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Title
Reevaluating Felon-in-Possession Laws After Bruen and the War on Drugs

Permalink
https://escholarship.org/uc/item/82x6g60j

Journal
UC Irvine Law Review , 15(3)

ISSN
2327-4514

Author
Abelson, Laura G.

Publication Date
2025-12-03

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Reevaluating Felon-in-Possession Laws After *Bruen* and the War on Drugs

Laura G. Abelson*

The legal landscape surrounding firearm possession is evolving rapidly. In 2022, the Supreme Court accelerated its expansion of the individual right to bear arms under the Second Amendment in New York Rifle & Pistol Ass'n v. Bruen. *Since* Bruen*, courts around the country have struck down nearly all types of firearm regulations, with a notable exception: felon-in-possession laws. This Article examines the implications of a legal landscape where those who have prior felony convictions, and especially prior drug convictions, are punished harshly for the same behavior—possession of a firearm—that is constitutionally protected for nearly everyone else.*

I argue that as the Second Amendment expands to protect more and more firearm possession, a dichotomy has arisen in which those who live in the communities most heavily targeted by the War on Drugs of the 1980s and 1990s are increasingly becoming virtually the only Americans for whom firearm possession is illegal. I examine the history and development of felon-in-possession statutes to show that they were not enacted with a clear purpose, and are not narrowly tailored to criminalize the most dangerous behavior. Further, I show how existing federal enforcement priorities and the structure of the United States Sentencing Guidelines compound the harms of the War on Drugs by punishing individuals with prior drug offenses most harshly, even when there is limited evidence to suggest that they pose the greatest danger from firearm possession.

The Supreme Court recently confirmed that the Second Amendment permits individuals who pose a danger to the community to be disarmed in United States v. Rahimi. *The question of how to determine who poses such a danger will be the next threshold of Second Amendment jurisprudence. I argue that as our understanding of the Second Amendment evolves, prosecutors and legislators must be cognizant of the lasting effects of the War on Drugs and question the assumption that any prior felony conviction is an accurate proxy for dangerousness.*

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*Assistant Professor of Law, SMU Dedman School of Law. Many thanks to Aliza Hochman Bloom, Jake Charles, John Connolly, John Duffy, Sarah Gottlieb, Paul Heaton, Rich Hynes, Benjamin Levin, Ion Meyn, Ross Miller, Anna Roberts, Colin Starger, the participants in the NYU Academic Careers Program Workshop, the ABA/AALS Criminal Justice Section Academics Committee workshop, the Drexel Law Faculty Workshop, the participants in the UVA Gun Violence and Second Amendment Colloquium, and Quattrone Center faculty and staff for feedback on earlier drafts. Special thanks to Haley Sturges for data analysis and to Madalyn Cohee and Hannah Stommel for research assistance, and to the terrific editors at the *U.C. Irvine Law Review*, who have truly been a pleasure to work with. Errors are all my own.

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INTRODUCTION

In 2022, the Supreme Court heard a case with the potential to disturb decades of precedent under the Second Amendment.[1] The petitioners in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* sought to have the Supreme Court recognize, for the first time, an individual right under the Second Amendment to bear arms in public, for self-defense. In the lead-up to the Supreme Court's decision in *Bruen*, a set of strange bedfellows emerged among the groups arguing for an expansion of Second Amendment rights. Not only did typically conservative groups, like the

1. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022).

National Rifle Association,[2] various gun clubs,[3] and conservative think tanks[4] file briefs as *amici curiae*, but so too did a group of Black attorneys from various public defender agencies.[5]

The Black public defenders argued for an expanded Second Amendment because of the disparate treatment their clients receive under existing firearms laws.[6] They argued that New York's licensing regime led to the disproportionate prosecution of people of color, where their behavior, merely possessing a firearm, would not be a crime in states with less restrictive licensing schemes.[7]

The Supreme Court responded to this diverse coalition of *amici*, not only striking down New York's firearms licensing scheme but crafting a new test for whether a law passes muster under the Second Amendment.[8] The Court held that for a law regulating firearms to be constitutional, it must be "consistent with this Nation's historical tradition of firearm regulation."[9]

As Second Amendment law develops after *Bruen*, a new problem is emerging that risks cementing the same dynamic the Black public defender *amici* identified, even though the petitioner prevailed as they had hoped.[10] Specifically, in the three years since the Supreme Court decided *Bruen*, courts around the country have used the "historical tradition" test to strike down nearly all types of firearms regulations *except* what are colloquially called "felon-in-possession" statutes, which prohibit those with prior convictions from possessing a firearm. In felon-in-possession cases, like licensing schemes, the only difference between lawful firearm possession and unlawful firearm possession is the status of the defendant: to be charged as a felon-in-possession of a firearm the defendant must have previously been convicted of a crime punishable by a term of imprisonment of more than one year.[11]

Other scholars have examined whether the government can and should regulate firearms. This Article discusses what happens in the wake of that discussion, when a rollback in regulation renders most Americans constitutionally entitled to possess firearms, with one segment—the same segment left behind by

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2. Brief for NRA Civil Rights Defense Fund as Amicus Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).

3. *See, e.g.*, Brief for Bay Colony Weapons Collectors as Amicus Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843); Brief for Association of New Jersey Rifle & Pistol Clubs, Inc., as Amicus Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).

4. *See, e.g.*, Brief for The Cato Institute as Amicus Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843); Brief for Claremont Institute's Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).

5. Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, the Franklin County Public Defender, Monroe County Public Defender's Office, St. Lawrence Public Defender's Office, Oneida County Public Defender, the Ontario County Public Defender's Office, the Ontario County Office of the Conflict Defender, and Wayne County Public Defender as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).

6. *Id.*

7. *Id.* at 16.

8. *Bruen*, 597 U.S. at 17.

9. *Id.*

10. Daniel Harawa recently published an essay arguing that similar patterns would emerge, post-*Bruen* in the context of both the Fourth Amendment and police shootings of Black men. *See* Daniel S. Harawa, NYSRPA v. Bruen*: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163 (2022).

11. *See*, *e.g.*, 18 U.S.C. § 922(g)(1).

prior over-criminalization waves—punished with increasing severity for the exact same conduct. Specifically, this Article examines the development of felon-in-possession statutes and their use in practice to show that they are an imprecise tool for promoting public safety. In their pervasive use, they sweep too broadly, punishing individuals who pose limited risk of dangerousness, and exacerbating existing racial disparities in the criminal justice system.

This discussion of the post-*Bruen* connection between felon-in-possession offenses and the War on Drugs builds on existing scholarship from an earlier era. Many scholars have chronicled how the War on Drugs of the late 1900s and early 2000s promoted draconian criminal enforcement of drug offenses that led to mass incarceration.[12] Others have examined patterns in firearms enforcement generally.[13] Yet, others considered the challenge of historical bias in firearm enforcement pre-*Bruen* that has now been cemented in the law post-*Bruen*.[14]

This Article fills a gap in the literature by synthesizing criminal justice reform literature and Second Amendment literature, and conducting a detailed examination under the United States Sentencing Guidelines to illustrate who receives the harshest sentences for federal felon-in-possession offenses.

In analyzing these areas together, I argue that the history of the War on Drugs, combined with *Bruen*, has created a dichotomy where firearms possession carries stiff penalties in communities that have historically been overpoliced, while the same behavior is constitutionally protected elsewhere. I demonstrate how people in majority-minority, urban centers are more likely to (1) have any type of felony conviction, (2) be prosecuted for felon-in-possession offenses, and (3) have the type of drug convictions that lead to longer sentences for felon-in-possession offenses. As individuals in the same communities targeted by the War on Drugs become some of the only people for whom firearm possession is not constitutionally protected, prosecutors choosing to focus on felon-in-possession prosecutions risk entrenching the harms of prior aggressive drug enforcement, without meaningful evidence that such a strategy improves public safety.

This Article proceeds in four parts to illustrate the interplay between the evolution of the Second Amendment, historical trends in drug and firearm enforcement, and existing federal sentencing law. In Part I, I provide an overview of recent Second Amendment jurisprudence that recognizes an individual right to bear arms in the wake of *Bruen*. Part I discusses the existing conversation surrounding race and the Second Amendment, which shows how an expanded Second Amendment alone is not a racial equity panacea. I also show that the conversation surrounding criminal justice reform has largely side-stepped the Second Amendment.

In Part II, I discuss the development of felon-in-possession laws, and the increase over the last three decades in felon-in-possession prosecutions. I examine whether there is any coherent purpose behind the passage of felon-in-possession laws, and whether prosecution priorities serve those purposes. I argue that individuals who live in communities that were subjected to aggressive enforcement

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12. *See generally infra* notes 54–57.

13. Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2179–80 (2016); Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637 (2021).

14. Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 139 (2021).

at the height of the War on Drugs are most likely to now be targeted for felon-in-possession cases, thereby perpetuating the harms of mass incarceration and racialized over-policing. Further, though courts and prosecutors assume there is a connection between a prior felony conviction and risk of future violence, felon-in-possession statutes were not passed with any coherent articulated purpose, and there is no demonstrated connection between the broad types of prior convictions that disqualify individuals from firearm possession under current law and risk of committing future acts of violence.

In Part III, I examine the framework of the United States Sentencing Guidelines (Guidelines), a 600-page book that recommends an advisory range of sentences for every federal offense. I demonstrate how the current Guidelines, which systematically increase sentences for individuals who have drug-related prior offenses, do not provide an accurate proxy for assessing dangerousness of a particular criminal defendant. Though the United States Sentencing Commission intended the Guidelines to reflect the seriousness of the underlying conduct,[15] the existing Guidelines are both over- and under-inclusive. The Guidelines themselves, and data from the Sentencing Commission, show that individuals who receive the longest average sentences for felon-in-possession offenses are generally those who have prior drug offenses on their records. Individuals with *only* drug priors receive longer sentences on average than those with *only* violent priors.[16] Moreover, the Guidelines' method for calculating criminal history sometimes perversely recommend longer sentencing ranges for individuals who have low-level drug offenses on their records than those who have served lengthy sentences for prior violent offenses. The Guidelines for felon-in-possession offenses also increase the advisory guideline range for several characteristics of the defendant or the offense that is not connected to physical violence or risk that the individual prosecuted would commit any future act of violence. The Guidelines, I argue, do not accurately reflect the seriousness of the offense in many cases.

In Part IV, I return to the post-*Bruen* evolution of the Second Amendment to demonstrate how felon-in-possession laws have quickly become among the few laws that courts near-universally have found to be constitutional under the *Bruen* test. Even in the limited cases where courts have held that felon-in-possession laws were unconstitutional as applied to an individual defendant, they have accepted the premise virtually without question that governments may prohibit at least some people who have criminal records from possessing firearms.

The nature of the dangerousness, or lack thereof, of people with prior felony convictions is relevant to the next frontier in the Second Amendment debate. In the 2024–25 term, the Supreme Court considered another Second Amendment challenge, in *United States v. Rahimi*,[17] in which it determined the contours of its "historical tradition" test for the first time post-*Bruen*. Oral arguments in that case suggested that the Supreme Court may eventually hold that governments may lawfully disarm individuals who present a general danger to the community.[18] A

15. U.S. SENT'G GUIDELINES MANUAL app. C, Amend. 374, § 2K2.1 (U.S. SENT'G COMM'N 1991).

16. *See infra* Section III.D U.S.1.

17. United States v. Rahimi, 602 U.S. 680 (2024).

18. Oral Argument, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915), https://www.supremecourt.gov/oral_arguments/audio/2023/22-915 [perma.cc/QM8Z-M6AD].

prior felony conviction is often used as a proxy for dangerousness. This Article shows that is an imperfect proxy based on untested assumptions. This analysis is therefore timely and necessary.

As other firearm regulations fall, and federal prosecutions of felon-in-possession offenses continue to rise—and also continue to target urban centers with majority-minority populations—society risks creating a two-tiered system in which firearm possession is a fundamental right for White Americans living in rural areas, but the same behavior is punished by harsh criminal sanctions and lengthy prison sentences for Black Americans, living in urban areas that already bore the brunt of the War on Drugs. In this landscape, this Article seeks to begin a conversation about the implications of continuing on the current trajectory of felon-in-possession prosecutions.

I. THE EXPANDING SECOND AMENDMENT AND THE MISSING DISCUSSION OF THE WAR ON DRUGS

A. Recent Expansion of the Second Amendment

In recent years, the Supreme Court has developed a novel, individual rights-based framework for the Second Amendment, and articulated a new test that places primary emphasis on historical regulation of firearms in the founding era. The new test has led courts around the country to strike down firearms regulations of nearly all types at a rate previously unseen.

In 2008, the Supreme Court decided the watershed case *District of Columbia v. Heller*,[19] which held for the first time that an individual has a constitutional right to possess a firearm in their home, and thereby ruled Washington, D.C.'s restrictive firearm possession statute unconstitutional.[20] In 2022, the Supreme Court extended *Heller* in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, holding that New York violated the Second Amendment with its restrictive firearms permit scheme because "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[21]

Though a detailed discussion of the Second Amendment after *Bruen* is beyond the scope of this Article, I note that courts have considered *Bruen* a sea-change in Second Amendment law, even in comparison with *Heller*. After *Heller*, the lower courts "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny."[22] In his majority opinion in *Bruen*, Justice Thomas articulated a new test, rejecting any use of means-end scrutiny, and instead held that the government may only regulate firearms if the laws are "consistent with this Nation's historical tradition of firearm regulation."[23] The decision vitiated the two-part test most courts used after *Heller* and rejected any balancing of the state's interest in regulating firearms with the burden to the individual's Second Amendment right.[24] In the last three years, scholars have spent

19. D.C. v. Heller, 554 U.S. 570 (2008).
20. *Id.*
21. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10 (2022).
22. *Id.* at 17.
23. *Id.*
24. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 450 (5th Cir. 2023), *cert granted*, 143 S.Ct. 2688 (U.S. June 30, 2023) (No. 22-915) (overruled by United States v. Rahimi, 602 U.S. 680, 692 (2024).

considerable energy parsing the implications of the *Bruen* holding and the boundaries of the test the Court articulated.[25]

Unsurprisingly, courts and state governments have begun to declare other state firearm laws unconstitutional as they apply the *Bruen* analysis.[26] For example, the Maryland Court of Special Appeals[27] held that Maryland's permitting scheme, which was analogous to New York's, violated the Second Amendment.[28] As a consequence, Marylanders who seek a permit to carry a concealed firearm no longer need to provide a "good and substantial reason" for requesting the permit.[29] Virtually any Maryland adult who has not previously been convicted of a crime punishable by more than one year in prison, is not a former or current drug addict or alcoholic, and who completes a safety course may pay $75 and receive a concealed carry permit.[30]

Courts in other jurisdictions have ruled in favor of plaintiffs challenging other firearms regulations, including those that prohibit so-called "ghost guns,"[31] assault weapons and high-capacity magazines,[32] and possession of firearms by 18-to-20-year-olds.[33] A federal court even quickly granted a preliminary injunction to a post-*Bruen* law passed by the New York State Assembly that prohibited concealed carrying of firearms in certain locations such as places of worship, nursery schools, playgrounds, public parks, and zoos, finding that the plaintiffs were likely to succeed on the merits of their Second Amendment challenge.[34]

Jacob Charles conducted a study of Second Amendment challenges in the first year after *Bruen* and found that 44 courts ruled in the first twelve months after the decision that different prohibitions on firearm possession were facially

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25. *See, e.g.*, Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023); Lawrence B. Solum & Randy E. Barnett, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49 (2022).

