

**Statement to the U.S. Senate Committee on the Judiciary**

Hearing on: Protecting Public Safety After *New York State Rifle & Pistol Association v. Bruen*

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***The limited importance of recent developments in gun rights jurisprudence in an era of criminal justice reform***

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## ***About the Author***

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Through the Manhattan Institute, and in other outlets, Mr. Mangual has authored and coauthored numerous policy papers, as well as more than one hundred essays and columns on topics related to policing, crime, and incarceration, among others. His work has been featured in a wide array of publications, including the Wall Street Journal, The New York Times, and The Washington Post.

Rafael holds a B.A. from the City University of New York's Baruch College and a J.D. from DePaul University in Chicago. In 2022, he was elected a member of the Council on Criminal Justice, and also serves on the New York State Advisory Committee to the U.S. Commission on Civil Rights.

\*\*The Manhattan Institute for Policy Research does not take institutional positions on federal, state, or local legislation, rules, or regulations. Although my comments draw upon my research and writing about criminal justice issues as an Institute fellow, my statement to the Subcommittee is solely my own, and should not be construed as my employer's.

## Statement

Chairman Durbin, Ranking Member Graham, and members of the Committee:

I'd like to begin by thanking you all for extending to me another invitation to testify before this body on what is perhaps the single most important policy issue of our time: Public safety—especially gun violence. What I'd like to explore in this statement is the possibility that recent and future policing and criminal justice policy choices have been, and will continue to be, far more consequential for public safety outcomes than the Supreme Court's recent decision in *New York State Rifle & Pistol Association Inc. v. Bruen*.

To put a finer note on it: When it comes to the important issue of public safety—our most pressing problem isn't the possibility that more law-abiding citizens will now be able to carry firearms for self-defense in the small handful of states that didn't already allow them to prior to *Bruen*; it's that in so many parts of the country, legislative and administrative policy choices have exacerbated the risks associated with failing to arrest, prosecute, and meaningfully incapacitate high-rate, high-risk criminal offenders. As such, the focus of policymakers hoping to stem the tide of resurgent violent crime should be on identifying and plugging the holes created by recent depolicing and decarceration efforts.

The problem of gun violence is a familiar foe, over which America has, in recent history, emerged victorious. Between 1991-2014, America's homicide rate was cut by more than 50%, going from 9.8 per 100,000 in 1991 to 4.5 per 100,000 in 2014.<sup>1</sup> During that period, America also saw a sharp decline in *non-fatal* firearm-related violence.<sup>2</sup>

But after nearly a quarter century of progress, America has begun to see an erosion of public safety in recent years—one characterized by marked increases in shootings that drove a nearly 12% increase in murders in 2015,<sup>3</sup> a more-than 8% increase in 2016,<sup>4</sup> and a 30% spike in murders in 2020; the single largest one-year spike this country has seen in at least 100 years.<sup>5</sup>

It's worth noting that in the lead up to the Great Crime Decline of the 1990s, our nation's criminal justice systems were hardened in a number of ways. States across the country enacted truth-in-sentencing regimes, three-strikes laws, and habitual offender statutes aimed at maximizing the incapacitation benefits associated with the incarceration of serious offenders. The federal government undertook similar efforts, and invested in local police departments that adopted more proactive postures and made use of data analysis to inform how they deployed and managed their officers. It's also worth noting that the recent softening of those

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<sup>1</sup> See, <https://ucr.fbi.gov/crime-in-the-u.s/1995/95sec2.pdf> and <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1>.

<sup>2</sup> <https://bjs.ojp.gov/content/pub/pdf/fv9311.pdf>.

<sup>3</sup> <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-12>.

<sup>4</sup> <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-10>.

<sup>5</sup> <https://www.pewresearch.org/fact-tank/2021/10/27/what-we-know-about-the-increase-in-u-s-murders-in-2020/>.

same systems began not long before the gun violence resurgence that is still plaguing too many American neighborhoods. Those efforts continue, and their impact is visible in criminal justice enforcement measures, as well as in the legislative and electoral success of the movement to pursue depolicing and decarceration.

