny depending on how burdensome the law at issue is.

That's where things stood as of this summer when the Supreme Court decided to hear *Bruen*. But it wasn't yet clear what this framework looked like outside the home: if states had more regulatory authority in public or if it was the same as in the home, and what kind of method should courts use to assess Second Amendment claims?

Prof. Eric Ruben,
Southern Methodist University Dedman School of Law

At issue in *Bruen* was New York's policy for regulating the public carry of handguns. In order to carry a handgun in public, you needed to get a permit; and in order to get a permit, you needed to show good or proper cause. If the permit applicant wants to carry a handgun virtually anywhere, then the good cause the applicant needed to show was a heightened need for self-defense – something that separates that applicant from the general public. It was not enough in New York's old regime to say, "I have a concern that I might get attacked by a stranger, therefore I want a permit to carry a concealed handgun everywhere."

The plaintiffs in the *Bruen* case were two men from upstate New York. They wanted to get an unrestricted permit, but they had no heightened need for self-defense that they could show on their application. They argued that the denial of their concealed carry permits violated their Second Amendment rights. The Supreme Court sided with those plaintiffs in a 6–3 ideologically split decision and struck down New York's requirement that a person shows a heightened need for self-defense before they carry a handgun in public.

Most immediately, the outcome affected New York's public carry permitting policy and the policies of six to eight states, depending on how you count them, which make up 20 percent of the United States population and about 1/3 of the United States urban population. Those places could no longer require showing a heightened need for self-defense in order to receive a permit to carry a handgun in public. That was the teeth of the public-carry regimes in those states.

At the same time that the Supreme Court struck down that policy, it also suggested that it would be permissible to restrict firearms in sensitive places – to declare certain places "no gun zones."

That is the narrow upshot of the *Bruen* case.

Importantly, the Supreme Court scrapped that two-part framework that the lower courts had applied in over 1400 cases between *Heller* and *Bruen*. So not only did *Bruen* have an impact on the public carry policy in New York and similar places, but it had implications for every regulation of weapons that had been upheld under that two-part approach.

The test that the Supreme Court ascribed is whether the modern gun law is consistent with an American tradition of firearm regulation. They must point to an analogous regulation as a historical matter. New York's law was from 1911, so it was over a century old – but that was not old enough. The temporal frame for this new historical analysis is around 1791 (when the Second Amendment was enacted) and maybe into the 1800s. There are lots of historical gun laws out there, but how do we analogize to those historical gun laws which are from a very different era? The Supreme Court didn't provide a lot of guidance on this. It said that we have to compare *why* the historical gun law was passed to *why* the modern gun law was passed and to compare how each impinged or affected the right to armed self-defense. But that's not substantive guidance that could guide courts on a host of questions.

I find it interesting that the Supreme Court in *Bruen* said that the societal problem that we're addressing today with our handgun regulations (which is urban handgun violence) existed at the founding in 1791. The Court reasoned that the founders dealt with the same general societal problem, but they didn't pass these kinds of laws that are being challenged today—the implication being that if the founders thought that these regulations were part of our historical tradition, they would have passed these sorts of laws. But as Professor Cornell said, the population at the framing looked a lot different: there weren't urban areas as we understand them today, Los Angeles's population is larger than the entire country's population in 1791, and handguns made up less than 10 percent of the stock. So, these claims are just hard to square with what we know about history.

I think it's fair to say that there's been a lot of confusion in the lower courts since *Bruen*. It's been 16 weeks since the *Bruen* decision and there have been at least eight decisions striking down laws on Second Amendment grounds. This is a lot more disruptive in the immediate aftermath of the decision than *Heller*. Just to talk about a few of those cases:

- The Northern District of New York struck down provisions of New York's Post-*Bruen* law regulating public carry. The court said there is a historical tradition of restricting guns from schools, so that's fine, but that's not analogous to summer camps, so guns have to be allowed in summer camps.
- The Northern District of Texas struck down the federal law that bars receiving firearms during the time that a person is under indictment – a law that's been on the books for a long time and was not challenged successfully after *Heller*.
- The Western District of Texas struck down a Texas law that barred those who are under 21 years old from carrying handguns in public.
- A district court in Delaware struck down Delaware's ghost gun ban.
- A district court in West Virginia struck down the federal law that bars a person from possessing a firearm with an obliterated serial

number—again, another law that's been on the books for a long time that wasn't successfully challenged after *Heller*.

- Two district courts in Colorado put localities' assault weapons bans on hold.
- Just yesterday, another court in New York said that New York's Post-*Bruen* law barring guns from places of worship is unconstitutional.
- There's been one case that has thoroughly examined and upheld a new law under *Bruen*. That was a case in San Jose where a federal court upheld the city's liability licensing scheme for gun owners.

We have lower courts all over the map on what "historical tradition" actually looks like. The Texas court said a law present in roughly half of the states in 1868 was insufficient. The New York case rejected that and said there should be three analogous laws. The case from yesterday with another New York court said seven is insufficient. So, we have three, seven, and half of all states—and no reasoning for why any of those should be the relevant benchmarks. Then once you figure out the relevant benchmark, courts are unclear on how widespread a law has to be: does it have to cover a large part of the population, or can it be a large number of states? What is a long enough time look to establish a tradition? How often does it have to be enforced, and does the government have to introduce statistics showing this was actually a law that was enforced, not just a law on the books?

