

DRUG DECRIMINALIZATION AND GUN CRIMINALIZATION: ASSESSING THE COMPATIBILITY OF THESE ASYMMETRICAL BELIEFS FROM A RACIAL JUSTICE LENS

I. INTRODUCTION

Thomas Frampton, my first-year Criminal Law Professor, began a class on drugs and guns by stating, “I want you all to vote on these two questions: (1) Do you support stricter drug laws? (2) Do you support stricter gun laws?” Unsurprisingly, very few individuals in the class supported stricter drug laws, while an overwhelming majority backed stricter gun laws. Professor Frampton then surveyed the class, finding that many opposed strict drug laws because of their impact on Black Americans. Many of my classmates stated that enforcement of drug laws has had a disparate impact on Black Americans with regards to discriminatory stops, searches, and arrests, ultimately leading to mass incarceration. Professor Frampton then asked, “but doesn’t this rationale also extend to stricter gun laws? Specifically, wouldn’t stricter gun laws and their discriminatory enforcement also harm Black Americans?”¹

The question presented above is not just academic—it has real-world relevance. In our country today, there are movements from both political parties that reflect asymmetrical positions regarding the criminalization or the decriminalization of guns and drugs. On one hand, Democrats overwhelmingly support drug decriminalization,² yet strongly support stricter gun control laws.³ On the other hand, Republicans “are [warier] than Democrats” about drug liberalization, advocating for stricter drugs laws,⁴ but generally disfavor gun control measures.⁵ In fact, the conservative movement to loosen gun control has been buoyed by the Supreme Court’s

¹ See Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173, 2179 (2016) (explaining “that criminal treatment of gun possession bears some important similarities to controversial components of the War on Drugs”). Levin’s article inspired Professor Frampton to lead the class discussion on this topic.

² See, e.g., Ted Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Apr. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/>.

³ See, e.g., Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/>.

⁴ Green, *supra* note 2.

⁵ Schaeffer, *supra* note 3.

decision in *New York State Rifle & Pistol Association v. Bruen*, which will likely greatly expand gun rights.⁶

Most relevant, however, is how Black Americans hold asymmetrical views regarding guns and drugs, with most opposing stricter drug laws (around 74% of Black Americans believe that persons with marijuana convictions should be released from custody and have their records expunged),⁷ but supporting stricter gun laws (with 75% of Black adults supporting stricter gun measures).⁸ This may presumably be because they believe that the interests of Black Americans are best served by criminalizing guns and decriminalizing drugs.

Are the asymmetries revealed above logically consistent? Or, as Professor Frampton suggested, is the position of supporting the decriminalization of drugs incompatible, or at least in tension, with that of supporting the criminalization of guns because of their effects on Black Americans? This Note explores the following question: If drug liberalization would be good for Black people, would gun decriminalization and legalization be good, too? This discussion may implicitly answer the question of whether one can reasonably hold the asymmetrical beliefs outlined above based on their respective impacts on Black Americans.

⁶ See *New York State Rifle & Pistol Ass'n., Inc. v. Bruen*, 142 S. Ct. 2111, 2112 (2022). The Court in *Bruen* held a New York law, forbidding gun possession without a license, unconstitutional. *Id.* Specifically, the Court stated that “[t]he Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” *Id.* Most importantly, the Court rejected the prior framework for determining the constitutionality of a gun regulation, which allowed the state to prove that the challenged gun law served an important societal interest. *Id.* at 2126. Instead, “the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* at 2130. This ruling will undoubtedly open the door to future litigation regarding strict gun regulation and likely result in the invalidation of some state gun control laws. See Sneed, *How the Supreme Court Put Gun Control Laws in Jeopardy Nationwide*, CNN (Oct. 10, 2022), <https://www.cnn.com/2022/10/09/politics/gun-control-second-amendment-supreme-court-bruen-fallout>; Amelia Thomson-DeVeaux, *What the Supreme Court’s Gun Ruling Means for Gun Control*, FIVETHIRTYEIGHT (June 23, 2022), <https://fivethirtyeight.com/features/what-the-supreme-courts-gun-ruling-means-for-gun-control/>.

⁷ Khadijah Edwards, *Clear Majorities of Black Americans Favor Marijuana Legalization, Easing of Criminal Penalties*, PEW RSCH. CTR. (June 8, 2022), <https://www.pewresearch.org/fact-tank/2022/06/08/clear-majorities-of-black-americans-favor-marijuana-legalization-easing-of-criminal-penalties/>.

⁸ *Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive*, PEW RSCH. CTR. (Apr. 20, 2021), <https://www.pewresearch.org/politics/2021/04/20/amid-a-series-of-mass-shootings-in-the-u-s--gun-policy-remains-deeply>; John Gramlich, *Safety Concerns Were Top of Mind for Many Black Americans Before Buffalo Shooting*, PEW RSCH. CTR. (May 20, 2022), <https://www.pewresearch.org/fact-tank/2022/05/20/safety-concerns-were-top-of-mind-for-many-black-americans-before-buffalo-shooting/>.

Overall, this Note assesses the compatibility of these positions through a racial justice lens.⁹

In this Note, I will argue that the historical reasons behind gun criminalization and its consequences for Black individuals parallel the reasons behind drug criminalization. I will further argue that some benefits of gun decriminalization mirror those of drug decriminalization. Namely, less strict gun laws can alleviate the disparate impact on Black individuals resulting from discriminatory stops, searches, and arrests.¹⁰ Moreover, gun decriminalization also carries benefits to Black individuals that do *not* mirror benefits realized through drug decriminalization, such as allowing them the opportunity to defend themselves in high-crime areas and lessening the impact of the “felon in possession of firearm” laws that have disparately harmed Black people.¹¹ But there are additional considerations that undermine whether gun decriminalization actually benefits Black individuals. These include the facts that strict gun laws are supported by a majority of Black people, create the potential for safer police interactions, and generally foster a safer community by reducing gun homicide and assault, which disproportionately harms Black people.¹² Therefore, while gun liberalization would impact Black Americans positively in some ways, there are undoubtedly other serious considerations that bring pause to those that tout the correlation between drug and gun decriminalization. Thus, this Note suggests that support for drug decriminalization and gun criminalization may, in fact, be compatible from a racial justice perspective.

