THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 26 | Issue 1

Winter 2023

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NYSRPA V. BRUEN AND NEW YORK: A LOST OPPORTUNITY FOR RACIAL EQUITY IN THE POLARIZING GUN CONVERSATION

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On June 23, 2022, the United States Supreme Court handed down its decision in *New York State Rifle and Pistol Association, Inc. v. Bruen*,[1] which invalidated the "proper cause" requirement of New York's "Sullivan Law," its gun licensing statute. Reactions to this decision were predictably mixed, largely drawn along the regular partisan lines.[2] For those concerned about racial justice, this decision created an opportunity for honest dialogue about how to enhance public safety in a nondiscriminatory way while being consistent with the Supreme Court's

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

[2] The Editorial Board, The Supreme Court Vindicates the Second Amendment, WALL ST. J., https://perma.cc/9KAF-9RWW (June 23, 2022, 7:44 PM); Jon Schwarz, Right-Wing Supreme Court Continues Its "Great Fraud" About the Second Amendment, INTERCEPT (Jun. 24, 2022, 12:01 PM), https://perma.cc/R4YZ-DLSC.

interpretation of the Second Amendment. Unfortunately, this was bound to be a lost opportunity in New York given the resistance to meaningfully acknowledging the need for racial justice in the gun conversation, recent publicity accorded mass shootings coupled with calls for more gun control, the powerful appeal of tough-on-crime politics, and the historically racialized nature of gun law enforcement. Further, New York's replacement statute, which is bound to be challenged in the foreseeable future and likely invalidated as well because of its "sensitive places" provision, does advocates of racial justice no favors.

This Note will be divided into three main parts. Part I will discuss the facts and procedural history of *Bruen*, the argument made in the Black Attorneys of Legal Aid (BALA) Brief, the Court's decision, and potential implications. Part II will examine the existing reasons why the opportunity to promote racial justice in the firearm context will be (if it has not already been) squandered in New York. Finally, Part III will examine the new gun licensing scheme that the state government enacted, concluding that New York's newest firearm statute is a poor attempt to leave the old law as intact as possible.

PART I: THE *BRUEN* DECISION

The *Bruen* decision represents the Supreme Court's first foray into Second Amendment law in over a decade.[3] This Part of the Note will discuss, in the following order: A) the facts and procedural history of *Bruen*; B) the racial justice arguments in the BALA Brief; C) the Court's decision; and D) the real and potential implications of the decision.

A. The Facts and Procedural History of Bruen

Petitioners Brandon Koch and Robert Nash were two New York State residents living in Rensselaer County.[4] Both of them were "law-abiding, adult citizens."[5] Mr. Koch had a firearm license that restricted his ability to carry firearms anywhere except for the purpose of target practice or hunting.[6] His 2017 application to remove said restrictions was largely denied, except that he was then permitted to carry firearms

[3] The Court's last Second Amendment decision was McDonald v. City of Chicago, 561 U.S. 742 (2010). The author is not counting Caetano v. Massachusetts, 577 U.S. 411 (2016), because that case merely vacated a decision that plainly violated the Court's prior precedents.

[4] *Bruen*, 142 S. Ct. at 2124-25.

[5] *Id.*

[6] *Id.*

to and from work.[7] Mr. Nash applied unsuccessfully for an unrestricted carry license in 2014 and again in 2016; he too was only allowed to carry a firearm for hunting and target practice.[8] Petitioners' Koch and Nash efforts were stonewalled due to New York's proper cause requirement, which gave state government officials discretion to deny applicants unrestricted carry licenses should they not, to the liking of those officials, "demonstrate a special need for self-protection distinguishable from that of the general community."[9]

In 2018, Petitioners Koch, Nash, and the New York State Rifle and Pistol Association (NYSRPA) filed suit against the licensing officials for denial of their Second and Fourteenth Amendment rights.[10] In December 2018, the United States District Court for the Northern District of New York dismissed the suit, ruling that New York's licensing law comported with the Second Amendment.[11] In August 2020, the Second Circuit Court of Appeals affirmed the district court ruling in a brief opinion[12] that invoked its most recent decision addressing a challenge to New York's licensing law, *Kachalsky v. County of Westchester*.[13] In April 2021, the Supreme Court granted certiorari, but limited the question before it to whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.[14]

B. The Racial Justice Angle – The BALA Brief

Between the granting of certiorari in April 2021 and the oral argument held in November 2021, dozens of amici briefs were filed in favor of both sides. One of the briefs filed in favor of the plaintiffs was submitted by BALA (of which the author was a representative at the time of the brief's drafting and filing), the Bronx Defenders, and a host of other public defenders.[15] Principally authored by Black attorneys in the Bronx Defenders, the "BALA Brief" documented the racist history of New York's gun licensing statute, illustrating how the law was designed from

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[7] *Id.*

[8] *Id.*

[9] *Id.* at 2123 (quoting *In re* Klenosky, 75 A.D.2d 793 (1980)).

[10] New York State Rifle & Pistol Ass'n, Inc. v. Beach, 354 F. Supp.3d 143 (N.D.N.Y. 2018), aff'd, 818 F. App'x 99 (2d Cir. 2020), rev'd and remanded sub nom. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

[11] *Id.*

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

[13] 701 F.3d 81 (2d Cir. 2012).

[14] New York State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021).

[15] Brief of the Black Attorneys of Legal Aid et al. as Amici Curiae in Support of Petitioners, New York State Pistol & Rifle Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) [hereinafter "BALA Brief"].

its inception to keep guns out of the hands of certain racial groups including African Americans.[16] The brief explained how the intent of the law is effectuated in present times, with most people prosecuted for mere gun possession being Black and Brown.[17] The brief walked through the devastating consequences of discriminatory gun control enforcement, including harsh policing practices, severe criminal penalties, and debilitating collateral consequences.[18] Finally, the brief highlighted the stories of individual citizens who chose to possess and/or carry firearms for self-defense and were met with horrifying outcomes in the criminal judicial system.[19] The brief made no comment regarding the correctness of the Supreme Court's rationale in *District of Columbia v. Heller*,[20] the first case in which the Supreme Court expressly announced an individual right to bear arms; accurate or not, the *Heller* court's holding that weapons possession for self-defense is an individual right backed by the Second Amendment is the law of the land.[21] Because the BALA Brief authors believed that New York's gun licensing scheme impermissibly infringed on that right, the brief called upon the Supreme Court to invalidate the law.[22]

BALA signed onto the brief for a very simple reason: it was the caucus' belief that any right guaranteed by the Constitution of the United States should apply to *all* Americans, regardless of race. The Second Amendment, as interpreted by the Supreme Court, guarantees individual citizens the right to keep and bear arms for self-protection.[23] Putting aside the longstanding academic debate about whether or not the Second Amendment was designed to bestow on an individual the right to bear arms, the Court's interpretation, rightly or wrongly, is the law of the land. As such, this right should apply to *all* Americans, including Black Americans. The Black tradition of keeping and carrying arms for self-defense is deeply rooted in history and endured despite the existence and history of violent crime within the African American community.[24]

However, as the BALA Brief carefully elucidated, New York's firearms law impermissibly hamstrung this right, making the ability to

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[16] *Id.* at 9-15.