26. *In re* Rounds, 255 Md. App. 205, 206 (2022) ("Pursuant to the United States Supreme Court's recent ruling in New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022), we are obligated to hold the 'good and substantial reason' requirement of the Maryland statute under which Rounds was denied a permit—PUBLIC SAFETY § 5-306(a)(6)(ii)—unconstitutional."); Memorandum from Office of the Attorney General, California Department of Justice to All California District Attorneys, Police Chiefs, Sheriffs, County Counsels, and City Attorneys (June 24, 2022), https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf [perma.cc/2CMH-4JUY].

27. By referendum, in November of 2022, the Maryland Court of Special Appeals—Maryland's intermediate appellate court—was renamed the Appellate Court of Maryland. Steve Lash, *Voters Approve New Names for Court of Appeals, Special Appeals*, DAILY REC. (Nov. 9, 2022), https://thedailyrecord.com/2022/11/09/voters-approve-new-names-for-court-of-appeals-special-appeals [perma.cc/49XF-92FU].

28. *See Rounds*, 255 Md. App. at 212.

29. *Id.*

30. MD. CODE ANN., PUB. SAFETY § 5-306(a) (West) (emphasis added).

31. Rigby v. Jennings, 630 F. Supp. 3d 602, 607 (D. Del. 2022). "Ghost guns" are firearms that can be printed with a 3D printer, or assembled from parts printed from at 3D printer. They do not have serial numbers and are therefore more difficult to trace.

32. Rocky Mountain Gun Owners v. Bd. of Cnty. Comm'rs of Boulder Cnty., No. 22-CV-02113, 2022 WL 4098998, at *3 (D. Colo. Aug. 30, 2022).

33. Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 745 (N.D. Tex. 2022).

34. *See* Antonyuk v. Hochul, 639 F. Supp. 3d 232, 249 (N.D. N.Y. 2022).

unconstitutional under the Supreme Court's *Bruen* test.[35] By contrast, he found that in the year after *Heller*, no court granted any such challenge.[36]

The most notable exception to this trend is the Supreme Court's ruling in June 2024 in *United States v. Rahimi*, that a federal law criminalizing possession of a firearm by someone under a domestic violence restraining order is constitutional.[37] The Court held that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed" under the Second Amendment.[38] The Court noted that the statute under which Mr. Rahimi had been convicted applied "only once a [state] court had found that the defendant 'represents a credible threat to the physical safety of another,'" and that it therefore was analogous to both surety and "going armed" laws that existed at the time of the founding.[39] The law therefore fell within the historical tradition of the Second Amendment, under *Bruen*,[40] and is constitutional.

The next frontier of Second Amendment litigation is all but guaranteed to involve the question of how to define who "pose[s] a credible threat to the physical safety of others"[41] and how much more broadly that definition can and should be stretched beyond people like Mr. Rahimi, who had a previous judicial finding of dangerousness in the form of a state court-ordered restraining order, where he had a legal opportunity to contest the finding. There is little to no scholarship about what dangerousness means in the Second Amendment context, and limited discussion of dangerousness in any other context when used as a term of art, as opposed to a colloquial principle.[42]

B. Race and the Second Amendment

As the Black public defender *amici* in *Bruen* portended, there is a growing recognition that there may be racial implications of the Supreme Court's changing Second Amendment jurisprudence, but no consensus on what those implications will be. Thinkers on every side of the gun control debate have used race to justify their positions.

The Supreme Court itself has used racial disparities to justify its expansion of the Second Amendment. In 2010, in *McDonald v. City of Chicago*, in which the Court

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35. Charles, *supra* note 25, at 53.

36. *Id.*

37. *See* United States v. Rahimi, 602 U.S. 680, 697 (2024).

38. *Id.* (citing 18 U.S.C. § 922(g)(8)(C)(i)).

39. *Id.*

40. The Court also revisited the *Bruen* analysis of how "sufficiently similar" an "historical analogue" law must be to the modern law to pass muster under the Second Amendment. *See id.* at 700. Some have argued that this emphasis on analogous laws rather than nearly identical ones amounts to a revisiting of the *Bruen* test. *See, e.g.*, *Second Amendment — 18 U.S.C. § 922(g)(8) — History and Tradition* — United States v. Rahimi, 138 HARV. L. REV. 325, 331 (2024).

41. Rahimi, 602 U.S. at 700.

42. *See, e.g.*, Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 583 (2018) ("[P]hysical violence, or the threat thereof, describes only a tiny fraction of felony offenses"); Jacob D. Charles, *Firearms Carceralism*, 108 MINN. L. REV. 2811, 2872 (2024) ("[T]his reductive dichotomy [between the law abiding citizen and the criminal] 'assume[s] that the definition of a "law abiding citizen" is ontologically stable, self-evident, and easily discernable in a moment of violent confrontation. There's good reason to be doubtful about those assumptions.") (quoting Lindsay Livingston, *Good [Black] Guys With Guns: Performance and the Anti-Black Logic of US Gun Culture*, LATERAL (Spring 2020), https://csalateral.org/forum/gun-culture/good-black-guys-with-guns-livingston [perma.cc/YXX6-VBJS]).

held that the Fourteenth Amendment incorporated the Second Amendment to the states, Justice Alito devoted several pages of his majority opinion to chronicling the history of race and prohibitions against firearm possession by Black people during slavery, and generally in the pre-Civil War era.[43] He argued that the Fourteenth Amendment was necessary to protect newly freed Black Americans' right to arm themselves in self-defense against White, southern militias in the post-Civil War period.[44] Justice Thomas echoed this narrative in his concurrence in *McDonald*,[45] and made similar arguments in *Bruen*.[46]

The Black public defender *amici* in *Bruen* argued that the Supreme Court should expand the Second Amendment as the petitioner requested because of New York's licensing regime's racially disparate impact.[47] In particular, they argued that by placing discretion in the hands of the New York Police Department (NYPD) to determine who qualified for a license to possess a firearm, the licensing regime sanctioned the NYPD's discrimination towards Black and Latino residents, and supported a system in which the NYPD could discretionarily deny permits to Black and Latino residents, and then prosecute them for possessing firearms.[48]

The narratives propounded by both the Supreme Court itself and the Black public defender *amici* have not been without criticism. After *Bruen* did what the Black public defenders asked, Daniel Harawa argued that the decision was cold comfort.[49] Even if some number of Black people are not prosecuted for firearm possession, he posited, they may be more likely to face police violence for carrying firearms, even lawfully. He wrote, "the modern Second Amendment landscape is just another vignette in the elusive quest of Black people trying to fully realize their equal citizenship."[50]

Scholars arguing for a less expansive reading of the Second Amendment have also used race to justify their positions,[51] or noted that an expanded Second Amendment would not be a panacea for racial equity. For example, a year before the Supreme Court decided *Bruen*, Joseph Blocher and Riva Siegel argued that White, male firearm owners have a *de facto* privilege to carry weapons that is not afforded to other groups.[52] Reviewing responses to widespread protests in the summer of 2020 over both racial justice issues and COVID-19 restrictions, they illustrated how protestors were treated very differently based on race and political affiliation.[53] They attributed the disparity to a "general and well established tendency to see African Americans as threatening."[54] They argued that these racial disparities in enforcement argued not for less enforcement of existing firearm laws, but more.

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43. McDonald v. City of Chicago, Ill., 561 U.S. 742, 771–80 (2010).
44. *Id.* at 779–80.
45. *Id.* at 837–38, 844–47 (Thomas, J., concurring).
46. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 60–64 (2022).
47. Brief of the Black Attorneys of Legal Aid et al., *supra* note 5, at 5.
48. *Id.* at 12–13.
49. Harawa, *supra* note 10, at 164–65.
50. *Id.*
51. *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573 (2022) (arguing in support of expanded use of felon-in-possession prosecutions as a tool to combat gun violence in minority communities).
52. Blocher & Siegel, *supra* note 14.
53. *Id.* at 195–96.
54. *Id.* at 196.

Specifically, they argued that because firearms can be used even in their display as a method of inducing terror, the government should be permitted to regulate both the physical and psychological harm of open firearm possession.[55]

Though each party has used racial disparities to justify its interpretation of the Second Amendment, none have grappled in depth with how a narrowing category of people for whom firearm possession is illegal would interplay with current prosecution priorities. The Black public defenders and the Supreme Court justices articulate a narrative of improved fairness based on race from a broadening Second Amendment, but do not consider any limitations of their argument. Though Blocher and Siegel recognized, before *Bruen*, that there was a de facto disparate treatment of Black and White Americans based on a definition of public safety, or threat, related to firearm possession,[56] they did not anticipate how the Supreme Court's history and traditions test would de jure expand firearms rights under *Bruen* for those already advantaged populations. And Daniel Harawa focuses on police behavior and brutality, not on the prosecutions themselves. In each case, *Bruen* has solidified constitutional protections for the communities that were already privileged with respect to firearm possession. That alone can create disparities in prosecution decisions.

C. Missing discussion of the Second Amendment in criminal justice reform

Since 2008, when the Supreme Court decided *Heller* and then later *McDonald*, a parallel robust literature has developed critiquing the aggressive policing strategies of the late twentieth century, colloquially known as the "War on Drugs." Researchers, policy analysts, activists, politicians, and judges have come together in recent years to criticize the "tough-on-crime" policies of the late twentieth century.[57] Criticisms of the War on Drugs have come from many different angles. Scholars have recognized the connection between the War on Drugs and mass incarceration

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55. *Id.* at 141–42.

56. Blocher and Siegel also published an essay while *Bruen* was pending in response to the amicus brief filed by the Black public defenders, arguing that "the racial justice concerns the public defenders highlight should be addressed in democratic politics rather than the federal courts." Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449 (2022).

57. *See, e.g.*, Levin, *supra* note 13; Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 830 (2013); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257 (2009); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (1st ed. 2010); Kimbrough v. United States, 552 U.S. 85, 98 (2007) ("[T]he Commission stated that the crack/powder sentencing differential 'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely held perception' that it 'promotes unwarranted disparity based on race.' Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed 'primarily upon black offenders.'" (citations omitted)); United States v. Brewer, 624 F.3d 900, 912 n.14 (8th Cir. 2010) ("The disproportionate impact of the crack cocaine guidelines on minorities should concern every federal judge, and provide another reason why guideline sentences for crack cocaine offenders warrant special attention."); United States v. Smith, 73 F.3d 1414, 1422 n.3 (6th Cir. 1996) (Jones, J., concurring) (likening the racial disparity of crack cocaine sentencing to the internment of Japanese Americans during World War II). *See also* Dan Merica & Evan Perez, *Eric Holder Seeks to Cut Mandatory Minimum Drug Sentences*, CNN (Aug. 12, 2013), http://www.cnn.com/2013/08/12/politics/holder-mandatory-minimums/ [perma.cc/V3H2-L8U5] ("Holder embraced steps to address 'shameful' racial disparities in sentencing . . . .").

in the United States.[58] Civil libertarians have objected to the courts' limitations on constitutional rights and individual liberties in the interest of allowing drug prosecutions to proceed.[59] Many voices have also criticized the expansion of prosecutorial power that stems from the coercive effect of mandatory minimum sentences.[60]

Even though, as the Black public defenders noticed, prosecution for firearm possession falls disproportionately upon Black defendants, much criminal justice reform literature has ignored the Second Amendment, and most scholars have sidestepped parallels between aggressive drug prosecutions and aggressive firearms prosecutions.[61] I summarize that history and literature here because it provides an important backdrop to my discussion of the lasting effects of the War on Drugs in current firearms prosecutions.

The connection between the War on Drugs and mass incarceration is most relevant to the discussion, *infra*, of felon-in-possession prosecutions because of the sheer number of Americans who were subject to prosecution under this punitive regime, and who therefore now have felony criminal records. As governments prioritized prosecutions of drug crimes, the number of incarcerated Americans ballooned.[62] Between 1970 and the high-water mark in 2009, the United States prison population increased from slightly under 200,000 to over 1.5 million,[63] representing a 750 percent increase. The federal system witnessed an even larger increase, by percentage. In 1980, there were just under 21,000 federal prisoners.[64] By 2011, there were nearly 200,000, a nearly ten-fold increase.[65] Even in 2020, in the wake of the COVID-19 pandemic and shifts away from incarceration for drug

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58. Levin, *supra* note 13, at 2188 (citing Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 1 (2015) ("Drug offenders make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the federal Bureau of Prisons, so they are in many ways the key to the size and nature of the federal prison population."); NAT. RSCH. COUNCIL OF THE NAT. ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 118 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014)).

59. Levin, *supra* note 13, at 2185–87.

60. *See, e.g.*, Angela Davis, *supra* note 57, at 831 ("Disproportionate offending in certain categories of crimes . . . , racial profiling, the War on Drugs, and certain sentencing laws and policies all contribute to racial disparity in the criminal justice system. The role that prosecutors play in the equation is unique because of their extraordinary power and discretion. The impact of their discretion, power, and decision-making cannot be overstated."); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 745 (1991); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137–38 (1995).

61. An important exception to this is Benjamin Levin's *Guns and Drugs*, *supra* note 13, discussed in detail elsewhere in this Article. Some other authors have presented general critiques of aggressive firearms prosecutions without connecting this strategy directly to the War on Drugs. *See, e.g.*, David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011 (2020); Mugambi Jouet, *Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization*, ARIZ. ST. L.J. 55 239, 239–89 (2023); Charles, *supra* note 42.

62. NAT. RSCH. COUNCIL OF THE NAT. ACADS., *supra* note 58, at 118.

63. *Growth in Mass Incarceration*, THE SENT'G PROJECT, https://www.sentencingproject.org/research [perma.cc/YQ85-XX6B] (last visited Jan. 31, 2025).

64. *Id.*

65. *Id.*

crimes, the total population of incarcerated people had decreased, but only to just over 1.1 million.[66]

The increase in the United States prison population, and the proliferation of people with felony records, has affected different racial groups differently because policy choices within laws have had racially disparate effects. For example, the 1986 Anti-Drug Abuse Act created a 100:1 sentencing disparity between crack and powder cocaine.[67] This choice has been broadly criticized as having a racially discriminatory effect because powder and crack cocaine are functionally similar in their harm as substances—the only difference is their prevalence in White, as opposed to Black, communities.[68] Courts generally rejected challenges to these laws under the Equal Protection Clause of the Constitution because the law was facially neutral.[69] Eventually, Congress reduced the crack/powder disparity to 18:1 in the Fair Sentencing Act of 2010. The change responded to reports from the United States Sentencing Commission that showed that the original law overstated the harmfulness of crack, as opposed to powder cocaine, punished low-level users too harshly, and had a racially disparate effect on communities of color.[70]

Broad-based consensus has arisen that the widespread prosecution of non-violent drug offenses has had a disparate impact on communities of color, even though research suggests the rate of drug use among White populations is similar to that in Black and Latino communities.[71] What differs between the communities is the rate of *prosecution* for drug offenses, not the rate of drug use or addiction.