Part II will outline the Note’s framework, including its definitions and assumptions. Part III will discuss the history and negative effects of strict drug laws and the reasons why drug decriminalization would benefit Black individuals. Part IV will explore the history and negative effects of strict gun laws and explain that certain benefits of gun decriminalization mirror those of drug decriminalization. Part IV argues that gun decriminalization carries additional benefits for Black Americans not inherent in drug liberalization. Lastly, Part V outlines how strict gun laws benefit Black people, bringing at least some doubt as to whether less gun control would be truly beneficial for Black Americans.

⁹ There are also undoubtedly non-racial justice concerns that may likewise support these seemingly asymmetric positions. See Part VI.

¹⁰ See *infra* part IV (A).

¹¹ See *infra* part IV (B).

¹² See *infra* part V (A)-(C).

II. FRAMEWORK

This Note will frequently use the terms “decriminalization,” “legalization,” “liberalization,” and “less/more strict laws,” with relation to drugs and guns. While these terms are technically different,¹³ in this Note they will all be used interchangeably. For this Note’s purpose, these words will mean that conduct in relation to guns or drugs is hardly (if at all) regulated by the state, and persons are free to possess guns or drugs without any fear of being criminalized for it.¹⁴ This Note concedes that the analysis could very well change if certain gun measures are adopted and others are not.¹⁵ Furthermore, for the purposes of Part V, effective enforcement of gun laws will be assumed—specifically that gun regulation and criminalization would work in limiting one’s access to guns.¹⁶ Finally, this Note will assume that the criminal justice system will stay as is, and measures to limit implicit biases¹⁷ will not be enacted.

III. WHY DRUG DECRIMINALIZATION WOULD BENEFIT BLACK AMERICANS

A. *The War on Drugs and Its Impact on Black Americans*

The War on Drugs, which ramped up in the 1970s, was a series of laws enacted to “combat” drug use by “greatly increasing penalties, enforcement, and incarceration for drug offenders.”¹⁸ It began during President Nixon’s administration, was reinforced during President Reagan and Clinton’s terms, and has arguably continued to this day.¹⁹ The War on Drugs “began as a

¹³ See, e.g., Dragan Svrakic et al., *Legalization, Decriminalization & Medicinal Use of Cannabis: A Scientific and Public Health Perspective*, 109(2) MO MED. 90, 90 (2012).

¹⁴ How the benefits to Black people would differ if drugs/guns were completely legalized, as opposed to merely decriminalized, is an interesting question, but is outside the scope of this Note. Moreover, the question of the constitutionality of these measures is outside the scope of the Note. Rather, this Note just addresses the merits and justifications for the criminalization/decriminalization of guns.

¹⁵ See *infra* Part VI.

¹⁶ It will be conceded that some of the arguments presented in Part V are limited if gun regulations and laws are not effective and/or the black market for guns replaces the legal sale entirely.

¹⁷ See Jennifer Eberhardt, *Biased*, YOUTUBE (Jan. 22, 2020), <https://www.youtube.com/watch?v=eLuOSuUIF6o> (discussing how implementing techniques to slow criminal justice actors down may assist in limiting implicit bias and correct/address some of the disparities that exists from discriminatory enforcement of the laws at 38:37/1:16:09. For more discussion on implicit bias, see *infra* notes 74-76 and accompanying text.

¹⁸ See, e.g., *The War on Drugs: History, Policy, and Therapeutics*, DOMINICAN U., <https://research.dom.edu/the-war-on-drugs--history-policy-therapeutics/history> (last visited Oct. 24, 2022).

¹⁹ See Andre Douglas Pond Cummings & Steven Ramirez, *The Racist Root of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 460-78 (2022).

means to control minority communities . . . a fight against Black, Brown, and poor people, as political leaders and the press whipped up public passions with racist lies, linking drug abuse to Black violence . . . and providing additional cover, more generally, for ongoing Jim Crow oppression.”²⁰ Indeed, the idea that these laws were created to marginalize and criminalize Black people came directly from the political leaders who enacted them.²¹ John Ehrlichman, Nixon’s top political advisor, stated, “we knew we couldn’t make it illegal to be . . . black, but by getting the public to associate. . . . blacks with heroin and then criminalizing [it] heavily, we could disrupt [their] communit[y].”²² These strict drug laws and the militarization of police to enforce them, in conjunction with (1) the implicit biases held by actors in the criminal justice system,²³ (2) the ability to make stops without probable cause,²⁴ and (3) the authority to engage in pretextual stops,²⁵ severely harmed Black Americans.

Despite using and selling drugs at similar rates as White people,²⁶ Black people are more likely to be stopped, arrested, and prosecuted—with higher sentences resulting from these prosecutions.²⁷ Specifically, empirical data shows that Black people are more likely to be stopped for minor traffic violations and searched by police than White people.²⁸ Stop-and-frisk practices on the street aimed at discovering drugs have also disproportionately targeted Black people.²⁹ And, after either a traffic stop or a street stop, Black people are more likely than White people to be arrested

²⁰ Josh Bowers, *What if Nothing Works? On Crime Licenses, Recidivism, and Quality of Life* 107 VA. L. REV. 959, 1022 (2021).

²¹ Cummings & Ramirez, *supra* note 19, at 461.

²² *Id.*

²³ Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 ASS’N FOR PSYCHPSYCHOL. SCI. 183,185 (2018).

²⁴ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968)

²⁵ See *Whren v. United States*, 517 U.S. 806, 812 (1996)

²⁶ See *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, THE HAMILTON PROJECT (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice [hereinafter *Rates by Race*]; see also *Criminal Justice Facts*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> (last visited Oct. 25, 2022); *Targeting Blacks: Drug Law Enforcement and Race in United States*, HUMAN RIGHTS WATCH (May 4, 2008), <https://www.hrw.org/report/2008/05/04/targeting-blacks/drug-law-enforcement-and-race-united-states>.

²⁷ See *infra* notes 28-33 and accompanying text.

²⁸ See, e.g., *Racial Profiling and Traffic Stops*, NAT’L INST. OF JUST. (Jan. 9, 2013), <https://nij.ojp.gov/topics/articles/racial-profiling-and-traffic-stops>; *Findings*, THE STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/> (last visited Oct. 25, 2022).

