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DEFIANCE, CONCEALED CARRY, AND RACE

NICHOLAS J. JOHNSON*

I INTRODUCTION

In other work I posit that two phenomena, the remainder problem¹ and the defiance impulse,² render supply side gun control—sweeping bans on broad classes of firearms technology—unworkable as firearms policy in the United States.³ My broader and continuing project considers whether context and character make certain firearms regulations more or less vulnerable to defiance. My thesis is that integrating defiance into firearms policy analysis in this way helps us position legal interventions along a spectrum ranging from viable solutions to unworkable policies that might make things worse.

The character of defiance has become more complex over time. My prior work focused on *private defiance* of gun bans by individual refusniks—lawful gun owners who refused to surrender items now deemed contraband. This Article integrates a new phenomenon—*official defiance*. This type of defiance involves local, county, or state government officials who are committed to defying gun regulations of a superior jurisdiction.

While private defiance is a powerful disruptor of gun bans, official defiance has greater potential to disrupt laws governing various other aspects of gun use and possession. This Article examines that problem in the context of concealed carry restrictions and offers an assessment of unintended consequences with a particular focus on race. Part II of this Article details the defiance phenomenon on which this analysis is based. Part III examines the questions and issues that arise from integrating the defiance phenomenon into assessments of restrictive concealed carry laws, and contemplates the potential unequal impact of such restrictive laws on minority communities. This Article concludes that defiance

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1. The “remainder problem” describes the fact that gun bans can be effective in stopping the prospective manufacturing of targeted firearms, but wresting previously legal, now banned guns from people who already own them is a different and harder problem.

2. The “defiance impulse” means the near-universal tendency to defy gun bans. This phenomenon is described in detail in Part II, *infra*.

3. See generally Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem Article and Essay*, 43 WAKE FOREST L. REV. 837 (2008).

could result in racial disparities in the implementation of restrictive carry rules, but that defiance generally is less disruptive of restrictive carry laws than it is of supply controls.

II

UNDERSTANDING DEFIANCE

A. Defiance in the United States

Defiance of gun prohibition has a long pedigree. Responses to gun prohibition and registration both internationally and in the United States demonstrate a powerful and nearly universal individual impulse to defy gun bans.⁴ This claim is subject to an important qualification: true gun bans in the United States have been limited to a handful of states and municipalities. Those bans are imperfect tests of defiance because the compliance options include moving or selling the banned technology out of the jurisdiction. It is undisputed that there have been very low rates of affirmative compliance in the form of actual registration or surrender of banned gun technology, as will be discussed more below. But alternative compliance by selling or moving the contraband out of state is difficult or impossible to track. A true test of defiance of U.S. supply controls will only occur on the heels of federal legislation that eliminates the possibility of alternative compliance.

Still, the international trend of defiance supports the projection that American gun owners, like gun owners globally, will defy prohibitive gun legislation. With data from seventy-seven countries, the 2007 International Small Arms Survey reports massive illegal parallel holdings with an average defiance ratio of 2.6 illegal guns for every legal one.⁵ There are good reasons to believe that defiance in the United States will be more extreme than anything that has occurred internationally because U.S. gun culture is exceptional. Americans hold nearly half of the private firearms on the planet.⁶ The number of guns in the United States is orders of magnitude higher than the next closest country.⁷ Our constitutional protection of private firearms is unparalleled, as is the political

4. To the extent that comparing registered versus unregistered firearms is indicative of gun defiance, a study conducted by the Graduate Institute of International Studies, an independent research project based in Geneva, documented vast disparities between legally registered firearms and illegal, unregistered firearms in countries across the globe. *See generally* GRADUATE INST. OF INT'L STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY (2007). For example, in England and Wales, the study estimated as many as four million illegal, unregistered firearms compared to 1.7 million legally registered firearms in 2005. *Id.* at 50. India reported fewer than six million registered guns compared to an estimate of 45 million unregistered ones. *Id.* at 51. Even Japan, a country known for its lack of gun culture, reported “unregistered holdings . . . one-quarter to one-half as large as registered holdings.” *Id.* at 55.

