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Rethinking Prison for Non-Violent Gun Possession

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RETHINKING PRISON FOR NON-VIOLENT GUN POSSESSION

Robert Weiss*

Whatever the wisdom or folly of the belief, Americans who live in violence-affected neighborhoods often believe they need a gun for self-defense. Yet many are, due to age or criminal record, unable to legally possess a firearm. The result is a Catch-22 they describe as either being “caught with a gun . . . [or] dead without one.” Indeed, Chicago, Philadelphia, and other cities imprison thousands of mostly young, Black men each year for non-violent gun offenses. These offenses do not involve firing or wielding a gun, but simply being found in possession of one—commonly, during a routine traffic stop where police discover a firearm under the seat of the car. Research indicates that mandating prison sentences for gun possession is not an effective tool for reducing gun violence. Yet, as this Comment describes, the painful status quo has proven difficult to change, even for “progressive prosecutors” elected to reform criminal justice.

This Comment draws on first-hand interviews to detail how progressive prosecutors handle gun possession cases in practice. While these prosecutors advance some important changes, reforms remain limited by practical and political realities. To aid in breaking through these barriers, this Comment proposes a new cost-benefit framework called “Burden-Adjusted Violence Averted” (BAVA). BAVA yields the simple insight that we should invest in policies that do the most to reduce gun violence with the least pain and inequity. Imprisoning people for simple gun possession is deeply burdensome. And, in comparison to community-based anti-violence interventions, it is less likely to make our cities safe.

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INTRODUCTION

In 2014, Newsweek Magazine ran an article about the persistent epidemic of gun violence in my hometown, Wilmington, Delaware, labeling it “Murder Town USA.”¹ Since then, hundreds more Wilmingtonians, almost all of them Black, have been shot.² They include Parys Henry, an eighth grader with dreams of becoming a surgeon, shot eight times in her hands,

¹ Abigail Jones, *Murder Town USA (aka Wilmington, Delaware)*, NEWSWEEK (Dec. 9, 2014), <https://newsweek.com/2014/12/19/wilmington-delaware-murder-crime-290232.html> [<https://perma.cc/UZA8-LK8V>].

² Jared Whalen, *A Year of Gun Violence*, DEL. NEWS J. (Mar. 16, 2021), http://content-static.delawareonline.com/projects/de_shootings/index.html [<https://perma.cc/EQ9U-XWSD>]; see also JIM SALT, DEL. CRIM. JUST. COUNCIL, *DELAWARE SHOOTINGS 2018: AN ANALYSIS OF INCIDENTS, SUSPECTS, AND VICTIMS 12* (2019), <https://sac.delaware.gov/wp-content/uploads/sites/64/2020/01/2018-Shootings-report-final-121719.pdf> [<https://perma.cc/J9LN-WU3A>] (noting that in 2018, 79% of shooting victims were Black men).

feet, and stomach;³ and six-year-old Jashawn Banner, struck in the head by an errant bullet while riding in a car with his mom and baby sister.⁴ Today, gun violence remains as devastating and intransigent as ever; in 2020, 168 people were shot in Wilmington, a 50% jump from the year before.⁵ In all, guns killed nearly 20,000 Americans in 2020.⁶

In 2020, the protests sparked by George Floyd's murder also forced more Americans to recognize racial inequity in policing and the criminal justice system.⁷ In the United States, with the world's highest incarceration rate, Black adults are nearly six times as likely as Whites to be imprisoned.⁸ Books like *Charged* and *Locking Up Our Own*,⁹ and the film adaptation of

³ Brittany Horn & Esteban Parra, *A Young Life, Forever Changed on a Wilmington Street*, NEWS J. (Sept. 10, 2017), <https://www.delawareonline.com/story/news/crime/2017/09/09/young-life-forever-changed-wilmington-street/103105246/> [<https://perma.cc/4N7Z-M9HW>].

⁴ Esteban Parra, *Outrage over 6-Year-Old's Shooting in Wilmington*, NEWS J. (June 8, 2017), <https://www.delawareonline.com/story/news/crime/2017/06/07/boy-stray-struck-bullet-mother-drives-him-fathers-house-wilmington-delaware/377838001/> [<https://perma.cc/2G6Y-TEG2>].

⁵ Mayor Mike Purzycki, *Police Chief Issues 2020 Crime Report: Some Successes Mixed with Continuing Challenges to Improved Public Safety; Mayor Addresses Deep Concerns About Continual Gun Use*, CITY OF WILMINGTON DEL. (Feb. 2, 2021), <https://www.wilmingtonde.gov/Home/Components/News/News/5339/225> [<https://perma.cc/JZX4-SR A3>]; see also Isabel Hughes, *The Violence Continues: 2 18-Year-Olds Injured in Thursday Night Shooting in Wilmington*, DEL. ONLINE (Sept. 4, 2020), <https://www.delawareonline.com/story/news/2020/09/04/two-shot-wilmington-thursday-night-police-say/5714164002/> [<https://perma.cc/2AH3-DKCK>]; Sophia Schmidt, *Gun Violence in Wilmington Rose Again in 2020*, DEL. PUB. MEDIA (Feb. 2, 2021), <https://www.delawarepublic.org/post/gun-violence-wilmington-rose-again-2020> [<https://perma.cc/UM2F-GF4C>].

⁶ Weekend Edition Sunday, *2020 Was A Record-Breaking Year for Gun-Related Deaths in the U.S.*, NPR, at 0:26 (Jan. 3, 2021), <https://www.npr.org/2021/01/03/952969760/2020-was-a-record-breaking-year-for-gun-related-deaths-in-the-u-s> [<https://perma.cc/P6RM-FQ UW>].

⁷ See, e.g., Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/64AN-PTH2>].

⁸ Liz Komar, Dir. of Innovations & Site Learning, Fair & Just Prosecution, Statement at Briefing on Racial Disparities and Prosecutorial Practices in Connecticut Before the Connecticut Advisory Committee of the United States Commission on Civil Rights 2–3 (Apr. 2, 2019).

⁹ EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2020); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (1st ed. 2017)

Just Mercy,¹⁰ increased visibility into the injustices experienced by Black and Brown Americans in the criminal justice system.¹¹

These two related strains—inequity and gun violence—bring into stark relief a phenomenon that author James Forman characterizes as the “simultaneous over- and under-policing of crime.”¹² That is, particularly low-income and Black Americans experience both criminal justice *over-enforcement* (mass incarceration, disparate arrest rates, police abuses) and *under-enforcement* (unabated gun violence, low homicide closure rates, etc.).¹³ The former is exemplified by the killing of George Floyd, Breonna Taylor, and others; the latter, by unfathomable gun violence in places like Wilmington, Chicago, and Philadelphia.¹⁴

Over the past few years, Americans have increasingly voted to elect “progressive prosecutors” or reformers emphasizing greater equity for communities of color, combatting mass incarceration, and enforcing policing accountability.¹⁵ These reform prosecutors often seek to rein in the harshest tactics and policies of their predecessors, but also to move with urgency to combat gun violence that falls particularly hard on low-income neighborhoods.¹⁶ On their face, these goals might cut in two directions: one toward being “tougher” on crime, the other toward being more merciful.

Illegal gun possession highlights this dilemma. In cities including Chicago, New York City, and Philadelphia, illegal gun possession (including by a minor, someone with a criminal record, or a person otherwise ineligible

¹⁰ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

¹¹ The approachable format of these works led to their inclusion in mainstream media. See, e.g., Jennifer Senior, ‘*Locking Up Our Own*,’ *What Led to Mass Incarceration of Black Men*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/books/review-locking-up-our-own-james-forman-jr.html> [<https://perma.cc/U5DR-BJYN>].

¹² FORMAN, *supra* note 9, at 35.

¹³ See *id.*; see also Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1146 (2018).

¹⁴ See Don Babwin, *Chicago Ends 2020 with 769 Homicides as Gun Violence Surges*, ASSOCIATED PRESS (Jan. 1 2021), <https://apnews.com/article/homicide-chicago-violence-coronavirus-pandemic-gun-violence-be4b972267e31358dd165925d5a33cce>; Ron Todt, *Philadelphia Officials Express Alarm over 2020 Gun Violence*, ASSOCIATED PRESS (Oct. 8 2020), <https://apnews.com/article/virus-outbreak-homicide-shootings-violence-philadelphia-ebe03dcb7e05777b7e73892e46b78b01>.