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66. *Id.*; *see also How Is Covid-19 Impacting Federal Criminal Enforcement?*, TRACREPORTS (May 20, 2020), https://trac.syr.edu/tracreports/crim/608/ [web.archive.org/web/20200527122056/https://trac.syr.edu/tracreports/crim/608]; Jon Schuppe, *Baltimore Will No Longer Prosecute Drug Possession, Prostitution, Low-Level Crimes*, NBC NEWS (Mar. 29, 2021), https://www.nbcnews.com/news/us-news/baltimore-will-no-longer-prosecute-drug-possession-prostitution-low-level-n1262209 [perma.cc/5VXU-P396].

67. H.R. 5483, 99th Cong. (1986).

68. *See, e.g.*, John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 381 (2013); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613 (2000); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1254–56 (1996).

69. Dorsey v. U.S., 567 U.S. 260, 296 (2012) ("Although many observers viewed the 100-to-1 crack-to-powder ratio under the prior law as having a racially disparate impact . . . only intentional discrimination may violate the equal protection component of the Fifth Amendment's Due Process Clause." (citations omitted)).

70. SENSIBLE SENTENCING REFORM: THE FAIR SENTENCING ACT OF 2010, U.S. SENT'G COMM'N (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_FSA_2010.pdf [perma.cc/3EGU-QYVX].

71. Levin, *supra* note 13, at 2181 (citing ALEXANDER, *supra* note 57, at 96–97; NAT. RSCH. COUNCIL OF THE NAT. ACADS., *supra* note 58; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1046 (2010) ("A critical fact often lost in the public debate over the propriety of the nation's 'war on drugs' is that the available statistical data suggests that Whites, Latina/os, Blacks, and Asian-Americans have roughly similar rates of illicit drug use. Nonetheless, the 'war on drugs' as it has been enforced has had devastating impacts on minority communities across the United States.")). *But see* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45 (2012) (arguing that focus on non-violent drug offenses has obscured the connection between prosecution of violent offenses and mass incarceration).

Consequently, the effects of prosecution and incarceration for those offenses differ as well.[72]

Though prosecution under harsh turn-of-the-century drug laws and aggressive prosecution under them created some disparities, unconstitutional police practices in majority-minority urban centers amplified them. In 2016, the United States Department of Justice (DOJ) completed an investigation of the police department in Baltimore,[73] where I worked as an assistant federal public defender, that illustrates how unconstitutional policing practices have contributed to this dynamic. The report found that the Baltimore Police Department (BPD) "engage[d] in a pattern or practice of making unconstitutional stops, searches, and arrests [and] using enforcement strategies that produce[d] severe and unjustified disparities in the rates of stops, searches and arrests of African Americans . . . ."[74]

The results of the investigation reflected the staggering degree to which individuals in over-policed, majority-Black communities have had more police involvement than their counterparts in other communities. For example, the DOJ found that African Americans accounted for 82 percent of all BPD vehicle stops, compared to only 60 percent of the driving age population in the City and 27 percent of the driving age population in the greater metropolitan area.[75] The Report also showed that racial disparities in BPD's arrests were most pronounced for highly discretionary offenses such as failure to obey, trespassing, making a false statement to an officer, and disorderly conduct,[76] suggesting that Black Americans are most likely to be arrested for and convicted of such offenses.

Notably, the DOJ Report found BPD arrested African Americans for drug possession at five times the rate of others.[77] Between 2010 and 2015, the BPD arrested approximately 100,000 people for drug possession in Baltimore, 89 percent of whom were Black.[78] As the DOJ noted, those disparities existed even though rates of drug use are nearly the same: research from the Centers for Disease Control and Prevention have found that drug use rates are similar among racial groups, with Black people being only 1.1 or 1.2 times more likely than White people to have reported drug use in the last month.[79]

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72. NAT. RSCH. COUNCIL OF THE NAT. ACADS., *supra* note 58, at 60; ALEXANDER, *supra* note 57, at 96–97.

73. U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), https://www.justice.gov/crt/file/883296/download [perma.cc/BTT9-XDSW] [hereinafter U.S. DEP'T OF JUST., C.R. DIV.].

74. *Id.* at 3. After the release of the DOJ report, the City of Baltimore and the Baltimore Police Department entered into a consent decree with the Department of Justice to address the Baltimore Police Department's history of unconstitutional and racially discriminatory policing. *See* Consent Decree, United States v. Police Dep't of Balt. City, No. 1:17-cv-00099 (D. Md. Jan. 12, 2017), https://www.mdd.uscourts.gov/sites/mdd/files/ConsentDecree.pdf [perma.cc/54PK-6HJ8].

75. U.S. DEP'T OF JUST., C.R. DIV., *supra* note 73, at 7.

76. *Id.*

77. *Id.* at 8.

78. *Id.* at 58.

79. *Id.* at 59–60 (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL SURVEY ON DRUG USE AND HEALTH (2013)). The most recent National Survey on Drug Use and Health, which compiled data for 2021, shows similar results. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL SURVEY ON DRUG USE AND HEALTH (2021), https://www.samhsa.gov/data/sites/default/files/reports/rpt39443/2021NSDUHFFRRev010323.pdf [perma.cc/56B3-RCMZ].

The DOJ report on the Baltimore Police Department described conduct that had far-reaching implications for the citizens of Baltimore City. The unconstitutional and racially discriminatory policing tactics described in the report mean that a Black citizen of Baltimore is substantially more likely to have a criminal record than someone living in a different community, even when their behaviors were exactly the same, because Black citizens of Baltimore are subjected to "heightened intrusion from the police into their lives."[80]

Baltimore is not unique. Similar patterns play out in Detroit,[81] Boston,[82] New Orleans,[83] and elsewhere around the United States.[84] Police resources are directed at poor, majority-minority communities, which results in more police interactions, more arrests, more convictions, and higher rates of incarceration, even when behaviors, such as drug use, are virtually the same as in White communities.

A broad swath of experts has sounded the alarm over the harms of mass incarceration. The coalition arguing for decarceration includes those who argue that imprisonment is just too expensive to justify its broad use,[85] those who argue that racial disparities in prosecution are discriminatory and therefore categorically unjustifiable,[86] as well as those who focus on the collateral consequences of imprisonment. Such consequences include the effects of imprisonment on those incarcerated—difficulty finding employment,[87] loss of housing,[88] ineligibility for

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80. U.S. DEP'T OF JUST., C.R. DIV., *supra* note 73, at 54.

81. *Metro Detroit Policing*, DETROIT JUST. CTR. (Aug. 20, 2021), https://detroitjustice.org/metro-detroit-policing [perma.cc/VDM3-FRAY].

82. JEFFREY FAGAN, ANTHONY A. BRAGA, ROD K. BRUNSON & APRIL PATTAVINA, FINAL REPORT: AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS (2015), https://s3.amazonaws.com/s3.documentcloud.org/documents/2158964/full-boston-police-analysis-on-race-and-ethnicity.pdf [perma.cc/U3EJ-Q7WU].

83. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATIONS OF THE NEW ORLEANS POLICE DEPARTMENT 39 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [perma.cc/5REE-ARLZ].

84. THE SENT'G PROJECT, SHADOW REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN SENTENCING IN THE U.S. (2022), https://www.sentencingproject.org/policy-brief/shadow-report-to-the-united-nations-on-racial-disparities-in-sentencing-in-the-united-states/ [perma.cc/UZ9Y-G6LS].

85. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 47 (2011).

86. Jonathan Simon & Adrian A. Kragen, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT'G REP. 271 (2014).

87. GREY GORDON & URVI NEELAKANTAN, INCARCERATION'S LIFE-LONG IMPACT ON EARNINGS AND EMPLOYMENT (2021), https://www.richmondfed.org/publications/research/economic_brief/2021/eb_21-07#:~:text=The%20model%20reveals%20that%20first,and%20employment%20by%2027%20percent [perma.cc/M5U4-8U6U].

88. Gabriel J. Chin, *What Are Defense Lawyers for? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 155 (2012) (citing Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158 (1999)); *see also* Tracey Tully, *Landlords Barred From Using Criminal Records to Deny Housing*, N.Y. TIMES (June 4, 2021), https://www.nytimes.com/2021/06/04/nyregion/nj-housing-bill-ban-the-box-bill.html [web.archive.org/web/20210604191247/https://www.nytimes.com/2021/06/04/nyregion/nj-housing-bill-ban-the-box-bill.html] (discussing "ban-the-box" legislation).

public benefits,[89] risks to physical health,[90] and the fraying of pro-social family ties[91]—and also the effects incarceration has on communities.[92] When large numbers of community members are incarcerated, the economic and social effects of their removal from society ripple through the lives of their families.[93] Together, a combination of those arguing for decarceration from an economic, libertarian perspective and those arguing for decarceration from a moral, social justice perspective have succeeded in passing new laws that aim to decrease prison sentences.[94]

A consensus has arisen that mass incarceration is harmful, and that policy makers should reconsider laws that lead to lengthy prison sentences. But even as that consensus has solidified around what people colloquially call "nonviolent drug offenses,"[95] leading to such policy changes as the Fair Sentencing Act of 2010,[96] the First Step Act of 2018,[97] and the repeal of New York's punitive Rockefeller Drug Laws,[98] the federal government has simultaneously increased penalties for and prosecutions of possessory firearm offenses.[99] As discussed below, federal felon-in-possession prosecutions have followed the same pattern as the War on Drugs, with law enforcement targeting individuals in majority-minority urban centers. But,

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89. Chin, *supra* note 88, at 155; *Collateral Consequences Inventory*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences [perma.cc/6MH9-75DV] (last visited Jan. 15, 2024).

90. JULIA ACKER, PAULA BRAVEMAN, ELAINE ARKIN, LAURA LEVITON, JIM PARSONS & GEORGE HOBOR, MASS INCARCERATION THREATENS HEALTH EQUITY IN AMERICA (2019), https://www.rwjf.org/en/library/research/2019/01/mass-incarceration-threatens-health-equity-in-america.html [perma.cc/AJ8J-LADY].

91. NAT'L RSCH. COUNCIL OF THE NAT'L ACADS, *supra* note 58, at 264–67, 270–74.

92. *Id.* at 297 (citing research finding "that concentrated disadvantage and crime work together to drive up the incarceration rate, which in turn deepens the spatial concentration of disadvantage and (eventually) crime and then further incarceration—even if incarceration reduces some crime in the short run through incapacitation. In such a reinforcing system with possible countervailing effects at the aggregate temporal scale, estimating the overall net effect of incarceration is difficult if not impossible, even though it may be causally implicated in the dynamics of community life.").

93. LEILA MORSY & RICHARD ROTHSTEIN, MASS INCARCERATION AND CHILDREN'S OUTCOMES: CRIMINAL JUSTICE POLICY IS EDUCATION POLICY (2016), https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes [perma.cc/ALU7-7LJA] (explaining the effects of having an incarcerated parent).

94. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html [web.archive.org/web/20250328102545/https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html]; Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES (Mar. 25, 2009), https://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html [web.archive.org/web/20250405054140/https://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html].

95. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 271–72 (2018) (citing JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 221–22, 228–31 (2017)).

96. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 2010, 124 Stat. 2372 (2010).

97. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

98. JIM PARSONS, QING WEI, JOSHUA RINALDI, CHRISTIAN HENRICHSON, TALIA SANDWICK, TRAVIS WENDEL, ERNEST DRUCKER, MICHAEL OSTERMANN, SAMUEL DEWITT & TODD CLEAR, A NATURAL EXPERIMENT IN REFORM: ANALYZING DRUG POLICY CHANGE IN NEW YORK CITY, 1, 13–15 (2015), https://www.vera.org/downloads/publications/drug-law-reform-new-york-city-technical-report_03.pdf [perma.cc/E7QV-BLAL] (summarizing 2009 drug law reform in New York state).

99. *See* Bipartisan Safer Communities Act of 2022, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

as Benjamin Levin describes,[100] there has been no similar consensus—and limited debate—over whether law enforcement should limit the prosecution of possessory firearm offenses to limit incarceration rates.

II. THE SCOPE AND PURPOSE OF FEDERAL FELON-IN-POSSESSION PROSECUTIONS

As drug-war policies led to larger numbers of citizens having prior convictions for drug-related offenses that then disqualify them from possessing firearms, the federal government has explicitly targeted these same communities for firearms enforcement. In this Part, I examine the history and purpose of felon-in-possession laws, arguing that they do not justify this disparate treatment. Indeed, felon-in-possession laws were not passed with any consensus on the purpose or intended effect of those laws, but rather as a response to civil unrest. In addition, lawmakers have paid little attention to the effectiveness of felon-in-possession laws in combatting gun violence. Felon-in-possession laws simply are not tailored to prevent violence, and therefore serve as a blunt instrument for doing so.

A. History of Felon-in-Possession Statutes

The historical context in which felon-in-possession statutes arose is murky, at best. It shows that they were not developed as a result of a careful study of the connection between firearm possession, past criminal records, and propensity for violence, but instead in response to periods of civil unrest. When Congress passed the Gun Control Act of 1968 that created the modern federal felon-in-possession statute, it did not consider whether those with prior felony convictions present greater risk of committing violent acts.

The original laws prohibiting possession of certain types of firearms by people with some prior criminal records laws were largely passed in the early twentieth century.[101] Some have argued that they are rooted in laws that explicitly disarmed Black people in the era of slavery.[102]

The precursor to the current federal felon-in-possession law was passed in 1938, in the same era in which some states were passing restrictive firearm possession laws that were race-neutral on their face, but were targeted at preventing or discouraging Black people from possessing firearms.[103] But, even in that environment, the first federal felon-in-possession statute was narrow compared to today's law: it prohibited the transfer of firearms and ammunition to people who had been previously convicted of certain very serious crimes, such as murder, manslaughter, rape, kidnapping, or assault with intent to kill, rape, or rob.[104]

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100. *See generally* Levin, *supra* note 13.

101. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 269–70 (2020) (collecting statutes).

102. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 166–68 (2018).

103. *Id.* at 169–70; *see also* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 929 (2001) (describing the history and connection between vagrancy laws and early laws prohibiting Black people from possessing firearms).