[17] *Id.*

[18] *Id.* at 5, 12-17.

[19] *Id.* at 17-31.

[20] 554 U.S. 570 (2008).

[21] *Id.* at 595.

[22] BALA Brief, *supra* note 15, at 6, 33-35.

[23] *See Heller*, 554 U.S. at 595; *see also* McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the Second Amendment is applicable to the states through the Fourteenth Amendment).

[24] *See* NICHOLAS JOHNSON, NEGROES AND THE GUN 86-87, 118, 305-8 (2014).

carry a firearm for generalized self-defense both expensive and dependent on the state's discretion. The result was a reality in which poor people of color, above all, are persecuted for attempting to exercise their Second Amendment rights. To be clear, BALA certainly recognized that gun violence is a serious problem in America and must be curtailed. However, selectively criminalizing the mere possession of firearms is no solution at all. Not only is such a law untenable with the supposed guarantees of the Constitution, but its effectiveness as a public safety measure must be questioned because it only prohibits gun possession among certain segments of the population.

C. The Decision

The Court gave a clear sense of which direction its decision would lean towards during oral arguments in November 2021.[25] On June 23, 2022, to the surprise of almost no one, the Court reversed the lower court decision and struck down New York's statute, finding its proper cause requirement to conflict with the Constitution.[26] With a slip opinion spanning 135 pages in total, *Bruen* was a split decision among the predictable partisan lines, with the six right-wing justices issuing the majority opinion and the three liberal judges dissenting.[27] Purporting to align itself with history, the majority rejected a means-end scrutiny test popularized by lower courts.[28] In its place, the opinion announced a new rule requiring states to prove that its firearms regulation is similar to the types of gun legislation permissibly enacted in the past.[29] The majority opinion reaffirmed the holdings of *Heller* and *McDonald* and rejected the respondents' offering of historical support for the argument that the New York law was constitutional, concluding that the history of total or near-total bans on public carry is sparse at best and nonexistent at worst.[30]

Three justices that joined the majority also wrote concurring opinions.[31] Justice Samuel Alito's concurrence criticized the dissent first for purportedly obfuscating the issue by trumpeting grim statistics regarding gun crimes to distract from the legal question before the court.[32] He then

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[25] *See* Adam Liptak, *Justices' Questions Suggest New York Gun Control Law Is Unlikely to Survive*, N.Y. TIMES (Nov. 3, 2021), https://perma.cc/L9DQ-EH6P.

[26] *See* New York State Rifle & Piston Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[27] *See id.* at 2121.

[28] *See id.* at 2125-28.

[29] *See id.* at 2125-27.

[30] *See id.* at 2135-56.

[31] *See id*. at 2121.

[32] *See id.* at 2157-59.

defended the majority's decision to rule without allowing the case to go to trial, proclaiming that the facts alleged at that point in the proceedings "tells us everything we need on this score."[33] He finally scoffed at the dissent's advocacy for the means-end test the majority rejected, claiming that such a test "places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun."[34] He closed out his concurrence by accusing the dissenting justices of rearguing *Heller* while averring not to.[35]

Justices Brett Kavanaugh and Amy Coney Barrett filed the other concurring opinions.[36] Importantly, Kavanaugh noted that unlike New York, the licensing schemes in those 43 states "do not grant open-ended discretion to licensing officials."[37] He claimed that the decision had no effect on most of the country as 43 states have constitutionally appropriate, "objective" licensing statutes in place.[38] Thus, according to Kavanaugh, New York can fix its statute to comply with the Second Amendment.[39] He concluded his concurrence by reiterating acceptable prohibitions on gun possession as announced by the *Heller* and *McDonald* courts.[40]

Justice Stephen Breyer wrote the dissenting opinion, which Justices Sonia Sotomayor and Elena Kagan joined.[41] The dissent criticized the majority first for deciding the issue without allowing it to go to trial, thereby creating the possibility that it may have "rest[ed] its decision on a mistaken understanding of how New York's law operates in practice."[42] The dissent devoted considerable space in pointing out the woes of gun violence and lamenting how the majority gave such problems short shrift.[43] Perhaps ironically, the dissent somewhat employed a states'-rights view, arguing that the majority decision infringes on the ability of individual states (and counties within New York) to regulate and remedy firearm matters in their respective jurisdictions.[44] The dissent chastised the majority for making sweeping conclusions about the impact of New York's law on the Second Amendment rights of citizens without being able to review the trial-level factual development neces-

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[33] *Id.* at 2159.
[34] *Id.* at 2160.
[35] *See id*. at 2160-61.
[36] *Id*. at 2121.
[37] *Id.* at 2161-62.
[38] *Id.*
[39] *See id.*
[40] *See id.*
[41] *See id.* at 2121.
[42] *Id*. at 2164.
[43] *See id.* at 2164-68.
[44] *See id*. at 2167-70.

sary to substantiate those conclusions.[45] The dissent further admonished the court for ditching means-end scrutiny—both the test used by the 11 federal circuit courts of appeals to speak on the question and the method by which impositions on other constitutional rights are assessed—in favor of a "rigid history-only approach."[46] The dissent then concluded with its own lengthy historical analysis that both illustrated a rich tradition of regulating the carrying of firearms and impugned the majority for ignoring and scoffing at the respondents' offer of historical proof.[47]

D. Real and Potential Implications of the Decision

The *Bruen* decision is truly a mixed bag. On the one hand, it invalidated a statute born out of a desire to keep firearms out of the hands of certain racial groups in New York, including African Americans. Enforcement of that law since its enactment in 1911 stayed true to that purpose. There is at least some historical precedent for people of color being denied firearm licenses for self-defense in New York; and criminal prosecution of poor people of color for mere firearms possession in New York has been racially discriminatory and devastating.[48] Such a law needed to either change or be overturned; and if it took a high court decision by an uber-conservative majority to make that happen, then so be it.