5. *Id.*

6. Michelle Nichols, *Americans Own Nearly Half World's Guns in Civilian Hands*, REUTERS (June 18, 2018) <https://www.reuters.com/article/us-usa-guns/americans-own-nearly-half-worlds-guns-in-civilian-hands-survey-idUSKBN1JE220> [<https://perma.cc/A9T9-BU7T>].

7. *See id.* (stating that, according to the 2018 Small Arms Survey, “[t]here were 120 guns for every 100 U.S. residents in 2017, . . . followed by Yemen with nearly 53 firearms per 100 people”).

power of gun owners and their organizations.⁸ So there are good reasons to believe that defiance in the United States will exceed the rates that have been observed in other countries.

The limited U.S. experiments with supply controls confirm this projection. While the reporting is imperfect, the rates of defiance do seem to exceed the international experience. A study of the first generation of state assault weapons bans by James Jacobs and Kimberly Potter found that:

In recent years, several states and municipalities passed laws mandating the registration [and subsequent prohibition] of assault rifles. These laws failed miserably, primarily due to owner resistance. In Boston and Cleveland, the rate of compliance with the ban on assault rifles is estimated at 1%. In California, nearly 90% of the approximately 300,000 assault weapons owners did not register their weapons. Out of the 100,000–300,000 assault rifles estimated to be in private hands in New Jersey, 947 were registered, an additional 888 were rendered inoperable, and [4] were turned over to the authorities.⁹

Reporting from New Jersey offers a similar defiance trend related to high capacity magazines. In December of 2018, New Jersey banned all ammunition magazines that can hold more than ten rounds.¹⁰ Current owners were required to either surrender them to police, render them inoperable, modify them so they cannot hold more than ten rounds, or sell them to authorized owners out of state.¹¹ Estimates, extrapolating from sales records of common firearms that come with higher capacity magazines, put the number of these magazines owned in New Jersey prior to the ban at around 2 million.¹² Reporting says that zero magazines have been surrendered.¹³ Like other state technology bans, the response to the New Jersey magazine ban is not a clean test of defiance. It is impossible to know exactly how many illegal magazines are now held in New

8. See Brennan Weiss & James Pasley, *Only 3 Countries in the World Protect the Right to Bear Arms in Their Constitutions: The US, Mexico, and Guatemala*, BUS. INSIDER (Aug. 6, 2019), <https://www.businessinsider.com/2nd-amendment-countries-constitutional-right-bear-arms-2017-10> [https://perma.cc/NB7P-XQJE] (stating that “there are only three countries that have a constitutional right to keep and bear arms: Mexico, Guatemala, and the United States[,]” but the United States “is the only country without any restrictions on gun ownership in its constitution”).

9. James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control's Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 106 (1998) (citations omitted). One explanation for the defiance of assault weapons bans is that the people who made the initial decision to buy an assault rifle are the more “hard core” gun owners and therefore predisposed to flout confiscation laws. If this intuition is true, the important question is how many of these hard core gun owners are there? Is it just the four million National Rifle Association (NRA) members? What about people who would not dream of joining the NRA but might think it’s rational to hold a gun for a stormy day?

10. Jacob Sullum, *Gun Owners Don't Seem Eager to Comply With New Jersey's New Magazine Ban*, REASON (Dec. 20, 2018), <https://reason.com/2018/12/20/new-jerseys-gun-owners-do-not-seem-eager/> [https://perma.cc/29BF-AQR8].

11. *See id.*

12. *Id.*

13. *Id.* New Jersey does have gun registration, so it would be possible to identify who purchased a gun that accepts a high capacity magazine prior to the ban. It also would be possible to demand that those individuals somehow certify their compliance with the ban. (Although now that the enactment date has passed, the excuse that the owner sold the magazine out of state and kept no record of the sale would blunt any subsequent certification requirement.)