¹⁵ See generally BAZELON, *supra* note 9, at xxvii; Note, *The Paradox of “Progressive Prosecution*,” 132 HARV. L. REV. 748, 750–51 (2018); Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CAL L. REV. 1967, 1969 (2017).

¹⁶ See, e.g., DARCEL CLARK, *A SAFER BRONX THROUGH FAIR JUSTICE* 5 (2019).

to buy a firearm) is often a felony carrying prison time.¹⁷ These offenses mostly do not involve violence; nevertheless, thousands of young, Black men face prison time each year for simply having, not using, a gun.¹⁸ This offense is one that, many offenders argue, the dangerousness of their living conditions leave them little choice but to commit.¹⁹ Reforms to provide alternatives to incarceration for gun possession remain limited in scope and, in times of rising gun violence, even risk backsliding.²⁰ As Professor Forman describes, the result is a “worst of all possible worlds [in which] guns—and gun violence—saturate our inner cities, while the people who go to prison for possessing guns are overwhelmingly Black and brown.”²¹

This Comment argues that we must find a better way to fight violence while lessening the burden to our core ideals of freedom, justice, and equality. We cannot accept a status quo in which gun violence devastates our cities. Nor can we accept sending thousands to prison for a non-violent act rooted in our collective failure to ensure basic community safety.

First, this Comment discusses the historical context of punishing illegal gun possession with imprisonment; prosecutor’s frameworks for thinking about public safety, and evidence around incarceration and gun violence. Next, this Comment draws upon direct interviews to describe how prosecutors approach gun possession felonies in practice. Finally, this

¹⁷ For Illinois statutes, see 720 ILL. COMP. STAT. 5/24-1(a)(4), (b) (2021) (Unlawful Use of Weapons); 720 ILL. COMP. STAT. 5/24-1.1 (2021) (Unlawful Use or Possession of Weapons by Felons); 720 ILL. COMP. STAT. 5/24-3.1 (2021) (Unlawful Possession of Firearms and Firearm Ammunition). For Pennsylvania statutes, see 18 PA. CONS. STAT. § 6109 (2022) (Licenses); 18 PA. CONS. STAT. § 6110.1 (2022) (Possession of Firearm by Minor). For New York statutes, see N.Y. Penal L. § 265.01-b (2021) (Criminal Possession of a Firearm); N.Y. Penal L. § 400.00 (2021) (Licenses to Carry, Possess, Repair and Dispose of Firearms). *See also* LOYOLA CTR. FOR CRIM. JUST. RSCH., POL’Y, & PRAC., ARRESTS IN ILLINOIS FOR ILLEGAL POSSESSION OF A FIREARM 14 (2020); Alex Yablon, *Larry Krasner’s Lonely, Radical Crusade to Solve America’s Gun Problem*, NEW REPUBLIC (Jan. 28, 2020), <https://newrepublic.com/article/156253/larry-krasnens-lonely-radical-crusade-solve-americas-gun-problem> [https://perma.cc/AA25-S3QV]; CLARK, *supra* note 16, at 5.

¹⁸ For example, many gun possession charges in Cook County, IL are the result of police finding a firearm in a person’s vehicle during a traffic stop, not during the commission of a violent crime. Telephone Interview with Kristina Kaupa, Cook Cnty. State’s Att’y’s Off. (Dec. 2020). *See also* LOYOLA CTR. FOR CRIM. JUST. RSCH., POL’Y, & PRAC., *supra* note 17, at 3.

¹⁹ BAZELON, *supra* note 9, at 69.

²⁰ For detail on these alternatives, *see infra* Section II.D. Alternative sentencing and diversion programs, whereby some gun possession offenders can avoid prison time and conviction records, are generally only narrowly accessible in Philadelphia (only 3% of gun offenders) and Chicago. Yablon, *supra* note 17; LOYOLA CTR. FOR CRIM. JUST. RSCH., POL’Y, & PRAC., *supra* note 17, at 14.

²¹ FORMAN, *supra* note 9, at 7.

Comment suggests a framework that, drawing upon public health concepts, may help policymakers grapple with tensions between safety and justice.

I. ILLEGAL GUN POSSESSION: EVIDENCE AND CURRENT FRAMEWORKS

This Part begins by discussing the history of criminalizing gun possession to place the problem in a real-world context. Next, it describes how progressive prosecutors often characterize their decision-making framework as “public safety first.” This Comment will argue that this framework is too one-sided: prosecution ought to balance any benefits to public safety against the significant costs of incarceration, and the availability of non-prosecutorial antiviolence interventions. Finally, this Part describes the research evidence on punishing gun possession with incarceration. That evidence does little to support the notion that imprisoning gun possessors is an effective way to achieve public safety.

A. PRISON FOR NON-VIOLENT GUN POSSESSION: HISTORY AND CONTEXT

Before being arrested on narcotics charges in the 1990s, Tarik, a Philadelphia resident, sometimes carried guns out of fear of being robbed and a lack of faith that the government would protect his neighborhood.²² Tarik summed up this sentiment, saying:

“I’ve been held up at gunpoint a number of times . . . [but] never bothered going to the police [because] “somebody’s gotta get shot and killed for the Philadelphia police to come around.”²³

Tarik, a high school graduate, now has a job and is married with kids. But due to his criminal record, he cannot legally own a gun, which he desires for personal protection.²⁴ In fact, Tarik—like many other low-income individuals in places like Philadelphia and Chicago—would likely go to prison if found with an unlicensed gun.²⁵

Gun possession laws that prohibit firearm possession by those with criminal records (or minors, or other categories) may strike us as sensible.

²² Yablon, *supra* note 17.

²³ *Id.*

²⁴ *Id.*

²⁵ SEE CLARK, *supra* note 16, at 5; Yablon, *supra* note 17. Individuals with a felony conviction, minors, or myriad other disqualifying conditions can be ineligible for a license. *Frequently Asked Questions*, ILL. STATE POLICE FIREARM SERVS. BUREAU, <https://www.ispfsb.com/Public/Faq.aspx> [<https://perma.cc/38SV-U468>].

Firearm deaths are at “epidemic proportions,”²⁶ with a quarter of a million people killed by guns every ten years in the United States.²⁷ No wonder, then, that “firearm violence in the United States has been a top priority for lawmakers, law enforcement agencies, and communities.”²⁸ For those concerned with racial justice, gun violence is impossible to ignore: if you are young, Black, and live in a low-income neighborhood, your chances of being shot are strikingly high.²⁹

Yet two things challenge the intuitive sensibility of laws criminalizing gun possession. First, the lack of safety from gun violence in his neighborhood is *precisely* what underlay Tarik’s desire to carry a gun. This directly relates to the efficacy of laws criminalizing gun possession. Individuals from high-violence neighborhoods arrested on gun possession charges repeatedly told journalist Emily Bazelon they would “rather get caught with a gun than end up dead without one.”³⁰ A 2018 survey of young Chicagoans in violence-impacted neighborhoods supports this empirically, finding that: “One-third had illegally carried a firearm at some point in their lives, and among males, it was 50%. Almost all . . . reported that self-protection was the primary reason, and those who had been previously victimized were even more likely to report carrying a gun.”³¹ As Loyola University’s Center for Criminal Justice Research, Policy, and Practice notes, “many of those who illegally possess guns do so for the same reasons as those who legally own and carry guns in Illinois: self-protection.”³² Laws criminalizing gun possession punish individuals for failing to unilaterally disarm: sensible in its collective goal, but a recipe for low compliance.

The second set of challenges is the scope and severity of how we punish non-violent gun possession. Police in Cook County, Illinois arrested 3,000 to

²⁶ Matthew D. Makarios & Travis C. Pratt, *The Effectiveness of Policies and Programs That Attempt to Reduce Firearm Violence: A Meta-Analysis*, 58 CRIME & DELINQUENCY 222, 222 (2012).

²⁷ INST. OF MED. & NAT’L RSCH. COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 11 (Alan I. Leshner, Bruce M. Altevogt, Arlene F. Lee, Margaret A. McCoy & Patrick W. Kelley eds., 2013).