That said, the dissent raised valid criticisms of the majority opinion, most importantly of which is the majority's needless rejection of what it called the "means-end" test.[49] The high court's denunciation of scrutinizing the means chosen to promote governmental interests within the Second Amendment sphere seems rather unnecessary; the majority could have reached the same outcome by concluding that New York's statute went beyond what was necessary to accomplish what could certainly be described as an important interest at a minimum. That the high court dismissed the relevance of examining the government's interest or the means chosen is disturbing. It is one thing to recognize the consequences of gun violence while averring that New York went too far in purporting to address the problem (assuming for the moment that the race-neutral purpose of curtailing gun violence was the driving force behind the Sullivan Law). It is quite another thing to proceed as if said consequences matter not at all.

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[45] *See id*. at 2170-74.
[46] *Id*. at 2174-81.
[47] *See id*. at 2181-90.
[48] See BALA Brief, *supra* note 15, at 9-15.
[49] *Bruen*, 142 S. Ct. at 2125-27.

Beyond that, the "proper cause" requirement was just one problem with New York's gun licensing law. As far as racial justice goes, the other problems were the prohibitive licensing costs and the "good moral character" requirement. The expensive application fees create an impediment for poor people to exercise their Second Amendment rights; and "good moral character" determinations by law enforcement have historically been and will likely continue to be fraught with racial bias.[50] *Bruen* does nothing to address either of these issues.

Nonetheless, the *Bruen* decision rendered New York's gun licensing statute invalid, thereby giving New York a chance to implement a regulatory scheme that reduces racial bias and adequately protects the right of Black and Brown Americans to bear arms in self-defense.

PART II: EXISTENT FACTORS EXPLAINING WHY THE OPPORTUNITY FOR RACIAL JUSTICE WILL BE LOST

The *Bruen* decision forced the New York legislature back to the drawing board to figure out what law it could craft to conform with the Second Amendment's command. New York had an opportunity to create sensible gun control legislation while ensuring that the Second Amendment rights of Black and Brown people are as equally protected as those of white Americans. Unfortunately, this will ultimately be a lost opportunity. Before New York's newly enacted law, four realities hinted that New York's government would squander this potentially pivotal moment: A) the negative response to the BALA Brief from both conservative and liberal circles; B) the powerful appeal of tough-on-crime politics; C) the recent spate of mass shootings; and D) the white supremacist tradition of precluding and punishing Black ownership of firearms.

A. The Response to the BALA Brief

One indication that this would be a lost opportunity was the reception the BALA Brief received. On the political left, the response ranged from respectful disagreement[51] to the hurling of insults;[52] but the general tone was that the brief was making an unholy alliance with the right wing. For example, Elie Mystal of *The Nation* offered a relatively fair response to the brief but concluded his response with the following:

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[50] *See* BALA Brief, *supra* note 15, at 11-12.

[51] *See, e.g.*, Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, NATION (July 26, 2021), https://perma.cc/KY5Z-DKNQ.

[52] *See, e.g.*, Michele Dauber (@mldauber), TWITTER (Nov. 29, 2021 11:48 AM), https://perma.cc/TJV6-KN4Q.

> I hope the people behind this brief, who do critical work and are bringing an important issue to light, can live with the consequences of lying with these bedfellows. If they win, they will have made it easier for some of their clients to purchase firearms and take them out on the streets without being questioned by police. But when these public defenders come crying to the Supreme Court because cops decide to shoot their clients first and ask questions later, they'll find their new upstate friends are nowhere to be found.[53]

In a far less tempered response, former Manhattan District Attorney candidate Tali Farhadian Weinstein attacked the brief for its "shock[ing] . . . nihilism that echoes the far-right champions of the men we have seen on trial."[54] It was almost as if the merits of the racial justice argument itself was largely ignored by persons and groups on the political left. The idea that African Americans should have the same Second Amendment rights as others—rights that Black people have insisted upon for over a century since the end of the Civil War[55]—is reduced to a far-right talking point by people who are supposed to be progressive.

Of course, aggravating the chilly reception received from the political left was the seemingly positive response to the brief from the political right. An op-ed by the conservative Wall Street Journal's Editorial Board praised the brief as "remarkable" and suggested the coming of a division within "America's gentry progressives."[56] The brief received favorable shoutouts from several other conservative publications, such as the Washington Free Beacon[57] and America's First Freedom, an official journal of the National Rifle Association (NRA).[58] Of course, these very same publications and entities have typically published articles either subtly or openly opposing racial justice and the persons who advocate for them.[59] The NRA in particular has generally been quiet about

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[53] Mystal, *supra* note 52.

[54] Tali Farhadian Weinstein, *Kyle Rittenhouse, Travis McMichael and the Problem of 'Self-Defense.'*, N.Y. TIMES (Nov. 29, 2021), https://perma.cc/HZ6M-8AZ8.

[55] Nicholas Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 Conn. L. Rev. 1491, 1516-53 (2013).

[56] The Editorial Board, *Progressive Gun-Control Crackup*, WALL ST. J. (Jul. 23, 2021, 6:43 PM), https://perma.cc/NR22-8CPB.

[57] Kevin Daley, *Black Lawyers Group Says New York Concealed Carry Restrictions Are Racist*, WASHINGTON FREE BEACON (Oct. 29, 2021, 5:00 AM), https://perma.cc/H8P8-GNYD.

[58] Nicholas Johnson, *Is the Left's Gun-Control Faction Breaking Up?*, AMERICA'S 1ST FREEDOM (Oct. 31, 2021), https://perma.cc/355L-7Z6B.

[59] As one example, the Washington Free Beacon reported on a bill that would require the Federal Reserve to prioritize racial equity in its practices. The article sets forth what the

racial justice issues within gun discourse; for example, the NRA had nothing of relevance to say regarding the police killings of Alton Sterling and Philando Castile, two legally armed Black men.[60] Given the political right's documented aversion to genuinely discussing matters regarding race, their endorsement of a racial justice argument in this context appears duplicitous and self-serving in progressive circles.[61]

B. The Powerful Appeal of Tough-on-Crime Politics

Also likely to kill any chance of honest racial justice discourse in the gun context is the powerful appeal of tough-on-crime politics. Tough-on-crime politics has been around for over five decades and continues to persist in New York despite the passage of criminal law reform legislation and increased conversation about being anti-racist. This subsection will first examine the history of tough-on-crime politics nationally and in New York, and then will give contemporary examples of how it persists to this day.