²⁹ See *Stop-and-Frisk Data*, NYCLU (May 23, 2017), <https://www.nyclu.org/en/stop-and-frisk-data>; *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, ACLU-DC & ACLU ANALYTICS (June 16, 2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.

for drug offenses. In a 27-year study, Black Americans were arrested at a rate between 2.8 to 5.5 times higher than White Americans.³⁰ Once arrested, prosecutors were more likely to pursue mandatory minimum sentences against Black defendants.³¹ Regarding 1996 crack offenses, Black individuals made up 88% of defendants in federal courts, which often handed down harsher sentences than state courts.³² After the conviction, Black people's sentences for drug offenses were on average 19.1% longer than White people's sentences.³³ Suffice it to say, although White people and Black people use and sell drugs at similar rates,³⁴ drug laws and their discriminatory enforcement have more negatively impacted Black people.

B. How Drug Decriminalization Would Benefit Black People

Researchers, academics, and organizations have called for an end to the War on Drugs. They argue that liberalizing drug laws and expunging drug sentences would ameliorate many of the harms created by strict drug laws.³⁵ If drugs were legalized, it would remove “a major cause of arrest and incarceration of primarily people of color[.]”³⁶ Furthermore, drug decriminalization could strip away “the legal tools and policing incentives that fuel pretextual stops.”³⁷ Overall, by decriminalizing something, the harmful effects that come with that criminalization (i.e. disparities in stops, arrests, sentence) would cease to exist or lessen substantially.

³⁰ *Decades of Disparity*, HUMAN RIGHTS WATCH (Mar. 2, 2009), https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states#_ftn1.

³¹ *The Drug War, Mass Incarceration and Race*, DRUG POL'Y ALL. (Jan. 25, 2018), <https://drugpolicy.org/resource/drug-war-mass-incarceration-and-race-englishspanish>.

³² See *United States v. Armstrong*, 517 U.S. 456, 480 (1996) (Stevens, J., dissenting).

³³ *Id.* (citing Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter?* 6–7 (Dec. 1993)). For more recent data, see *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, U.S. SENTENCING COMM'N at 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf. These disparities were in part driven by statutes that gave longer sentences for crack possession (i.e., 100-1 ratio between powder and crack cocaine). See, e.g., *Crack Cocaine Sentencing Policy: Unjustified and Unreasonable*, THE SENTENCING PROJECT, <https://www.prisonpolicy.org/scans/sp/1003.pdf> (last visited Oct. 25, 2022).

³⁴ *Rates by Race*, *supra* note 26.

³⁵ See John McWhorter, *How the War on Drugs is Destroying Black America*, 9 CATO'SCATO'S LETTER 1, 5 (2011) (“If we truly want to get past race in this country, we must be aware that it will never happen until the futile War on Drugs so familiar to us now is a memory”); Cummings and Ramirez, *supra* note 19, at 490; Brian Earp et al., *Racial Justice Required Ending the War on Drugs*, 21 AM. J. OF BIOETHICS 4 (2021).

³⁶ *The Drug War, Mass Incarceration and Race*, DRUG POLPOL'Y ALL. (June 2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf.

³⁷ Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 744 (2016).

The early data on drug decriminalization suggests that it does, in fact, result in substantially fewer stops, arrests, and convictions of Black people. States that legalized or decriminalized cannabis found “large reductions in race-based arrests among adults”³⁸ and cities have found similar patterns. For example, drug decriminalization in Philadelphia reduced the arrest rate of Black individuals by nearly half.³⁹ Data in Oregon suggests that drug liberalization would “reduce drug convictions for Black and Native people by nearly 95 percent.”⁴⁰ Finally, a study analyzing search rates in Colorado and Washington (states that legalized marijuana) against twelve states that had not, found that Black individuals were searched at a far lower rate per 100 people in Colorado and Washington.⁴¹ Although the study illustrated that Black people were searched far less in states that decriminalized drugs, slight disparities in search rates remained between Blacks and Whites.⁴² Overall, however, drug decriminalization would alleviate some of the impacts of discriminatory policing and prosecution by lessening police authority, consequently limiting stops and interactions between law enforcement and Black individuals.⁴³

Finally, while not completely within the racial justice lens that this Note is focused on, I note that strict and effective enforcement of drug laws does have benefits. For example, effectively controlling drugs would alleviate many of the serious harms of the opioid epidemic. With over 13,000 individuals dying from heroin overdoses in 2020,⁴⁴ eradication and control of drugs would undoubtedly decrease this number significantly.

³⁸ Brynn Sheehan et al., *Association of Racial Disparity of Cannabis Possession Arrests Among Adults and Youths with Statewide Cannabis Decriminalization and Legalization*, 2(10) JAMA HEALTH FORUM 1 (2021). Note, however, that the authors concede these reductions could be explained by other factors as well.

³⁹ Aaron Warnick, *Study: Decriminalizing Marijuana Reduces Arrests of Black Americans*, APHA: THE NATION’S HEALTH (July 2020), <https://www.thenationshealth.org/content/50/5/E19> (citing Tran et al., *The Heterogeneous Effect of Marijuana Decriminalization Policy on Arrest Rates in Philadelphia, Pennsylvania, 2009-2018*, NAT’L LIBRARYLIBR. OF MED. (July 2020), <https://pubmed.ncbi.nlm.nih.gov/32442749/>).

⁴⁰ *The Effects of Drug Legalization*, NEWPORT INST., <https://www.newportinstitute.com/resources/co-occurring-disorders/drug-legalization/> (last visited Oct. 25, 2022).

⁴¹ THE STAN. OPEN POLICING PROJECT, *supra* note 28.

⁴² *Id.*

⁴³ Although lawmakers and law enforcement might just find other means of criminalizing Black people by creating new laws and finding new ways to discriminate.

⁴⁴ *Heroin Overdose Data*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/deaths/heroin/index.html#:~:text=In%202020%2C%20heroin%2Dinvolved%20overdose,deaths%20for%20every%20100%2C000%20Americans.https://www.cdc.gov/drugoverdose/deaths/heroin/index.html#:~:text=In%202020%2C%20heroin%2Dinvolved%20overdose,deaths%20for%20every%20100%2C000%20Americans> (last updated June 6, 2020).