Prof. Saul Cornell,
Guenther Chair in American History at Fordham University

To invoke the second-greatest Marxist theorist in the history of the world, "history repeats itself, the first time as tragedy, and the second time as a farce." *Bruen* is the farce. *Heller* pretty much got almost everything wrong. If you look at how Justice Scalia reads the Second Amendment, he reads it backward as if it was written in Yiddish. A notorious footnote takes you to a mid-19th-century treatise—but as a historian, I wonder how the 18th-century founders got ahold of that 19th-century text so they could write the Second Amendment the way Justice Scalia thought it should be written and understood.

Then, of course, Justice Scalia says the main purpose of the Second Amendment is individual self-defense. But interpersonal violence, at least among people of European descent, was not a serious problem in the year of the Second Amendment—that really only happens with the rise of handguns in the Jacksonian era. He also assumes that guns in common use were protected, but that was the exact opposite of what American policy was. The entire structure of early American gun policy was to stop people from getting the guns they wanted (guns that were useful on farms to rid your fields of pests and shoot birds) and get

military-quality brown best muskets (guns that could be useful in brutal hand-to-hand combat).

So, *Heller* got everything wrong—but at least *Heller* didn't give us much guidance on what to do with this bad history. But then the Originalists on the Court made up a new sort of pseudo-Disney-esque version of history, which they call "Tradition." Now, there's no evidence from the founding era of people talking about "history, text, and tradition"—that's a modern Federalist Society invention. So, we have this pseudo-historical argument in *Bruen*, and to add insult to injury, Justice Thomas says that we don't *actually* have to get it right, we just have to use what the parties present us, and we have no obligation to actually know any history – anything that comes over the transom of an amicus brief is good to go.

In *Bruen*, the Court gave a lot of weight to a couple of laws from the early colonial period, which is completely different from the rest of American history because the population was minuscule. They said anything that came from the territories in the 19th century (where the population was probably greater than it was in colonial America) doesn't count. They also say we shouldn't pay any attention to traditional English history because the American Revolution marked a sharp break from that. Yet, of course, two days later, we're hearing about Matthew Hale and Blackstone in the *Dobbs* decision and how we have to accept that in medieval England, abortion was a crime (which, of course, it wasn't).

So, we are in a very, very unusual moment: the Supreme Court's legitimacy has been severely damaged; the Court is not displaying any of the sort of traditional judicial value; the Federalist Society has strangled every form of intelligent conservative thought; we no longer have judicial minimalism; and we don't have sort of a strong reverence for federalism (despite it being called the Federalist Society). What we have is a completely inane, Originalist view of the past that is *completely untethered* to the past. So, from the point of view of a historian, it's pretty horrific – and I haven't met a single serious historian who thinks that any of these recent decisions has any intellectual credibility.

My favorite recent example is minors. What the courts have done and said is minors, 18-to-21-year-olds, were in the militia; therefore, they must have had this right. But it's a basic principle of constitutional theory that rights are not the same as obligations. Rights impose obligation; by definition, an obligation is a corridor of a right, not a synonym. The Court has said, "you can be forced to do this, and we can punish you if you don't, and that's evidence of a right." I don't know any rights that the government can force me to exercise and punish me if I don't. Further, minors have no legal rights under English common law; they are treated similarly to married women under coverture, who were legally dead. The idea that an obligation is evidence of a right and that people who had no rights under English common law or under the absorbed English common law in place in early America had a Second Amendment right is just kind of crazy.

Danny Li,
Associate at Jenner & Block

I want to make three points initially. The first one is that for decades gun rights activists have marshaled race-conscious arguments in favor of more expansive interpretations of the Second Amendment – one of them being the argument that various forms of gun regulation across history have been motivated by racial animus. Gun rights activists frequently cite laws disarming slaves, black codes, Jim Crow laws, laws disarming black Americans, colonial-era laws disarming Catholics and Native Americans, and even more recent laws. In the *Bruen* litigation, there were *amicus* briefs filed arguing that the New York law at issue in *Bruen* was originally motivated by anti-immigrant and anti-Black animus.

Another argument is the racial disparities in policing and enforcement of gun regulations in communities of color. This is highlighted by the Public Defenders brief in *Bruen*, but this claim has been around for decades.

The third prominent argument is the relationship between communities of color and self-defense. The argument is that marginalized communities need guns for self-defense when the state is either unwilling or unable to protect them. These claims have been around for a long time, but I think *Bruen* is a good example of how far they've come. About a quarter of all of the briefs filed in *Bruen* in favor of invalidating New York's law made reference to one of these three race-conscious arguments in favor of Second Amendment expansionism.

The second point is that these advocates making racial justice claims in *Bruen* were the same people arguing that the Court should adopt the "history and tradition" method of interpreting the Second Amendment, which erases all of these racial justice claims from constitutional interpretation. Under the "history and tradition" method, there's no reason why any of these arguments would carry any constitutional weight: the only thing that matters is whether gun regulation has support in history and tradition, not whether there are racial disparities and enforcement or whether there are discriminatory origins. Without means-end scrutiny or interest balancing, the arguments about the consequences of certain policies don't seem to matter.

There are other reasons why we should worry about the history and tradition method from a racial justice perspective. For example, the dissenting opinion in *Dobbs* referred to the ways in which looking purely at history and tradition for legal authority means looking at sources of legal authority at a time in American history when many groups of people were excluded from the polity, so it means that the sources of authority that you're drawing on leave out many perspectives and voices.