1. The History of Tough-On-Crime Politics

Tough-on-crime politics was the national response to the civil rights movement, particularly the campaigns of civil disobedience and the dozens of urban rebellions during the 1960s.[62] Richard Nixon popularized the "law and order" dog whistle[63] during his first successful pres-

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bill purports to do and then, to underscore the author's view that such a bill is both unimportant and counterproductive, notes that the bill passed the House "as the economy is on the brink of recession, as inflation reaches numbers not seen in 40 years, and as the Fed predicts that more than a million Americans could lose their jobs next year." Continuing in that vein, the author writes that with Biden as president, "the government has prioritized 'diversity, equity, and inclusion,' left-wing policies and programs that focus on race but view 'equality' as inadequate at addressing systemic racism. Biden's Department of Homeland Security, for example, has emphasized such measures even as illegal border crossings and opioid trafficking skyrocket." *See* Robert Schmad, *House-Passed 'Woke Mandate' Would Force Federal Reserve to Prioritize Racial Equity*, WASHINGTON FREE BEACON (Jun. 23, 2022, 2:00 PM), https://perma.cc/GG4G-G63W.

[60] CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA, 3 (2021).

[61] Carl Takei & Paige Fernandez, *Does the Second Amendment Protect Only White Gun Owners*, ACLU (Dec. 5, 2018), https://perma.cc/W99V-NQR8.

[62] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 40-41 (2010); *See* IAN HANEY LOPEZ, DOG WHISTLE POLITICS 23-25 (2014).

[63] The term "dog whistle politics" refers to the use of racially coded and facially neutral phrases to communicate racist messages to certain segments of the population. It usually works by associating certain phrases with certain racial groups and then using such phrases to appeal to particular audiences while appearing race-neutral. For a full treatment of this topic, *see* LOPEZ, *supra* note 63.

idential run and his presidency, effectively casting Black people as the face of crime.[64] This approach had broad appeal among the majority of working-class white voters who grew tired of the civil rights movement and the federal government's perceived sympathy for African Americans.[65] What followed were decades of merciless, career-driven politicians from both parties promulgating ruthless criminal and social policies disproportionately harming Black people.[66] What also followed was an unbridled love affair between white Americans and law enforcement that continues to this day.[67]

At the federal level, successful presidential candidates from both parties prevailed by styling themselves as being tough on crime while portraying their opponents as sympathetic to criminals. As an example for the Republican Party, 1988 presidential candidate George H.W. Bush hit his opponent Michael Dukakis with the "Willie Horton ad,"[68] a classic symbol of dog whistle politics that emphasized Black male criminality and white victimhood.[69] On the Democratic side, Bill Clinton paused his first presidential campaign to oversee the execution of a severely mentally disabled Black man, and then bragged after the execution that "no one can say I'm soft on crime."[70] Punitive laws enacted included the Anti-Drug Abuse Act of 1986, which implemented strict penalties for possessory drug offenses and created the infamous disparity between sentencing for crack cocaine and powdered cocaine;[71] and the Violent Crime Control and Law Enforcement Act of 1994, the notorious 1994 crime bill.[72] The United States Supreme Court gave the government wide latitude to pursue draconian laws and policing practices, narrowing both the constitutional rights of persons charged with crimes

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[64] *Id.* at 23-25; ALEXANDER, *supra* note 62, at 40-41.

[65] *See* LOPEZ, *supra* note 62, at 25-27.

[66] *See* ANDERSON, *supra* note 60, at 140-41.

[67] *See generally* MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 51 (2005).

[68] Willie Horton Political Ad 1988, YOUTUBE (Oct. 27, 2006), https://youtu.be/EC9j6Wfdq3o.

[69] Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always be the Reference Point for Dog-whistle Racism*, VOX (Dec. 1, 2018, 4:10 PM), https://perma.cc/L7NJ-NN65.

[70] Marc Mauer, *Bill Clinton, "Black Lives" and the Myths of the 1994 Crime Bill,* MARSHALL PROJECT (Apr. 11, 2016, 7:15 AM), https://perma.cc/738X-Q8LY.

[71] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 801 note).

[72] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (codified at 42 U.S.C.A. § 1301 note).

and the remedies available to said persons for constitutional transgressions.[73]

In New York, tough-on-crime policies thrived. In fact, New York led the nation in enacting draconian criminal laws; it was New York governor Nelson Rockefeller who first proposed life sentences for non-violent drug offenders in the early 1970s.[74] Governor Rockefeller's new position was a drastic change in policy from where he stood for most of his governorship, believing that drug abuse was a social problem.[75] Despite criticism from drug treatment experts, it passed overwhelmingly in the state legislature and would serve as a model for laws all around the country, including at the federal level.[76] Put another way, New York led the way in America's so-called War on Drugs.

From the mid-1960s onward, New York also aggressively criminalized persons for mere possession of a firearm, particularly Black and Brown people. While the Sullivan Law itself was enacted in 1911, the New York legislature expanded the reach of the statute in the 1960s and 1970s. Amongst the additions to the law include a number of statutory presumptions that increase culpability, including an automobile presumption, a home presumption, and the presumption of illegal intent whenever a person possesses a firearm without a license.[77] Moreover, a person is deemed to possess a loaded firearm simply if they have a firearm and ammunition at the same time, even if the firearm itself does not have any bullets in it.[78] These changes allowed for increased prosecution for the more serious firearm offenses in New York.[79]

2. Tough-On-Crime Politics in Contemporary New York

Policing practices in New York have been geared towards surveilling Black and Brown people and keeping weapons out of their hands. From the passage of the Sullivan Law to the present, police officers would routinely stop Black and Brown males and search them for weapons.[80] Broken windows policing[81] has been promoted by both New York

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[73] See ALEXANDER, *supra* note 62, at 60-68; Michael D. Cicchini, *The Collapsing Constitution*, 42 HOFSTRA L. REV. 731, 732-41 (2014); *See also* Zamir Ben-Dan, *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, 73 RUTGERS U. L. REV. 1373, 1422-23 (2021).

[74] *See* Brian Mann, *The Drug Laws That Changed How We Punished,* NPR (Feb. 14, 2013, 3:04 AM), https://perma.cc/HA5E-YHRF.

[75] *Id.*

[76] *Id.*

[77] N.Y. PENAL LAW § 265.15 (McKinney 2022).

[78] N.Y. PENAL LAW § 265.00(15) (McKinney 2022); People v. Gordian, 952 N.Y.S. 2d 46 (2d Dep't. 2012).

[79] BALA Brief, *supra* note 15, at 7-8.