Jersey. Perhaps all owners of high capacity magazines complied with the law through the other alternatives offered by the statute, though some activists have openly proclaimed their intention to defy the ban.¹⁴

Rates of compliance with New York's assault weapon ban, dubbed the SAFE Act, yield similar results. In 2015, state Freedom of Information Act responses showed that 23,847 people registered 44,485 assault weapons.¹⁵ The number actually owned and required to be registered was estimated by the National Shooting Sports Foundation at about one million assault weapons.¹⁶ Registration was not the only option. Owners could have complied by moving or selling their guns out of state. But there is reason to think that some gun owners have flatly defied the ban: a Forbes report by a New York resident who identified himself as a gun owner, claimed that "there is a profound social stigma among gun owners against registering these guns with the government, . . . [and that gun owners were] quick to tell you that many municipalities and county sheriff departments have reported they won't enforce the SAFE Act in their jurisdictions."¹⁷

Connecticut's 2013 ban on semiautomatic rifles with at least one "military" characteristic—like a pistol grip—also tells the familiar potential defiance story. About 50,000 guns were registered in Connecticut by the end of 2013.¹⁸ Estimates, drawn from national sales and manufacturing data, put the number of unregistered guns in Connecticut as high as 350,000.¹⁹ The law also required high capacity magazines to be "declared."²⁰ Only about 37,000 magazines were declared.²¹ Connecticut's non-partisan office of legislative research concluded that there were about two million high capacity magazines in the state at the time of the ban.²²

14. See, e.g., Joe Atmonavage, *N.J. Gun Owners Are Storing 'Thousands and Thousands' of Banned Gun Magazines in a Steel Vault*, NJ.COM (Sept. 4, 2019), <https://www.nj.com/news/2019/09/nj-gun-owners-are-storing-thousands-and-thousands-of-banned-gun-magazines-in-a-steel-vault.html> [<https://perma.cc/KND4-6UZS>] (quoting Scott Bach, executive director of the Association of New Jersey Rifle and Pistol Clubs, as stating: "Why would you turn in property you paid money for when a government has banned it and there is a lawsuit challenging it that could take years?").

15. Rick Karlin, *New York SAFE Act Gun Registration Numbers Are Released*, TIMES UNION (Jun. 22, 2015), <https://www.timesunion.com/news/article/New-York-SAFE-Act-gun-registration-numbers-are-6343080.php> [<https://perma.cc/K754-4VJ6>]. Observers do not know how many assault weapons are in N.Y. State, but estimates range from hundreds of thousands to up to a million. See *id.*

16. *Id.*

17. Frank Minitzer, *Nearly One Million New Yorkers Didn't Register Their 'Assault Weapons'*, FORBES (Jun. 24, 2015), <https://www.forbes.com/sites/frankminiter/2015/06/24/nearly-one-million-new-yorkers-didnt-register-their-assault-weapons/#12753db2702f> [<https://perma.cc/H33R-H7HP>].

18. Dan Haar, *Untold Thousands Flout Gun Registration Law*, HARTFORD COURANT (Feb. 10, 2014), <https://www.courant.com/business/hc-xpm-2014-02-10-hc-haar-gun-registration-felons-20140210-story.html> [<https://perma.cc/8BX3-EBBW>].

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

In California, preliminary reporting shows single-digit compliance with the state's most recent technology restriction on assault rifles with "bullet buttons."²³ The bullet button is a mechanism that had allowed gun owners to comply with a California statute that prohibited guns with easily detachable box magazines (typically one just pushes the magazine release to drop the empty magazine). The legislation only permitted guns that required a tool to release the magazine. An enterprising tinkerer devised a magazine release that required the use of a bullet tip—satisfying the requirement of a tool—to release the magazine, thus allowing continued use and possession of the assault rifles with a slight modification. California legislators responded to this workaround by banning the bullet button.

B. Official Defiance: An Important New Disruptor

The examples discussed so far describe defiance by private individuals. But there is a separate type to consider—namely *official defiance* by public officers voiced through state laws, local laws, resolutions, and public commitments to defy gun laws enacted by superior jurisdictions. Official defiance threatens to disrupt firearms regulation in new ways and expands the range of policies that defiance might impact.