²⁸ Makarios & Pratt, *supra* note 26, at 222.

²⁹ See, e.g., BAZELON, *supra* note 9, at 64 (“Guns are the leading cause of death for African American men between the ages of fifteen and thirty-four”).

³⁰ *Id.* at 69.

³¹ LOYOLA CTR. FOR CRIM. JUST. RSCH., POL’Y, & PRAC., *supra* note 17, at 14 (citing JOCELYN FONTAINE, NANCY LA VIGNE, DAVID LEITSON, NKETCHI ERONDU, CAMERON OKEKE & ANAMIKA DWIVEDI, “WE CARRY GUNS TO STAY SAFE”: PERSPECTIVES ON GUNS AND GUN VIOLENCE FROM YOUNG ADULTS LIVING IN CHICAGO’S WEST AND SOUTH SIDES (2018)).

³² *Id.* at 14.

6,000 people each year for illegal gun possession, representing over 70% of all gun-related arrests.³³ Thousands in Illinois went to prison on gun possession charges over the past half-decade, with incarceration rates for gun possession increasing 27% even as prison admissions for other crimes fell.³⁴ Many other cities and states have laws making non-violent gun possession a felony carrying prison time.³⁵

The federal government has mostly failed to pass policies to “curb the vibrant national gun market [n]or to address crime’s root causes.”³⁶ But states have exercised policing power to combat urban gun deaths by instituting mandatory minimums for gun possession, prosecuting gun crimes under more severe federal laws with longer sentences, using pre-textual traffic stops to seize unlicensed firearms, and more.³⁷ Journalist Emily Bazelon frames the issue thusly:

Time and again, politicians have offered the following trade-off to urban Black communities: *To make you safer, we have to stop more of your young men on the streets and put them in prison if they get near a gun.* Meanwhile, the empirical evidence strongly suggests that mandating prison for carrying a gun has not reduced violence.³⁸

Bazelon quotes criminologist Franklin Zimring in explaining these results: “the backgrounds and motives of people who commit gun-carrying offenses . . . are too varied for a mandatory minimum penalty to be fair and reasonable.”³⁹ Despite these increasingly severe penalties and mandatory minimums, shooting and death rates reached new heights in the summer of 2020 as the COVID-19 pandemic raged.⁴⁰

³³ *Id.* at 3, 15.

³⁴ LOYOLA CTR. FOR CRIM. JUST. RSCH., POL’Y, & PRAC., SENTENCES IMPOSED ON THOSE CONVICTED OF FELONY ILLEGAL POSSESSION OF A FIREARM IN ILLINOIS 2, 9, 16 (July 2021).

³⁵ See generally STEPHANIE KOLLMANN & DOMINIQUE D. NONG, NW. L. BLUHM LEGAL CLINIC, COMBATING GUN VIOLENCE IN ILLINOIS: EVIDENCE BASED SOLUTIONS (2013) (describing various city and state laws on mandatory prison sentences for gun possession).

³⁶ FORMAN, *supra* note 9, at 77.

³⁷ *Id.* at 75–77. Forman notes that many such laws and practices were originally championed by Black state and local policymakers intent on protecting Black lives. *Id.* at 72–73. Those policymakers were aware that more than policing and prosecution would be required, but counted on broader national investment in Black communities and action on gun control that never materialized. *Id.* at 76. For example, efforts by politicians in D.C. and other cities to pass mandatory minimums for gun possession coincided with Rep. John Conyers’ attempts to pass national restrictions on handguns. *Id.* But while local sentencing increases succeeded, Congress failed to pass gun control legislation, and national enthusiasm for the “Great Society” programs investing in health, jobs and education waned by the mid-1970s. *Id.*

³⁸ BAZELON, *supra* note 9, at 62.

³⁹ *Id.* at 63.

⁴⁰ Weekend Edition Sunday, *supra* note 6, at 1:25.

B. LIMITATIONS OF CURRENT “SAFETY FIRST” PROSECUTORIAL FRAMEWORKS

The phenomenon of mass incarceration⁴¹ stems in part from a powerful prosecutorial system that often leaves defendants at the mercy of the state’s decisions about when and what to charge.⁴² While it may feel all-powerful to offenders, the justice system is also considered too ineffective by many, especially those in low-income Black neighborhoods: low homicide closure rates, an inability to reduce the number of shootings, and distrust of law enforcement contribute to cynicism about the state’s ability to keep people safe.⁴³ In response to these challenges, voters elected a new wave of “progressive prosecutors.”⁴⁴ These reformers—including Philadelphia’s District Attorney Larry Krasner, Cook County Illinois State’s Attorney Kim Foxx, and Brooklyn District Attorney Eric Gonzalez—have made important changes, including limiting “overcharging” as a tactic to pressure defendants to enter plea deals, increasing the use of alternatives to incarceration, and investigating police misconduct, among others.⁴⁵

However, criminal justice reform is politically difficult. Under Kim Foxx’s administration, the Cook County State’s Attorney’s Office changed their policy to prosecute retail theft of less than \$1,000 as only a misdemeanor, despite the state’s threshold for felony retail theft being \$300.⁴⁶ Foxx framed the policy as not only sending fewer people to prison for a non-violent crime but also freeing up resources to focus on gun

⁴¹ See Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor’s Case for Restorative Justice*, 64 N.Y. L. SCH. L. REV. 31, 33 (2019).

⁴² BAZELON, *supra* note 9, at 69.

⁴³ Tuerkheimer, *supra* note 13, at 1152–54; see also Michael Sierra-Arévalo, *Legal Cynicism and Protective Gun Ownership Among Active Offenders in Chicago*, COGENT SOC. SCIS., Sept. 2016, at 14–15.

⁴⁴ See BAZELON, *supra* note 9, at xxvii; Note, *supra* note 15, at 750–51; Barkow, *supra* note 15, at 1969.

⁴⁵ See Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [https://perma.cc/7NGB-XQ9Y]. See generally FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018) (citing twenty-one policy areas in which prosecutors have implemented reforms to increase fairness in criminal justice).

⁴⁶ Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off. (Nov. 20, 2020). For an example of political criticism of the retail theft policy, see Stacey Baca, *Shoplifting Concerns Rise, Retailers Target Cook County State’s Attorney Kim Foxx*, ABC7 CHI. (Dec. 20, 2019), <https://abc7chicago.com/shoplifting-kim-foxx-chicago-crime-news/5769897/> [https://perma.cc/XND9-BSTT].

offenses.⁴⁷ Even apparent “win-wins” like this policy attracted blowback: retailers argued that the policy “encouraged, emboldened more people to steal.”⁴⁸ On public safety issues like gun crime, criticism is even more strident.⁴⁹

To combat this, reformers often emphasize that their public safety policies are paired with “smarter” ways of doing business.⁵⁰ Brooklyn District Attorney Gonzalez’s policy statement is prototypical: “The job of a District Attorney—a prosecutor—is to promote community safety. This means more than simply punishing people who commit crimes . . . [we] look for different—and smarter—ways to carry out [our] responsibilities.”⁵¹ Cook County State’s Attorney Kim Foxx makes a similar argument, saying her job “is to promote public safety” which would not be possible without recognizing “racial disparities and the disproportionate impact of violence and mass incarceration. With this in mind, I focused on . . . increasing public safety through smart prosecution strategies.”⁵²

While an important start, these “safety first” frameworks may place a ceiling on reform.⁵³ True, a public safety through-line is consistent with more

⁴⁷ Tim McNicholas, *With Rise in Shoplifting, Some Retailers Criticize State’s Attorney’s Approach; Prosecutors Defend Policy*, CBS CHI. (Oct. 11, 2019), <https://chicago.cbslocal.com/2019/10/11/with-rise-in-shoplifting-some-retailers-criticize-states-attorneys-approach-prosecutors-defend-policy/> [<https://perma.cc/3P6K-9M7E>].

⁴⁸ *Id.* (discussing controversy over State’s Attorney Foxx’s policy to decline to pursue retail theft cases of less than \$1,000 as felonies to focus staff time on prosecuting gun crimes).