IV. WOULD GUN DECRIMINALIZATION LIKEWISE BENEFIT BLACK PEOPLE?

A. *How Gun Decriminalization May Benefit Black Individuals: Fewer Searches and Seizures*

Like drug control laws, gun control laws were historically enacted to marginalize and criminalize Black people. For example, early in America's history, certain gun laws were facially racist.⁴⁵ These included laws that made it (1) legal for any White person to enter the house of a Black person and take any guns they had, and (2) illegal for Black people to carry weapons.⁴⁶ In fact, the Supreme Court in *Dred Scott v. Sandford* said that one of the justifications for denying Black individuals citizenship was that it would give them the right to carry firearms.⁴⁷ Now, there are no explicitly discriminatory gun laws. However, just like drug laws, gun control efforts still target Black individuals and have a racist effect. Examples of implicitly racist laws/gun control tactics that disparately impact Black people include (1) requiring permits to carry guns and using these permits to "prevent lawful gun ownership among 'unpopular' populations," (2) banning guns in public housing, and (3) conducting "gun sweeps" in "high crime neighborhoods."⁴⁸

Gun control, in conjunction with the broad authority and discretion given to law enforcement,⁴⁹ has resulted in the harassment of Black individuals by police.⁵⁰ Strict gun laws give police another avenue to stop and search Black Americans. As discussed in Part III(A), Black individuals are stopped and arrested at higher rates relative to their population, and criminalizing more behavior will likely exacerbate these issues. In fact, the stop-and-frisk practices aimed at uncovering drugs mentioned in Part III(A) are also aimed

⁴⁵ Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 537-38.

⁴⁶ *Id.* at 537.

⁴⁷ *Id.*

⁴⁸ Steve Ekwall, *The Racist Origins of US Gun Control: Laws Designed to Disarm Slaves, Freedmen, and African-Americans*, SEDGWICK CTY., <https://www.sedgwickcounty.org/media/29093/the-racist-origins-of-us-gun-control.pdf> (last visited Oct. 25, 2022); see David Babat, *The Discriminatory History of Gun Control*, U. OF R. I., <https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1142&context=srhonorsprog>; Patrick Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, DUKE CTR. FOR FIREARMS: SECOND THOUGHTS (Apr. 8, 2020) (explaining that the Mulford Act, which was a law that required gun permits in California, was drafted in response to protests held by the Black Panthers).

⁴⁹ See *supra* notes 23-25 and accompanying text.

⁵⁰ See *infra* notes 51-53 and accompanying text.

at searching for “illegal weapons.”⁵¹ An *amicus* brief written by the Black Attorneys of Legal Aid, the Brooklyn Defender Services, and the Bronx Defenders explains how gun control measures in New York negatively impact Black individuals in similar ways to strict drug laws:

Virtually all our clients whom New York prosecutes for exercising their Second Amendment right are Black or Hispanic. And that is no accident. New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities. That remains the effect of its enforcement by police and prosecutors today. The consequences for our clients are brutal. New York police have stopped, questioned, and frisked our clients on the streets. They have invaded our clients’ homes with guns drawn, terrifying them, their families, and their children. They have forcibly removed our clients from their homes and communities and abandoned them in dirty and violent jails and prisons for days, weeks, months, and years. They have deprived our clients of their jobs, children, livelihoods, and ability to live in this country. And they have branded our clients as “criminals” and “violent felons” for life.⁵²

While no studies have been conducted with regards to gun liberalization and its effect on the stops, arrests, and sentences of Black persons, one would likely think that it would benefit Black people in similar ways to drug decriminalization. Repealing laws that require permits to carry guns and eliminating police searches for weapons in “high crime” areas would reduce contact with law enforcement (i.e. eliminating *Terry* frisks aimed at searching for weapons), thus reducing discriminatory police harassment. Some of the magic words used to justify *Terry* stops and frisks generally are that the person getting stopped made “furtive movements” or had “a bulge” near their waist.⁵³ If gun laws were liberalized, the “bulge” would theoretically not be grounds for a stop, as the “bulge” would be legal and,

⁵¹ ACLU-DC & ACLU ANALYTICS, *supra* note 29, at 8.

⁵² Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners at 5, *New York State Rifle & Pistol Ass’n., Inc v. Corlett*, 142 S. Ct. 211 (2022) (No. 20-843) [hereinafter Brief of the Black Attorneys of Legal Aid].

⁵³ See, e.g., 31 N.Y. Jur. 2d Criminal Law: Procedure § 465. If firearms are highly regulated, a bulge or furtive movement would undoubtedly be constitutionally reasonable. See Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited Terry Stops*, 54 IDAHO L. REV. 297, 298 (2018).

thus, alone not supply reasonable suspicion or probable cause. While police may still be able to conduct stop-and-frisks on someone for making furtive movements and being “dangerous,” the liberalization of gun laws would inevitably undercut many claims that an officer had reasonable suspicion to stop an individual. Overall, legalizing something that has been a means of criminalizing the Black community would naturally lead to less arrests, searches, and prosecutions of Black individuals.

B. Additional Benefits of Gun Decriminalization: Felon in Possession of a Firearm and Self-Defense

Gun decriminalization also carries with it benefits to Black persons that are not inherent in drug decriminalization (i.e., concerns outside of policing). Namely, allowing all citizens to carry weapons would alleviate the harms created by the felon in possession of firearm statutes and also ensure Black individuals the right to defend themselves.

i. Felon in Possession of Firearm Laws Disproportionately Harm Black People

First, allowing access to firearms to all citizens, including felons, will positively impact Black people.⁵⁴ It is undeniable that felon in possession of a firearm laws⁵⁵ disproportionately harm Black individuals.⁵⁶ Due to decades of institutional and social racism, Black people are “disproportionately represented among those who are arrested and convicted of felonies.”⁵⁷ Thus, despite making up only 13.8% of the United States’ population, 54.2% of felon in possession of a firearm offenders were Black.⁵⁸ Therefore, laws that restrict felons from carrying guns contribute to the criminalization of Black people.