Further, the history and tradition method treats the kind of gun regulations that were enacted with discriminatory intent *favorably*. In fact, when Justice Barrett was Judge Barrett on the Circuit Court, she

suggested that colonial-era laws like the ones disarming Native Americans, slaves, and Catholics can be understood as creating a history and tradition of disarming people who are deemed "dangerous," even though those laws are repugnant today. We can gather from these historical laws that there is a historical tradition of disarming dangerous people that we can apply today. In fact, after *Bruen* invalidated New York's licensing law, New York went back to the drawing board and came up with a new gun regulation, which was immediately subject to Second Amendment challenge. In its reply brief defending the new law, it referred expressly to these laws disarming Native Americans and Catholics as establishing a practice of disarming "dangerous" people, and in a footnote said we recognize that these laws are repugnant, but given the Court's ruling in *Bruen*, they are relevant because they establish historical tradition.

The last point is a broader problem with historical methodology, which is that it is entirely untethered from anything that ordinary citizens care about when it comes to the gun regulation debate. Are history and tradition the kind of justification that ordinary citizens deserve when courts strike down gun regulations that have been enacted through democratic procedure? It's entirely unrelated to the ordinary public debates that people have about gun regulation. Ordinary citizens are not talking about whether or not they can find a historical analogy for the kind of gun regulation that they want to enact today – that's highlighted by the way that the history and tradition method erases racial justice and public safety claims from the calculus.

Much of the work is now going to have to happen outside of courts. These arguments won't face friendly audiences in federal and state courts, which means that it's only more important for gun regulation advocates to make racial justice arguments in the public forum. In policy debates, it's important for lawmakers to make clear that there is a very strong racial justice claim for combating gun violence and for different kinds of gun regulation – and that work happens within communities.

III. Panel 3: Police Violence and Public Safety in a World of Concealed Carry

This panel discussed how to address public health and police violence concerns in a world where there is a fundamental right to carry a concealed weapon—particularly, in situations when police confront legally-armed people of color. Additionally addressed was Fourth Amendment jurisprudence and whether and how the increasing number of individuals carrying firearms may be used to justify more police violence and interpersonal violence. Moderator Alicia Virani is the Rosalinde and Arthur Gilbert Foundation Director of the Criminal Justice Program at UCLA School of Law.

Prof. Kiel Brennan-Marquez,
University of Connecticut School of Law

I'd like to talk about where the authority for police violence comes from. The idea that police exercise legitimate authority to use force in certain situations was originally understood as an outcropping of the more general authority that the state exercises when it subjects people to criminal punishment. The police start that process when they see a crime ongoing in public or when they have a warrant. From there, the consequence that follows from an encounter with the police (as long as other conditions are met) is criminal punishment; and because criminal punishment is an authorized form of violence, police have a derivative authority to use violence under certain circumstances.

For a variety of reasons, I think that account of police authority doesn't work; we need an idea of police authority that derives from elsewhere. The violence that the law permits them to exercise is way too capacious and broad and has too many detrimental consequences to be justified on that basis alone.

So, then the question becomes: how do we justify it? What is the ultimate source of police authority to exercise violence? What we have seen over time in law and popular discourse is an idea of self-defense. The justifications police give to explain why their exercises of violence are justified are consistent with the parameters of the Fourth Amendment. They point to the fact that police can be in the line of fire.

That claim should be startling to us, even though it's also very common as an argument. Self-defense or defense-of-others arguments are ultimately arguments that we have historically talked about as licensing violence from *anybody*, whether or not they are police.

I think this is where the Court has grounded its understanding of the existing Second Amendment regime. The reason why under *Heller*, and now *Bruen*, the Second Amendment is important is that it is connected to the right of every person, as a rights-bearing citizen, to engage in defense of themselves and the defense of others. In *Heller*, it was in the context of a home, but now we see in *Bruen* that the boundaries of that can expand because there are many places in the world where one might feel under threat. So, we're seeing the justification for police violence on the one hand, and the justification for robust Second Amendment protections for private persons on the other hand, are merging together in a very deep way.

This should give us pause for lots of reasons. These arguments were developed in political theory and the context of trying to describe what distinguishes a civilized legal order from a state of nature. Hobbes's whole idea was that the moment when somebody threatens your life or the life of somebody near you, you are put back in the position of the state of nature. So, in a sense, the whole regime is actually revealing an understanding of the firearms-laden world as essentially a highly technologized

state of nature which we are susceptible to at all times, whether we are civilians or police officers – it's kind of a violent free for all.

Prof. Peter Salib,
University of Houston Law Center

We know that in a world where there's more liberalized access to firearms, we will see more instances of shootings and killings that are motivated by animus of various kinds, including racial animus; but in a short essay Guha and I published last year, we argued that the situation is maybe much worse. We draw on game theory, specifically the game theoretic models that economists and political scientists developed in the middle of the 20th century to think about the nuclear arms race to model the threat of the use of small arms—guns. The basic idea is that in a world where there's more access to guns and relatively few restrictions on how they can be brandished and used in self-defense, there might be a lot of violence between people who don't have invidious attitudes and don't, in fact, want to hurt anybody.