[80] *Id.* at 10, 13.

politicians and law enforcement for the past 40 years and counting.[82] In New York City in particular, Mayor Rudy Giuliani organized the New York Police Department (NYPD)'s Street Crimes Unit, which became infamous for its aggressive policing tactics and mistreatment of young men of color.[83] Following Giuliani was three-term mayor Michael Bloomberg, whose stop-and-frisk program led to over four million stops of Black and Brown persons within eight years, with nearly 90 percent of stops yielding no weapons.[84] Bloomberg's ideology, in his own words, captures the belief of many Americans:

> 95% of your murders and murderers and murder victims fit one M.O. You can just take the description and Xerox it and pass it out to all the cops. They are male minorities 15 to 25 . . . . That's true in New York. That's true in virtually every city in America. And that's where the real crime is. You've got to get the guns out of the hands of the people that are getting killed . . . . People say, 'Oh my God, you are arresting kids for marijuana who are all minorities.' Yes, that's true. Why? Because we put all the cops in the minority neighborhoods. Yes, that's true. Why'd we do it? Because that's where all the crime is. And the way you should get the guns out of the kids' hands is throw [sic] them against the wall and frisk them.[85]

The number of documented stop-and-frisks fell after a federal court declared the program unconstitutional in 2013,[86] but police still routinely stop and search Black and Brown people without reasonable suspicion.[87] Additionally, the NYPD has increased its "gang policing" practices, creating a secretive database composed almost entirely of young

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[81] Broken windows is the "crime theory" that purports that lenient or lack of enforcement of petty offenses causes people to commit more serious crimes. *End Broken Windows Policing*, CAMPAIGN ZERO (Sep. 22, 2022), https://perma.cc/LTQ3-QKJ5.

[82] Zamir Ben-Dan, *Reimagining Justice: People v. Charles and the Myth of Justice Without Police Accountability in New York City*, 45 N.Y.U. REV. L. & SOC. CHANGE 509, 519-20 (2022).

[83] David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES (Feb. 15, 1999), https://perma.cc/T9UC-NW4E; William K. Rashbaum & Al Baker, *Police Commissioner Closing Controversial Street Crimes Unit*, N.Y. TIMES (Apr. 10, 2002), https://perma.cc/M243-LTWV.

[84] Floyd v. City of New York, 959 F.Supp.2d 540, 558 (S.D.NY. 2013).

[85] Bobby Allyn, *'Throw Them Against The Wall and Frisk Them': Bloomberg's 2015 Race Talk Stirs Debate*, NPR (Feb. 11, 2020, 11:52 AM), https://perma.cc/AS72-M3XA.

[86] Ben-Dan, *supra* note 82, at 526.

[87] Alice Speri, *The NYPD Is Still Stopping and Frisking Black People at Disproportionate Rates*, INTERCEPT (Jun. 10, 2021, 7:00 AM), https://perma.cc/45LM-KT7R.

Black and Brown people, many of whom are not actual gang members.[88] The NYPD disbanded the anti-crime unit during the George Floyd fever in 2020,[89] only to reinstate it in 2022 as an explicit anti-gun troop.[90] Current mayor Eric Adams, who was elected mayor of New York City in November 2021 after having ran a law-and-order, tough-on-crime campaign, has gotten comparisons to Rudy Giuliani for his strict and passionate adherence to tough-on-crime politics.[91]

The powerful appeal of tough-on-crime politics can be illustrated using the criminal pretrial reforms New York enacted in April 2019. Implemented in January 2020, those reforms were designed to bring major changes to New York's bail, discovery and speedy trial statutes, making the criminal judicial process fairer for criminal defendants.[92] However, the press, law enforcement, prosecutors, and even members of the judiciary lambasted the laws as being overly sympathetic to criminals, dangerous to complainants, and too restrictive of judges' ability to hold accused persons accountable for whatever they were accused of.[93] Despite the lack of evidence that bail reform caused increases in crime, the fear mongering this coalition of critics brought to bear was enough to pressure Democratic legislators running for reelection in November 2020.[94] It was also enough for Governor Andrew Cuomo to vow to roll back bail reform as part of the budget vote for April 2020.[95]

The first rollback in April 2020 predictably made the bail laws harsher, but also silently altered the discovery statutes. The new bail laws expanded the list of conditions judges could set on pretrial release, added more crimes to the list of bail eligible offenses, and set forth additional criteria in which a person who is not charged with a qualifying offense can nonetheless be jailed prior to trial.[96] Kalief Browder's[97] har-

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[88] *See* JOSMAR TRUJILLO & ALEX S. VITALE, GANG TAKEDOWN IN THE DE BLASIO ERA: THE DANGERS OF 'PRECISION POLICING', POLICING AND SOCIAL JUSTICE PROJECT 2-3, 6, 8, 13-15 (2019), https://perma.cc/2HQX-7ER3.

[89] Ali Watkins, *N.Y.P.D. Disbands Plainclothes Units Involved in Many Shootings*, N.Y. TIMES (June 15, 2020), https://perma.cc/UU3V-X75R.

[90] Erin Durkin, *Mayor Eric Adams Revives Controversial NYPD Unit Responsible for Chokehold Death of Eric Garner*, POLITICO (Mar. 16, 2022, 2:03 PM), https://perma.cc/9CL2-Q64N.

[91] *See, e.g.*, Josmar Trujillo, *The Black Giuliani*, COPWATCH MEDIA (Mar. 28, 2022), https://perma.cc/LM5H-HCA3.

[92] Zamir Ben-Dan, *When True Colors Come Out: Pretrial Reforms, Judicial Bias, and the Dangers of Increased Discretion*, 64 HOW. L. J. 83, 87-107 (2020).

[93] *Id.* at 107-08.

[94] *Id.* at 139.

[95] *Id.* at 149-50.

[96] *Id.* at 151-54.

[97] Kalief Browder was arrested for robbery at 16 and spent three years on Rikers Island awaiting a trial that never came. While detained, he was beaten by inmates, abused by

rowing experiences with the judicial system, coupled with his tragic suicide, provided a major motivation for the initial reforms;[98] but the laws were scaled back to such a degree that, had the rollbacks been in existence at the time of Kalief Browder's case, it would likely have made no difference in the outcome.[99] The new discovery statutes permit prosecutors to withhold information they were previously required (at least on paper) to turn over, such as 9-1-1 calls and adequate contact information as opposed to portal codes.[100]

Even with the first set of rollbacks, politicians on both sides pushed for more. During the 2020 George Floyd protests, Manhattan District Attorney Cyrus Vance called for a suspension of the bail laws so that judges could set bail on (or even remand) protesters.[101] Democratic lawmakers from Long Island were defeated at the ballot box; their Republican opponents made bail reform their rallying cry.[102] Within the first few months of his term, Mayor Eric Adams publicly pushed for further rollbacks to bail reform as well as changes to Raise the Age.[103] Democratic lawmakers rebuffed him at first,[104] but with the national crime rate rising and Republicans successfully weaponizing fear against them, positions in Albany began to change.[105] The common theme be-

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guards, and subjected to isolation for more than half of his time in jail. A couple years after he was finally released and his case dismissed, he committed suicide; Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), https://perma.cc/5VXJ-U8CY.