104. Shreefter, *supra* note 102, at 153 (citing Federal Firearms Act of 1938, Pub. L. No. 75-785, § 2, 52 Stat. 1250, 1251 (repealed 1968)). It bears noting that the original federal law was narrower than

Congress greatly expanded the federal felon-in-possession law with the Gun Control Act in 1968.[105] That Act created the felon-in-possession law as it existed until the passage of the Bipartisan Safer Communities Act (BSCA)[106] in 2022 and criminalized possession of a firearm by those with *any* type of felony conviction, including non-violent offenses.[107] As Alice Ristroph has noted, this category is enormous, and is much larger than the original group of felonies recognized at common law: "[E]ach of the common law felonies involved violence, destruction, and/or a serious deprivation of property. Not so with the modern felony. Today, the category reaches everything that seems even a little bit wrongful or harmful, and much that does not."[108]

Congress passed the Gun Control Act of 1968 (GCA) in an environment of increasing racial and political tension. Riots broke out in several cities in the middle of the decade, in response to increasingly aggressive policing of Black neighborhoods, a rise in police brutality, and eventually the assassination of Martin Luther King, Jr.[109] The Black Panther Party had come to prominence in the middle of the decade, encouraging members to carry firearms openly as they sought to empower the Black community to assert their civil rights with respect to police. Not only would they carry law books and follow police to provide those arrested with *Miranda* rights,[110] but they would carry firearms openly in these interactions.[111]

Conservative politicians sought to capitalize on fears surrounding the growing unrest, and the need to increase policing, particularly of Black neighborhoods.[112] States around the country also began passing new, restrictive gun control laws during this period. New York,[113] California,[114] and Illinois[115] all passed laws creating significant restrictions on or criminalizing firearm ownership in 1967. Congress then followed, in the summer of 1968, with the GCA, which President Lyndon B. Johnson signed into law in October of that year.[116] The federal statute followed a trend that developed over the last century: possession offenses of many types replaced vagrancy laws as a method for sweeping social control, and as a tool to expand control of populations that the state deems undesirable and prevent perceived threats to the social order.[117]

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some of the racially-motivated vagrancy laws passed by states in the same time period. *See also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009) (arguing that broad felon disarmament does not comport with the Second Amendment, and arguing that only those convicted of "crimes of violence" should be prohibited).

105. Charles & Garrett, *supra* note 13, at 654.

106. Bipartisan Safer Communities Act of 2022, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

107. Shreefter, *supra* note 102, at 170.

108. Ristroph, *supra* note 42, at 583.

109. Renée McDonald Hutchins, *Stop* Terry*: Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 887–88 (2013).

110. Shreefter, *supra* note 102, at 170 (citing Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 964 (1999)).

111. *Id.*

112. Hutchins, *supra* note 109, at 887–88.

113. N.Y.C. Admin. Code § 10-303.

114. 1967 Cal. Stat. 2459, 2459–63.

115. *See generally* 430 ILL. COMP. STAT. 65 /1.1 (2012).

116. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

117. Dubber, *supra* note 103, at 836, 920.

Jacob Charles and Brandon Garrett note that although parts of the GCA had been debated for years, the section that became the felon-in-possession law was a last-minute addition to the bill, added with no debate and little analysis, and "largely as a political favor to improve its author's image as tough on crime."[118] Congress relied on a report by the President's Commission on Law Enforcement and Administration of Justice (Commission) that strongly supported additional restrictions on firearm possession.[119] The Commission explicitly stated that such restrictions would reduce "the danger of crime in the United States," but relied on no empirical evidence for this claim—none existed at the time.[120] Notably, even the Commission did not recommend as broad a ban on possession by people with prior criminal convictions as the one that Congress eventually enacted, recommending only a ban on those with "certain [prior] offenses."[121]

A long string of legislative compromises have prioritized criminalization of firearm possession and harsher punishments, including stiff mandatory minimum sentences.[122] As other scholars have described, the rare compromises in the contentious debates over on firearm regulation have generally resulted in harsh criminal penalties for unlawful firearm possessors.[123] As Charles and Garrett note, traditional "gun control" proponents want to limit access to firearms because of the weapons' inherent potential to cause harm, and opponents of gun control want to preserve the sporting and self-defense uses of firearms for law-abiding citizens.[124]

Even as recently as 2022, in the wake of a spate of mass shootings, Congress broke a longstanding stalemate over firearms regulation and passed the BSCA[125]—the first time since 1994 that lawmakers in Washington came together on meaningful gun control legislation. The BSCA was passed hastily in a brief window of political opportunity. In approximately one month, legislators passed an eighty-page bill with very limited debate or deliberation. They released the text of the bill on June 21;[126] the Senate passed the bill without amendment two days later,[127] with the House of Representatives following suit the next day.[128] Less than a week later, President Biden signed the bill into law.[129] Along with much-publicized funding for red-flag laws in the states and more robust background checks for firearm

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118. Charles & Garrett, *supra* note 13, at 653–54.

119. Philip J. Cook, *Challenge of Firearms Control in a Free Society*, 17 CRIMINOLOGY & PUB. POL'Y 437 (2018).

120. *Id.*

121. *Id.*

122. Charles & Garrett, *supra* note 13, at 685; Charles, *supra* note 42.

123. Charles & Garrett, *supra* note 13, at 686, 688 (citing Levin, *supra* note 13, at 2192).

124. *Id.* at 688.

125. Bipartisan Safer Communities Act of 2022, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

126. *Murphy Statement on Gun Safety Legislative Text*, CHRIS MURPHY (June 21, 2022), https://www.murphy.senate.gov/newsroom/press-releases/murphy-statement-on-gun-safety-legislative-text [perma.cc/YC5N-MEXW].

127. Mike DeBonis, *Senate Passes Bipartisan Gun Violence Bill, Marking Breakthrough*, CHRIS MURPHY (June 23, 2022), https://www.murphy.senate.gov/newsroom/in-the-news/senate-passes-bipartisan-gun-violence-bill-marking-breakthrough [perma.cc/4AFH-QPMS].

128. Niels Lesniewski, *House Clears Bipartisan Gun Violence Reduction Measure*, ROLL CALL (June 24, 2022), https://rollcall.com/2022/06/24/house-clears-bipartisan-gun-violence-reduction-measure/ [perma.cc/ HX6T-VXA8].

129. Donald Judd, *Biden Signs Bipartisan Gun Safety Bill into Law: 'God Willing, It's Going to Save a Lot of Lives'*, CNN (June 25, 2022), https://www.cnn.com/2022/06/25/politics/biden-signs-gun-bill/index.html [perma.cc/4LH7-3MLM].

purchases, the BSCA expanded federal criminal laws governing firearm possession and their penalties,[130] including increasing the maximum penalty for felon-in-possession offenses from ten to fifteen years of imprisonment.[131]

B. The Purposes of Felon-in-Possession Statutes

Given the history described in Part II.A, *supra*, what is the purpose of felon-in-possession prosecutions? There has been limited academic examination of *why* these laws are passed and enforced, as opposed to *how*. Are felon-in-possession laws supported by accurate assumptions about dangerousness? Do such laws intend to strip rights from those who have violated the social compact, akin to felon disenfranchisement laws?

The dearth of evidence on the purpose of felon-in-possession laws suggest that there is no singular purpose. Indeed, Jacob Charles and Brandon Garrett observe and chronicle the practical motivations that have caused these laws to be passed and enforced at the federal level: (1) the compromises between the pro-gun and anti-gun factions in the policy sphere, (2) the enforcement priorities of federal prosecutors who feel pressure to address urban gun violence, and (3) a limited judicial check on use of these statutes.[132] None of these observations suggests a principled, as opposed to practical, collective theoretical underpinning for such laws.

One could argue that stripping Second Amendment rights is akin to felony disenfranchisement, and therefore may represent a societal judgment that those who have previously committed a felony offense have lost their rights to possess firearms, even if protected by the Second Amendment. However, as Kate Weisburd recently observed in an article discussing the stripping of rights as punishment, the Fourteenth Amendment explicitly acknowledges the possibility that the right to vote may be abridged for participation in "rebellion or other crime."[133] The Second Amendment contains no such exception. Abridgment of the right to possess a firearm, therefore, must rest on a separate justification.

Felon-in-possession statutes were passed, at least in part, to criminalize "the possibility of harm"[134] and are predicated on an assumption that those with prior felony convictions possess a higher risk of committing violent acts, or causing harm with a firearm, than those without such prior convictions. The government has relied on this justification of aggressive enforcement of felon-in-possession laws, by suggesting there is a connection between possession of firearms illegally and subsequent use of those firearms to commit crimes.[135] Courts have also assumed

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130. Kyana Givens, Michael Carter & Laura Ginsberg Abelson, *Federal Time*: *Congress' Rush to Respond to Recent Mass Shootings Repeats Historic Mistakes that Fueled Mass Incarceration*, INQUEST (Aug. 11, 2022), https://inquest.org/federal-time/ [perma.cc/2ZGQ-T33L].

131. Bipartisan Safer Communities Act of 2022, Pub. L. No. 117-159, § 903(b), 136 Stat. 1313 (2022); 18 U.S.C. § 922(g).

132. Charles & Garrett, *supra* note 13, at 688–91.

133. Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1335-36 (2023); U.S. CONST. amend. XIV, § 2.

134. Shreefter, *supra* note 102, at 154.

135. Albert R. Gonzalez, Att'y Gen., U.S. Dep't of Just., One Year Anniversary Speech (Feb. 15, 2006), https://www.justice.gov/archive/ag/speeches/2006/ag_speech_060215.html [perma.cc/ZLH8-5QWG] (touting a 73 percent increase in firearms prosecutions and a concurrent decrease in violent crime, without any research on the causal relationship between the two).

that the current federal felon-in-possession law is ostensibly predicated on the theory that those previously convicted of a felony "may not be trusted to possess a firearm without becoming a threat to society."[136] As one court explained:

> [P]ossession of a gun gives rise to *some* risk that the gun may be used in an act of violence. By definition, without possessing a gun, one cannot use a gun for the commission of a violent act; with a gun, one can. Possession of a gun greatly increases one's ability to inflict harm on others and therefore involves some risk of violence.[137]

There is limited evidence to support the assumption that *anyone* previously convicted of *any type* of crime punishable by more than a year in prison is more likely to commit an act of violence using a firearm than someone without such a prior conviction.[138] Notably, the category of felony offenses that disqualify someone from possessing a firearm is very broad.[139] Such a conviction could just as easily be a conviction for unauthorized use of a credit card[140] as it could be a conviction for a violent assault.[141] Federal law only requires that the prior offense be punishable by more than a year in prison, regardless of what sentence a court actually imposed.[142] Moreover, the prohibition is for life—firearm possession is prohibited for any person convicted of any offense punishable by more than a year in prison, unless their civil rights have been restored.[143] Such restorations are virtually impossible at the federal level,[144] and often very difficult under state law.[145]

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136. Scarborough v. U.S., 431 U.S. 563, 572 (1977) (quoting 114 CONG. REC. 13868, 14773 (1968)).

137. United States v. Dillard, 214 F.3d 88, 93 (2d Cir. 2000) (emphasis in original).

138. *See* Kanter v. Barr, 919 F.3d 437, 467–68 (7th Cir. 2019) (Barrett, J., dissenting) *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 721 (2007) ("[M]any felonies are not violent in the least, raising no particular suspicion that the convict is a threat to public safety. Perjury, securities law violations, embezzlement, obstruction of justice, and a host of other felonies do not indicate a propensity for dangerousness. It is hard to imagine how banning Martha Stewart or Enron's Andrew Fastow from possessing a gun furthers public safety. Yet, despite this overinclusiveness, felon possession bans are consistently, and without exception, deemed reasonable measures of promoting public safety.").

139. *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting) ("It also encompasses those who have committed *any* nonviolent felony or qualifying state-law misdemeanor—and that is an immense and diverse category. It includes everything from Kanter's offense, mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses. *See* Mass. Gen. Laws ch. 129, §§ 39, 43; Mich. Comp. Laws § 445.574a(1)(a), (2)(d); *see also, e.g.*, 21 U.S.C. § 676 (violating the Federal Meat Inspection Act in certain ways); 18 U.S.C. § 1621 (committing perjury); Mass. Gen. Laws ch. 266, § 30A (shoplifting goods valued at $100).").

140. MD. CODE ANN., CRIM. LAW §§ 8-214(a), 8-216 (West 2021, 2024).

141. MD. CODE ANN., CRIM. LAW § 3-202 (West 2024).

142. 18 U.S.C. § 922(g).

143. 18 U.S.C. § 921(a)(20). Federal courts look to the law of the state in which the conviction arose to determine if such a process has occurred. *See, e.g.*, United States v. Ramos, 961 F.2d 1003, 1009 (1st Cir. 1992). Federal law has no process for restoration of civil rights after a felony conviction. *See* Beecham v. United States, 511 U.S. 368 (1994).

144. *See, e.g.*, United States v. Bean, 537 U.S. 71, 76–77 (2002) (explaining that the Bureau of Alcohol Tobacco and Firearms has not even reviewed restoration requests since the mid-1990s).

145. *See* Restoration of Rts. Project, *Firearms Rights Under Federal Law*, COLLATERAL CONSEQUENCES RES. CENTER, https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges-2/ [perma.cc/6BXP-L9EP] (last visited Jan. 17, 2024). The chart reflects that in at least 25 states, there is no mechanism by which someone can

In recent years, scholars have also considered the possibility that prohibitions on firearm possession by those with prior felony convictions could be based on a theory that those who are not "law abiding citizens" are excluded from the Second Amendment's protections altogether.[146] As Jacob Charles notes, in arguing that rights under the Second Amendment are defeasible, both scholars and judges have disagreed on whether the dangerousness of a particular individual should be the "touchstone" of the Second Amendment analysis,[147] or whether the law may properly exclude classes of people without an individualized determination of dangerousness.[148] Regardless of the answer, Jacob Charles' work illustrates that there remains no consensus on the purpose of felon-in-possession laws.

In this light, blanket criminalization of firearm possession by anyone with a prior conviction for a drug-related felony is particularly concerning, not only because poor communities of color have disparately been targeted for drug enforcement, as discussed in Part I.C, *supra*, but because the assumed connection between drug use and violence, and even drug trafficking and violence is supported only by anecdote, not evidence. In 2015, Shima Baradaran Baughman attempted to determine whether there is, in fact, a connection between drugs and violence, as Congress[149] and the courts[150] presume. She noted that courts have held, as a matter of law, that there is a connection between violence and both drug trafficking and drug use offenses.[151] Yet, social science shows that the connection is more tenuous. Between 1995 and 2012, drug use in the United States increased or stayed the same, yet violent crime decreased in every region of the country over the same period.[152] Though there is some evidence that those actively under the influence of drugs may be more likely to commit violent acts than those not using drugs, only small

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have their civil rights restored for purposes of federal firearms law except gubernatorial pardon or having their conviction set aside. In yet more states, an individual must petition a court for restoration of rights, or for expungement of the initial conviction.

146. Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 224 (2021); Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, 83 L. & CONTEMP. PROBS. no. 3, 53, 61 (2020).

147. Charles, *supra* note 146, at 63.

148. *Id.* at 67.

149. *See* General Statement and Summary, Title III-Forfeiture, S. 1762, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374 (1985) (referring to the "inevitable attendant violence" of the drug trade).