To understand this, think about this vignette in Thomas Schelling's book on game theory from the middle of the 20th century. Suppose you wake up in the middle of the night hearing a sound in your home, and you venture downstairs and you see someone's broken in. You see that they're armed. Imagine you also own a weapon. You don't know whether this person who has broken into your house is simply there to steal some things and leave, or whether they are there to commit murder. You have a choice to make: do you do nothing and hope that they'll leave, or do you go and retrieve your weapon in case you might need to use it? It's a pretty easy choice. It's much better to have your weapon just in case than to not have it and be shot on the chance that this person wishes you harm. But, of course, once you have your weapon, now the other person is in exactly the same position you just found yourself in. The question is: should that person now retreat and risk being shot in retreat, or should they maybe unholster their weapon in case they need to use it before you? Every escalation not only puts the other party in the position of deciding whether to escalate further, but it also increases the risk of accidental shooting where one person misreads the other party thinking that they are about to be shot, and then shoots first.

Guha's and my basic argument is that in a world post-*Heller* and post-*Bruen*, where states have increasingly liberal gun rules, each of these acts is an instance where you might put the brakes on an arms race. But in every instance, the trajectory of the law appears to be *against* putting the brakes on these escalations. We think that that's quite a dangerous world to find ourselves in.

How do you stop the arms race? We think the answer is that we have to make some step of escalation more costly. The whole reason that this cycle happens is at each moment, it's more costly *not* to escalate than

to escalate. It's better to be ready to shoot than to be shot because there's very little cost to be ready to shoot. The break in escalation can come at any stage; for example, when people consider buying a gun in the first place. Another one is the difference between the duty to retreat versus the right to stand your ground. For most of the history of the common law, there was a duty to retreat before using deadly force, but in the past couple of decades, we've seen states institute the opposite rule which says there's no legal liability if you stand your ground.

We think reinstituting duties to retreat in any of the states that don't have them anymore is a promising approach. One reason is that it is a historically rooted legal regime – it was always the case that you had a duty to retreat until recently. Under the new history-first test from *Bruen*, those kinds of legal rules rooted in history are the ones most likely to be upheld as constitutional.

From the perspective of public health, about as many people die every year in the United States from a gunshot wound as from an auto accident. But one thing that I think hasn't come up is that the majority of those deaths are suicides, not homicides—and it's not close. We have at least some evidence that there is a causal relationship between having a gun in your house and killing yourself. Men commit suicide at a much higher rate than women, but it turns out that men don't attempt suicide at much higher rates than women, they just succeed much more often. That's because they use a gun prominently, whereas women tend to use other means that are less lethal.

Prof. Guha Krishnamurthi,
University of Oklahoma College of Law

In the paper that Peter mentioned, we discussed the case of the McMichaels and the killing of Ahmad Arbury. Ahmad Arbury was running in a neighborhood and the McMichaels followed him in a truck and confronted him on videotape. Ahmad Arbury was unarmed and tried to grab the gun because he was fearful that they were trying to assault him, and then one of the McMichaels shot and killed him. The McMichaels were charged criminally and convicted by a jury. Because it was a jury verdict, we don't know exactly what the jury was thinking, but some of the key facts are: Ahmad Arbury was unarmed; the McMichaels knew it; Ahmad Arbury had not committed a crime (even though the McMichaels claimed they suspect it); and Ahmad Arbury hadn't taken any violent actions.

Peter and I observed that had any of those facts changed, then there is a plausible argument that the McMichaels would have been acquitted or at least not convicted (because they require unanimous juries). Even under the facts as they were, it's possible that the McMichaels would have been acquitted just because of how the law works. We think that is really, really bad and that the regimes, including stand-your-ground laws,

laws on how you can hold your gun, laws on who can possess and brandish guns, etc., really contribute to this. It's a return to the Wild, Wild West—who can draw more quickly.

As gun laws expand, it's rational for police to think that everyone is a threat, and therefore this may license police to engage in more violent and brutal behavior toward citizens. Far from creating a more robust self-defense state, these laws make everyone more dangerous with respect to private citizens against private citizens or private citizens against the state.

I'll just add the irrationality that our paper doesn't tackle but we acknowledge is racism and bigotry. That's the kind of the irrationality where, you know, these liberal gun regimes will lead to, you know, black and brown and poor people feeling the brunt of police force in response. Because the fact that there are guns out there, I think, may lend to a situation where Police feel empowered to take violent action more quickly, because they can point to a kind of broad rationality to this "look, it's very dangerous out there, what do you want us to do?" And who's going to face the, you know, as a factual matter in our world, who's going to face the brunt of that? I think we know who, right? Black, Brown, and poor communities.

Julie Diaz Martinez, Check the Sheriff Coalition

One of the components missing from *Bruen* was the effect on the quality of human life. The Los Angeles County Sheriff's Department is the largest Sheriff department in the nation, and it is also the most violent and has the largest budget. My grandson was 18 years old when he was killed by the police. The Sheriff's version of events is that my grandson, who was 5' 2" and weighed 120 pounds—attacked and ran, and then was shot within a minute. Within three and a half minutes of this routine traffic stop, he was shot and killed. The Sheriff claimed that he was hit, but video footage later showed that there was no physical confrontation with my grandson.

Since that time, I've been working very closely with a group called Check the Sheriff. We're a coalition spearheaded by Andres Kwan of ACLU SoCal. Some of the groups in our large coalition are Say Their Names, Black Lives Matter LA, Reform LA Jails, White People for Black Lives, Dignity and Power Now, and Centro CSO. We have been focusing on drawing attention to the unlawful killings and violence that have been inflicted upon communities of color in Los Angeles County.