The Supreme Court’s recent decision in *Bruen* and possible subsequent liberalization of gun laws opens the possibility of allowing felons to carry firearms. The Court’s new “historical analogue” test will likely lead to the

⁵⁴ Felon in possession may be likened to habitual offender drug laws. But, in the drug context, there is not a “felon in possession of a drug” statute. That is, there are no laws that specifically single out felons for using/possessing drugs.

⁵⁵ These are laws that forbid felons from possessing firearms and impose strict penalties for violations thereof. *See, e.g.*, Va. Code §18.2-308.2.

⁵⁶ *Quick Facts: Felon in Possession of a Firearm*, U.S. SENTENCING COMM’N (2018), https://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

⁵⁷ Winkler, *supra* note 45, at 545.

⁵⁸ U.S. SENTENCING COMM’N, *supra* note 56; *see also* Brief of the Black Attorneys of Legal Aid, *supra* note 52, at 14 (“In 2020, while Black People made up 18% of New York’s population, they accounted for 78% of the state’s felony gun possession cases.”).

striking down of gun laws and may slowly erode the felon in possession of a weapon laws. For example, in *United States v. Quiroz*, Judge Counts⁵⁹ held unconstitutional laws prohibiting those who were indicted, but not yet convicted, of a felony from carrying a gun.⁶⁰ Although the court upheld the constitutionality of laws prohibiting convicted felons from carrying weapons, the court stated that, “[w]hether this Nation has a history of disarming felons is arguably unclear—it certainly isn’t clearly ‘longstanding.’”⁶¹ This statement, at the very least, casts doubt on the constitutionality of felon in possession of firearm laws under current doctrine. Nonetheless, and as a general matter, liberalizing gun laws and allowing all individuals, regardless of criminal status, the right to possess a firearm, will lessen the harmful impact that felon in possession of firearm laws have on Black people.

ii. Decriminalization Will Allow Black Individuals the Right to Defend Themselves

Another benefit unique to the decriminalization of guns is that legal ownership of guns allows for self-defense. Specifically, guns enable Black individuals the right to carry weapons to defend themselves from violent crime. Violent crime in America has been rising substantially in the last decade.⁶² The data illustrates that over the past ten years, Black people have disproportionately been victims of violent crime.⁶³ Despite making up only 13.8% of the population, 32.7% of violent crime victims generally, and 54.4% of homicide victims, are Black.⁶⁴ Consequently, some have argued that “self-defense [is] vitally important to the African American community.”⁶⁵ Indeed, “[t]he need for armed self-defense is most critical when the local, state and federal government fails to offer assistance.”⁶⁶

⁵⁹ Judge David Counts is a federal judge in the Western District of Texas. He was nominated to be a magistrate judge in Texas by then President Obama. In 2018, he was nominated to the Western District of Texas by President Trump. See *David Counts*, BALLOTEDIA, https://ballotpedia.org/David_Counts (last visited Oct. 25, 2022).

⁶⁰ *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at *13 (W.D. Tex. Sept. 19, 2022).

⁶¹ *Id.* at 8.

⁶² GianCarlo Canaparo & Abby Kassal, *Who Suffers the Most From Crime Wave?*, THE HERITAGE FOUND. (Apr. 12, 2022), <https://www.heritage.org/crime-and-justice/commentary/who-suffers-the-most-crime-wave> (citing *Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/home> (exploring data from 2011-2020)).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Brief of the Black Guns Matter, A Girl & a Guy Women’s Shooting League and Armed Equality, as Amici Curiae in Support of Petitioners at 11, *New York State Rifle & Pistol Ass’n, Inc v. Bruen*, 142 S. Ct. 211 (2022) No. 20-843.

⁶⁶ *Id.* at 11 (citing CHARLES E. COBB, JR., *THIS NONVIOLENT STUFF’LL GET YOU KILLED* (2014)).

When Black individuals are disproportionately exposed to violent crime and are “under protected”⁶⁷ by law enforcement, possessing a firearm is vital for self-protection. Therefore, less gun control would help Black Americans better defend themselves.

V. CASTING DOUBT ON THE LOGICAL COMPARISONS BETWEEN DRUG AND GUN DECRIMINALIZATION - THE BENEFITS OF STRICT GUN LAWS AND ADDITIONAL CONSIDERATIONS

A. *Gun Control Will Lead to Safer, Less Deadly Interactions Between Black People and Law Enforcement*

Gun control measures will likely lead to safer interactions between Black individuals and police, therefore reducing “blue-on-black violence.”⁶⁸ It is certain that Black people get killed by police at higher rates than White people.⁶⁹ A study conducted by the Washington Post found that between 2015 and 2022, Black Americans were shot and killed by police at a nearly 2.5 times higher rate than White people.⁷⁰ Specifically, there were on average 5.9 deaths per million Black people compared to 2.3 deaths per million White people each year from 2015 to 2023.⁷¹ In certain cities or regions, Black people were 85% of the victims of police shootings from 1950-1960.⁷² The evidence is so strong that “every study that has examined this issue found that [B]lacks are represented disproportionately among those at the wrong end of police guns.”⁷³

⁶⁷ See Phelps et al., *Overpoliced and Under-Protected: Public Safety in North Minneapolis*, U. MINN. CURA REPORTER (Nov. 17, 2020), https://www.cura.umn.edu/research/over-policed-and-under-protected-public-safety-north-minneapolis?utm_source=CURA&utm_campaign=1de07b59e8-CBR_Email-Spring-2018_COPY_01&utm_medium=email&utm_term=0_580f30cfc5-1de07b59e8-336380809#Findings (explaining how Black individuals in Minneapolis feel that they are “exposed both to police and community violence.” That is, despite a robust police presence, Black people receive very little protection from those whose duty is to do exactly that).

⁶⁸ Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, THE NATION (July 26, 2021), <https://www.thenation.com/article/society/black-gun-owners-court/> (arguing for police reforms before gun control, but agreeing on the need for the latter to reduce illegitimate police violence; See Devon Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1480-81 (defining “blue-on-black violence”).

⁶⁹ *Fatal Force*, THE WASHINGTON POST (Oct. 7, 2022), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Cynthia Lee, *But I Thought He Had a Gun-Race and Police Use of Deadly Force*, 2 HASTINGS RACE AND POVERTY L.J. 1, 3 (2004) (citing James Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 189 (1988)).