⁴⁹ See, e.g., Mike Lowe, *In Forum, Kim Foxx Says She Battles Misperceptions Along with Violent Crime*, WGN9 (Oct. 27, 2021), <https://wgntv.com/news/chicago-news/foxx-faces-questions-from-public-says-she-is-not-soft-on-crime/> [<https://perma.cc/6ZBZ-GQSG>] (quoting Chicago Mayor Lori Lightfoot criticizing the State’s Attorney’s office: “If [people who commit gun violence] don’t feel like the criminal justice system is going to hold them accountable, we’re going to see a level of brazenness that will send this city into chaos.”).

⁵⁰ “Smarter” public safety often emphasizes data-driven, rather than emotively-driven, responses to crime based on research that, for example, shows that mass incarceration has not produced commensurate increases in community safety. ERIC GONZALEZ, *JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN* 5 (2019).

⁵¹ *Id.*

⁵² KIMBERLY M. FOXX, *COOK COUNTY STATE’S ATTORNEY’S TWO-YEAR REPORT* 1 (2019).

⁵³ For more on this critique, see FORMAN, *supra* note 9, at 221, 228–29. Forman criticizes the approach which “divide[s] the world of criminal defendants in two groups,” the non-violent drug offenders on one hand, and “violent criminals . . . who need to be in jail,” as too narrow to tackle mass incarceration. *Id.* at 221. He notes that only about a fifth of incarcerated persons are in prison on drug charges, and a much smaller fraction would be eligible under an Obama-era clemency initiative that typifies this approach by extending eligibility only to federal prisoners who had already served 10 years, had committed only low-level offenses, and had no history of violence prior to or during their incarceration. *Id.* at 228–29.

merciful handling of offenses that create no obvious public safety concerns, such as low-level theft or drug use offenses. But even tougher decisions may be required to reverse mass incarceration: fewer than one-fifth of persons in the United States' prison system are incarcerated on non-violent drug charges.⁵⁴ This may seem difficult, even impossible now, but it will be essential to making change on a scale that creates broad trust in the justice system.⁵⁵ Gun possession may be one place to start this challenging journey.

C. EVIDENCE ON INCARCERATION, PUBLIC SAFETY, AND GUN VIOLENCE

As a general matter, leaders in the criminal justice reform movement contend that, “our carceral and punitive approach has not worked, and . . . society is not safer for it.”⁵⁶ This conclusion is rooted in empirical research that finds that increased incarceration rates yield little benefit for public safety.⁵⁷ Moreover, in communities that have a high concentration of incarcerated people, incarceration has a criminogenic effect.⁵⁸ Overall rates of incarceration in the United States are so high that increasing them does not appear to improve public safety because expanding those rates means that more people go behind bars for non-violent offenses.⁵⁹

⁵⁴ FORMAN, *supra* note 9, at 228–29; *see also* Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y. L. SCH. L. REV. 69, 77 (2019) (noting that, in the long-run, “experts agree that in order to significantly reduce mass incarceration within our lifetimes, governments must not only consider alternatives to prosecuting low-level offenses, but also significantly reduce incarceration for violent offenses.”).

⁵⁵ Trust in the justice system, in addition to being good in itself, is critical to improving community safety. *See* Yablon, *supra* note 17 (“A 2012 paper titled ‘Why Do Criminals Obey the Law?’ found that feelings about the legal system’s legitimacy had a stronger effect on whether criminals would carry a gun than any other factor the researchers considered, including age, gang membership, education, or, crucially, the deterrence of heavy policing and harsh legal penalties. The more trust people had in the legal system, the less likely they were to carry a firearm.”).

⁵⁶ Krinsky & Phares, *supra* note 41, at 33.

⁵⁷ DON STEMEN, VERA INST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER I* (2017) (“Increases in incarceration rates have a small impact on crime rates and each additional increase in incarceration rates has a smaller impact on crime rates than previous increases Any crime reduction benefits of incarceration are limited to property crime Research consistently shows that higher incarceration rates are not associated with lower violent crime rates Since 2000, however, the increased use of incarceration accounted for nearly zero percent of the overall reduction in crime.”).

⁵⁸ That is, one that tends to increase crime. *Id.*

⁵⁹ *Id.* Empirical work that meets the gold standard for rigor (controlled experimentation) is impossible to do in this arena for obvious ethical reasons. Creative research has attempted

Evidence of a connection between putting people in prison for gun possession and increased public safety is weak. Researchers at Northwestern Law’s Bluhm Legal Clinic reviewing the empirical literature on gun possession laws (including studies on felony firearm laws in Florida, Massachusetts, Michigan, and Virginia) found “no credible evidence that mandatory sentences lead to crime reduction.”⁶⁰ In contrast, they found empirical support for non-carceral interventions—from focused policing to employment and mentorship programs—that reduced gun possession and violence.⁶¹ And while research has found some evidence that “misdemeanants and felons who purchase handguns are at a greater risk of using such weapons in illegal activity,” laws designed to respond to this risk yielded mixed results.⁶²

Mandating prison for gun possession is also highly burdensome. For each act of violence averted through incarceration, we also sweep up many individuals who would not have harmed others.⁶³ In *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, Douglas Husak argues that this dilemma lies at the heart of possession offenses, noting that: “perhaps the most worrisome feature of statutory schemes to prohibit gun or drug possession is the willingness to use the criminal law to prevent the risk of harm, even though that harm would materialize in only a tiny fraction of the cases in which persons are subject to punishment.”⁶⁴ He further argues

to solve this difficulty by leveraging natural randomness. A study in Michigan, for example, examined the variability in sentences—sometimes probation, sometimes prison—that similarly-situated criminal defendants received from their randomly-assigned judges. David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen, Shawn D. Bushway & Ingrid A. Binswanger, *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, NATURE HUM. BEHAV., 671, 671–73 (2019). The data suggested that prison yielded no “rehabilitative” or “deterrent” effect: i.e., that an imprisoned defendant was just as likely to commit violence once released as someone who received probation. *Id.* at 671. Moreover, the benefit of “incapacitation,” i.e., that a person cannot commit violence in their community by virtue of the fact that they are imprisoned, was small—and costlier and less effective than other policy alternatives. *Id.* at 673–75.

⁶⁰ KOLLMANN & NONG, *supra* note 35, at 2.

⁶¹ *Id.* at 5–7; see also Makarios & Pratt, *supra* note 26, at 226–28.

⁶² Makarios & Pratt, *supra* note 26, at 224–25.

⁶³ As an approximate yardstick, research finds that “preventing one person who was previously convicted of a violent crime from committing a new violent crime within five years of their sentence requires imprisoning 16 such individuals.” David J. Harding, *Do Prisons Make Us Safer?*, SCI. AM. (June 21, 2019), <https://www.scientificamerican.com/article/do-prisons-make-us-safer/#:~:text=The%20study%20found%20that%20sentencing,have%20been%20sentenced%20to%20probation> [<https://perma.cc/3Q3T-GVN2>].

⁶⁴ Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437, 476 (2004). An excellent analogy is also found in laws

that the “net of criminal liability is deliberately cast far and wide to catch enormous numbers of offenders, fully aware that only a small percentage of those who are punished would ever have caused the harm to be prevented.”⁶⁵

Traditional “tough-on-crime” rhetoric overstates the case that incarcerating people for gun possession is likely to result in sustainable, long-term public safety improvements.⁶⁶ Yet, by using a “public safety above all” framework, we place the burden on reformers to prove that changes to the status quo pose zero risk—an unreasonably high threshold. A better framework would appropriately balance risk and burden, avoiding policies which lead us to imprison many people with little demonstrable benefit to public safety. But before making recommendations, some grounding in how reform prosecutors currently approach gun possession cases is required. The next section discusses the Cook County State’s Attorney’s Office (CCSAO), whose jurisdiction includes Chicago, Illinois. The office is currently headed by Kim Foxx, who is considered a leading progressive prosecutor.⁶⁷

II. PROSECUTION OF ILLEGAL GUN POSSESSION IN COOK COUNTY, ILLINOIS

Gun violence is a unique and significant feature of American life, yet the academic legal literature is light on detail about how progressive prosecutors approach gun crimes. Drawing on interviews with Assistant States’ Attorneys (ASAs) and policy advisors in the Cook County, Illinois State’s Attorney’s Office (and supplemented by interviews with attorneys and advocates in Philadelphia, Brooklyn, and Wilmington, Delaware),⁶⁸ Part II seeks to fill that gap.

that prohibit felons from having guns. See Zack Thompson, *Is it Fair to Criminalize Possession of Firearms by Ex-Felons?*, 9 WASH. UNIV. JURIS. REV. 150, 173 (2016) (“Felon-in-possession laws do not proscribe or punish harm itself, but instead attempt to avert the possibility of harm. This means that actual harm will materialize in only a fraction of the instances in which an ex-felon would be subject to punishment for unlawfully possessing a firearm.”).