150. *See, e.g.*, United States v. Carlton, 356 F. App'x 864, 873 (6th Cir. 2009); United States v. Martinez, 938 F.2d 1078, 1083 (10th Cir. 1991); United States v. Williams, 919 F.2d 147 (9th Cir. 1990) (unpublished table decision); United States v. Holland, 810 F.2d 1215, 1219 (D.C. Cir. 1987); United States v. Mabry, No. 11-10102-01-EFM, 2011 WL 4014375, at *2 n.9 (D. Kan. Sept. 9, 2011); United States v. Alexander, 923 F. Supp. 617, 623 (D. Vt. 1996); People v. Arista, No. F061906, 2012 WL 1437290, at *2 (Cal. Ct. App. Apr. 26, 2012); Commonwealth v. Moses, 557 N.E.2d 14, 18 (Mass. 1990); People v. Broadie, 332 N.E.2d 338, 342-43 (N.Y. 1975); People v. Soler, 460 N.Y.S.2d 537, 541 (App. Div. 1983) (reasoning that drug traffickers often commit violent crimes against police); United States v. Bannister, 786 F. Supp. 2d 617, 675 (E.D.N.Y. 2011) ("In moral terms, those working in the drug trade are primarily responsible not for drug abuse but for the trade itself and the violence and extortion attendant to it. Those who engage in violence and extortion should be punished in accordance with the danger their actions represent to the community."). *But see* State v. Santini, No. C.A. IN-93-03-0136, 1998 WL 109844, at *2 (Del. Super. Ct. Feb. 19, 1998) (relying on a study published related to the criminal histories of shooting suspects in Wilmington, Delaware).

151. Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 254–56 (2015) (collecting cases).

152. *Id.* at 276.

percentages of drug defendants commit violent crimes, and only small percentages of violent crimes involve drugs.[153] As she notes, "there is no solid empirical support for a direct relationship between drugs and violence, but because the data on this topic contradicts common perception, it is slighted."[154]

As the law stands, prosecutors have broad discretion to determine whether an individual with a prior felony conviction warrants prosecution for possession of a firearm. They are left to determine whether there is a connection between having been convicted of an auto theft as a teen and then possessing a firearm for protection as a thirty-five-year-old, or whether a prior fraud conviction means someone may commit a violent crime with a firearm. In the district where I practiced, prosecutors regularly justify prosecuting firearm possession because a defendant has a prior record of drug offenses, or possessed any quantity of drugs at the time of arrest. In short, felon-in-possession laws are broad, their purpose is disputed, and they provide prosecutors an enormous amount of discretion. At the same time, I have been unable to find any published guidance for prosecutors that provides advice for *how* to determine when the community harm resulting from prosecuting such offenses outweighs the danger posed by someone with a felony conviction possessing a firearm.

C. Federal Felon-in-Possession Prosecutions in Majority-Minority Communities

Federal prosecutors in recent decades have chosen to prioritize felon-in-possession offenses over nearly every type of other firearm offense.[155] At the height of the War on Drugs, the federal government began targeting the same majority-minority communities targeted by the War on Drugs for firearm prosecution through programs that continue today. Such prosecutions have continued to gain acceptance even as drug prosecutions have fallen out of favor. Jacob Charles and Brandon Garrett observe that federal firearm prosecutions have created a system "where underresourced minoritized communities are both disproportionately victims of gun violence and targeted by federal sentencing."[156]

Beginning in the early 1990s, the federal government began an initiative, most recently called Project Safe Neighborhoods, that explicitly targeted majority-minority, urban jurisdictions for federal prosecution of what would usually have been state-level firearm possession crimes.[157] The program is a collaboration between federal, state, and local law enforcement to ensure that the defendants prosecuted receive the longest sentences possible.[158]

Project Safe Neighborhoods succeeded a program in Richmond, Virginia in the 1990s called Project Exile.[159] That program sought to federalize firearm prosecutions for three reasons: (1) to hold defendants without bail under federal law, (2) to subject defendants to potential federal mandatory minimum sentences,

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153. *Id.* at 286–88.

154. *Id.* at 278–80.

155. Charles & Garrett, *supra* note 13, at 676.

156. *Id.* at 645.

157. Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 307 (2007).

158. *Id.* (citing Press Release, Debra W. Yang, L.A. Law Enforcement Officials Roll-Out Project Safe Neighborhoods (Dec. 18, 2003)).

159. *Id.* at 309–12.

and (3) to "exile" the defendants to federal prison, forcing them to serve prison time outside of their communities.[160]

The program had a disproportionate effect on the Black community. Over 90 percent of the individuals prosecuted under Project Exile were Black.[161] The program caused these individuals to be prosecuted in a jurisdiction, the Eastern District of Virginia, where the jury pool was only 10 percent Black, as opposed to the Richmond jury pool, which was 75 percent Black.[162] An Assistant United States Attorney in Richmond even stated at the time, at a local Bench-Bar Conference discussing the program, "that one goal of Project Exile is to avoid 'Richmond juries.'"[163]

A three-judge panel of the United States District Court for the Eastern District of Virginia seemed to notice that the program had a disproportionate effect on the Black community.[164] The court noted that the decision to situate Project Exile in the predominately Black communities of Richmond and Norfolk "[meant] that defendants charged with firearms offenses in outlying areas of the Eastern District of Virginia, who are more likely to be Caucasian, evade federal prosecution under identical and equally applicable statutes for identical conduct."[165] The court therefore found "there is little doubt that Project Exile has a disparate impact on African-American defendants."[166] Nevertheless, the court concluded that the defendant failed to prove the racial animus necessary to make out a claim under the Equal Protection Clause of the Constitution.[167]

The judges in *Jones* were in the minority of decisionmakers at the time who voiced concern over the racial disparities caused by Project Exile. Instead, Project Exile, was lauded by a diverse coalition.[168] The National Rifle Association praised the program, as did gun control advocates.[169] Those who generally disagreed on questions of firearm regulation were able to agree when it came to criminalization of firearm possession, regardless of the effect those policies had on criminalizing conduct of poor, urban, Black communities.

Though Richmond saw a precipitous decline in violent crime during the initial Project Exile years, there is no consensus among experts about the effect of Project Exile on that decline because gun-related violence dropped significantly across the country during the same time period. [170] Nevertheless, the Bush Administration expanded the program to other cities[171] and, as noted above, it eventually became

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160. *Id.* at 309.
161. United States v. Jones, 36 F. Supp. 2d 304, 308 (E.D. Va. 1999).
162. *Id.*
163. *Id.*
164. *Id.* at 307–08.
165. *Id.* at 312.
166. *Id.*
167. *Id.*
168. Gardner, *supra* note 157, at 310.
169. *Id.*
170. *See* Charles & Garrett, *supra* note 13, at 637; Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, *in* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 111 (Gene Healy ed., 2004); Patton, *supra* note 61, at 1020–21.
171. *Id.* at 310–11.

known as Project Safe Neighborhoods, which continues to exist today.[172] Indeed, statistics show that since 2015, federal firearm prosecutions have remained in favor. They have continued to rise over the last several years, even as drug prosecutions have declined.[173] The expansion of Project Safe Neighborhoods and a related program, Project Guardian, which both focused on aggressive federal prosecution of existing firearm possession offenses, remained a centerpiece of federal law enforcement strategy through the Trump administration.[174] Federal felon-in-possession prosecutions have continued to target majority-minority urban centers to this day.[175]

As the *Jones* court noted, there is no question that Project Safe Neighborhoods and similar programs have had a disparate impact on different racial groups. The decision to increase federal firearm prosecutions in majority-minority cities has meant that individuals in those locations caught possessing firearms illegally face stiffer, federal penalties than they would face if prosecuted under state law for the very same offenses.[176]

It is important to note that Project Safe Neighborhoods has not, as President George W. Bush stated, "enforce[d] [all] the gun laws which exist on the books."[177] Rather, the increase in firearm prosecutions has focused overwhelmingly on the street-level possessors of firearms, whether or not they are engaged in any violence.[178] United States Attorneys' Offices have largely chosen to prosecute the end-possessors of firearms rather than federally licensed firearms dealers or those who traffic in illegal firearms.[179] This is the case even though, as Bonita Gardner found in 2007, slightly more than 1 percent of the federally licensed firearms dealers in the United States could be linked to over 57 percent of the firearms recovered in crimes that could be traced.[180]

D. Federal Felon-in-Possession Prosecutions in the Aftermath of the War on Drugs

In 2016, Benjamin Levin posited that "criminal regulation of gun possession may well reinscribe the inequalities of the drug war."[181] That concern has played out

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172. Gardner, *supra* note 157, at 311; U.S. Dep't of Just., *Project Safe Neighborhoods*, https://www.justice.gov/psn [perma.cc/3769-WRWW].

173. Charles & Garrett, *supra* note 13, at 677.

174. *Id.* at 681–82.

175. *See*, *infra* Part II Section E.

176. ANTHONY A. BRAGA, GUN VIOLENCE AMONG SERIOUS YOUNG OFFENDERS 17 (2010), https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-w0191-pub.pdf [web.archive.org/web/20211123200329/https://cops.usdoj.gov/RIC/Publications/cops-w0191-pub.pdf] (describing Project Exile as "essentially a firearms sentence-enhancement initiative, as offenders are diverted from state to federal courts.").

177. Gardner, *supra* note 157, at 311–12 (citing Letter from President George W. Bush to United States Attorneys, (Nov. 27, 2001) Letters to U.S. Attorneys from the President of the United States, the Attorney General and the Director of the Bureau of Alcohol, Tobacco and Firearms, Project Safe Neighborhoods Tool Kit).

178. U.S. SENT'G COMM'N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE?, 10, 20 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf [perma.cc/Y9YF-CAN5] [hereinafter USSC Firearms Report].

179. Gardner, *supra* note 157, at 313; *see also* Patton, *supra* note 61, at 1022–23.

180. Gardner, *supra* note 157, at 313 (citing Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry's 'Dirty Little Secret' Does Not Deserve Congressional Protection*, 73 UMKC L. REV. 911 (2005)).

181. Levin, *supra* note 13, at 2197.

in recent years. In light of the history of felon-in-possession statutes and the War on Drugs, the decision to prosecute primarily street-level possessors of firearms in urban areas through Project Safe Neighborhoods, and similar programs, has exposed a much greater swath of the population to prosecution for firearm possession alone, as opposed to firearm use or trafficking. Disparate levels of prosecution for drug crimes have resulted in many more "prohibited persons"[182] in historically over-policed communities. The decision to target the same communities targeted by the War on Drugs for prosecution of firearms possession, and to seek lengthy sentences for conduct that would not be unlawful but for past over-policing, contributes to a cycle of mass incarceration, further criminalization, and the fraying of the social fabric of the targeted communities.

To be sure, gun violence exacts a tremendous toll on the communities in which Project Exile and its progeny have been implemented.[183] As James Forman, Jr., notes, the policies that ultimately generated the circumstances discussed in this Article arose from the very real increase in crime in the 1960s and 1970s in predominately Black communities. The tough-on-crime policies subsequently enacted were, in no small part, a response to the voiced concerns of people living in the communities most affected.[184] Even recently, for example, Baltimore City voters who were tired of persistent violence in their community replaced a reform-minded prosecutor with one who promised a partial return to tough-on-crime policies, and an increased emphasis on firearm prosecutions[185] several years after Freddie Gray's death set off protests against aggressive policing tactics.[186]

There is no consensus about the best way to mitigate both the harms of gun violence, and the harms of over-policing, but the harms of over-policing are also real. In fiscal year 2022, the vast majority of people prosecuted for felon-in-possession offenses—76.9 percent—were non-White people.[187] Those disparities become even more stark in districts encompassing historically over-policed communities like the jurisdiction where I practiced—Maryland. An analysis of sentencing commission data shows that there, from 2012-2021, 93 percent of individuals convicted of federal felon-in-possession offenses were Black.[188] Similar patterns have played out in the federal districts that include Detroit, Cincinnati, New York City,[189] and St. Louis,[190] among others.

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182. 18 U.S.C. § 922(g)(1).

183. *See* Forman, *supra* note 71, at 43.

184. *Id.* at 36.

185. Alex Mann and Lee O. Sanderlin, *Ivan Bates Wins Democratic Primary for Baltimore State's Attorney, Mosby, Vignarajah Concede Race*, BALTIMORE SUN (July 7, 2023), https://www.baltimoresun.com/2022/07/23/ivan-bates-wins-democratic-primary-for-baltimore-states-attorney-mosby-vignarajah-concede-race/ [perma.cc/EQ73-V93E].

186. Sheryl Gay Stolberg and Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray's Death*, N.Y. TIMES (Apr. 25, 2015), https://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html.

187. *Quick Facts: Felon in Possession*, U.S. SENT'G COMM'N (2023), https://www.ussc.gov/research/quick-facts/section-922g-firearms [perma.cc/Q3NM-ZFGT].

188. Analysis conducted from *Commission Datafiles*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/datafiles/commission-datafiles [perma.cc/T9VB-8Y7M] (last visited Jan. 31, 2025).

189. Shreefter, *supra* note 102, at 164.

190. Humera Lodhi, *There's a Large Racial Disparity in Federal Gun Prosecutions in Missouri, Data Show*, KANSAS CITY STAR (July 1, 2022), https://www.kansascity.com/news/state/missouri/gun-violence-missouri/article258304878.html.

As discussed, *infra*, in Part III.C, the United States Sentencing Guidelines contain automatic enhancements for prior criminal convictions, especially prior drug offenses. Because Black Americans are more likely to (1) live in communities that are over policed, (2) be stopped and searched, and (3) be arrested for a drug offense than their White counterparts, they are not only more likely to *have any* prior felony conviction, but they are also more likely to face longer federal sentences for felon-in-possession offenses. Because of Project Safe Neighborhoods, they are also more likely to face federal—as opposed to state—prosecution for firearm possession.

United States Sentencing Commission data on felon-in-possession prosecutions reflects the continuing effect of the assumed connection between drugs and violence. Over 58 percent of those prosecuted for felon-in-possession offenses had a prior drug possession offense, the second-highest category of prior conviction, only behind "public order" crimes, such as disorderly conduct, obstruction of justice, prostitution, gambling, and contributing to the delinquency of a minor, of which more than 65 percent of defendants had been convicted.[191] Thus, a large number of those people prosecuted for possessory firearms offenses would not be prohibited from having a firearm but for disparate prosecution of drug offenses and public order crimes, and they receive longer sentences because of the presumed connection between drugs and violence.

III. IMPLICATIONS OF THE WAR ON DRUGS FOR FEDERAL FIREARM SENTENCING

An examination of the United States Sentencing Guidelines illustrates the broad and lasting effects of the War on Drugs on today's felon-in-possession prosecutions. People living in targeted communities are more likely to receive longer sentences, especially when their prior offenses are drug-related.