⁷³ Fyfe, *supra* note 72, at 189.

Research suggests that this disparity can be explained largely by the unconscious biases that members of the police force have.⁷⁴ Studies show that people are more likely to associate Blackness with crime and therefore are less accurate when “distinguishing weapons from harmless objects” in the hands of Black people.⁷⁵ This increases both (1) the likelihood that the police will shoot a Black person and (2) the speed at which they shoot.⁷⁶ These implicit biases make interactions between both armed and unarmed black individuals less safe.

*i. Violent Interactions with Unarmed Black Individuals Who Police
“Thought Had a Gun”*

When police kill unarmed Black people, they often attempt to justify the killing by stating that “I thought they had a gun.” William Whitfield, a 23-year-old Black man was shot and killed by police despite putting his hands up.⁷⁷ Officers thought that his keys were a gun.⁷⁸ Oddest Mitchell was shot six times because the police believed that the sunglasses in his hands were a gun.⁷⁹ LaTanya Haggert, a 26-year-old Black woman was shot for having her cellphone in her hand.⁸⁰ In nearly all of these tragic events, the police officers were not indicted, charged, or convicted.⁸¹ While police shoot and kill about a thousand people each year, only about ten to twenty officers are charged for these shootings.⁸² This is because the “I thought they had a gun defense” is often quite successful.⁸³ In a number of Supreme Court decisions, the Court has held that to justify the use of deadly force, police officers need only have an objectively reasonable fear that they are in danger of death or serious physical harm.⁸⁴ This standard, alongside other

⁷⁴ See generally Eberhardt, *supra* note 17; Hetey & Eberhardt, *supra* note 23; Lee, *supra* note 72, at 10-12.

⁷⁵ Lee, *supra* note 72, at 11 (citing Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399, 403 (2003)).

⁷⁶ Jennifer Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY AND SOC. PSYCH. 876, 876 (2004) (explaining that the implicit bias is so strong that the actions of the officers “appear to be automatic.”).

⁷⁷ Lee, *supra* note 72, at 18.

⁷⁸ *Id.*

⁷⁹ *Id.* at 19-20.

⁸⁰ *Id.* at 24-25.

⁸¹ *Id.* at 18-33; see also Erik Ortiz, *More Officers Were Charged in Fatal Police Shootings in 2021. Not Everyone Sees Progress*, NBC (Jan. 22, 2022), <https://www.nbcnews.com/news/us-news/officers-charged-fatal-police-shootings-2021-not-everyone-sees-progress-rcna12799>.

⁸² Ortiz, *supra* note 81.

⁸³ See, e.g., Lee, *supra* note 72, at 20, 25.

⁸⁴ See *Tennessee v. Garner*, 471 U.S. 1, 1 (1985) (holding that deadly force against unarmed fleeing felons is reasonable only when an officer has probable cause to believe that the suspect poses a threat of

institutional problems outside the scope of this Note, enables police to avoid the consequences of their actions when they shoot Black individuals who do not have a gun.

ii. Violent Interactions with Armed Black Individuals Who Police Know Have a Gun

Implicit biases amongst police officers, driving them to associate Blackness with danger and crime,⁸⁵ also make interactions with individuals who have disclosed a gun to them more dangerous. Take, for example, Philando Castile who was killed by Officer Jeronimo Yanez.⁸⁶ After being pulled over, Castile notified the officer that he had a legally registered firearm.⁸⁷ Yanez then told Castile to not pull the weapon out.⁸⁸ Castile stated that he was not going to do so⁸⁹ and was merely “in the process of producing his identification.”⁹⁰ Despite this, he was shot seven times and killed.⁹¹ Tyisha Miller, a 19-year-old Black teenager, was similarly killed by police.⁹² Miller, who had a flat tire, pulled over at a gas station, locked her car, and kept a gun on her lap to keep her safe.⁹³ Friends of Miller came to help, only to see her in need of severe medical attention and apparently unconscious.⁹⁴ The police arrived at the scene and were aware of the gun in Miller’s lap.⁹⁵ After entering the car, the officer at the car heard a loud noise and ducked, causing the other police at the scene to fire shots at Miller.⁹⁶ There was no clear evidence that Miller ever reached for or fired the gun.⁹⁷ Despite being severely ill and practically unconscious, the mere presence of a gun in the

danger or serious bodily harm to the officer or others); *Graham v. Connor*, 490 U.S. 386, 388 (1989) (clarifying *Garner* by establishing that the objective reasonableness requirement under the Fourth Amendment also governs police use of deadly force).

⁸⁵ See *supra* notes 74-76 and accompanying text.

⁸⁶ Patrick Brayer, *Gender Nonconforming Expression and Binary Thinking: Understanding How Implicit Bias Becomes Explicit in the Legal System, Considering the Shooting Death of Philando Castile*, 55 AM. CRIM. L. REV. 44, 48 (2018); see also Madison Park, *The 62-Second Encounter Between Philando Castile and the Officer Who Killed Him*, CNN (May 30, 2017), <https://www.cnn.com/2017/05/30/us/philando-castile-shooting-officer-trial-timeline> (providing the timeline of events and a transcript of the police recording).

⁸⁷ Brayer, *supra* note 86, at 49.

⁸⁸ *Id.*

⁸⁹ See Park, *supra* note 86.

⁹⁰ Brayer, *supra* note 86, at 49.

⁹¹ *Id.*

⁹² Lee, *supra* note 72, at 26.

⁹³ *Id.*

⁹⁴ *Id.* at 27.

⁹⁵ *Id.* at 27-28.

⁹⁶ *Id.* at 28.