Over the last decade-plus, jurisdictions around the country have seen a number of policy developments in the areas of policing and criminal justice—those developments reveal a great deal of momentum for the reform movement that has accelerated in recent years. What has that looked like?

- Between 2010-2016, police departments across the country saw a sharp increase in oversight actions undertaken by the U.S. Department of Justice’s Civil Rights Division, which has initiated pattern and practice investigations and entered into agreements with police departments at a far higher clip than in years past.<sup>6</sup> The current administration seems to be continuing this approach, despite evidence that the launching of prior investigations led to sharp increases in serious crime.<sup>7</sup>
- Over the last 10-20 years, the country has seen federal and state sentencing reforms,<sup>8</sup> state and local bail reforms,<sup>9</sup> state-level discovery reforms,<sup>10</sup> various decriminalization efforts aimed at drug and theft offenses,<sup>11</sup> successful litigation efforts targeting police practices<sup>12</sup> or incarceration levels,<sup>13</sup> and a slew of (often hasty<sup>14</sup>) state and local police reforms aimed at restricting police powers and discretion.<sup>15</sup>
- Since 2016, the so-called “progressive” prosecutor movement has enjoyed an enormous amount of electoral success, winning seats across the country, such that somewhere in

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<sup>6</sup> <https://www.justice.gov/crt/file/922421/download>, at page 19.

<sup>7</sup> See, <https://www.nber.org/papers/w27324>.

<sup>8</sup> For just a few examples, see: <https://www.congress.gov/bill/111th-congress/senate-bill/1789>, <https://www.congress.gov/bill/115th-congress/senate-bill/756>, <https://nyassembly.gov/comm/Codes/20091120/>, <https://conservativejusticereform.org/state/texas/>, <https://sd35.senate.ca.gov/news/2021-10-12-governor-newsom-signs-sb-567-correcting-14-years-unjust-criminal-sentencing>, and <https://apps.legislature.ky.gov/law/acts/11RS/documents/0002.pdf>.

<sup>9</sup> See, e.g., <https://www.manhattan-institute.org/bail-reform-in-chicago>, <https://ejournal.org/news/alaska-enacts-bail-reform/>, <https://media4.manhattan-institute.org/sites/default/files/reforming-ny-bail-reformRM.pdf>, and <https://www.nj.gov/oag/newsreleases16/pr20161013b.html>.

<sup>10</sup> <https://www.nacdl.org/Article/June2013-NACDLNewsDiscoveryReform-Texas> and <https://www.manhattan-institute.org/press/release-discovery-reform-in-new-york-places-undue-burden-on-prosecutors>.

<sup>11</sup> <https://www.courts.ca.gov/prop47.htm>.

<sup>12</sup> <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al>.

<sup>13</sup> <https://www.oyez.org/cases/2010/09-1233>.

<sup>14</sup> <https://www.opb.org/article/2022/03/17/washington-inslee-signs-rollback-of-police-reform-bill/>.

<sup>15</sup> <https://www.nytimes.com/2018/10/19/nyregion/right-to-know-act-nypd.html>, <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> (reporting that “Over 30 states have passed more than 140 new police oversight and reform laws...”), <https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>, <https://www.cbsnews.com/chicago/news/chicago-police-unveil-new-foot-pursuit-policy-chases-will-no-longer-be-acceptable-just-because-someone-runs/>.

the range of 30-40 million Americans live in jurisdictions with “progressive” prosecutors, who have:

- adopted broad policies of non-prosecution as to certain disfavored offenses, limited the discretion of line prosecutors with respect to pretrial detention, parole opposition, and the pursuit of sentencing enhancements, among other things.<sup>16</sup>

These shifts, individually, and collectively, seem to have reduced the likelihood of arrest, prosecution, and/or incarceration for many criminal offenders. Evidence that these shifts have had just such an impact includes (though is certainly not limited to):

- A 24% decline in the nation’s prison population between 2010-2021;<sup>17</sup>
- A 15% decline in the national jail population between 2010-2021;<sup>18</sup>
- A 25% decline in arrests, nationwide, between 2009-2019;<sup>19</sup> and
- A long-standing police recruitment and retention crisis characterized by declines in hiring, increases in resignations and retirements, and reports of recent declines in morale.<sup>20</sup>