One burgeoning example of official defiance is the phenomenon of Second Amendment sanctuary cities and counties. Second Amendment sanctuaries deploy the tactics of immigration sanctuary cities and state and local laws that defy federal criminalization of marijuana to promote Second Amendment rights.²⁴ By resolutions and informal declarations, elected officials in these jurisdictions have embraced and encouraged the defiance impulse. Elected officials, including sheriffs in Washington, Maryland, Oregon, Illinois, New Mexico, Colorado, and Virginia,²⁵ have declared that they will not enforce gun laws enacted by the state legislature.²⁶ Organizers admit they took the idea from liberals who have created immigration sanctuaries where local officials defy efforts to enforce tougher immigration laws.²⁷

23. See Stephen Gutowski, *Gun Group: Only 3 Percent of Californians With Assault Weapons Registered Them After Latest Gun Law*, WASH. FREE BEACON (July 20, 2018), <https://freebeacon.com/issues/gun-group-3-percent-californians-assault-weapons-registered-latest-gun-law/> (reporting that, according to the Firearms Policy Coalition, "the likely registration rate of 'bullet-button assault weapons' was only about 3 percent of the total number of firearms in California that fall under the state's latest expansion of its 'assault weapons' ban[.]" and that "the number of attempted registrations [is projected to be] about 3.6 percent of the total number of firearms required to be registered").

24. Daniel Trotta, *Defiant U.S. Sheriffs Push Gun Sanctuaries, Imitating Liberals on Immigration*, REUTERS (Mar. 4, 2019), <https://www.reuters.com/article/us-usa-guns-sanctuary/defiant-us-sheriffs-push-gun-sanctuaries-imitating-liberals-on-immigration-idUSKCN1QL0ZC> [<https://perma.cc/42Y7-NVDM>].

25. Marianne Goodland, *Colorado Counties Declare Themselves '2nd Amendment Sanctuaries' in Response to Red-Flag Gun Bill*, GAZETTE (Mar. 7, 2019), https://gazette.com/news/colorado-counties-declare-themselves-nd-amendment-sanctuaries-in-response-to/article_dce2a6f4-4065-11e9-881d-c7d0cb51777e.html [<https://perma.cc/5WRT-NDJC>].

26. Trotta, *supra* note 24.

27. *Id.*

Another example of official defiance emerged at the state level through the now-invalidated Firearms Freedom Acts. This model legislation was nullified in litigation surrounding Montana's version of the act.²⁸ However, the repeated enactment of the model legislation shows a strong willingness by states to defy federal gun laws. The Firearms Freedom Acts rest on arguments of limited federal power and a bounded commerce clause. It declares that federal law has no application to guns manufactured purely within state boundaries.²⁹ It then authorizes intra-state possession and sale of a variety of firearms—including some otherwise regulated by the National Firearms Act.³⁰ By 2013, the model act had been enacted in Montana, Idaho, Wyoming, South Dakota, Utah, Arizona, Kansas, Tennessee, and Alaska.³¹

It is easy to see how *private defiance* would disrupt laws that attempt to regulate possession. Absent a prior scheme of registration, individual refusniks might just resist complying with commands to register or surrender guns that the government now considers contraband. *Official defiance* adds a new dimension to the defiance calculation in that it might create real or perceived safe havens for particular types of behavior that are prohibited by the superior jurisdiction—such as the public carrying of firearms. The balance of this Article will examine defiance in this new dimension by considering its impact in the context of state reversion to restrictive carry laws.

III

REVERSION TO RESTRICTIVE CARRY RULES, DEFIANCE, AND RACE

This Part focuses on defiance of gun carry laws by a class of people who are distinct from traditional criminals. This class of refusniks consists of people who previously satisfied their jurisdiction's gun carry requirements and then defy new laws that make carrying guns illegal.

Projections about the behavior of this class of refusniks rest substantially on the studies of Defensive Gun Uses (DGUs). There is wide agreement that the vast majority of DGUs do not involve the discharge of firearms. Some subset of these involve guns carried outside the home.³² The prevalence of these non-firing

28. In 2013, the United States Court of Appeals for the Ninth Circuit concluded that the federal law preempted, or took precedence over, the state legislation because Congress' commerce power extended to regulating firearms initially manufactured and sold exclusively intrastate, based on the substantial effect this activity could have on the interstate market in guns. *See generally* Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975 (9th Cir. 2013).