⁶⁵ Husak, *supra* note 64, at 476.

⁶⁶ See generally KOLLMANN & NONG, *supra* note 35, at 2; HARDING, *supra* note 63, at 671; STEMEN, *supra* note 57, at 1–2 (reviewing empirical literature and finding only very weak relationships between imprisonment and violent crime rates).

⁶⁷ Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR (Nov. 26, 2020), <https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair> [<https://perma.cc/RWA3-JGPX>].

⁶⁸ These interviews include: Telephone Interview with Dana Bazelon, Pol’y Advisor, Phila. Dist. Att’y’s Off. (Jan. 19, 2021); Telephone Interviews with Lisa Minutola, Alanna Farber, and Meghan Crist, Wilmington Pub. Def.’s Off. (Jan. 19, 2021); Telephone Interview with Marny Zimmer, Consultant, Univ. of Chicago Crime Lab (Nov. 23, 2020); Telephone

This Part proceeds by examining how the Cook County State's Attorney's Office makes decisions at each stage of felony gun possession prosecution.⁶⁹ First, the **intake** stage (arrest & felony review) is where initial decisions about whether an incident should be prosecuted as a felony are made.⁷⁰ Second, the **initiation** stage (bond court & pre-plea) is where prosecutors gather additional information about the particular case and defendant, and make assessments about charging decisions, connection to social services, and eligibility of offenders for diversion.⁷¹ Finally, there is **disposition** (plea and trial stage) and **sentencing**. This Comment will focus on the first two phases, intake and initiation. Prosecutors' decisions about how to handle a case are mostly completed prior to disposition, so disposition and sentencing are beyond the scope of this Comment.⁷²

A. CCSAO GUN POSSESSION PROSECUTIONS: INTAKE STAGE

Some progressive prosecutors sketch an approach that includes turning attention from low-level to more serious violent crimes, noting that spending limited prosecutorial resource on non-violent offenses detracts from the ability to prosecute offenders causing violent harm.⁷³ In theory, at least, a

Interview with Risa Lanier, Chief Deputy, Cook Cnty. State's Att'y's Off. (Dec. 11, 2020); Charise Valente, Chief of Special Prosecutions Bureau, Cook Cnty. State's Att'y's Off. (Dec. 11, 2020); Ethan Holland, Supervisor, Gun Crimes Strategy Unit, Cook Cnty. State's Att'y's Off. (Dec. 11, 2020); Telephone Interview with Kristina Kaupa, Pol'y Advisor, Cook Cnty. State's Att'y's Off. (Nov. 20, 2020); Telephone Interview with Kristina Kaupa, Pol'y Advisor, Cook Cnty. State's Att'y's Off. (Nov. 16, 2020); Telephone Interview with Liz Komar, Dir. of Strategic Initiatives, Fair & Just Prosecution (Nov. 13 2020). Please note that the views in this Comment are the author's alone, and that citation does not imply endorsement.

⁶⁹ For a chart that provides a visual reference for the felony prosecution process, which varies by jurisdiction, but may follow a generally similar outline, see *How to Read the Open Data*, Cook Cnty. State's Att'y, www.cookcountystatesattorney.org/resources/how-read-open-data [https://perma.cc/R2U9-6SJW].

⁷⁰ Telephone Interview with Kristina Kaupa, Pol'y Advisor, Cook Cnty. State's Att'y's Off. (Nov. 16, 2020).

⁷¹ *Id.*

⁷² *Id.*

⁷³ For example, in 2016, Baltimore's State's Attorney Marilyn Mosby stated: "When it comes to violent offenders, I'm going to go hard, and I'll sit in the courtroom and make sure that the jury sees me and that you get the maximum sentence . . . but at the same time, when we're talking about nonviolent offenses . . . I think that that's when you can exercise discretion." Wil S. Hylton, *Baltimore v. Marilyn Mosby*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html> [https://perma.cc/X3UM-4LLL]. Similarly, Cook County State's Attorney Kim Foxx frames this use of discretion as a public safety imperative, noting that "in a city like Chicago where we have a gun violence epidemic . . . spending our time chasing offenses that aren't going to

prosecutor could apply a similar rationale here: in a world of limited resources, perhaps the time prosecuting non-violent gun possession would be better spent on offenders who have committed or are about to commit violence.⁷⁴

The CCSAO enacted an analogous policy for felony retail theft: the office will no longer default to prosecuting retail theft of less than \$1,000 as a felony; for those specific cases, it is rejected prior to bond court.⁷⁵ Instead of felonies, the CCSAO defaults to considering these offenses as misdemeanors, which law enforcement directly enters into the system for prosecutors to take forward instead of going through felony review.⁷⁶ This saves the ASAs time—time they can spend on felony review of more serious crimes—and advocacy groups predicted the move would reduce the number of people in jail on non-violent offenses.⁷⁷

So, do progressive prosecutors use policy guidance in this way to downgrade gun possession charges to misdemeanors (in order to focus on offenses where someone is directly harmed)? The answer is no; a deep dive into a typical Cook County gun possession prosecution is instructive.⁷⁸ First, when someone is arrested on a gun charge, the arresting officer will call the ASA and describe the incident.⁷⁹ At this stage, the ASA is simply collecting enough information for ASAs in the Felony Review Unit to make a determination as to whether the incident at issue is a felony case or not.⁸⁰ The majority of gun arrests are handled over the phone, because at this stage determining whether the case is a felony is a simple question of “was there a

have an impact on that, isn't keeping our community safe.” Chuck Goudie & Barb Markoff, *Kim Foxx Says Progressive Prosecution Could Result in Safer Neighborhoods*, ABC 7 EYEWITNESS NEWS (Dec. 18, 2019), <https://abc7chicago.com/kim-foxx-chicago-jussie-smollett-foxx/5763245> [https://perma.cc/27HQ-4QQS].

⁷⁴ Recall that, in Illinois, a person possessing a gun without a valid Firearms Owners Identification (FOID) license may be charged with Unlawful Use of a Weapon (UUW) even if the weapon was not “used” in the typical understanding of the word (fired, threateningly brandished, etc.). 720 ILL. COMP. STAT. 5/24-1(a)(4), (b) (2021) (Unlawful Use of Weapons).

⁷⁵ Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off. (Nov. 16, 2020).

⁷⁶ *Id.*

⁷⁷ *Id.*; Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB. (Dec. 15, 2016), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html>.

⁷⁸ Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off. (Nov. 16, 2020).

⁷⁹ Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off. (Nov. 16, 2020).

⁸⁰ *Id.*

gun or not.”⁸¹ In other words, the intake stage is more of a technical determination, not a time when the prosecutor would make a decision not to pursue a gun possession case in line with the administration’s progressive policies.⁸² Gun possession offenses in Cook County are generally felonies, with a small exception of cases that are misdemeanors.⁸³

During this felony review stage, prosecutors review the case to determine evidentiary sufficiency, the presence of any constitutional issues, and other information particular to the case. But a prosecutor at the CCSAO described that they would need more information than is available at this relatively early stage in order to make a decision about the disposition of the case.⁸⁴ Additionally, because gun violence is such an important and politically hot-button issue in Chicago, a blanket discretionary policy declining to prosecute gun-related offenses would be nearly impossible.⁸⁵

The CCSAO is not alone in being disinclined to set a blanket policy at the intake stage to downgrade or divert gun possession offenses. For example, Bronx County District Attorney Darcel Clark stated that “the illegal possession of a loaded gun is an inherent threat to public safety” and defines her office’s policy as seeking at least a two-year prison sentence followed by two years of supervision after release for anyone carrying a loaded gun.⁸⁶ While it might be possible to decline to prosecute theft or marijuana possession as felonies, CCSAO prosecutors—and other prosecutors too—

⁸¹ If there are constitutional (search) issues, the case might not be prosecuted, but these instances are relatively rare. Also, this felony determination could be made at the police station (as with misdemeanors) and is likely done so in prosecutor’s offices elsewhere that do not have Felony Review Units. *Id.*

⁸² *Id.*

⁸³ *Id.* One example of a situation in which gun possession in Cook County qualifies as a misdemeanor would be if an individual with a Concealed Carry License entered a grocery store that has a “no guns allowed on premises” and nevertheless carried their legally owned firearm into the building.