To the extent these changes have contributed to the crime spike of the last several years, it’s important to remember that the effects of these shifts won’t be evenly distributed. Indeed, troubling as they may have sounded, the national statistics I mentioned earlier mask an important reality that is key to a more-than-superficial understanding of our gun violence problem: Crime, especially violent crimes like homicides and shootings, are *hyper*-concentrated both geographically<sup>21</sup> and demographically.<sup>22</sup>

A county-level analysis from 2014 showed that somewhere in the range of 2% of U.S. counties saw approximately half of the country’s murders in a given year, while a majority of counties didn’t see any.<sup>23</sup> But that still doesn’t fully capture the degree to which crime concentrates at

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<sup>16</sup> See, e.g., <https://capitalresearch.org/article/living-room-pundits-guide-to-soros-district-attorneys/>, <https://www.newsweek.com/progressive-prosecutors-election-outcomes-nationwide-wins-1757651>, and <https://deliverypdf.ssrn.com/delivery.php?ID=050092116099127105121022026088100078125064008055022090023124074064119127070117018074126126018004021051040003110114117097070072103047039050084004098126117067093082079085019060072064111020101102084116115117108019016097023115005111096112064120075026001127&EXT=pdf&INDEX=TRUE> for lists of progressive prosecutors by jurisdiction.

<sup>17</sup> See, <https://bjs.ojp.gov/content/pub/pdf/p10.pdf> and <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>.

<sup>18</sup> See, <https://bjs.ojp.gov/content/pub/pdf/jim10st.pdf> and <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ji21st.pdf>.

<sup>19</sup> See Mangual, *Criminal (In)Justice* at page 21.

<sup>20</sup> <https://www.policeforum.org/workforcemarch2022>.

<sup>21</sup> <https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9125.12070>.

<sup>22</sup> <https://www.wsj.com/articles/gun-death-rate-nears-three-decade-high-with-men-at-most-risk-11669749562>.

<sup>23</sup> <https://crimeresearch.org/2017/04/number-murders-county-54-us-counties-2014-zero-murders-69-1-murder/>.

microgeographic levels. Analyses done in both urban<sup>24</sup> and suburban<sup>25</sup> environments across the country consistently have shown that somewhere in the range of 3-5% of street segments (defined as the space between one side of two city blocks—i.e., corner to corner, both sidewalks) will see 50% of a given jurisdiction’s violent crime, while somewhere in the range of 1% of street segments will see 25% of the violence.

The uneven geographic distribution of crime is accompanied by equally stark demographic disparities. For example, the homicide victimization rate for blacks in the United States between 1980-2008 was six times the rate for whites.<sup>26</sup> That disparity has since grown. In 2020, the black homicide victimization rate grew from 19.5 per 100,000 to 25.3 per 100,000—almost *ten times* the 2020 white homicide victimization rate of 2.6 per 100,000.<sup>27</sup> The bulk of that disparity is driven by the shockingly larger disparity in the firearm homicide victimization rate between black and white men. In 2021, that rate approached 60 per 100,000 for black men—reaching that measure’s early 1990s peak—while the white male rate stood in the single digits.<sup>28</sup>

To illustrate the point, consider data out of the city of Chicago, whose ten most dangerous neighborhoods in terms of homicide risk in 2019 (where 95.7% of residents were either black or Latino) posted a homicide rate of 61.7 per 100,000. Those neighborhoods saw 250 *more* murders that year than 28 of the city’s safer neighborhoods, combined—this despite housing 264,000 *fewer* residents. In my home city of New York, a minimum of 95% of shooting victims have been either black or Hispanic since at least 2008, despite those groups not constituting anywhere close to 95% of the city’s population.<sup>29</sup>

The concentrated nature of serious violent crime, and gun violence, in particular, undermines the suggestion that the announcement of broadly applicable rules regarding the Second Amendment’s interpretation will cause the public safety sky to fall. One reason for this is that the available data suggest that the perpetrators of shootings and homicides in particular were already prohibited from legally possessing firearms at the time of their offenses because of their ages, lack of permits, or criminal justice status. Indeed data out of cities like Chicago suggest that a key driver of America’s gun violence problem is the systemic failure to meaningfully incapacitate repeat offenders before they kill.