⁹⁷ *Id.*

hands of a Black woman arguably caused police to act irrationally and dangerously.

iii. Limiting Gun Access Will Make Police Encounters Safer and Ensure Legal Accountability When Police Officers Shoot Black People

Gun control would lead to fewer situations in which Black individuals have a gun, disclose the gun, and yet are still killed. That is, in Philando Castile and Tyisha Miller's situations, it would have been better to simply not have a gun. These types of violent exchanges would be less likely to happen with stricter gun laws. Furthermore, with regards to interactions where police "thought" a Black person had a firearm, stricter gun control may curb the implicit biases held by police. Specifically, if police know that guns are highly regulated, controlled, and difficult to get, they may be less incentivized to use deadly force. Generally speaking, police officers are shot in the United States at higher rates than in other countries with stricter gun control measures.⁹⁸ Even within the United States, police are more likely "to be fatally shot in states with higher levels of gun ownership and weaker gun laws."⁹⁹ Given these facts, a large number of police reportedly have "concerns about their safety" on the job.¹⁰⁰ As Jennifer Eberhardt states, if officers are forced to respond quickly and are fearful, they are more likely to act on implicit biases they hold.¹⁰¹ By controlling guns, one could argue that police officers' fear would be reduced. It may also enable them to act more slowly. These two elements could, as a whole, limit implicit biases used by officers during interactions with Black individuals and make encounters safer.

Gun control would also increase legal accountability in situations where police do wrongfully shoot an unarmed Black person. Broadly speaking, if there is nationwide gun control that makes access to guns very difficult, it may be harder for police to claim that their fear of an armed Black victim is reasonable. Likewise, if very few people have guns and if a police-shooting victim does not in fact have a gun, grand jurors may be more likely to indict

⁹⁸ In the last ten years, 456 police officers were shot and killed in America, 12 were fatally shot in Canada and 3 in Australia. See Nick Wilson and Eugenio Vargas, *Weak Gun Laws Are Hurting Police Officers*, CTR. FOR AM. PROGRESS (June 27, 2022), <https://www.americanprogress.org/article/weak-gun-laws-are-hurting-police-officers/>.

⁹⁹ *Id.* (citing Swedler et al., *Firearm Prevalence and Homicides of Law Enforcement Officers in the United States*, 105 AM. J. PUB. HEALTH 2042-48 (2015)). Police officers have often come out in support for stricter gun control measures and in opposition to gun liberalization efforts. *Id.*

¹⁰⁰ Rich Morin et al., *Behind the Badge*, PEW RSCH. CTR. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/behind-the-badge/> (stating over 80 percent of law enforcement officers report feeling at least somewhat concerned about their safety).

¹⁰¹ Eberhardt, *supra* note 17, at 38:40/1:16:09.

and petit jurors to convict. Gun control could, therefore, result in more justice for Black people killed by police.

*B. Gun Control Could Better Protect Black Americans From Gun Violence*¹⁰²

Strict gun control and enforcement could lead to greater safety for Black Americans with regards to gun homicide and assaults. Stricter enforcement of the laws to eliminate a potential source of violence is a consideration that drove much of Justice Thomas's opinion in *Chicago v. Morales*.¹⁰³ Overall, Black Americans are "disproportionately represented in U.S. firearm homicides (14.6 per 100,000)."¹⁰⁴ More specifically, Black people are ten times more likely to die from gun homicides and "experience 18 times the gun assault injuries of white Americans."¹⁰⁵ Most startling is the fact that Black children and teens are 14 times more likely to die of gun violence than White children and teens are.¹⁰⁶ Finally, gun violence and death are not evenly distributed geographically across America.¹⁰⁷ "In 2015, half of all gun homicides took place in just 127 cities across the country and [were] concentrated in a relatively small number of neighborhoods in these cities, which have historically been under resourced and racially segregated."¹⁰⁸ Death is not the only negative consequence of gun violence; gun violence creates a number of collateral consequences for Black Americans. Studies have shown that exposure to gun violence leads to a number of mental health

¹⁰² While it may be argued that this is more of a public health stance, I believe that safety and its relation to gun control is a "racial justice" issue because Black people are disproportionately killed by guns.

¹⁰³ *City of Chicago v. Morales*, 527 U.S. 41, 99 (1999) (Thomas, J., dissenting) ("Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes.").

¹⁰⁴ Kerry O'Brien, *Racism, Gun Ownership and Gun Control: Biased Attitudes in US Whites May Influence Policy Decisions*, 8(10) PLOS ONE (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3815007/>.

¹⁰⁵ Kristen Ellingboe, *Gun Violence in the Black Community: Myths and Facts*, ALLIANCE FOR GUN RESP. (Mar. 15, 2022), <https://gunresponsibility.org/blog/gun-violence-in-the-black-community-myths-and-facts/>.

¹⁰⁶ *The Impact of Gun Violence on Children and Teens*, EVERYTOWN (Dec. 28, 2021), https://everytownresearch.org/report/the-impact-of-gun-violence-on-children-and-teens/#foot_note_23 (citing *WONDER Online Database: Underlying Cause of Death*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://wonder.cdc.gov> (set search parameters to people ages 0-19 for years 2016-2020)).

¹⁰⁷ Marissa Edmund, *Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color*, CTR. FOR AM. PROGRESS (June 30, 2022), <https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color/>.

¹⁰⁸ *Id.* (citing Aliza Aufrechtig, *Want to Fix Violence in America? Go Local*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2017/jan/09/special-report-fixing-gun-violence-in-america> (last visited Oct. 25, 2022)).

problems (i.e., anxiety, decreased cognitive function, PTSD), affects education, and impacts family stability.¹⁰⁹

The reason for these disparities is that “concentrated gun homicide is tied closely to urban poverty, which tracks inequality, which tracks segregation, which tracks race.”¹¹⁰ In other words, gun violence is largely a result of the anti-Black, institutional racism that has persisted in this country. A way to combat this problem is by controlling and eliminating guns. The empirics regarding gun control and loss of life are convincing. States and counties with less gun ownership and more gun control see far fewer gun assaults and gun deaths.¹¹¹ A reduction in death and gun assault not only contributes to greater overall safety for Black Americans who disproportionately suffer from gun violence but would alleviate many of gun violence’s collateral consequences. Some commentators have used these facts to respond to the argument that guns are necessary for Black Americans to defend themselves. That is because, on balance, the presence of firearms decreases one’s safety and “increases an individual’s risk of injury or death,” particularly because “defensive gun use is rare when compared to harmful gun use,”¹¹² and self-defense is not always particularly effective.¹¹³ Overall, strict gun laws could positively impact Black Americans by increasing safety and reducing gun deaths, from which Black people disproportionately suffer.