The Guidelines provide an advisory range of months of incarceration for every federal felony offense[192] with the stated aim of furthering several purposes of sentencing: deterrence, incapacitation, just punishment, and rehabilitation.[193] The Guidelines matter: though they are now advisory, they were mandatory for more than two decades after their inception[194] and they are still highly predictive of the prison sentence someone will receive in federal court. For example, in fiscal year 2022, the year for which the most recent data is available, more than 65 percent of individuals sentenced for felon-in-possession offenses received a sentence within or above the final advisory guideline range as determined by the judge at sentencing.[195]

The Sentencing Commission intended the Guideline that applies to firearms offenses to recommend the longest sentences in the most serious offenses,[196] but that has not borne out in practice over time. Judicial interpretations of the Guidelines have limited the enhancements that apply based on a defendant's past history of violence, while preserving enhancements for past drug offenses. In the

191. USSC Firearms Report, *supra* note 178, at 20.
192. U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2010).
193. U.S. SENT'G GUIDELINES MANUAL § 1A (U.S. SENT'G COMM'N 1987).
194. *See* United States v. Booker, 543 U.S. 220 (2005).
195. *QuickFacts: Felon-in-Possession*, *supra* note 187.
196. U.S. SENT'G GUIDELINES MANUAL app. C, Amend. 374, § 2K2.1 (U.S. SENT'G COMM'N 1991).

following Section, I illustrate how the Guidelines systematically and consistently increase a defendant's advisory guideline range based on an individual's prior drug offenses, such that those with prior drug offenses now receive some of the longest sentences under the Guidelines. I also use two case studies from my experience as a public defender to demonstrate how individuals who have no history of violence may be subject to longer advisory guideline ranges than those with histories of what many people would consider violent crimes, such as assaults, rapes, and attempted murders. Last, I summarize the Sentencing Commission's analysis and underlying data related to three types of common sentencing enhancements in felon-in-possession cases: those related to drug priors, those for strict liability increases based on the characteristics of the firearm possessed, and those for possession or use of a firearm in connection with another felony offense. The Sentencing Commission's analysis shows that drug-related priors are, in fact, the factor most likely to increase individuals' sentences for felon-in-possession offenses, and that the longest Guideline ranges often apply in cases where there has been no physical violence.

A. Firearms and the United States Sentencing Guidelines

The United States Sentencing Guidelines set forth an advisory guideline range for each offense, using the specific characteristics of each crime and the defendant's criminal history to determine the range. To that end, every defendant sentenced under the Guidelines receives a criminal history score based on the number of prior convictions in his criminal history and the sentences imposed for those prior convictions, which is then paired with an offense level based on the conduct in the instant offense. In general, an individual receives one criminal history point for every conviction in the ten years prior to the instant offense for which he received a sentence less than 60 days, two points for every conviction in the last ten years for which he received a sentence of between sixty days and one year and one month, and three points for every conviction in the last fifteen years for which he received a sentence of more than one year and one month.[197]

The sentencing court must then calculate the advisory guideline range by matching the criminal history category with the offense level, which is determined by the guideline assigned to the offense of conviction and any relevant adjustments based on the facts of the offense, called "specific offense characteristics."[198] The result is an "advisory guideline range," set forth as months of incarceration, as illustrated in the table below.

197. U.S. SENT'G GUIDELINES MANUAL §§ 4A1.1, 4A1.2 (U.S. SENT'G COMM'N 2015).
198. U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2018).

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
Zone A	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

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Table 1: United States Sentencing Guidelines (2021)

For firearms offenses, the applicable guideline, section 2K2.1, which I will refer to from this point forward as the *Firearm Guideline*, increases the "base offense level" for a firearm offense if a defendant has previously been convicted of certain types of crimes. The base offense level increases dramatically by six levels if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense"[199]

199. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(4) (U.S. SENT'G COMM'N 2016).

and by ten levels if the defendant has two such prior convictions.[200] The Firearm Guideline defines the term "crime of violence" as:

> Any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that:
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[201]

A "controlled substance offense" is defined as:

> An offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[202]

The statutory maximum sentence necessarily cabins the upper end of the advisory guideline range. Prior to the passage of the BSCA in 2022, convictions for being a felon in possession of a firearm carried a maximum penalty of ten years of imprisonment.[203] The BSCA increased the statutory maximum penalty from ten to fifteen years of incarceration, giving prosecutors a new tool to punish existing crimes more harshly.

B. What Is a "Controlled Substance Offense" or a "Crime of Violence"?

The portion of the Firearm Guideline that increases the base offense level for firearms convictions based on prior controlled substance offenses and crimes of violence dates back to the 1991 edition of the United States Sentencing Guideline Manual.[204] There, the Sentencing Commission issued a limited statement explaining that the amendments were intended to "more adequately reflect the seriousness of [the offense conduct], including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses."[205]

The Commission did not articulate why increasing a sentence for someone with a prior controlled substance offense would "more adequately reflect the seriousness of" a firearm possession offense. Temporal context provides some guidance, however. In the 1980s and 1990s, Congress passed sweeping criminal laws

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200. *Id.*

201. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2016).

202. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2016).

203. 18 U.S.C. § 924(a)(8) (2018).

204. 1991 FEDERAL SENTENCING GUIDELINES, U.S. SENT'G COMM'N 109, 163 (1991), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1991/manual-pdf/Chapter_2_E-K.pdf [perma.cc/92YW-JT49].

205. U.S. SENT'G GUIDELINES MANUAL app. C, Amend. 374, §2K2.1, *supra* note 196.

that expanded punishment for a broad swath of conduct[206] in response to the crack epidemic.[207] Though norms around nonviolent drug offenses have changed in recent years, it has been widely assumed that drug offenses correlate with violence.[208]

In the intervening decades, broad laws penalizing drug-related prior offenses have consistently had unintended negative consequences.[209] In 2016, the United States Sentencing Commission issued a report to Congress,[210] addressing the definitions of "crime of violence" and "controlled substance offense" that are used in the Firearm Guideline. The report notes that, though Congress and the Sentencing Commission intended these definitions to increase sentences for defendants with a "long and serious criminal history . . . , in practice, determining which prior convictions should result in substantially increased sentences raises complex policy issues," and has consequently resulted in "overly severe penalties for some offenders."[211]

Even setting aside the broader questions of *why* the Sentencing Commission created enhancements for prior drug offenses and whether the enhancements in principle would serve the purpose of punishing the most culpable offenders, the practical application of the definitions of the terms "controlled substance offense" and "crime of violence" has been a difficult exercise that has sometimes caused absurd results. Courts have consistently struggled with how to fairly determine whether prior offenses qualify as "controlled substance offenses" or "crimes of violence." Beginning in *Taylor v. United States*, decided in 1990, the Supreme Court developed a *categorical approach* to determining which prior offenses qualify as predicates for recidivist enhancements,[212] which gave courts a framework for deciding whether a defendant's prior conviction qualified as a crime of violence or a controlled substance offense. Under this approach, courts must consider only the statute of conviction in a prior offense, not the underlying offense conduct.[213] Though *Taylor* interpreted the Armed Career Criminal Act[214]—not the Firearm Guideline—a consensus has developed in the lower courts that the same categorical approach applies to the Firearm Guideline, which uses similar definitions.[215] The

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206. Comprehensive Crime Control Act of 1984, S. 1762, 98th Cong. (1984); Armed Career Criminal Act of 1984, 130 CONG. REC. 28,096 (1984); Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. (1994).

207. *See* Levin, *supra* note 13, at 2181–82.

208. *See* Baradaran, *supra* notes 151-154.

209. *See, e.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 201 (2019) (discussing unintended consequences of the Armed Career Criminal Act).

210. U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2016); REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, U.S. SENT'G COMM'N 1, 18 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf [perma.cc/9LM5-BTF7].

211. REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, *supra* note 210, at 6–7.

212. *See generally* Taylor v. United States, 495 U.S. 575, 588–89 (1990) (holding that predicate offenses in the Armed Career Criminal Act should be defined by a "categorical approach" and "not left to the vagaries of state law").

213. *Id.* at 590.

214. 18 U.S.C. § 924(e).

215. *See, e.g.*, United States v. Jenkins, 680 F.3d 101 (1st Cir. 2012); United States v. Jones, 740 F.3d 127 (3d Cir. 2014), *cert. denied*, 134 S. Ct. 2319, 189 L. Ed. 2d 196 (2014); United States v. Avila,

categorical approach represents an effort by the courts to ensure that the definitions "capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof . . . regardless of technical definitions and labels under state law."[216]

Over the last three decades, the categorical approach first set forth in *Taylor* has led to countless legal battles and myriad judicial opinions determining what qualifies as a crime of violence or a controlled substance offense. Both the Sentencing Commission and legal scholars have criticized the approach for its complexity[217] and the unintended consequences of its application. Some individuals who pose little risk of danger receive unduly harsh penalties,[218] while others who have committed violent acts in the past are not subject to the enhancements.

Under the categorical approach, judicial opinions have sometimes significantly curtailed the reach of the sentencing enhancements. For example, courts have found that the state law elements of many aggravated assault, manslaughter, and burglary offenses do not include "the use, attempted use, or threatened use of physical force against the person of another."[219] Others have held that various state laws do not meet the generic versions of the offenses as enumerated in the Firearm Guideline definition of a "crime of violence."[220] In recent years, some courts have limited the definition of a "controlled substance offense" based on the definition of the particular substance under either federal or state law at the time of the offense or at the time of sentencing.[221] The categorical approach is a blunt instrument used to

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770 F.3d 1100 (4th Cir. 2014); United States v. Rodriguez-Rodriguez, 775 F.3d 706 (5th Cir. 2015); United States v. Curtis, 645 F.3d 937 (7th Cir. 2011); United States v. Maid, 772 F.3d 1118 (8th Cir. 2014); United States v. Wray, 776 F.3d 1182 (10th Cir. 2015); United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014).

216. Taylor, *supra* note 212, at 590.

217. REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, *supra* note 210, at 51.

218. Barkow, *supra* note 209, at 227; Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act*, 70 OKLA. L. REV. 623, 645 (2018).

219. *See, e.g.*, United States v. Armijo, 651 F.3d 1226 (10th Cir. 2011) (manslaughter under Colo. Rev. Stat. § 18-3-104(1)(a)); United States v. Garcia-Perez, 779 F.3d 278 (5th Cir. 2015) (manslaughter under Fla. Stat. § 782.07(1)); United States v. Zuniga-Soto, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (Texas aggravated assault); United States v. Martinez-Flores, 720 F.3d 293, 299 (5th Cir. 2013) (New Jersey aggravated assault); U.S. v. McMurray, 653 F.3d 367, 374–75 (6th Cir. 2011) (Tennessee aggravated assault); U.S. v. Shell, 789 F.3d 335, 341 (4th Cir. 2015) (North Carolina second degree rape); *In re* Sealed Case, 548 F.3d 1085 (D.C. Cir. 2008) (D.C. robbery); U.S. v. Yockel, 320 F.3d 818 (8th Cir. 2003) (federal bank robbery); U.S. v. Kelley, 412 F.3d 1240 (11th Cir. 2005) (federal bank robbery); U.S. v. Woodrup, 86 F.3d 359 (4th Cir. 1996) (federal bank robbery); Delgado-Hernandez v. Holder, 697 F.3d 1125 (9th Cir. 2012) (California kidnapping); U.S. v. Sherbondy, 865 F.3d 996 (9th Cir. 1988) (Model Penal Code kidnapping); U.S. v. Amos, 501 F.3d 524, 525 (6th Cir. 2007) (possession of a sawed-off shotgun); U.S. v. Gore, 636 F.3d 728 (5th Cir. 2011) (conspiracy to commit any offense); U.S. v. White, 571 F.3d 365 (4th Cir. 2009) (conspiracy to commit any offense); U.S. v. Fell, 511 F.3d 1035 (10th Cir. 2007) (conspiracy to commit any offense); U.S. v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir. 2014) (Delaware attempt to commit any offense); James v. U.S., 550 U.S. 192, 197 (2007) (Florida attempted burglary), *overruled on other grounds by* Johnson v. U.S., 576 U.S. 591 (2015).

220. *See, e.g.*, U.S. v. Major, 694 F. Supp. 2d 131 (D. R.I. 2010); U.S. v. Wynn, 579 F.3d 567 (6th Cir. 2009); U.S. v. Carthorne, 726 F.3d 503 (4th Cir. 2013).

221. *See, e.g.*, U.S. v. Holliday, 853 F. App'x 53 (9th Cir. 2021); U.S. v. Scott, No. CR 18-457, 2021 WL 6805797 (D. N.J. Dec. 6, 2021); U.S. v. Lofton, No. 20-20221, 2021 WL 5494782 (E.D. Mich. Nov. 23, 2021); U.S. v. Bautista, 989 F.3d 698 (9th Cir. 2020); U.S. v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021); U.S. v. Williams, 2021 WL 1149711 (6th Cir. 2021) (career offender); U.S. v. Miller, 480 F. Supp. 3d 614 (M.D. Pa. 2020).

conduct what should be a precise task of determining a criminal defendant's actual culpability and propensity for recidivism.

Despite the criticisms discussed above, the Sentencing Commission has remained committed to enhancing sentences for drug-related prior offenses. The Sentencing Commission's 2023 amendments clarified that it intended the enhancement for controlled substance offenses to apply to inchoate offenses, such as attempts and conspiracies.[222] The current definition of a "controlled substance offense" therefore applies to any drug distribution offenses, regardless of the quantity,[223] which would include those individuals who distributed or possessed with intent to distribute small quantities to friends or to support their own addiction. And, data from the Sentencing Commission reflect that more individuals facing sentencing have drug-related prior offenses than any other type of offense except public order crimes.[224]

C. Advisory Guideline Calculations for Individuals with Drug-Related Prior Offenses

Not only are those individuals who live in communities most affected by the War on Drugs most likely to have convictions that prohibit them from possessing firearms, but they are also most likely to receive the longest sentences if they are prosecuted for felon-in-possession offenses. In Maryland, where I practiced as an assistant federal public defender, those were often individuals who had amassed several short sentences on convictions for relatively low-level drug crimes, for which they would very likely never have been prosecuted except that they lived in Baltimore City, a jurisdiction targeted heavily for aggressive drug enforcement.[225]

The outsized effect of criminal history on the sentencing guideline calculation in firearms cases is especially relevant because the guideline range in firearms cases is highly predictive of the sentence the defendant will receive. The United States Sentencing Commission recently undertook a study of individuals sentenced under the Firearm Guideline in fiscal year 2021 (USSC Firearms Report), which found that individuals sentenced under the Firearm Guideline received sentences within the guideline range approximately ten percent more often than those sentenced for other offenses.[226] Moreover, the average downward "variance," or sentence below the guideline range, received by those individuals who received sentences outside their guideline range was minimal: only one to five months below the guideline range.[227] Further, though variant sentences above the guideline range were infrequent, courts imposed upward variant sentences at more than double the rate they imposed such sentences in cases involving other types of offenses.[228]

When the government targets people in historically overpoliced communities for felon-in-possession prosecutions, those prosecutions often lead to lengthy sentences that are inextricably interwoven with the historical overpolicing. A review of the advisory guideline calculations in two case studies demonstrates how the Firearm Guideline can advise longer sentences for individuals with a history of only

222. AMEND. TO SENT'G GUIDELINES at 96 (U.S. SENT'G COMM'N April 27, 2023).
223. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b).
224. USSC Firearms Report, *supra* note 178.
225. *See* Part I. Section C.
226. USSC Firearms Report, *supra* note 178, at 2.
227. *Id.* at 34.
228. *Id.* at 16.

nonviolent drug offenses than even those who have served long sentences for violent crimes. Under the current structure of the Sentencing Guidelines, the individuals who fall into the highest criminal history category, VI, and have the highest specific offense levels, are very likely to be those individuals who have several drug-related prior offenses for which they received short sentences, allowing them to amass high criminal history scores.[229] That type of criminal record is closely connected to the aggressive police tactics described in Part I.C. of this Article.