A study done by the University of Chicago Crime Lab found that, on average, those arrested for a shooting or homicide in the city of Chicago in 2015 and 2016 had **12 prior arrests**; nearly one

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<sup>24</sup> See [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2632683](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632683) and <https://www.manhattan-institute.org/weisburd-zastrow-crime-hot-spots>.

<sup>25</sup> <https://cebcp.org/wp-content/halloffame/Gill-et-al-Testing-Concentration-Crime.pdf>.

<sup>26</sup> <https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf>.

<sup>27</sup> Rafael A. Mangual, *Criminal (In)Justice: What the push for decarceration and depolicing gets wrong and who it hurts most*, Figure 2 at page 30.

<sup>28</sup> <https://www.wsj.com/articles/gun-death-rate-nears-three-decade-high-with-men-at-most-risk-11669749562>.

<sup>29</sup> See, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/crime-enf.page>, and <https://www.census.gov/quickfacts/newyorkcitynewyork>.

in five had more than **20 prior arrests**.<sup>30</sup> This measure is in line with recent remarks from Washington D.C. Metro Police Chief Robert Contee, who told members of the media earlier this month that “the average homicide suspect has been arrested **11 times** prior to them committing a homicide. (emphasis added)”<sup>31</sup> In 2018, the Baltimore Police Department reported that the 2017 homicide suspects identified by the Department had **9 prior arrests** on average, and that more **than a third** of them were on parole or probation.<sup>32</sup> Repeat offenders have long played central roles in America’s violent crime story. The Bureau of Justice Statistics reported that between 1990-2002, **more than a third** of those convicted of violent felonies in America’s 75 largest urban counties were on probation, parole, or pretrial release at the time of their offense; **75%** of them had a prior arrest history.<sup>33</sup>

What these statistics tell us is that while the police seem to be doing a decent job of concentrating enforcement resources on the right people and in the right places, the criminal justice system more broadly is failing to serve as a meaningful backstop to those efforts by ensuring that dangerous offenders are taken off the street. Those failures too often prove deadly.

Consider the tragic case of Keaira Bennfield in upstate New York. Bennfield—a 40 year-old mother of two—was, police and prosecutors allege, shot in the head while taking her young children to school by her husband who was released on his own recognizance the night before her murder. His release came after being charged with savagely beating her. You see, due to New York’s bail laws, the judge could not consider the danger Bennfield’s husband posed to her or the community when deciding whether and under what conditions to release him pretrial. This, despite the fact that Bennfield had posted a recording of the beating that led to her husband’s arrest. Perhaps the most tragic part of this story is that Keaira Bennfield was so certain about the risk she faced—the one New York’s law requires judges to turn a blind eye to—that she was reportedly wearing a bullet proof vest when she was killed.<sup>34</sup> Instead of the protection she needed, all the court could offer Bennfield, and victims like her, was a piece of paper containing an order of protection.

What cases like this tell us is that the laws we have on the books regarding firearms restrictions, or any other criminal law, are no good to us unless we have the wherewithal to see to it that those who violate the rules are held to account in a way that actually protects the public’s safety. This is where the focus of policymakers should lie. We must be seeking to find, and, where necessary, create, opportunities to maximize the incapacitation benefits that attend the

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<https://urbanlabs.uchicago.edu/attachments/c5b0b0b86b6b6a9309ed88a9f5bbe5bd892d4077/store/82f93d3e7c7cc4c5a29abca0d8bf5892b3a35c0c3253d1d24b3b9d1fa7b8/UChicagoCrimeLab+Gun+Violence+in+Chicago+2016.pdf>.

<sup>31</sup> <https://www.police1.com/chiefs-sheriffs/articles/dc-police-chief-average-homicide-suspect-has-11-prior-arrests-before-committing-murder-scVSPy0EROWQuAiA/>.