[98] Ben-Dan, *supra* note 92, at 95, 104-05.

[99] Ben-Dan, *supra* note 92, at 153.

[100] Ben-Dan, *supra* note 92, at 155-56.

[101] Brendan Krisel, *Manhattan DA Wants NYC Looting Suspects Held Without Bail: Report*, PATCH (June 4, 2020, 4:25 PM), https://perma.cc/6J6H-AYMM.

[102] Joseph Spector & Anna Gronewald, *New York Democrats Pare Back Nation-Leading Bail Reform Amid Crime Wave,* POLITICO (Apr. 11, 2022, 3:45 PM), https://perma.cc/6V6H-CRUX.

[103] "Raise the Age" was legislation that New York enacted requiring 16- and 17-year-olds to be prosecuted in Family Court for any criminal offenses, absent the fulfillment of carefully delineated exceptions. For more information, *See Raise the Age,* OFF. JUST. INITIATIVE, N.Y. STATE UNIFIED COURT SYS., https://perma.cc/9VH4-QDNB (last visited Sept. 30, 2022). *See also* Zach Williams, *Eric Adams Calls for Bail Reform Rollbacks at Virtual State Budget Hearing*, CITY & STATE N.Y. (Feb. 9, 2022), https://perma.cc/RWV6-3PQW; Gwynne Hogan, *Adams Once Lobbied for Raise the Age Law – Now His Push To Roll It Back Faces Headwinds In Albany*, GOTHAMIST (Jan. 27, 2022), https://perma.cc/U899-Y7TZ.

[104] *See generally* Dana Rubinstein, Grace Ashford & Jeffery C. Mays, *Mayor Adams Clashes With Albany Democrats over His Crime Plan*, N.Y. TIMES (Feb. 9, 2022), https://perma.cc/J5T5-TF5Q.

[105] *See generally* Harry Siegel, *To a Hammer, Everything Looks Like Bail: Cuomo, Hochul and Our Dishonest Criminal Justice Debate*, N.Y. DAILY NEWS (Mar. 19, 2022, 5:00 PM), https://perma.cc/4RP6-JYM4; Kathy Hochul & Brian Benjamin, *Gov. Hochul and Lt. Gov. Benjamin: Don't Blame Bail Reform; Do Improve It*, N.Y. DAILY NEWS (Mar. 23, 2022, 12:45 PM), https://perma.cc/M3QD-TSRK.

hind all of this was the continuous fear of rising crime and the dread of being labeled as soft on crime.[106]

Democratic lawmakers and Governor Kathy Hochul eventually promoted and passed additional rollbacks to bail reform in April 2022.[107] The new bail law again expanded the circumstances under which an accused person could have bail set on them.[108] In keeping with the times, there was a particular focus by the legislature on amending the law to permit setting bail on accused persons where any part of their case or any criminal past they may have involved a firearm.[109] There were efforts to quietly but significantly gut discovery reform as well; a coalition of politicians and district attorneys tried to lessen prosecutorial responsibilities and essentially eliminate consequences for noncompliance.[110] Thankfully, such efforts failed;[111] but the fact that modifications were even proposed, let alone promoted at the highest levels of state government, speaks to the tough-on-crime, anti-defendant culture that has pervaded the state for decades.

Tough-on-crime politics is very much alive and well in New York, and it is still a viable strategy for winning a political race. Promoting Second Amendment rights for Black people, a demographic long considered to be associated with crime, is inconsistent with tough-on-crime politics and may very well be political suicide.

C. Recent Mass Shootings

Another indication that the opportunity for racial justice in the gun conversation will be lost is the recent spate of mass shootings in America. Mass shootings have been on the rise in recent years, with historic numbers in 2020 and 2021.[112] There were more mass shootings over the last five years than any five-year period going back to 1966.[113] At least

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[106] *See generally* Joseph Spector & Anna Gronewald, *New York Democrats Pare Back Nation-leading Bail Reform Amid Crime Wave,* POLITICO (Apr. 11, 2022, 3:45 PM), https://perma.cc/JX52-VPEG.

[107] Luis Ferre-Sadurni & Grace Ashford, *New York Toughens Bail Law in $220 Billion Budget Agreement*, N.Y TIMES (Apr. 7, 2022), https://perma.cc/S4XG-N68N.

[108] *Id.*

[109] See, e.g., N.Y. CRIM. PROC. LAW § 510.10(1)(h), which now includes as a bail factor "[t]he principal's history of use or possession of a firearm."

[110] PETER MITCHELL ET AL., , THE LEGAL AID SOC'Y, PRACTICE ADVISORY–DISCOVERY AND "KALIEF'S LAW" CHANGES 1, 1 (Apr. 13, 2022), https://perma.cc/G8QY-HYXT.

[111] *Id.*

[112] Saeed Ahmed, *Halfway Through Year, America Has Already Seen at Least 309 Mass Shootings*, NPR (July 4, 2022, 3:46 PM), https://perma.cc/C563-C4VE.

[113] Anastasia Valeeva, et al., *What You Need to Know About the Rise in U.S. Mass Shootings*, MARSHALL PROJECT (July 6, 2022), https://perma.cc/AUL5-9DZK.

one of the shootings this year was racially motivated;[114] another shooting happened in an elementary school.[115] In the first half of 2022, there were 309 mass shootings, putting this year on track to being the third straight year to have over 600 shootings.[116]

In light of all of the mass shootings, there has been increased public support for gun control and strengthening firearm restrictions. A majority of Americans, and a majority of Republicans, favor more stringent gun regulation.[117] Seventy percent of Americans view gun control as more important than protecting the right to own firearms.[118] Overwhelming majorities of Americans favor universal background checks and "so-called red flag laws," statutes that allow for the temporary seizure of guns from a civilian deemed to be dangerous by a court.[119] After many of the mass shootings that occurred, politicians (usually Democrats) and the press called for increased gun control; and for the first time in decades, Congress passed gun control legislation that the sitting president signed into law.[120] Many have noted such legislation may not have prevented some of the most recent mass shootings,[121] but the fact that any legislation was passed is noteworthy.

Given the mood of the country and the priorities of voters, society and policymakers in New York are unlikely to give much attention to the idea of protecting the rights of Black people to possess arms in self-defense.

D. The White Supremacist Tradition of Precluding and Punishing Black Ownership of Firearms

Finally, the opportunity for honest dialogue about racial justice in the gun conversation will be lost because it conflicts with the centuries-old tradition of white society keeping Black people disarmed. From the

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[114] Eric Levenson, et al., *Mass Shooting at Buffalo Supermarket was Racist Hate Crime, Police Say,* CNN (May 16, 2022, 2:47 AM), https://perma.cc/K2VF-QHVT.