29. *The Firearms Freedom Act (FFA) is Sweeping the Nation*, FIREARMS FREEDOM ACT (June 3, 2010), <http://firearmsfreedomact.com> [<https://perma.cc/2QFV-7XWM>].

30. *Model Version of FFA Legislation*, FIREARMS FREEDOM ACT (Apr. 14, 2010), <http://firearmsfreedomact.com/model-version-of-ffa-legislation/> [<https://perma.cc/9FFZ-V72T>].

31. *State by State*, FIREARMS FREEDOM ACT (June 26, 2019), <http://firearmsfreedomact.com/state-by-state> [<https://perma.cc/7E5X-FXSL>]. The legislation also had found sponsors and was introduced in all but ten states. *Id.*

32. *See generally, e.g.*, PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE (1996); Gary Kleck, *Has the Gun Deterrence Hypothesis Been Discredited?*, 10 J. FIREARMS & PUB. POL'Y 65 (1998); Gary Kleck

DGUs should prompt some illegal gun carriers to make reasonable bets that they can use a gun as deterrence, by brandishing or pointing it, and escape without facing criminal liability. From this, one can posit a class of refusnicks who (1) calculate a net benefit from carrying an illegal gun and (2) live in politically sympathetic jurisdictions where carrying in defiance of the law seems fairly low risk. This Part will discuss the policy implications of this combination both generally and with a particular focus on race.

One of the most obvious consequences of prohibiting concealed carry is that DGUs should decline.³³ However, integrating defiance tells us that DGUs outside the home and general gun carrying will not shrink to zero. The question is who will benefit from these residual DGUs and if we will be happy with how the distribution changes. So how might defiance of carry restrictions shift the character and behavior of public gun carriers? Several variables affect the answer.

First, it is fair to assume that some cohort of people who previously carried will not break the law. The data showing that concealed carry weapon (CCW) permittees are hyper-law-abiding is apt here.³⁴ The most hyper-law-abiding cohort of carriers should comply with the law. The remaining carriers, refusnicks who carry in defiance, would make the pool of public gun carriers marginally riskier and that would arguably leave society somewhat worse off. On the other hand, the pool of carriers also would be smaller, and some will argue that is preferable (even if the pool of carriers is now more dangerous and defiant).

Another complication is that reversion to restrictive rules could change the behavior of gun carriers. Illegal carriers may be far more guarded. The brandishing option, which constitutes most DGUs, should be, by far, the preferred option of the illegal carrier. Illegal carriers hoping to avoid detection should treat firing the gun as absolutely the last option. So the scenario of the officious licensee, the George Zimmerman's who mistake a CCW permit as authority to behave like police, should virtually disappear. There may be disagreement about how to balance these benefits against the cost of declining positive DGUs and the multifaceted risk of shifting public gun carriers away from the hyper-law-abiding carriers to more aggressive, probably more male and younger, carriers.³⁵

& Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995); Tom Smith, *A Call for a Truce in the DGU War*, 87 J. CRIM. L. & CRIMINOLOGY 1462 (1997).

33. Researchers disagree about the number of DGUs. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW & THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 19 (2d ed. 2018). Whatever the true number, reviving restrictions on gun carrying will mean fewer positive DGUs—that is, lawful gun uses that save innocents.

34. See Nicholas J. Johnson, *Lawful Gun Carriers (Police and Armed Citizens): License, Escalation, and Race*, 80 LAW & CONTEMP. PROBS. no. 2, 2017, at 209, 210.

35. Although lawful gun carriers are hyper-law-abiding, Gary Kleck's classic study of DGUs acknowledged a cohort of DGUs that that might or might not be lawful. See generally Kleck & Gertz, *supra* note 32. Various demographic studies show that young males are more prone to violence than other cohorts of the population. See, e.g., JOHNSON ET AL., *supra* note 33, at 1–69.