C. Black Individuals’ Support of Gun Control May Provide Insight on This Debate

In addition to gun control contributing to greater safety for Black individuals,¹¹⁴ Black people generally support greater gun control measures. This fact is of some importance when determining whether to give greater

¹⁰⁹ See Nick Cotter, *Black Communities are Disproportionately Hurt by Gun Violence. We Can’t Ignore Them*, PUB. SOURCE, <https://projects.publicsource.org/pittsburgh-gun-violence-1/> (citing ROBERT SAMPSON, *GREAT AMERICAN CITY* (2013)); Grace Wong, *PTSD in Black Women Needs Attention Study of South Side Group Says*, CHI. TRIB. (Mar. 23, 2017), <https://www.chicagotribune.com/news/breaking/ct-ptsd-black-women-met-20170322-story.html>; Patrick Sharkey, *The Acute Effect of Local Homicides on Children’s Cognitive Performance*, 107 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 11733, 11736 (2010); Patrick Sharkey, *High Stakes in the Classroom, High Stakes on the Street: The Effects of Community Violence on Students’ Standardized Test Performance*, 1 SOC. SCI. 199, 209 (2014).

¹¹⁰ *Gun Violence is a Racial Justice Issue*, BRADY, <https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue> (last visited Oct. 25, 2022).

¹¹¹ See, e.g., Matthew Miller, *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 J. SOC. SCI. 656, 657, 661 (2007).

¹¹² Ellingboe, *supra* note 105.

¹¹³ See *Gun Threats and Self-Defense Gun Use*, HARV. SCH. OF PUB. HEALTH: HARV. INJURY CONTROL RSCH. CTR., <https://www.hsph.harvard.edu/hicrc/firearms-research/gun-threats-and-self-defense-gun-use-2/> (last visited Oct. 25, 2022).

¹¹⁴ See *supra* notes 103-113 and accompanying text.

weight to the arguments regarding self-defense (presented in Part IV(B)(ii)) or the argument that less guns would allow for a safer community (presented in Part V(B)). Around 80% of Black adults say gun violence is a very big problem.¹¹⁵ Seventy-five percent of Black adults feel that gun laws should be stricter.¹¹⁶ Overall, in stark contrast to Black opposition to strict drug laws, Black individuals overwhelmingly support more gun control. This, in and of itself, is strong evidence that Black individuals believe that some of the safety and police concerns presented in Part V(A)–(B) outweigh considerations regarding possible discriminatory enforcement of gun laws. Indeed, “the decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community.”¹¹⁷ Given that Black people have been inordinately policed and victimized since this country’s founding, their opinion on this subject matters and should be strong evidence of what, on balance, is best for them.¹¹⁸

VI. CONCLUSION

The Supreme Court’s decision in *Bruen* will undeniably lead to the liberalization of gun laws.¹¹⁹ In light of the Court’s recent decision, some have suggested that looser gun control measures will benefit Black individuals, much like how permissive drug laws have benefitted Black individuals by reducing the frequency of police encounters. This Note has attempted to answer the question of whether it logically follows that because drug decriminalization is good for Black Americans, so too would be gun decriminalization. In other words, from a racial justice lens, can one reasonably advocate for the decriminalization of drugs due to its effect on Black individuals, but at the same time, call for stricter gun laws?

¹¹⁵ See Gramlich, *supra* note 8. This is in stark contrast to Black support of easing drugs laws (specifically marijuana laws). See Edwards, *supra* note 7.

¹¹⁶ *Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive*, PEW RSCH. CTR. (Apr. 20, 2021), https://www.pewresearch.org/politics/2021/04/20/amid-a-series-of-mass-shootings-in-the-u-s--gun-policy-remains-deeply-divisive/?utm_content=buffer67f13&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

¹¹⁷ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

¹¹⁸ Dan Kahan & Tracy Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1166 (1998) (“But the willingness of inner-city residents to support this form of law-enforcement nevertheless reflects their judgment that in *today’s* political and social context, the continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police.”).

¹¹⁹ See *supra* Part I and accompanying notes.

As Part IV illustrated, not only would less gun control alleviate the discriminatory effects of stop-and-frisk practices and full searches (which are present in the enforcement of drugs laws), but it would also (1) undermine current felon in possession statutes, which disproportionately harm Black people and (2) ensure that Black individuals are able to defend themselves. Part V, however, casted great doubt on this logical comparison, as gun control measures are (1) supported by Black people and (2) would lead to safer communities and safer interactions with police. Therefore, the case for gun decriminalization is seemingly less straightforward than the case for drug decriminalization. Thus, from a racial justice lens, support for the decriminalization of drugs and the criminalization of guns may, in fact, be compatible.

In trying to reconcile these competing impulses with regards to drugs and guns, it may be helpful to study which gun laws have the greatest discriminatory impact. Specifically, would there be ways to eliminate specific gun laws that have a significantly negative impact on Black individuals, while keeping certain strict gun laws that have not been shown to disparately impact Black individuals?

While this Note focuses solely on gun and drug decriminalization as isolated topics, interesting questions may be raised as to how the two may interact with one another. For example, if only drugs were decriminalized, but guns were not, would the state and its actors merely shift discriminatory practices aimed at marginalizing and criminalizing Black people to gun laws? As rational actors, if society took away the right to enforce one law, police may merely shift enforcement practices on to another law.¹²⁰ In other words, to truly see the benefits of decriminalizing drugs, would we also need to decriminalize guns? This certainly begs the question that was set aside in this Note of whether society needs larger, institutional changes to truly see impactful improvement of unjust or biased conduct.

One other topic not discussed in this Note is the fact that there are other serious considerations, outside of race, that could support asymmetrical positions with regards to drugs and guns. Unlike drugs, the purpose of a gun is to injure and kill. While the collateral consequences of drug use on a person, their family, and their community are great, the inherent purpose of its use is not to inflict pain and violence on others. The senseless death that has occurred from the countless mass shootings every year, the worry

¹²⁰ See, e.g., Bonnie et. al, *Criminal Law* § 1.3 (3rd ed. 2010) (discussing this theory in the criminal context).

children may have going to school or events, and the fear that their parents carry each day, alone, may justify these seemingly incompatible positions.

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