⁸⁴ *Id.*; Letter from Risa Lanier, Chief Deputy, Cook Cnty. State’s Att’y’s Off. (Oct. 20, 2021) (on file with author).

⁸⁵ See, e.g., Omar Jimenez & Priya Krishnakumar, *The Influx of Guns Is ‘Ground Zero for Violence’ at the End of a Bloody Summer in Chicago*, CNN (Oct. 3, 2021), <https://www.cnn.com/2021/10/03/us/chicago-gun-violence-summer/index.html> [<https://perma.cc/4HCL-23G7>]; Neil MacFarquhar & Robert Chiarito, *Chicago Gun Violence Spikes and Increasingly Finds the Youngest Victims*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/05/us/chicago-shootings.html> [<https://perma.cc/999V-A4BM>].

⁸⁶ DA Clark’s policy document does note, however, that the two-year sentence is actually below New York’s mandatory minimum (3.5 years), and that her prosecutors may also consider lower sentences. CLARK, *supra* note 16, at 5.

will generally move forward with a constitutionally valid gun felony case (but may look for diversion options in the next phase).⁸⁷

B. CCSAO GUN POSSESSION PROSECUTION: INITIATION STAGE

Once a felony prosecution has been initiated, progressive prosecutors can sometimes leverage alternatives to traditional carceral punishment.⁸⁸ In Philadelphia, District Attorney Larry Krasner increased the use of Accelerated Rehabilitative Disposition (ARD), a diversion program that involves supervision similar to probation but does not put a criminal conviction on the defendant's record.⁸⁹ Brooklyn District Attorney Eric Gonzalez similarly makes use of alternatives to incarceration by “divert[ing] young gun offenders into community programs instead of jail,” and by providing behavioral healthcare services.⁹⁰

The CCSAO considers defendants for diversion programs, including non-violent gun offenders, on a limited basis.⁹¹ Prior to preliminary hearings, Cook County prosecutors screen cases to see if defendants are a good fit for a diversion program or whether they pose a risk to public safety.⁹² Over the following days and weeks, the prosecutor may work with local service providers who assess whether the defendant can benefit from social services related to an “unmet need” (e.g., drug use, mental health, needs specific to emerging adults, or simply poverty).⁹³

Risa Lanier, Chief Deputy at the CCSAO, emphasized the search for a holistic understanding of the defendant in order for the prosecutor to make an accurate determination about what would be best for both the individual

⁸⁷ *Id.*; Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off (Nov. 16, 2020). For more on diversion, see *infra* Section II.B.

⁸⁸ FAIR & JUST PROSECUTION, *supra* 45, at 4.

⁸⁹ Yablon, *supra* note 17.

⁹⁰ Ali Watkins, *As Shootings Spike in Northern Brooklyn, N.Y.P.D. and Prosecutors Collide*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/nyregion/brooklyn-shootings-da-nypd.html> [<https://perma.cc/4957-AAV4>].

⁹¹ Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off (Nov. 16, 2020).

⁹² Bond courts often hear cases only twenty-four hours after the time of arrest, so at this stage there may not be enough information to determine whether a gun possession offender may be eligible for diversionary programs. *Id.*

⁹³ The longer after the point of arrest, the less likely it is that the defendant will access these social services. Telephone Interview with Kristina Kaupa, Pol’y Advisor, Cook Cnty. State’s Att’y’s Off (Nov. 16, 2020).

and for public safety.⁹⁴ She distinguished the case of an eighteen-year-old arrested for illegal gun possession for the first time from that of an individual identified as a “key driver of violence” in the community.⁹⁵ For the latter, it is a public safety issue with a more straightforward pathway to seeking a sentence.⁹⁶ For the former, the CCSAO tries to understand the person’s home life, educational opportunities, and background before seeking a sentence.⁹⁷ Rather than a “check-the-box” approach, ASAs are encouraged to use judgement to strike an appropriate balance.⁹⁸

Ethan Holland, supervisor of the CCSAO’s Gun Crimes Strategy Unit, echoed this approach, saying: “if we are going to lock people up, let’s make sure it’s the right people.”⁹⁹ Holland’s unit focuses on prosecuting individuals identified as “key drivers of violence” in their communities.¹⁰⁰ One way the unit does this is by embedding prosecutors within several police districts so these prosecutors can move quickly in response to shootings.¹⁰¹ In theory, by embedding prosecutors to work alongside law enforcement, the CCSAO can better distinguish an individual who merely possesses a firearm from those driving violence in the same neighborhood, and prosecute accordingly.¹⁰² Special Prosecutions Bureau Chief Charise Valente noted that, even for “drivers of violence,” her department still considers the individuals in a holistic manner, seeking to understand a defendant’s background and unmet needs.¹⁰³

Finally, in Illinois, one statutory tool for diversion of gun possession cases is the First Time Weapon Offender Program, started in 2018.¹⁰⁴ Whereas a conviction for possession of a loaded gun carries a one-year

⁹⁴ Telephone Interview with Risa Lanier, Chief Deputy, Cook Cnty. State’s Att’y’s Off. (Dec. 11, 2020).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ This mitigation information is often given by or sought from the defense attorney. Telephone Interview with Risa Lanier, Chief Deputy, Cook Cnty. State’s Att’y’s Off. (Dec. 11, 2020) (characterizing her approach as, “before I saddle this eighteen-year-old with a conviction, what can you tell me about them?”).

⁹⁸ *Id.*

⁹⁹ Telephone Interview with Ethan Holland, Supervisor, Gun Crimes Strategy Unit, Cook Cnty. State’s Att’y’s Off. (Dec. 11, 2020).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Telephone Interview with Charise Valente, Chief of Special Prosecutions Bureau, Cook Cnty. State’s Att’y’s Off. (Dec. 11 2020).

¹⁰⁴ First Time Weapon Offender Program, 730 ILL. COMP. STAT. 5/5-6-3.6 (2021).

mandatory minimum prison sentence by statute, the First-Time Weapon Offender Program offers a sentencing option other than a felony conviction.¹⁰⁵ Available to those aged eighteen to twenty years old, the program requires eighteen to twenty-four months of probation with a number of conditions (e.g., seeking educational courses, avoiding drug use, not possessing a firearm, attending counseling, etc.) that, if met, result in a dismissal of the gun possession charge.¹⁰⁶

C. CHALLENGES

Efforts by reform prosecutors to align their work with a whole understanding of the individual defendant is an important step forward. Yet challenges remain. One is that diversion programs that provide alternatives to prison for gun offenders are, so far, relatively small in scale. Loyola University's analysis of Illinois's diversion program for gun possession notes that:

While efforts like the passage of the First Time Weapon Offender Program have sought to recognize the nuance and sub-populations of those arrested for 'unlawful use of a weapon,' the population eligible for this diversion program is relatively small . . . less than 16% of all of those arrested in Illinois for illegal gun possession.¹⁰⁷

Similarly, in Philadelphia, from 2018 to 2019, District Attorney Krasner diverted seven times as many illegal possession defendants as his predecessor to Accelerated Rehabilitative Disposition (ARD), but that represented only 3% of the gun possession cases during that time.¹⁰⁸

Another issue is defending new policies from politically motivated challenges. In Chicago, the mayor and police superintendent held press

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; LOYOLA CTR. FOR CRIM. JUST. RSCH., POL'Y, & PRAC., *supra* note 17, at 13 (citing JOCELYN FONTAINE, NANCY LA VIGNE, DAVID LEITSON, NKETCHI ERONDU, CAMERON OKEKE & ANAMIKA DWIVEDI, "WE CARRY GUNS TO STAY SAFE": PERSPECTIVES ON GUNS AND GUN VIOLENCE FROM YOUNG ADULTS LIVING IN CHICAGO'S WEST AND SOUTH SIDES (2018)).

¹⁰⁷ *Id.* at 15.