The individuals with the longest advisory guideline ranges often are not those who have been convicted of more serious, violent offenses. Indeed, those who have received long prior prison sentences have not had the opportunity in the community to accumulate criminal convictions in the last fifteen years, and often paradoxically have lower criminal history categories.[230] For example, someone who serves ten years on an armed robbery conviction, leaves prison, and then quickly commits a new offense would have a lower criminal history category than someone experiencing drug addiction who has five convictions over the same time period for petty theft or small-quantity drug possession, for which he received sentences of ninety days or less for each.

Two former clients' criminal history calculations, set forth in detail in Appendix A, reflect this arbitrary and somewhat paradoxical effect of this structure.[231] Client 1, who had a long-standing drug addiction but no history of violence, had a guideline range more than double that of Client 2, who had served a lengthy sentence for an attempted murder. This counterintuitive outcome is a result of the increases in the base offense levels for controlled substance offenses: Because Client 1 had two prior convictions for possession with intent to distribute narcotics, which qualified as controlled substance offenses, his calculation started four levels higher than Client 2 despite Client 1's prior offenses being relatively minor—only ever serving two years in prison—and undisputedly committed to feed his own addiction. Client 2, whose base offense level was only increased by the single crime of violence (attempted murder) under the categorical approach, started at a lower base offense level.

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229. The Guidelines, appropriately, do not include minor convictions older than 10 years or more serious convictions older than 15 years. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2016).

230. The policy statement in the criminal history section of the Sentencing Guidelines has not been revised since its original implementation in 1987. It explicitly chooses to use only the number of prior convictions as the proxy for risk of recidivism, while discounting other factors. It states:

> A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation. The specific factors included in [the Guidelines] are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. *While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, e.g., age and drug abuse, for policy reasons they were not included here at this time*.

U.S. SENT'G GUIDELINES MANUAL § 4A (U.S. SENT'G COMM'N 1987) (emphasis added).

231. *See* Appendix A.

Thus, Client 1 had a sentencing guideline range of seventy-seven to ninety-six months of incarceration,[232] while Client 2 had a sentencing guideline range of thirty to thirty-seven months. Client 1, who had no history of violence, and had received short prison sentences for addiction-fueled drug offenses, had an advisory guideline range more than double that of Client 2, who had served a lengthy sentence for an attempted murder.

D. Does a High Advisory Guideline Range Accurately Reflect the Seriousness of the Offense?

Given the framework discussed above, does the advisory guideline range actually reflect the seriousness of the offense, as the Sentencing Commission intended in creating it?[233] The Sentencing Commission does not define the "seriousness of such conduct"[234] that it intended to capture with the amendments increasing base offense level based on an individual's prior offenses. For the purposes of this article, I will assume that the Commission believed that longer sentences were warranted for individuals with certain prior offenses who possessed firearms because it believed those people were more likely to cause physical harm with a firearm than those without such priors.

There is a missing link in the Sentencing Commission's assumption: While some firearm possession offenses involve a related act of violence, many are status-only offenses. In other words, the defendant has done nothing else besides carry or possess the firearm, and their status as a prohibited person is the only aspect of their behavior that converts a lawful act into a crime. The compounding harm of felon-in-possession prosecutions in the wake of the War on Drugs, and in light of the expansion of the Second Amendment for other Americans, arises from these prosecutions, where the individuals prosecuted and imprisoned for lengthy sentences pose no greater risk to the community than someone whose firearm possession is protected by the Constitution.

In this section, I review the USSC Firearms Report, and consider (1) in what contexts the instant offense of possession of a firearm is more "serious" than a status offense, and (2) to what extent individuals who commit those most aggravated offenses are the individuals who receive the longest sentences.

The USSC Firearms Report reflects that those who received the longest sentences for firearm possession offenses were those with drug priors, those who possessed firearms with obliterated serial numbers or which were stolen, and those who possessed firearms in connection with another felony offense. Each of these upward adjustments captures very broad ranges of conduct. The USSC Firearms Report shows that the Firearm Guideline increases the base offense level in each of these categories of offenses substantially even for those individuals who have not committed any act of violence in the instant offense and whose prior offenses do not suggest any propensity for violence.

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232. *Id.*

233. U.S. SENT'G GUIDELINES MANUAL app. C, Amend. 374, § 2K2.1, *supra* note 196.

234. *See* U.S. SENT'G GUIDELINES MANUAL app. C, Amend. 374, § 2K2.1 (U.S. SENT'G COMM'N 1991).

1. Increased Sentences for Drug-Related Prior Offenses

In the USSC Firearms Report, the Commission attempted to track the criminal histories of individuals with either drug trafficking prior offenses or histories of prior violence. The report showed that those who had prior drug offenses received, on average, longer sentences than individuals who had only prior violent offenses or offenses that were neither drug-related nor violent.[235]

To do this analysis, the Commission used a definition of "violent crime" that is broader than the definition used in the Firearm Guideline,[236] and includes simple assaults and many other state law offenses that have been held by courts not to qualify as "crimes of violence" for the purpose of the guideline enhancements in the Firearm Guideline.[237] Using these definitions, the Commission found that those with only drug trafficking priors received sentences on average 7 percent higher than those who had only violent priors while those who had both violent and drug trafficking priors received sentences that were nearly 30 percent higher on average than those individuals with only violent priors.[238]

I reviewed the underlying data from the USSC Firearms Report to expand on the Commission's analysis.[239] My review confirmed, as the report indicates, that individuals who had both drug and violent offenses in their criminal history received the longest average sentences for felon-in-possession offenses. But, in addition, I examined whether there was any difference among those with drug offenses in their history based on whether their prior offenses were drug possession or drug trafficking offenses. My analysis showed that those individuals who had both trafficking and possession offenses in their criminal histories received longer average sentences for felon-in-possession offenses than those who had only drug trafficking offenses.

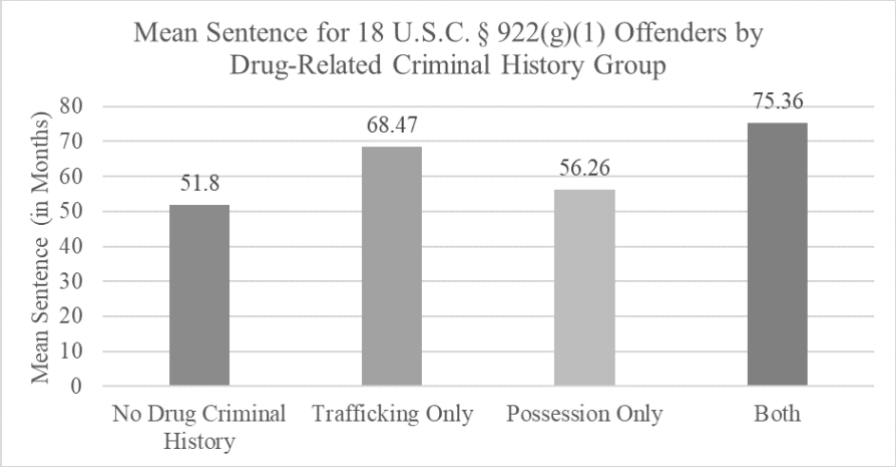

Figure 1: Analysis of USSC Firearms Report

235. USSC Firearms Report, *supra* note 178, at 23.

236. *Id.* at 19.

237. *Id.* at 19 n.40 (citing TRACEY KYCKELHAHN & EMILY HERBST, THE CRIMINAL HISTORY OF FEDERAL OFFENDERS (2018)).

238. *Id.* at 23.

239. Haley Sturges, Ph.D., a data analyst at the Quattrone Center assisted in this analysis. The methodology and complete analysis are included as Appendix B.

This is notable because, in my experience as a public defender, those who had a mix of drug trafficking and drug possession convictions were most likely to be low-level dealers who were feeding their own addictions, not kingpins or large-scale middlemen in a drug trafficking operation.

The USSC Firearms Report and this additional analysis both reflect the phenomenon described above in Part III.B: That because of the narrowing of the definition of "crime of violence" under the categorical approach, individuals who have histories of drug offenses like Client 1's are more likely to have higher base offense levels, and therefore higher guideline ranges and receive longer sentences, than those who *only* have histories of violence, like Client 2.

2. Increased Sentences for Strict Liability Characteristics of Firearms

The Sentencing Commission also found that the presence of certain other aggravating factors increased the average sentence received in firearm possession cases.[240] Among those factors are two specific offense characteristics that increase the sentencing guideline calculation by two and four levels, respectively: possession of a stolen firearm,[241] and possession of a firearm with an obliterated serial number.[242] The Sentencing Commission found that in cases in which these enhancements applied, the average sentence was nearly 66 percent longer than in cases where they did not apply.[243]

Each of these enhancements applies regardless of the defendant's knowledge of the status of the firearm, and therefore says little or nothing about the intent of the offender or that person's connection, for instance, to the theft of the firearm or the obliteration of the serial number. The application notes to the Firearm Guideline clearly state that "Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."[244] Based on this strict liability standard, the government need not prove that the defendant stole the firearm himself, or had anything to do with the theft, or the obliteration of the serial number, or even knew the firearm was stolen or that the serial number had been defaced.

Nothing in the history of the development of the Firearm Guideline suggests that there is a demonstrable increased risk associated with the possession of a firearm that is either stolen or has an obliterated serial on a case-by-case basis when a strict liability standard applies. As one court has noted,

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240. USSC Firearms Report, *supra* note 178, at 26.

241. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(4)(A) (U.S. SENT'G COMM'N 2016).

242. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(4)(B) (U.S. SENT'G COMM'N 2016).

243. USSC Firearms Report, *supra* note 178, at 26.

244. U.S. SENT'G GUIDELINES MANUAL § 2K2.1 app. n.8 (U.S. SENT'G COMM'N 2016). Every circuit to consider the issue has concluded that the strict liability application of this enhancement is lawful. *See* U.S. v. Gibson, 817 F. App'x 202, 205 (6th Cir. 2020); U.S. v. Gonzalez, 857 F.3d 46, 54–56 (1st Cir. 2017); United States v. Taylor, 659 F.3d 339, 343–44 (4th Cir. 2011) (finding that the Stolen Gun enhancement is not "inconsistent with federal law" where defendant lacks knowledge that the firearm is stolen); U.S. v. Thomas, 628 F.3d 64, 68–70 (2d Cir. 2010); U.S. v. Martinez, 339 F.3d 759, 761–62 (8th Cir. 2003); U.S. v. Murphy, 96 F.3d 846, 849 (6th Cir. 1996); U.S. v. Richardson, 8 F.3d 769, 770 (11th Cir. 1993); U.S. v. Goodell, 990 F.2d 497, 499 (9th Cir. 1993); U.S. v. Schnell, 982 F.2d 216, 220–22 (7th Cir. 1992); U.S. v. Mobley, 956 F.2d 450, 454–59 (3d Cir. 1992); U.S. v. Singleton, 946 F.2d 23, 26–27 (5th Cir. 1991).

> [E]very felon in possession of a firearm has engaged in the illegal marketplace to acquire a gun. That is true whether the gun reached him through a straw purchase, an illegal transfer from a lawful owner, or by the acquisition of a stolen gun. The felon who acquires a firearm in the illegal marketplace likely does not ask where the gun came from. . . . The post-arrest discovery by a federal agent tracing the gun that, unbeknownst to [a defendant], the gun was stolen does not reflect on the need to protect the public from the defendant, the need for deterrence, or the seriousness of the offense, nor does it bear on the defendant's history and characteristics or relate to any other relevant sentencing factor. . . . [I]t is purely a function of chance that the gun was stolen and did not enter the illegal marketplace through a means that does not trigger an enhanced penalty. An outcome based on chance is an inappropriate basis upon which to increase the amount of time that [a defendant] must spend in federal prison.[245]

The history of amendments to the Firearm Guideline reflects no deliberation about these enhancements even as they have resulted in increasingly severe penalties for defendants over the last thirty-five years. The original 1987 United States Sentencing Guideline Manual included a one-level increase for possession of a stolen firearm or a firearm with an obliterated serial number,[246] as opposed to the two- and four-level increases that exist today. In the application notes, the Sentencing Commission justified the increase because "independent studies show that stolen firearms are used disproportionately in the commission of crimes," but listed no such studies.[247] The Commission did not mention obliterated serial numbers at all.

The original guideline reflects the Commission's apparent concern that possession of a stolen firearm or a firearm with an obliterated serial number would lead to the firearm's eventual *use* in connection with another offense. Today's guideline, however, includes a separate four-level upward adjustment for such use[248] that did not exist in the original guideline.[249]

As the Firearm Guideline was amended over time, the Sentencing Commission never revisited the initial assumption on which the original specific offense increases were founded. In 1989, the Commission amended the Firearm Guideline to increase the upward adjustment from one level to two, to "better reflect the seriousness of this conduct," without any additional explanation.[250] In 2006, the Commission amended the Firearm Guideline to provide for a four-level upward adjustment instead of two for possession of a firearm with an obliterated serial number.[251] By way of explanation, the Commission simply stated that "[t]his increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons."[252] The

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245. U.S. v. Faison, No. GJH-19-27, 2020 WL 815699, at *7 (D. Md. Feb. 18, 2020).

246. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(1) (U.S. SENT'G COMM'N 1987).

247. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(1) app n.1 (U.S. SENT'G COMM'N 1987). I have been unable to find any such studies, either.

248. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(6) (U.S. SENT'G COMM'N 2018).

249. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(c)(1) (U.S. SENT'G COMM'N 1987).

250. U.S. SENT'G GUIDELINES MANUAL § 2K2.1 Amend. 189 (U.S. SENT'G COMM'N 1989).

251. U.S. SENT'G GUIDELINES MANUAL § 2K2.1 Amend. 691 (U.S. SENT'G COMM'N 2006).

252. *Id.*

Commission included no data to suggest that increased punishment would deter individuals who were prohibited from owning a firearm from possessing these specific types of firearms.

3. Increased Sentences for Possession of a Firearm in Connection with Another Felony

The Firearm Guideline includes a four-level enhancement for possession of a firearm in connection with another felony offense.[253] In theory, cases in which that adjustment applies should be the most serious, because there is a demonstrated connection between the firearm possessed and another crime. To better understand the scope of the potential harm in those cases, the Sentencing Commission used a special coding project to analyze the facts surrounding a sample of 25 percent of the cases in which defendants were sentenced under the Firearm Guideline in fiscal year 2021.[254] In this process, the Commission reviewed the underlying documentation for the cases in the sample in an effort to gain "additional insight into the nature of the Firearm Guideline offenders' criminal conduct, the risk of harm posed by the offenders, and the events leading to the offenders' apprehension by law enforcement."[255] The analysis showed that there was no physical violence or threat in more than 85 percent of cases.[256]

The Commission's analysis showed that nearly one-third of individuals in the sample received the four-level upward adjustment. Given the higher average sentences received by all other categories of defendants whose guidelines included upward adjustments for specific offense characteristics, it is likely that those who received the four-level upward adjustment for possession of a firearm in connection with any felony offense would also have received categorically higher average sentences.