[115] Edgar Sandoval, *Inside a Uvalde Classroom: A Taunting Gunman and 78 Minutes of Terror*, N.Y. TIMES (July 12, 2022), https://perma.cc/8R2F-D9RW.

[116] Ahmed, *supra* note 112.

[117] *Factbox: Americans Favor Changing Gun Laws, Even if Congress May Not Act*, REUTERS (May 26, 2022, 6:20 PM), https://perma.cc/66SZ-W7PZ.

[118] *Three in Five Americans Disapprove of Biden's Handling of Economic Recovery*, IPSOS (June 5, 2022), https://www.ipsos.com/en-us/news-polls/three-in-five-americans-disapprove-of-bidens-handling-of-economic-recovery (on file with CUNY Law Review).

[119] REUTERS, *supra* note 117.

[120] Emily Cochrane & Zolan Kanno-Youngs, *Biden Signs Gun Bill into Law, Ending Years of Stalemate*, N.Y. TIMES (June 25, 2022), https://perma.cc/3HM5-TGXU.

[121] Laura Romero & Dr. Mark Abdelmalek, *New Gun Legislation won't Eliminate Mass Shootings but will Still Save Lives*, ABC NEWS, *(*July 8, 2022, 6:14 PM), https://perma.cc/EW83-G57M.

days of chattel slavery to the present times, the white power structure has consistently sought to preclude and punish Black ownership of firearms. New York's history of banning firearms fits within this larger tradition. The rationale behind such efforts has been an enduring fear that African Americans will use such weapons against white people either in the name of revolution or for self-defense purposes, either of which gravely threaten white supremacy.[122] In the last few decades, a new school of thought emerged among so-called progressives, one that reeks of paternalism: a belief that poor African Americans in particular cannot be trusted with firearms and should instead rely on the government for protection.[123]

The tradition of banning firearm possession of Black Americans began during chattel slavery and both predated and postdated the Second Amendment. Virginia, South Carolina, Georgia and other states passed statutes during the 1700s that barred Black people from owning firearms.[124] Such proscriptions were not confined to the south; in northern territories such as New Hampshire, Massachusetts, New York, and New Jersey, Black people were banned from possessing guns and from military service.[125] White militias in the South routinely searched the homes of Black people for firearms.[126] In the rare instances when Black people were commissioned to serve in the military during war time (at the behest of the white power structure), they were immediately dismissed from service and disarmed once the conflict ended.[127]

The tradition of prohibiting Black gun ownership continued after chattel slavery ended well into the twentieth century during the Civil Rights Movement. Immediately following the end of the Civil War, several southern states enacted Black Codes, a set of punitive laws governing the conduct of newly emancipated African Americans.[128] A consistent component of the Black Codes was the ban on Black gun

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[122] ANDERSON, *supra* note 60, at 12 ("As early as 1639, Virginia prohibited Africans from carrying guns because 'what white Southerners feared the most . . . [was] an armed black man unafraid to retaliate against both the system of slavery and those who fought to defend it.'"); 47 ("Ironically, the Age of Revolution contributed greatly to the foreboding threat of being overtaken, ruled, or killed by Black people."); 89 ("A white woman in Nashville recalled in horror the sight of a 'brigade of *negroes* uniformed and equipped [that] paraded our streets to day. Oh how humiliating,' she exclaimed. Beyond humiliating . . . was the frightening possibility . . . that these '[n-----s]' were being trained 'in our midst to kill and destroy' whites.").

[123] JOHNSON, *supra* note 24, at 124.

[124] ANDERSON, *supra* note 60, at 5, 12, 14-17.

[125] *Id*. at 18-19.

[126] *Id*. at 34-35.

[127] *Id*. at 64-66, 68-69.

[128] RICHARD WORMSER, THE RISE AND FALL OF JIM CROW, 8 (2021).

ownership.[129] Following the ratification of the Fourteenth Amendment in 1868, the Black Codes could no longer stand, as they conflicted with the amendment's equal protection clause.[130] In response, states in the South wrote race-neutral laws that in application targeted Black people and excluded them from possessing firearms.[131] Northern states, with New York leading the way (yet again), enacted gun-permit statutes that gave law enforcement discretion over who was allowed to own a firearm and who was not.[132] Keeping guns out of the hands of people of color was consistently a motivating factor in enacting such statutes.[133] Private gun shop owners refused to sell firearms and ammunition to Black people,[134] and both governments at the local, state, and federal levels routinely banned and criminalized Black gun ownership.[135] Violence by both white citizens and government officials was also central to taking and keeping firearms out of Black hands.[136]

The efforts to disarm Black people intensified during the Black Power Movement. The sight of Black Panther Party members openly carrying firearms and standing off with the police frightened white America, as well as African Americans committed to nonviolent activism.[137] That the Panthers followed the law when carrying guns made no difference; California banned the open carry of firearms in the state, and the federal government would soon enact gun control legislation as well.[138] The NRA supported such laws[139], further proof that the NRA is selective about whose gun ownership rights are important—and that its newfound "gun control is racist" argument is disingenuous. Helping to feed the frenzy to criminalize Black gun ownership—and to place civil

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[129] *See, e.g.*, ANDERSON, *supra* note 60, at 85-86.

[130] *See, e.g.*, COBB, THIS NONVIOLENT STUFF'LL GET YOU KILLED, 45 (2014); Johnson, *supra* note 24, at 81-83.

[131] *See, e.g.,* Watson v. Stone, 4 So. 2d 700, 523-24 (Fla. 1941).

[132] *See, e.g.*, J. Baxter Segall, *The Curse of Ham: Disarmament Through Discrimination - The Necessity of Applying Strict Scrutiny to Second Amendment Issues In Order to Prevent Racial Discrimination by States and Localities Through Gun Control Laws*, 11 LIBERTY U. L. REV. 271, 294-95 (2016); Nicholas Gallo, *Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness*, 99 N.C. L. REV. 529, 534-35; 555-56 (2021).

[133] *See generally*, Segall, *supra* note 132; Gallo, *supra* note 132.

[134] *See, e.g.*, COBB, *supra* note 130, at 183; *see also*, JOHNSON, *supra* note 24*,* at 107, 164.

[135] JOHNSON, *supra* note 24, at 180-181 ("The crime of carrying a concealed weapon, enforced primarily against Negroes, was, by the turn of the [twentieth] century, one of the most consistent methods of dragooning blacks into the system."), 168.