A less obvious impact of defiance in jurisdictions that revert to restrictive carry rules is that previously lawful concealed carriers who are also black or brown should be less likely than whites to defy a newly implemented ban on concealed carry. Defiance is facilitated in part by Fourth Amendment protections against unlawful searches. People who face or perceive a higher risk of being stopped and or searched by police should be less likely to defy laws banning gun carry. This was the logic of the New City York Mayor Michael Bloomberg administration's now infamous aggressive stop and frisk policies that disproportionately targeted black and brown men.³⁶ Bloomberg's polices are not unique.³⁷ Racial disparities in application of the Fourth Amendment thus could make it riskier for black or brown individuals to defy newly implemented restrictive carry rules.

Further, it is a staple of black culture that police deal more harshly with blacks than with whites.³⁸ The Philando Castile shooting crystalized that criticism in the context of black gun carriers.³⁹ This critique is bolstered by the data suggesting that blacks are far more likely to be the targets of random *Terry* stops.⁴⁰

The perception that defiance of CCW restrictions is riskier for blacks and browns should impact their level of defiance in at least two ways. First, it should affect the distribution of concealed firearms among blacks and browns within the immediate boundaries of their communities. To the extent that propensity for violence could be indicative of risk tolerance for concealed carry,⁴¹ the distribution of concealed firearms in black and brown communities may skew towards young and male populations. Arguably, this is the more worrisome cohort of public gun carriers.⁴² Those who believe that lawful carry suppresses crime should worry about this result.

36. Philip V. McHarris, *Should Mike Bloomberg's Stop-and-Frisk Record Disqualify Him?*, WASH. POST (Feb. 20, 2020), <https://www.washingtonpost.com/outlook/2020/02/16/should-mike-bloombergs-stop-and-frisk-record-disqualify-him/> [https://perma.cc/5A58-XH5P].

37. See generally, e.g., David Rudovsky & David A. Harris, *Terry Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501 (2018); Brando S. Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131 (2012).

38. See Elahe Izadi, *Dave Chappelle Has Always Joked About Policing. Here's How He Tackles It In His Netflix Specials.*, WASH. POST (Mar. 22, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/03/22/dave-chappelle-has-always-joked-about-policing-heres-how-he-tackles-it-in-his-netflix-specials/> [https://perma.cc/N9DC-5X6U]; see also *Dave Chappelle: Talking to Police* (HBO Special Dec. 20, 2017), <https://www.youtube.com/watch?v=K4N2OhUI4Vk> [https://perma.cc/8D6Z-SHA3].

39. Luke Darby, *Trever Noah: "The Second Amendment is Not Intended for Black People"*, GQ (Nov. 28, 2018), <https://www.gq.com/story/trevor-noah-second-amendment-not-for-black-people> [https://perma.cc/WSX5-KKM5].

40. See, e.g., N.Y. CIVIL LIBERTIES UNION, *STOP-AND-FRISK IN THE DE BLASIO ERA 2* (2019), <https://www.nyclu.org/en/publications/stop-and-frisk-de-blasio-era-2019> [https://perma.cc/EA92-QS8S]; Starkey, *supra* note 37.

41. See *supra* note 35 and accompanying text.

42. See *supra* note 35 and accompanying text.

Outside the immediate boundaries of black and brown neighborhoods, the dynamic should be different. After the El Paso shooting, there was reportedly a spike in black and brown people arming themselves.⁴³ Imagine a similar dynamic in a jurisdiction that reverts to restrictive carry rules. Some of these people who previously chose to legally arm themselves against the risk of racist attack may defy the law. These black and brown refusniks may face greater risk of detection and arrest and, compared to whites, a greater percentage of them may be deterred from carrying.

If one considers defiance purely criminal, then these worries can be dismissed with the criticism that it is perverse to criticize policy on the basis that black criminals will not get the same lax treatment for gun crimes as white criminals. On the other hand, this sort of criticism has now become a powerful critique offered by scholars who aim to root out inequality in the criminal justice system.⁴⁴ In the context discussed in this Article, that sort of inequality could mean that white people may benefit disproportionately from non-firing DGUs, and the arguable free-rider benefits,⁴⁵ as well as lax enforcement of laws against carrying guns.