I want to go back to a word we bantered which was "Wild, Wild West." For communities of color, it's already the Wild, Wild West with the police. There are already massive shootouts. It doesn't take a lot to trigger policing of communities of color. I think after *Bruen*, communities that are not communities of color will be experiencing what communities of color have for years. Police do not need a pretense to shoot

us. Since 2015, approximately 6600 people have been killed by police. Since that time, only eighteen cops were ever convicted of manslaughter and four were convicted of murder. Absolutely no accountability for policing. Former LA District Attorney Lacey prosecuted one cop in her entire six years.

We don't believe in police reform; it doesn't work. The entire system needs to be dismantled. It was never based on equality or justice. The deputy who shot my grandson was rumored to be a gang member within the East LA Bandidos. The frightening part is it's a trophy for them to shoot people. So, there is no justice. To me, justice would be a breakdown of the entire system.

IV. Panel 4: Different Enforcement and Disparate Impacts of Gun Laws

In light of the arguments raised by public defenders as *amici* in Bruen, this panel discussed racial disparities in the enforcement of gun laws, how this contributes to the inequities of mass incarceration, and the social science evidence demonstrating the disproportionately high burden borne by children and communities of color as a result of gun violence. This panel also explored what policies can help address this disproportionate gun violence without enhancing the burdens that mass incarceration imposes on the same communities. Moderator Ingrid Eagly is the Faculty Director of the Criminal Justice Program and Professor at UCLA School of Law.

Sharone Mitchell Jr.,
Chief Public Defender of the Cook County Public Defender

It's ironic that after supporting the New York Public Defenders' *amicus* brief, people say that I'm siding with the NRA because I'm *not* a gun person. I believe the research that suggests that guns make domestic violence, suicide, and everyday conflicts more lethal. When you turn on the TV in Chicago, you are inundated with news about carjackings and shootings. Although the news outpaces the actual situation on the street, people are scared.

I have this buddy I grew up with. When he was 16 years old, he picked up a case and took care of it, no big deal. He became a union professional, and he is doing really well. At 35 years old, he got a new job. In this new job, he had to go in and out of houses around where we live on the Southside, so he decided he wanted to apply for a gun license. Personally, I don't think it is a great decision because I'm not a gun person, but he chose to make it. He applied for a gun license and was rejected based on the thing that happened before he was 20 years old and that wasn't even a conviction. He's in a position where he can do one of two things: he can choose not to protect himself, or he can carry illegally.

Take that story and transpose it to what I see as a public defender. In Cook County, we have almost 100,000 cases. Each (non-pandemic) year, almost 25 percent of our felony cases are gun possession cases. What I see, and what our attorneys see every day, is body camera footage of those cases and a very, very clear strategy of the Chicago Police Department to act in particular neighborhoods, pull people over one by one by one, and try to get in the cars and find guns. I suspect that my friend will eventually get pulled over, and I suspect they're eventually going to find an illegal gun on him.

I wonder—does my community win in that result? I cannot deny the State's interest in reducing the number of guns in our community, but I don't think making folks like my friend a felon is a good public safety decision. We see that over and over again—people choosing to carry, not because they want to go shoot somebody, but because they feel genuinely scared. There's a great study from the Joyce Foundation that talks about why we carry, and it touches on this.

I think the public defenders in New York have the same experience. They think there is a failure in our collective strategy to felonize gun possession. They note the arbitrary and expensive barriers to legal possession. In New York, you had to pay $400 and you had to add ask the police, who could say no. They see the racially discriminatory law enforcement approach toward possession. They see the legal fiction that illegal possession is a violent act – if you get your license from the state then that's fine, but if you don't have $400, suddenly you're a violent felon.

Prof. David Olson,
Loyola University Chicago

In Chicago, in the last decade or so, there's been this refrain from elected officials, "we need to do more with the violent gun offenders." Really, they were talking about people charged with illegally possessing a gun. They conflated the two—they portrayed to the public that people who illegally possess a gun (to Sharone's point) are violent individuals. Part of what complicates this is Illinois law describes carrying a concealed handgun without a license as "aggravated unlawful use of a weapon." So, when the public hears that, they assume you're out shooting people.

In my research, we found that when it came to illegal firearm possession and how that is responded to, there are really interesting relationships. The first important thing is what is actually illegal varies across the states. The behavior in Chicago where Sharone's friend has a handgun for self-protection but does not have the permit is a felony with a mandatory one to three years in prison; that exact same behavior in a large number of states is not illegal behavior where there is permitless carry (so-called "constitutional carry"). So, the behavior that is defined as illegal varies a lot from state to state.

But even in those states where that behavior is illegal, the punishments vary from misdemeanors all the way up to Illinois's example. Looking at trends over the last 40 years in arrests for weapons offenses, the trends in arrests mirror the violent crime rate and the homicide rate almost exactly. So, the question is: do arrests by law enforcement for illegal gun possession just reflect gun carrying—as violent crime goes up, are more people carrying guns? Or is it because more people are carrying guns that violent crime is going up? Or is going after the guns just the proxy for going after the violent crimes committed with a firearm—the police are told to do something about violent crime, and the thing they can do is look for guns.