[136] COBB, *supra* note 130, at 45, 58-59, 73-74; JOHNSON, *supra* note 24, at 94.

[137] ANDERSON, *supra* note 60, at 132.

[138] *Id.*, at 133-40.

[139] *Id.*

rights activists and groups such as the NAACP on the side of gun control—was the news media's promotion of Black criminality and its hyperfocus on "Black-on-Black crime."[140]

The fear of Black firearm ownership endures among progressives and civil rights groups to this day. Elie Mystal lamented that the solution posited by the BALA Brief—as he interpreted it—will "lead to more gun deaths generally, and more Black and brown deaths at the hands of law enforcement specifically."[141] The NAACP amicus brief in support of the respondents featured a whole section about how laws like New York's are needed to protect Black lives from violence.[142] Inherent in these arguments is the faulty belief that gun control saves Black lives, a claim that does not hold water.[143] Beyond that, what arguments like these ultimately amount to is Black people should *not* push for their Second Amendment rights because doing so would endanger their own lives. By that logic, African Americans should never have rebelled against slavery, tried to vote, demanded integration and equality, or insisted on their dignity and self-respect in any context. Obviously, traditional racial justice progressives are unlikely to believe that Black people should have accepted injustice in any of those areas, so the fear they have of Black firearm ownership is a curious fear indeed.

In any event, white America has a long history of laboring tirelessly through legal and extrajudicial means to keep Black people disarmed. Over the last few decades, many progressives—many African American progressives in particular—have aligned themselves with these efforts (although not necessarily with the white supremacist rationale behind these efforts). Given this history, promoting the idea that Black people should be allowed to own guns to the same extent as white citizens is unlikely to find many open ears.

PART III: NEW YORK'S NEWEST GUN LAW

In response to the *Bruen* decision, the New York legislature hurriedly passed a new gun licensing scheme, and New York governor

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[140] *Id.* at 140-41.

[141] Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, NATION (Jul. 26, 2021), https://perma.cc/YV69-VAAZ.

[142] NAACP Brief for Corlett as Amicus Curiae Supporting Respondents, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) at 14-19.

[143] JOHNSON, *supra* note 24, at 312-13. ("The data say[s] . . . that urban areas where disproportionate black murder rates now center generally have stricter gun laws, fewer guns, and more gun crime than rural areas where there are far more guns, easier access to guns, and less gun crime.").

Kathy Hochul quickly signed it into law.[144] A review of the new statute, which went into effect on September 1, 2022, provides yet further indication that the state government is totally unconcerned about the discriminatory effects of the prior law. The law is styled by Governor Hochul, Senate Majority Leader Andrea Stewart-Cousins, Assembly Speaker Carl Heastie, and others as a law that will enhance public safety.[145] However, this new law will simply amount to what the prior law was: a vehicle by which the poor, especially poor people of color, will be caught up in the criminal judicial system.

Following the letter of *Bruen*, the new law does away with the proper cause requirement.[146] However, the "good moral character" requirement is left in place; and while the phrase is newly defined, it remains without any statutory guidelines for how an official should make such a determination.[147] This provision allows for discretionary assessments by licensing officials, which is very likely to work against people of color and African Americans especially. The law left the prohibition in place for felons but also barred applications from persons convicted of three specific misdemeanors within five years of their application: 1) assault in the third degree, 2) any drunk driving offense; and 3) menacing in the third degree.[148] The law also took a broad view of the term "sensitive place," defining it so broadly so as to practically render an unrestricted license tantamount to a restricted license and then criminalizing possession in any place so deemed. Under the new law, sensitive places include theaters, stadiums, parks, and vehicles used for public transportation, which would include taxi cabs, buses, and terminals and subway cars, among many others.[149] The law goes as far as criminalizing firearm possession on private premises where the owner of said premises has not given written permission for the possessor to have a gun.[150] It further requires background checks for the purchase of *ammunition*, not just the firearm.[151]

All in all, New York has set itself up for another constitutional battle with its new law, a bout in which the state will likely fare as unsuccessfully as it did in *Bruen*. A federal court said as much in two very re-

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[144] *Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision*, N.Y. State (July 1, 2022), https://perma.cc/8F4H-ZKTA.

[145] *Id.*

[146] S.510001/A.41001, 2021-2022 Leg., Extraordinary Sess. (N.Y. 2022).

[147] *Id.* at 2.

[148] *Id.* at 2-3.

[149] *Id.* at 8-9.

[150] *Id.* at 10.

[151] *Id.* at 11-12.

cent decisions. In the first decision, the district court stated: "While pursuing the laudable goal of public safety, and in an attempt to curb ever-increasing mass shootings, the New York state Legislature has generated an unconstitutional statute in the CCIA."[152] The law's "good moral character" requirement would potentially draw the ire of Justices Roberts and Kavanaugh, as it does indeed "grant open-ended discretion to licensing officials . . . ."[153] Evidencing this reality is the same federal district court enjoining New York from enforcing that provision, along with several other parts of the law.[154]

Most offensive to the federal constitution is the law's expansive classification of "sensitive places." The law's "sensitive place" provision practically defies the Supreme Court's instruction in *Bruen*, which noted as follows:

> In their view, "sensitive places" where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." Brief for Respondents 34. It is true that people sometimes congregate in "sensitive places," and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below.[155]

New York's new law effectively defines "sensitive place" the way the Supreme Court said it could not. This law has already been challenged recently, and given the current makeup of the Court, it most likely will not survive constitutional scrutiny if and when the law gets in front of the Court again. Perhaps when this new law is ultimately struck down, the social and political environments will be radically different and conducive for honest dialogue about race and firearm possession.

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[152] Antonyuk v. Bruen, 2022 WL 3999791 at 26 (N.D.N.Y. 2022). Despite the constitutional infirmities in the statute, the court dismissed the case due to lack of standing of the plaintiffs.

[153] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) at 2162.

[154] Antonyuk v. Hochul, 2022 WL 5239895 (F. Supp.3d. Oct. 6, 2022).

[155] *Id*. at 2133-34.

IV. CONCLUSION

The Second Amendment of the United States Constitution has a complicated history that involves racial violence and discrimination against African Americans. In a tortured decision with potential racial implications, the United States Supreme Court struck down the oldest "Sullivan Law" in the nation, holding that the law ran afoul of the Second Amendment. Although it represented an opportunity for racial equity in gun legislation, the signs indicated that New York's government would double down on its law and seek to make no changes of significance. The newest iteration of its licensing statute does just that. While the opportunity for honest dialogue has seemingly been lost, it will potentially be found sometime after the high court strikes down the replacement statute, as it plainly defies its instruction in *Bruen*.