A different set of concerns arises as we add detail to how defiance might unfold. Consider the case of a shall issue⁴⁶ jurisdiction that reverts to restrictive carry laws after a divisive political battle where defiance is endorsed and supported by political subdivisions. This model incorporates the scenarios discussed above where, for example, political subdivisions and their officers, county commissioners, sheriffs, and others have declared their intention to resist state gun control initiatives.

How will official endorsement of defiance affect the behavior of gun owners and gun carriers? This question is particularly intriguing in the concealed carry context, because CCW licensees are hyper-law-abiding.⁴⁷ Will these previously hyper-law-abiding people reverse course and carry in violation of the law? How will they incorporate the rhetoric and commitments of local government actors into the decision of whether to carry in defiance or not? It is reasonable to expect

43. See, e.g., Amanda Woods, *Hispanic El Paso Residents Flock to Gun Shops, Ranges After Mass Shooting*, N.Y. POST (Aug. 13, 2019), <https://nypost.com/2019/08/13/hispanic-el-paso-residents-flock-to-gun-shops-ranges-after-mass-shooting/> [<https://perma.cc/B688-9A4W>].

44. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2018); Lydialyle Gibson, *Color and Incarceration*, HARV. MAG., Sept.–Oct. 2019, at 40.

45. Free rider benefits would occur where the general knowledge that some people are armed deters criminals from attacking unarmed people.

46. Shall issue concealed carry laws mandate that anyone who meets the statutory qualifications for a permit to carry a gun shall be issued a permit. Shall issue stands in contrast to discretionary permitting schemes where police or courts exercise discretion over issuances of individual permits. See generally Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715 (2005).

47. The permitting process culls out felons and others whose behavior bars them from lawfully carrying guns. Moreover, data from large state samples shows that licensees have lower rates of arrest than off duty police. See, e.g., Johnson, *supra* note 34.

refusniks in these locations to be emboldened—at least within their home jurisdictions.

This scenario complicates the already fraught intersection of defiance and race. Where sheriffs and county governments embrace and facilitate a culture of defiance, should we expect that to play out in a purely egalitarian way? Or should we expect defiant sheriffs and county officials to exercise their discretion in a way that favors known constituents, locals, and cronies, with tougher enforcement against outsiders, such as those who are readily identifiable by race? Even where blacks and browns are known within these jurisdictions, will they benefit from the locals' privilege? It is plausible to worry that this dynamic would generate, in a more limited way, the sort of historic disparities achieved by explicitly racist gun legislation common in the nineteenth century, de facto discriminatory intent of the early and mid-twentieth century, or simple cronyism (favoring white male insiders) that some charge was the impulse for the late twentieth-century CCW revolution in the first place.⁴⁸

Separately, will blacks and browns in communities where they represent political majorities enjoy the sort of insider privilege that is signaled in jurisdictions where local governments support defiance of state or federal gun regulations? This is another phenomenon that plays out on the basis of race and political alignment. It is difficult to find black public officials who are advocates of gun rights. Blacks overwhelmingly vote for democrats, and the black political class generally has adopted the party line on firearms and gun control. Indeed, most official defiance rhetoric has emerged from conservative political subdivisions in opposition to gun laws pressed by urban liberal counterparts. So it is unlikely that blacks will experience anything like the local privilege of their rural white counterparts in politically conservative jurisdictions.

Who will suffer here? This question takes us back to the arguments in *District of Columbia v. Heller*⁴⁹ and *McDonald v. City of Chicago*,⁵⁰ where the practical impact of gun restrictions fell most heavily on innocents like the black plaintiffs, Shelly Parker and Otis McDonald. Parker and McDonald were good people living in tough places, who faced a higher than average risk of violent attack, and who the state manifestly could not protect.

IV CONCLUSION

I have argued elsewhere that defiance is extremely disruptive of firearms and affiliated technology supply controls.⁵¹ While as a general matter defiance may be relatively mild disruptor of restrictions on gun carrying, significant unintended consequences may fall on black and brown populations because of discriminatory applications of law and constitutional protections.

48. See generally Johnson, *supra* note 46.

49. 554 U.S. 570 (2008).

50. 561 U.S. 742 (2010).

51. See generally Johnson, *supra* note 3.