Some police departments declare that they are going to target gun possession, and (no surprise) the number of arrests for possession increases. However, those arrests are not uniformly spread out across the country; they are concentrated in large cities in states that have restrictions on carrying and licensure processes. But even in those large cities like Chicago, it's not evenly spread out. It's concentrated in very specific communities. In the state of Illinois *as a whole*, around 40 percent of all the people arrested and convicted for illegal firearm possession were arrested in 11 neighborhoods in Chicago. The challenge is those are the communities with the highest rates of firearm violence, so it's where the police are concentrating their efforts. So, the arrests are in some ways where you would expect them to be—where the highest rates of gun violence are. But the means by which those arrests are being made is most often as a result of traffic stops where the police are using the Illinois Vehicle Code to make a stop for almost anything.

Importantly, that isn't the approach in all communities. In many of the smaller, rural jurisdictions, police say they don't look for guns because everybody has them. In those communities, while it's illegal to have a concealed firearm or firearm in your car, if you're not licensed, they don't see it as an issue. The gun culture suggests that it isn't a concern, so police use their discretion to not make arrests. If they did make arrests, it's likely that the prosecutor would also use their discretion to not pursue charges because of the gun culture.

In Illinois, the challenge is what should the prosecutor do. The law was changed around 2011 to make illegal carrying a non-probational crime. The only jurisdiction that imposed this policy (and sent almost all people who illegally carried to prison under it) was Chicago. The rest of the state prosecutors exercised their discretion to not charge as a felony or plead down to a lower classification. So the consequences in Illinois are the majority of individuals subject to this law are the people who are living in 11 neighborhoods in Chicago, almost exclusively African American men between 18 to 24.

We looked at other states as well and found the greatest impact of the application of this law and its disparate impact on communities of color was really limited to very specific counties in specific states. Just

to give you some numbers: about one-third of all the people sentenced to prison for illegal gun possession in the last few years were sentenced to prison from Illinois, New York, and California. More than one out of every ten people was sentenced to prison in Cook County (Chicago) or Los Angeles County. It's because of the laws in specific States and how those laws are applied in specific communities that you see this impact.

Prof. Melissa Barragan,
California State Polytechnic University - Pomona

Back in 2013–2014, a few colleagues and I interviewed 140 individuals that were detained on gun-related charges in LA County. Learning how they think about the law and punishment and why they carry were the motivating factors for that study. 82 percent of the people that we ended up interviewing were banned from carrying a firearm and they were aware of it, 7 percent said that they were legally able to possess, and the other 10 percent didn't have that information.

In addition to knowing that they were not allowed to carry, we found that they were pretty familiar with the law as well. One of the central features of deterrence theory is that if you do not know the law, it cannot deter. Clearly, by virtue of where they're sitting, the law did not deter their behavior. What we learned from this particular sample is that this very real fear of safety drives that motivation, just like it drives anyone else that wants to protect their home. But, they very clearly point to the discriminatory ways in which the law is enforced and how their sense of self-defense and protection is not valued in the same way because they carry this felon label. Many of the respondents that we spoke to identified explicit experiences with police harassment or neglect, where they were seen as a suspect first and a victim second, if at all.

Those experiences with how the law is enforced impact their perceptions of the legitimacy of the law. There's quite a bit of research now around the impacts of legal cynicism on criminal behavior, particularly in gun behavior. The more that a person believes the law does not serve them, the more likely they are to carry a firearm. That finding bore out within our own study.

What came out in that particular study is that routine enforcement practices were getting them arrested – being stopped while they were walking to the store or while they were driving. Some people claim that guns were planted on them. Some claimed that they actually did have a firearm, but their justification was that a prior offense did not allow them to legally have a gun.

California has now started to consider some of the ramifications of some of our extreme policies. We've seen some changes in sentencing enhancement policies and discretion with mandatory minimums in gun cases (but only if it's not branded as a violent offense). Defining these crimes as violent or not violent and diverting people from the

criminal justice system is where some of the respondents that I interviewed suggested we focus. Given the research we have that suggests that enhancements don't work and incarceration only works so much, criminal law, in my perspective, is where we should be focusing our efforts to reduce gun violence.

Prof. Sarah Britto,
California State University - Dominguez Hills

The Supreme Court recognized in *Heller*, *McDonald*, and then again in *Bruen* that there are sensitive places where guns are not allowed. States have decided high schools are universally a sensitive place, even in Texas – and my data (which I gathered with Dr. Dahlia Stoddart) is from an exploratory study focused on Texas. Texas has some of the most permissive gun laws in the entire United States, but youth are not allowed to carry in school, and carrying in school is a third-degree felony and also comes with mandatory expulsion from school – some pretty severe consequences.

We interviewed about 500 students. 15 percent of them reported that they had carried a gun at least once to high school during their senior year. To give you an idea, the national studies for Texas for black students usually find between 6–8 percent. We think this difference is because of the methodology, but again, it's an exploratory study, so it needs to be repeated.

So why do black students choose to carry guns to school? First of all, the strongest predictor (which speaks to the work of my other three panelists) was neighborhood gun carrying. If you were afraid in your neighborhood and felt you had to carry in the neighborhood, when you went to school, that gun went in your backpack. Teens who avoided specific places in their schools—if there were stairwells or different meeting places that they avoided—and teens who felt unsafe in their school were significantly more likely to carry a gun. There's an unfortunate correlation between victimization and offending, and our initial model showed that victims were more likely to carry a gun.

When we introduced collective efficacy, this idea of trusting other people and feeling like they had a safe place and were valued, the relationship between victimization dropped out. This means that collective efficacy at a school can serve as a protective factor against gun carrying. Not unlike what the Community Violence Intervention panelists from yesterday said, having that group that can help you through those experiences can reduce the chances that you feel like you have to carry a gun to protect yourself or have to retaliate.