<sup>32</sup> <https://www.baltimoresun.com/news/crime/bs-md-ci-2017-homicide-data-breakdown-20180103-story.html>.

<sup>33</sup> <https://bjs.ojp.gov/content/pub/pdf/vfluc.pdf>.

<sup>34</sup> <https://nypost.com/2022/11/01/ny-man-sprung-on-no-bail-in-facebook-posted-beating-guns-down-wife-cops/>.

incarceration of bad actors. Actively supporting efforts to cut down on those incapacitation benefits is simply incongruous with the arguments made in favor of gun rights restrictions as a means to pursue public safety gains.

Nevertheless, I understand that some may feel uneasy about even a marginal expansion in gun carriage rights during a time of rising crime. However, skepticism of the claim that recent developments in Second Amendment jurisprudence will bring about a significant crime increase is warranted.

In short, there seems to be little in the way of rigorous causal evidence suggesting that an expansion of gun carriage rights will have a significant impact on public safety, in either direction.<sup>35</sup> In a recent analysis and literature review, my Manhattan Institute colleague, Robert VerBruggen, explains why this is so.<sup>36</sup> Among the things VerBruggen illustrates is that the results of the most prominent study linking Right-To-Carry (RTC) Laws with violent crime increases are dependent on modeling choices that other scholars have questioned.<sup>37</sup>

One of the mechanisms through which some suspect RTC expansions may increase crime is that establishing or broadening a right to carry may undermine the efforts of police to discover and seize illegally possessed firearms. But, as my colleague, Mr. VerBruggen concludes in another paper analyzing data from New York City, “stops that uncover guns... tend to have other bases, in addition [to suspicion of carrying a firearm]—suggesting that changes in the legal landscape need not dismantle efforts to stop illegal gun carriers via street stops.”<sup>38</sup> Perhaps more important on this front are recent efforts seeking to minimize the involvement of police in traffic enforcement. Why? Because there is good evidence to suggest that traffic enforcement is a common means through which police discover contraband—including illegally possessed firearms. For example, a paper published by the Manhattan Institute and authored by Deputy Inspector John Hall of the NYPD’s Office of Crime Control Strategies reported that, in 2020, 42.3% of gun arrests made by the department began as traffic stops.<sup>39</sup>

Good policymaking in the realm of public safety requires an honest assessment of the available data. Those data suggest that, if enhancing public safety is our goal, our collective attention would be better directed at efforts to minimize the role of repeat offenders in America’s violent

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<sup>35</sup> See, e.g., <https://media4.manhattan-institute.org/sites/default/files/analyzing-the-effect-of-right-to-carry-laws-on-homicide-and-violent-crime.pdf>.

<sup>36</sup> <https://media4.manhattan-institute.org/sites/default/files/analyzing-the-effect-of-right-to-carry-laws-on-homicide-and-violent-crime.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> <https://media4.manhattan-institute.org/sites/default/files/when-its-legal-to-carry-guns-on-street.pdf>.

<sup>39</sup> <https://media4.manhattan-institute.org/sites/default/files/hall-police-enforce-traffic-laws.pdf>. See also, <https://nij.ojp.gov/topics/articles/gun-recovery-strategies> (finding that traffic and pedestrian stops “account for the majority of gun seizures”), and [https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/gun\\_violence/profile20.html](https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/gun_violence/profile20.html) (finding that “Traffic stops were most effective in locating illegal guns, with 1 gun found per 28 stops,” made during the experiment in which “intensive police patrols [were] directed to an 80-block hotspot area where the homicide rate was 20 times the national average.”).



crime problem than at recent jurisprudential developments with respect to the Second Amendment. The policies most urgently in need of change are those that lower the transaction costs of committing crime and/or raise the transaction costs of enforcing the law. Rules without the means or will to enforce them are little more than empty threats. In light of recent spikes in serious violent crime, we would all do well to closely and carefully consider the degree to which criminal justice policy has exacerbated the risks of victimization faced by those in the areas already struggling with elevated crime. Such consideration, I hope, will lead to a long past-due reorientation of our nation's criminal justice systems around their proper mission: maintaining safety for those who need it most.

Thank you.

/s/ Rafael A. Mangual