¹⁰⁸ Yablon, *supra* note 17. ARD is a program that (like the First Time Weapon Offender Program) offers a supervised probation instead of a conviction. *See Diversion & Reentry Programs*, PHILA. DIST. ATT'Y'S OFF., <https://philadelphiada.org/diversion-reentry-programs> [<https://perma.cc/T68X-66W7>] (explaining ARD in accordion menu). The program typically lasts from six months to two years, with conditions such as participation in classes or community service, and upon successful completion, the original criminal charges are dismissed. *Id.* Entry into the ARD program is at the discretion of the District Attorney. *Id.*; *see also* Julie Shaw, *Under DA Krasner, More Gun Possession Cases Get Court Diversionary Program*, PHILA. INQUIRER (June 23, 2019), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-gun-possession-cases-diverted-ard-probationary-program-20190623.html> [<https://perma.cc/9UFD-XSMA>].

conferences to criticize a CCSAO data webinar that suggested that increasing arrests of non-violent gun possessors might also be sweeping up people not responsible for the city's gun violence.¹⁰⁹ Reforms perceived to be lenient can also be vulnerable to backlash when failures are vivid, such as when an offender who was *not* incarcerated commits a violent crime.¹¹⁰ During times of high violence, even reformists can fall back into defending their policies using traditional metrics. For example, in a June 2019 interview, District Attorney Krasner noted his office had approved a higher percentage of gun cases for prosecution (98% versus 96%) compared to his predecessor, emphasizing that “[i]t is clear that we are more vigorous—not less vigorous, more vigorous—than the prior administration about bringing gun cases.”¹¹¹

III. “BURDEN-ADJUSTED VIOLENCE AVERTED” AS A DECISION-MAKING LENS

This Part begins by introducing Burden-Adjusted Violence Averted (BAVA), a framework that applies public health decision-making concepts to criminal justice. Next, this Part describes the advantages of using this

¹⁰⁹ Police Superintendent David Brown ridiculed the CCSAO's presentation as insufficiently tough on gun crime, even as the presentation showed that CCSAO was charging gun possession offenders at approximately the same rates as previous administrations (>90%). Chip Mitchell, *Chicago's Mayor And Top Cop Trash Kim Foxx For Challenging CPD's Gun Arrest Priorities*, WBEZ (June 15, 2021, 4:42 PM), <https://www.wbez.org/stories/chicagos-mayor-and-top-cop-trash-kim-foxx-for-challenging-cpds-gun-arrest-priorities/90863e32-7697-42f1-8b67-66290ac5f713> [<https://perma.cc/ELN2-K7UF>] (“Obviously, common sense is not so common. We should all know that illegal gun possession makes us less safe, not more safe. And I would argue the idea of decriminalizing illegal gun possession is the most ridiculous thing I've heard in my 40 years of law enforcement”).

¹¹⁰ An opinion piece critical of Krasner exemplifies this phenomenon. James Schultz, Opinion, *The Disastrous Consequences of DA Larry Krasner's 'Reforms'*, PHILA. MAG. (June 27, 2019, 1:20 P.M.), <https://www.phillymag.com/news/2019/06/27/larry-krasner-reforms-philadelphia/> [<https://perma.cc/QH8G-XZBL>] (“Krasner is funneling an increased number of gun cases to a court diversionary program called Accelerated Rehabilitative Disposition (ARD) Why does this matter? Because criminals who carry guns usually intend to use them. Maalik Jackson-Wallace . . . was initially arrested on a gun possession charge. The case was sent to ARD and Jackson-Wallace received probation. He was arrested a second time for gun possession and released on unsecured bail. On June 13th, he was arrested again and charged with murder; police say he shot and killed a 26-year-old man.”).

¹¹¹ Given that the Philadelphia District Attorney's office expanded the use of alternative sentencing for illegal gun possession offenders, there is an apparent recognition that prison sentences are not always appropriate for gun possession. This return to tradition perhaps reflects the dilemmas reformists face. See Chris Palmer, *After Weekend Shootings, Philly DA Larry Krasner Defends His Office's Record on Gun Cases*, PHILA. INQUIRER (June 19, 2019), <https://www.inquirer.com/news/larry-krasner-district-attorney-philadelphia-gun-prosecutions-richard-ross-20190618.html> [<https://perma.cc/65AX-U76X>].

framework in practice. The final section applies the BAVA framework to gun possession, suggesting how policymakers and prosecutors might more successfully avert gun violence while minimizing the burden of incarceration.

A. INTRODUCING BAVA: A PUBLIC HEALTH APPROACH

To grapple with the dilemmas above, this Comment proposes a cost-benefit framework called “Burden-Adjusted Violence Averted.” To use BAVA, policymakers would evaluate existing or proposed criminal justice policies, such as mandatory prison terms for gun possession, by weighing their public safety benefits against the burdens imposed. The benefits are measured by how much violence the policy averts, while the costs could involve disruption to the community, damage inflicted on a convicted offender’s future job prospects, the opportunity cost of not investing in alternative public safety interventions, and more.¹¹²

A risk-reward framework might not be applicable to every crime; some offenses may still be worthy of punishment to indicate society’s moral condemnation.¹¹³ But BAVA could apply to criminal justice policies that primarily exist for utilitarian purposes. Gun possession falls within this category. Few people are likely to think that having a gun is, on its own, an immoral act. Instead, it seems more intuitive that prosecuting gun possession is intended to achieve a practical public safety goal. We should evaluate such policies against their alternatives; on the extent to which they achieve their goals, and on the social, financial, and other costs they incur.

BAVA is analogous to Disability-Adjusted Life Years (DALYs), which public health professionals use to weigh the impact of an intervention against its costs, as well as against the costs and benefits of other potential interventions.¹¹⁴ Researchers use DALYs to measure the cost of various diseases to human health in a unified metric of wellbeing, and as a way to compare the economic effectiveness of different health care interventions.¹¹⁵

¹¹² The output of a BAVA analysis need not be quantifiable, although efforts to do so eventually would be a positive development for adding empirical rigor to decision-making.

¹¹³ This theory of punishment is often termed retributive justice. *See, e.g.*, Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 193, 194 (2008) (“Retributive justice is a system by which offenders are punished in proportion to the moral magnitude of their intentionally committed harms.”).

¹¹⁴ *See, e.g.*, Franco Sassi, *Calculating QALYs, Comparing QALY and DALY Calculations*, 21 *HEALTH POL’Y & PLAN.* 402, 402–03 (2006).

¹¹⁵ DALYs typically combine measures of both morbidity (illness) and mortality (death) to estimate the burden of a disease and the benefit of preventing or curing it. *See* A. J. J. M.

A health minister might, for example, compare the expected DALYs of a malaria net program with that of a vaccination campaign and conclude that, dollar-for-dollar, the vaccination campaign saves more lives and therefore deserves investment of scarce resources.¹¹⁶

Further supporting the application of public health tools here is substantial literature that considers gun violence a public health problem.¹¹⁷ One reason advocates consider gun violence to be a health issue is that it is a leading cause of death, on par with major diseases.¹¹⁸ Another is that researchers have observed that gun violence can spread in a similar manner to a communicable disease, where individuals traumatized by observing or being victims of violence risk spreading violence further.¹¹⁹ Finally, a public health framework appropriately recognizes that gun violence—widespread, occurring annually, and afflicting some communities more than others—is systemic rather than merely a matter of individual criminality.¹²⁰

B. ADVANTAGES OF A BAVA FRAMEWORK

Applying BAVA to criminal justice has three advantages. First, BAVA recognizes that criminal justice policymaking involves analysis of *both* the benefits of punishment and its burdens. Second, BAVA acknowledges that we live in a world of constrained resources, and using a criminal justice tool carries an opportunity cost that ought to be analyzed. Third, it provides an objective touchpoint and common language for decision-making, helping to insulate internal deliberations against outside noise like political criticism.

Oostvogels, G.A. De Wit, B. Jahn, A. Cassini, E. Colzani, C. De Waure, M. E. E. Kretzschmar, U. Siebert, N. Mühlberger & M. J. J. Mangen, *Use of DALYs in Economic Analyses on Interventions for Infectious Diseases: A Systematic Review*, 143 EPIDEMIOLOGY & INFECTION 1791, 1793 (2014).