Also notable: the relationships that you don't find can be as meaningful as the ones you find. Physical and social disorder (things like graffiti or metal detectors) did not have an impact on whether they chose to carry or not. Perceived police efficacy had absolutely no impact on whether they chose to carry a gun or not.

Something that was not lost on us is in our sample of about 500 youth, over 70 students had carried a gun in high school. When they participated in our study, they were starting a university career. They could have just as easily, by chance alone, been in the school-to-prison pipeline that Harris County, Texas is famous for; but because of chance, here they were, working towards becoming productive members of society.

V. Panel 5: Guns at Poll-Booths and Protects: the Chilling Effect on First Amendment Activities and Against Criminal Justice Reform

This panel discussed how the presence of guns in public chills the exercise of First Amendment rights, particularly at polling sites and protests advocating for legal reforms. This panel also examined how the increasing number of fringe groups illegally conspiring to use firearms to threaten, coerce, or kill public officials—including federal and state legislators—can undermine the channels through which reforms would ordinarily take place, affecting the likelihood of meaningful and much-needed change. Moderator Allison Anderman is Senior Counsel and Director of Local Policy at Giffords Law Center.

Prof. Joseph Blocher,
Duke Law School

Gun laws have a role to play not only in saving individual lives, but also in the common law dimension of preserving a "public sphere." In our most recent paper, we take that principle of protection of democracy and apply it specifically to the question of the constitutionality of sensitive place restrictions after *Bruen*. We focus here because the Supreme Court, by striking down the good cause requirement in *Bruen*, effectively increased the relevance and importance of locational restrictions. Almost immediately after *Bruen*, New York amended its laws to remove the good cause requirement and to designate a list of places as gun-free. Just a few weeks ago, a federal District Judge struck down many of those locational restrictions, including the prohibitions in Times Square, on public transit, and at summer camps, as lacking sufficient historical antecedents under the *Bruen* test.

Just how comparable the modern and historical gun laws have to be is unclear, except that remote resemblance is not enough. However, the laws don't have to be twins, as the Court said, "Even if a modern-day regulation is not a dead ringer for historical predecessors, it may be analogous enough to pass historical muster." So, what we take from that is that instead of focusing narrowly on a historical list of sensitive place locations, we should focus on two principles: the why and the how of gun regulation. If we can understand those, then we may be able to guide ourselves in extrapolating from historical examples to find things that connect to modern circumstances.

Focusing first on "why" historical and modern gun laws burden the right to self-defense, "what is the justification" is the phrase that the Court uses. The prevention of physical harm is one reason the majority seems to accept that. It's important to note that sensitive place restrictions historically were used not only to preserve life, but also to protect public peace and democratic self-governance, which after all, is the function of the specific places that *Bruen* enumerates—legislative assemblies, polling places, and courthouses.

With regard to the "how," it's a little bit conceptually difficult to unpack sensitive place restrictions because, within a sensitive place, the burden on armed self-defense is total—that is, you're not allowed to have your gun in there at all. But the court says in *Heller*, *McDonald*, and *Bruen* that the sensitive places restrictions are nonetheless constitutional. So the fact that the burden is absolute can't be dispositive. After all, the burden is only temporary—it just applies while you're in that particular place.

The principle that we think emerges from reading the historical cases on locational law restrictions is that courts and legislatures were effectively balancing the burdens on armed self-defense with public safety interests. That's significant because, although *Bruen* says courts can't do balancing, the Supreme Court enjoins future courts to look to historical interest balancing; that is how prior generations struck that balance. What we see when we look at these cases is the courts often characterized gun owners' interest in carrying guns in sensitive places as minimal and perhaps even illegitimate.

I'll give one striking quote from the Georgia Supreme Court, which was the case upholding the state's prohibition on guns in any election grant or precinct. Here's how the Court put it: "The practice of carrying arms at ports, elections, and places of worship, etc, is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the Constitution used words broad enough to give it a constitutional guarantee." The court went on to say, "In concerts and prayer meetings and elections, the bearing of arms of any sort is an eyesore to good citizens, offensive to peaceable people, and a marked breach of good manners." So, what we see is that the historical record provides robust support for governments' authority to restrict weapons in order to protect particular science and democratic functioning, even when doing so has the effect of burdening people's ability to engage in armed self-defense in those places.

Prof. Reva Siegel,
Yale Law School

Does Bruen restrict the government from enacting locational restrictions only when they're replicas of historical antecedents? Some courts seem to be reading the decision that way, though *Bruen* itself says

otherwise. The "how and why" principles Joseph and I have identified can help demonstrate the constitutionality of laws that don't perfectly mirror historical antecedents.

The vast majority of contexts in which legislators want to apply sensitive place restrictions don't have historical twins – in Justice Thomas's words, "the subways, the summer camps, domestic violence shelters, and the like." To evaluate their constitutionality, legislators are going to need help in abstracting the constitutional principles from the historical record.

Roughly two weeks after *Bruen* was decided, residents of Highland Park, Illinois gathered for a 4th of July parade, and at 10:15 that morning a gunman began firing on them with a semi-automatic rifle. Seven people were killed, dozens more injured, and countless were traumatized by the carnage, including a toddler orphaned by the murder of both parents. Highland Park prohibits guns at any public gathering licensed by the government. Suppose a gun owner wishing to carry a gun at the next 4th of July parade argues that this gun law violates his right to arm himself under *Bruen*. Now with this new test in place, does the *Bruen* analogical method give a good leg up to this defense? Does the Second Amendment require that Highland Park authorize guns at the next 4th of July parade?