¹¹⁶ The example above was composed for conceptual clarity, but I have no evidence that any such real-world comparison has been made.

¹¹⁷ See GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, HEALING COMMUNITIES IN CRISIS: LIFESAVING SOLUTIONS TO THE URBAN GUN VIOLENCE EPIDEMIC 30 (2016), <https://giffords.org/wp-content/uploads/2019/01/Healing-Communities-in-Crisis.pdf> [<https://perma.cc/AH64-ZXD9>]; VERA INST., INVESTING IN EVIDENCE-BASED ALTERNATIVES TO POLICING: COMMUNITY VIOLENCE INTERVENTION 2 (2021), <https://www.vera.org/publications/investing-in-evidence-based-alternatives-to-policing> [<https://perma.cc/HVN5-MDXW>].

¹¹⁸ THE EDUC. FUND TO STOP GUN VIOLENCE & THE COAL. TO STOP GUN VIOLENCE, A PUBLIC HEALTH CRISIS DECADES IN THE MAKING 24 (2021), <https://efsgv.org/wp-content/uploads/2019CDCdata.pdf> [<https://perma.cc/B8Z8-YQZ7>].

¹¹⁹ GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 117, at 16.

¹²⁰ INST. OF MED. & NAT'L RSCH. COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 3–7 (Alan I. Lashner, Bruce M. Altevogt, Arlene F. Lee, Margaret A. McCoy & Patrick W. Kelley eds., 2013).

BAVA discards the idea that any criminal justice strategy linked to public safety is, by default, justified. Instead, it asks that the decision-maker consider the policy's costs and plausible alternatives. A prosecutorial decision-maker could ask the following questions before instituting (or retaining) a policy: could we invest taxpayer dollars more effectively elsewhere to achieve the desired public safety outcome? Secondly, if we carry out this policy, what is the burden of injustice? Would we accept sending dozens of individuals to prison for possessing firearms to stop a single individual who would have fired their weapon? Weighing these costs against potential averted violence aligns with the approach some reform prosecutors already take at an individual level in considering the holistic context of a person, taking into account nuance when making charging decisions, and rejecting formalism.¹²¹

Finally, having a unified framework for policymakers for deliberating about criminal justice interventions has several benefits. Treating prosecution as a public health intervention to create greater public safety and justice is a conceptual framework supported by a broad coalition of legal and community advocacy groups.¹²² Common language emphasizing consideration of benefits (averted violence) and costs (burdens on fairness and finances) helps guide organizational decision-making by giving individuals a common touchpoint for argument and deliberation that is rooted in our most important ideals: justice and community safety. Using a metric like BAVA does not prescribe a certain path, but rather provides a framework for advancing data-driven arguments about what policies best advance collective goals.

C. APPLYING BAVA TO GUN POSSESSION AND GUN VIOLENCE

BAVA would be applied to prosecutorial policy as follows: if a government prosecutes gun possession in order to reduce gun violence, it ought to compare the likely benefits (of violence averted) and costs (e.g., inequitable incarceration, less budget for other interventions, etc.) with other strategies for public safety. BAVA puts the burden on policymakers to justify criminal justice policies that are costly, requiring evidence showing them to be more effective than comparable investments at reducing gun violence. Some features of a BAVA-driven approach to illegal gun possession might include:

¹²¹ See *supra* Section II.B.

¹²² See NW. L. BLUHM LEGAL CLINIC CHILD. & FAM. JUST. CTR., BUILDING A SAFE CHICAGO 2 (2016), <https://wwws.law.northwestern.edu/legalclinic/cfjc/documents/building%20a%20safe%20chicago%20report.pdf> [<https://perma.cc/AZ9W-ZS3K>].

Construct interventions based on evidence about what would change elasticity of demand for firearms among persons prohibited, such as minors and individuals with felony convictions. Empirical evidence indicates that demand for firearms among minors is inelastic in response to criminal laws, in part because of psychological immaturity and underdevelopment of the areas of the brain governing rational decision-making and self-control.¹²³ This poses a particular problem for the idea that increasing punishment will reduce incidence of gun possession. Instead, according to Northwestern's Bluhm Legal Clinic, statistical research found that alternatives to prosecution, employment programs, and community counseling and mentoring programs had greater effects on violent crimes, shootings, and arrests.¹²⁴

Change the default punishment for gun possession. Although progressive prosecutors recognize that each defendant is different and should be treated accordingly, that the *default option* for illegal gun possession is prison deeply shapes outcomes. Even prosecutors who seek alternatives to incarceration for defendants, such as diversion or restorative justice programs, still must convince judges and the public of the value of these programs.¹²⁵ Additionally, there are limited spots in a small number of non-profit programs for diversion or restorative justice programs.¹²⁶ Empirical evidence supports a shift such that individuals should not go to prison unless the prosecution affirmatively builds a case that they are dangerous to public safety; otherwise, removing the gun, not the person, from the community may be a better use of resources.¹²⁷

Reconsider what builds long-term public safety. Research has found that "feelings about the legal system's legitimacy had a stronger effect on whether criminals would carry a gun than . . . heavy policing and harsh legal penalties. The more trust people had in the legal system, the less likely they were to carry a firearm."¹²⁸ By moving away from policies that cause deep inequity and fail to avert much violence, we might strengthen confidence in

¹²³ *Id.* at 10; KOLLMANN & NONG, *supra* note 35, at 7.

¹²⁴ KOLLMANN & NONG, *supra* note 35, at 5–8.

¹²⁵ Telephone Interview with Kristina Kaupa, Pol'y Advisor, Cook Cnty. State's Att'y's Off. (Nov. 16, 2020).

¹²⁶ Telephone Interview with Kristina Kaupa, Pol'y Advisor, Cook Cnty. State's Att'y's Off. (Nov. 20, 2020).

¹²⁷ NW. L. BLUHM LEGAL CLINIC CHILD. & FAM. JUST. CTR., *supra* note 122, at 9–10.

¹²⁸ Yablon, *supra* note 17 (citing Andrew V. Papachristos, Tracy L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 400 (2012)).

the system in ways that do avert violence.¹²⁹ Likewise, research on other community-based interventions—violence interruption programs, mental health, financial stability, and housing interventions, and changes to the physical environment—yielded promising evidence on reducing violence.¹³⁰

CONCLUSION

The relative nascency of progressive prosecution has meant that reforms have often focused on “win-wins,” but as the movement grows in power, prosecutors will grapple with increasingly challenging trade-offs. As Forman argues: “if we’re going to have real reform of this [criminal justice] system, you can’t do this thing that so many people do . . . only talking about reform for non-violent drug offenders, but if you commit a violent crime, we don’t have any sympathy for you.”¹³¹ The BAVA framework aims to support reformers who are looking at data and listening to community members to devise solutions that balance safety and justice.

Applying the BAVA lens yields an increasingly-apparent truth: we are not getting a lot of “juice for the squeeze” with how we punish gun possession, and so should view that policy with heightened skepticism. Applying a critical eye does not mean eliminating all gun arrests. But it does suggest that prison sentences ought to be used much more sparingly for gun possessors, particularly in cases without evidence that the gun would be used other than for self-protection. And it reminds us that our approach to gun violence so far has not been effective enough at protecting people’s safety. The good news is, research has already started to show us what works. Greatly expanding investment in these community-based interventions can make our cities safer while incarcerating fewer of our neighbors.

¹²⁹ *Id.*

¹³⁰ See JOHN JAY COLL. OF CRIM. JUST. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING CMTY. VIOLENCE, REDUCING VIOLENCE WITHOUT POLICE: A REVIEW OF RESEARCH EVIDENCE (2020), https://johnjayrec.nyc/wp-content/uploads/2020/11/AV20201109_rev.pdf [<https://perma.cc/XP7N-KXZG>]; VERA INST., *supra* note 117.

¹³¹ Scott Peters, *James Forman Jr. Calls for Systematic Reform to Mass Incarceration Policies*, KENAN INST. FOR ETHICS AT DUKE UNIV. (Feb. 20, 2019), https://kenan.ethics.duke.edu/eon_jamesformanjr [<https://perma.cc/JEA3-5L8B>] (referencing James Forman, Speech for “Ethics of Now” Series at Duke Univ. (Feb. 15, 2019)).