One version of deciding this case is determined by adding up historical laws that are basically mirrors of the current law; but, a different approach to the question would expand the number of historical antecedents that are relevant to determining a tradition under *Bruen*. Can we expand the number of historical antecedents by pointing to the regulation of weapons in polling places, legislatures, courts, and schools? We could ask the "why" question: why would the government restrict weapons here? It has restricted weapons to protect democratic activities, solidarities, acculturation, and community. In searching for historical antecedents to ascertain whether there's a tradition of restricting gun regulation, we could argue for expanding the relevant set not only to include those that are exactly mirror images or very close to it, but others involving the restriction of guns for similar *purposes*.

Kelly Sampson,
Senior Counsel and Director of Racial Justice at the
Brady Campaign

One of the things I noticed in my research is that there's this pattern in America where when structural barriers fail, violence is turned to: lynch mob step in where poll taxes failed in the Jim Crow era; today, AR-15-toting mobs step in where gerrymandering fails; the January 6 attack is another instance where a mob tried to use violence to overturn an election where voter suppression failed.

In the face of all this, the Supreme Court has at best turned a blind eye and at worst aided and abetted in undermining democracy. Looking at these cases, there are sort of three things the Court consistently does:

(1) it claims that text, history, and tradition require restraint in firearms laws, but it holds that for voting laws, you really need to consider evolving circumstances; (2) it treats the slightest burden on exercising the Second Amendment right as an anathema, but it tolerates all manner of burdens on participating in elections; (3) it doesn't show deference to states' interests in preventing gun violence, but it will practically invent a state's interest to uphold a discriminatory voting law.

In the Second Amendment context, the Court seems to say that history takes precedence over everything; but in the voting rights context, the Court says the exact opposite. One example of that is *Shelby County*. There, the Court upheld the reauthorization of Section 4 of the Voting Rights Act up until 2006, but stopped in part because "the nation has changed." What I find stunning about the decision in *Shelby County* is that it almost chastised Congress for using outdated, irrelevant information – and that data was only 40 years old. One quote that really stood out to me from the majority is: "There's no valid reason to insulate [Section 4] from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted [Section 4]. It would have been irrational for Congress to distinguish between States in such a fundamental way, based on 40-year-old data, when today's statistics tell an entirely different story." I mean, that is gun violence in a nutshell. The statistics and the way interpersonal violence looks today are completely different, and yet the Court seems to think that that is just fine.

Further, it seems to be very eager to remove any burdens associated with firearms. *Bruen* is interesting because it was in a pleading stage, so there wasn't a record, but the Court just concluded that it was too inconvenient. But in the voting rights context, where the VRA was explicitly enacted to respond to states putting burdens in the way of Black, brown, and other minoritized voters, the Court nonetheless breezily accepts that voting just has burdens.

Finally, the *Bruen* majority effectively says that the Second Amendment is above any interest that the state might have. They believe that because this is coming out of tradition struck by the American people as they define it (not people who look like me), it demands their "unqualified deference." But in the voting rights context (which again, very different history coming from a legacy of states passing laws so that they can discriminate), the Court seems to show much more deference to the state's interest. But states can come up with all sorts of pretextual issues to pass discriminatory voting laws—that's why the VRA was passed.

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My paper "Quiet Riot: A Framework for Prosecuting the Open Carry of Firearms at Elections," asked whether the criminal law has

anything to say about the scenes outside of polling places, vote tabulation centers, and even the private residences of election officials. It assumes that people showing up at elections with firearms is not a good thing for democracy, suggests that the tools that prosecutors typically look to in this are not up to the task, and further suggests that prosecutors should look at the law of riot.

When most people think of riots, they think of January 6, hand-to-hand combat with police, physical assaults, and property damage. But as a legal concept, riot is broader than that. At common law, riots are armed groups unauthorized by law that cause terror to the people. 47 states have either codified the law of riot or adopted the common law offense. Only Nebraska, Wyoming, and Wisconsin have not.

Generally speaking, at common law, riot was a group of three or more people engaged in some act, either lawful or unlawful, done in a violent and tumultuous manner, to the terror of the people. For that last element, a lot of jurists and commentators back in the day in England believed that the mere act of being armed was sufficient to cause terror to the people. For Blackstone, going armed with dangerous and/or unusual weapons was all that was required to terrify the people of the land, and neither proof of intent to terrify nor proof that actual terror resulted was required to establish that element.

I think folks might reasonably ask, "if someone standing silently outside of a polling place, albeit with an AR-15, are they engaging in violent or tumultuous conduct?" I think the answer there is yes. In the law, violence is not just the use of force, but the threatened use of force or violence. In fact, a crime of violence is defined in the U.S. code and in a lot of states, not just as the use of force, but the threatened use of physical force. Context is important: an individual walking down the street from point A to point B with a handgun in a holster is hard to classify as an act or threat of violence, but if you have five people standing around with AR-15s outside a polling place, I think a reasonable person could interpret that as a threat to use violence. Some might say, "In my state, open carry is lawful, so my conduct is not without authority of law." But the issue isn't whether open carry is lawful, it's whether the use or threat of use of force is lawful. So, the argument is that in this context of elections, it would not be.