The USSC Firearms Report, however, demonstrates that the vast majority of those individuals in the sample who received the four-level enhancement did not commit a violent felony while possessing the firearm. Of the 29 percent of individuals who received an increase for possession of a firearm in connection with another felony offense, nearly twenty percent were drug related felonies, including simple possession of drugs. Only 4.7 percent of the cases analyzed involved possession of a firearm in connection with a violent felony offense.[257]

Notably, courts have construed the four-level "in connection with" enhancement broadly, approving its application where the firearm "facilitated or potentially facilitated" or "had some potential emboldening role in a defendant's felonious conduct."[258] These circumstances have included such felony offenses as possession of personal-use quantities of drugs,[259] possession of a firearm when a

253. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(6)(B).

254. USSC Firearms Report, *supra* note 178, at 29.

255. *Id.*

256. *Id.* at 30.

257. *Id.*

258. U.S. v. Routon, 25 F.3d 815, 819 (9th Cir. 1994). *See also* U.S. v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996) (affirming conviction where police testified that the guns were dirty and appeared to not have been moved in a long time, and were found in a different room from marijuana, occupied by a different person than the defendant).

259. U.S. v. Regans, 125 F.3d 685, 685 (8th Cir. 1997) (holding that Regans was a passenger in a car stopped for a traffic violation. When Regans appeared to be concealing a weapon, the officers conducted a pat-down search and discovered a .22 caliber pistol in his waistband. They arrested Regans

gun and drugs were found in the same room but there was no other evidence of any connection between the two,[260] possession of a firearm where the other felony offense was a state law criminalizing essentially the same conduct,[261] and where the defendant was resisting arrest for the same firearm possession offense.[262] Courts of appeals have applied a deferential standard of review to determinations of whether or not the four-level enhancement applies.[263] And, like other federal sentencing determinations, a court may rely on acquitted conduct if it finds the government has proven facts to support the enhancement by a preponderance of the evidence.[264]

4. The Rarity of Offenses Involving Physical Harm

In its special coding project, the Commission also sought to measure how frequently a firearm possession case involved the threat of physical injury or actual physical injury to anyone involved, including the defendant, a co-perpetrator, law enforcement or a victim. The Commission's analysis showed that only approximately 6 percent of cases involved any type of physical contact with another person, including law enforcement, while another 7.8 percent involved a threat during the commission of the offense or the arrest.[265]

Over 83 percent of the cases in the sample involved simply possessing the firearm during the offense, not brandishing or discharging the firearm.[266] Even in those cases where a firearm was brandished or discharged, 74.1 percent did not result in any physical harm to a person.[267] Thus, the Commission's data reflect that only 4.3 percent of federal firearms offenses resulted in physical injury to anyone, including the defendant or a co-participant.

While 4.3 percent is not an insignificant number of cases in which physical harm has occurred, the USSC Firearms Report reflects that the vast majority of

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and brought him to the police station, where a further search uncovered .29 grams of heroin. Regans said he possessed the heroin for personal use.); U.S. v. Moran-Paz, 35 F. App'x 93, 93–94 (4th Cir. 2002) (possession of small quantity of cocaine); U.S. v. Justice, 679 F.3d 1251 (10th Cir. 2012) (holding it was reasonable to find that firearms gave defendant a sense of security emboldening him to venture from his home with drugs that someone might wish to take from him by force); U.S. v. Jarvis, 814 F.3d 936 (8th Cir. 2016) (user quantity of drugs).

260. U.S. v. Hardin, 248 F.3d 489, 492 (6th Cir. 2001) (applying four-level "in connection with" enhancement because the gun was present near the cocaine).

261. U.S. v. Boots, 816 F.3d 971, 975 (8th Cir. 2016) (possession of firearm with aggravated misdemeanor of possessing it while in a car—rejecting argument that it was the same conduct because he "failed to show that he could not have committed the underlying federal offense without also violating the state offense that the district court used to support the [enhancement].").

262. U.S. v. Hampton, 628 F.3d 654 (4th Cir. 2010).

263. U.S. v. Blalock, 571 F.3d 1282, 1285–86 (D.C. Cir. 2009) (applying due deference standard).

264. U.S. v. Concepcion, 983 F.2d 369 (2d Cir. 1992) ("'Another offense,' as used in sentencing guideline applicable to possession of firearm in furtherance of narcotics conspiracy included offense with which defendant had been charged, but of which he was acquitted."); U.S. v. Joshua, 259 F. Supp. 2d 446 (E.D. Va. 2003) (applying four-level enhancement for possession of a firearm in connection with another felony offense where the defendant was charged with and acquitted of both the underlying drug offense and possession of a firearm in connection with that drug offense, under 18 U.S.C. § 924(c)).

265. USSC Firearms Report, *supra* note 178, at 30–31.

266. *Id.* at 31.

267. *Id.*

firearm possession cases do not involve any physical harm, or even threat of physical harm.

The Report demonstrates that the current iteration of the Firearm Guideline leads to increased sentences based on factors that do not necessarily correlate with violent behavior in the past or during the current offense. Rather, the vast majority of individuals who receive the longest sentences under the current Firearm Guideline are those who have drug-related priors or commit drug offenses while possessing a firearm. Courts have assumed such offenses are more serious even though there is limited evidence to support the claim that drug offenses, or strict liability characteristics of the firearms themselves, correlate with more violence.

As discussed in Parts I and II *supra*, the historical over policing of majority-minority, urban communities has led to more individuals having convictions for controlled substance offenses, because they have been arrested and prosecuted for drug crimes at much higher rates than people living in other communities. And, individuals living in those same communities are prosecuted for firearm possession at much higher rates than those living in other communities. The Firearm Guideline therefore perpetuates the disparities created by the War on Drugs and allows prosecutors to leverage them into more convictions and longer sentences for the same populations that have been most affected by mass incarceration.

IV. LIMITS OF THE EXPANDING SECOND AMENDMENT: ONLY FOR PEOPLE WITH PRIOR CONVICTIONS

A. Limits of the Bruen *Test in Felon-in-Possession Cases*

Taken together, the expanding Second Amendment, the prosecution priorities for firearms offenses, and the United States Sentencing Guidelines show that the restrictive, history-only test the Supreme Court articulated in *Bruen* has expanded constitutional protection for firearm possession for nearly every group of Americans, but not individuals with prior felony convictions. In *Bruen* itself, as many lower courts have recognized, the Supreme Court stated that "ordinary, *law-abiding* citizens have a . . . right to carry handguns publicly for their self-defense."[268] Courts have universally interpreted this to mean that Second Amendment rights do not apply to at least some, or sometimes all, people with prior felony convictions.[269]

Indeed, in the years immediately after *Bruen* was decided, it seems that virtually the only firearms restrictions that were upheld consistently by courts are those prohibiting individuals with prior felony convictions from possessing firearms.[270] Jacob Charles' analysis showed that of the 208 challenges to the federal felon in

268. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022) (emphasis added).

269. *See, e.g.*, U.S. v. Jackson, 110 F.4th 1120, 1129 (8th Cir. 2024); U.S. v. Dubois, 94 F.4th 1284, 1293 (11th Cir. 2024); U.S. v. Gay, 98 F.4th 843, 846–47 (7th Cir. 2024); Vincent v. Bondi, 127 F.4th 1263, 1266 (10th Cir. 2025); U.S. v. Sheely, No. 22-13500, 2024 WL 4003394 (11th Cir. Aug. 30, 2024); *see also* U.S. v. Diaz, 116 F.4th 458, 467 (5th Cir. 2024); U.S. v. Williams, 113 F.4th 637 (6th Cir. 2024) (recognizing that as-applied challenges to the felon-in-possession law may succeed but rejecting them in the specific cases). *But see* Range v. Att'y Gen. United States of Am., 69 F.4th 96 (3d Cir. 2023) (rejecting facial challenge to federal felon-in-possession statute but finding statute was unconstitutional as applied to Mr. Range).

270. Range v. Att'y Gen. United States, 53 F.4th 262, 268 n.6 (3d Cir. 2022) (overruled on other grounds) (collecting cases).

possession law that were brought in the first twelve months after the Supreme Court issued its *Bruen* opinion, courts in only six cases, or 2.9 percent, found the law unconstitutional.[271] Alternatively, nearly 23 percent of Second Amendment challenges to other firearms laws were successful.[272]

Though the Supreme Court upheld prohibitions on firearm possession by those under domestic violence restraining orders in *Rahimi*,[273] the landscape for felon-in-possession challenges has not changed dramatically after that decision. To date, no court of appeals has upheld a facial Second Amendment challenge to the federal felon-in-possession law. Several courts of appeals have held that *Rahimi* does not change the analysis in their prior felon-in-possession cases because the *Rahimi* Court did not consider the felon-in-possession statute directly.[274] They have leaned into the "ordinary, *law-abiding* citizens" language in *Bruen* and earlier cases. Recognizing that felon-in-possession claims could be unconstitutional for *some* people with prior felony convictions, some courts have begun to consider as-applied challenges to the felon-in-possession law.[275] But, these challenges have only been successful in very narrow circumstances.[276]

B. Limits of a Dangerousness Analysis

In *Rahimi*, the Supreme Court ruled narrowly that Mr. Rahimi, who had previously been found by a state court to pose a great enough threat to another person that the state court had entered a domestic violence restraining order against him and explicitly suspended his gun license after providing legal process, could lawfully be barred from possessing a firearm under the Second Amendment.[277] The Supreme Court held that the statute prohibiting someone under such a restraining order was constitutional because it falls within the historical tradition of this country to restrict the firearm rights of individuals who "pose[] a clear threat of physical violence to another."[278]

The next frontier of litigation related to felon-in-possession laws will very likely involve the contours of this phrase: what does it mean to "pose a clear threat of physical violence"? Is that the only constitutionally valid justification for disarming someone who has a prior felony conviction?

The courts that have already begun to struggle with these questions have shown a willingness to answer them in ways that will allow most felon-in-possession cases to proceed. Foreshadowing the Supreme Court's ultimate discussion of

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271. Charles, *supra* note 25, at 53.

272. *Id.*

273. U.S. v. Rahimi, 602 U.S. 680, 697 (2024).

274. *See, e.g.*, U.S. v. Dubois, 94 F.4th 1284, 1293 (11th Cir. 2024); U.S. v. Gay, 98 F.4th 843, 846–47 (7th Cir. 2024); Vincent v. Garland, 80 F.4th 1197, 1200–02 (10th Cir. 2023), *vacated*, 144 S.Ct. 2708 (2024); U.S. v. Sheely, No. 22-13500, 2024 WL 4003394 (11th Cir. Aug. 30, 2024).

275. *See* U.S. v. Diaz, 116 F.4th 458, 467 (5th Cir. 2024); U.S. v. Williams, 113 F.4th 637 (6th Cir. 2024) (recognizing that as-applied challenges to the felon-in-possession law may succeed but rejecting them in the specific cases). *But see* Range v. Att'y Gen. United States of Am., 69 F.4th 96 (3d Cir. 2023) (rejecting facial challenge to federal felon-in-possession statute but finding statute was unconstitutional as applied to Mr. Range).

276. *See* Range v. Att'y Gen. United States of Am., 69 F.4th 96 (3d Cir. 2023).

277. *See Rahimi*, 602 U.S. at 680.

278. *Id.* at 1901.

dangerousness in *Rahimi*, both the Ninth Circuit[279] and Third Circuit[280] upheld as-applied challenges to the felon-in-possession statute in 2024, and 2023, respectively, though the Ninth Circuit ultimately vacated the decision upon granting rehearing *en banc*. Since *Rahimi*, the Fifth Circuit and Sixth Circuit have considered and rejected as-applied challenges to the felon-in-possession law, while recognizing that such analysis is required and such challenges could theoretically be successful in some circumstances.[281]

Though decided before *Rahimi*, the Third Circuit's *en banc* decision in *Range v. Attorney General*,[282] is instructive, and elucidates the ways in which even successful challenges to felon-in-possession laws are likely to exclude those communities punished most harshly under current law and prosecution priorities. In *Range*, the Third Circuit held that the federal felon-in-possession statute was unconstitutional as applied to petitioner Brian Range, who had a prior Pennsylvania state conviction for making a false statement on an application for food stamps from nearly thirty years earlier.[283] Applying the history-based test articulated in *Bruen*, the *Range* court held that the government did not satisfy its burden to show that there was any historical analog for depriving someone convicted of Mr. Range's earlier crime of his Second Amendment rights.[284]

Though the *Range* majority ruled that it was not within the historical tradition of this country to disarm individuals based on convictions like Mr. Range's for food stamp fraud, Mr. Range himself argued that disarming some people with felony convictions, namely those deemed to be dangerous, would be constitutional.[285] Three of the nine judges in the majority joined a concurring opinion that went farther, emphasizing that the decision in *Range* "does not spell doom for [the federal felon-in-possession statute]."[286] Judge Ambro, who authored the concurrence, opined that disarming those "who legislatures believed would, if armed, pose a threat to the orderly functioning of society" was consistent with the nation's history and tradition, and would therefore pass muster under the *Bruen* test.[287] He further emphasized that the felon-in-possession statute itself represents a judgment that "[m]ost felons have broken laws deemed to underpin society's orderly functioning, be their crimes violent or not."[288]

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279. *See* United States v. Duarte, 101 F.4th 657 (9th Cir.), *reh'g en banc granted*, *opinion vacated*, 108 F.4th 786 (9th Cir. 2024).

280. Range v. Att'y Gen. United States of Am., 69 F.4th 96, 98–99 (3d Cir. 2023).

281. *See* U.S. v. Diaz, 116 F.4th 458, 467 (5th Cir. 2024); U.S. v. Williams, 113 F.4th 637 (6th Cir. 2024); U.S. v. Morton, 123 F.4th 492, 499 (6th Cir. 2024).

282. Range v. Att'y Gen. United States of Am., 69 F.4th 96 (3d Cir. 2023).

283. *Id.* at 98–99.

284. *Id.* at 106. Similarly, in *U.S. v. Duarte*, a panel of the Ninth Circuit held, under *Bruen*, that the federal felon-in-possession law was unconstitutional as applied to Mr. Duarte, whose prior felony convictions for drug possession, firearm possession, and vandalism were not "distinctly similar" to offenses that would have been "punishable by execution, life imprisonment, or permanent forfeiture of the offender's estate" at the time of the founding. *Duarte*, 101 F.4th at 690-91. However, the *en banc* Ninth Circuit later reversed the panel decision and upheld Mr. Duarte's conviction, holding that the federal felon-in-possession law "is not unconstitutional as applied to non-violent felons." *See* U.S. v. Duarte, 137 F.4th 743, 745 (9th Cir. 2025).

285. *Range*, 69 F.4th at 104, n.9.

286. *Id.* at 110 (Ambro, J., concurring).

287. *Id.* (Ambro, J., concurring).

288. *Id.* at 112 (Ambro, J., concurring).

Like the Third Circuit, other courts that have shown a willingness to consider as-applied challenges to felon-in-possession statutes after *Rahimi* have shown a similar hesitance to narrow those prosecutions substantially. The Fifth Circuit Court of Appeals recently held, in *United States v. Diaz*, that it was constitutional to prohibit someone who had previously been convicted of "car theft, evading arrest, and possession of a firearm as a felon" from possessing a firearm.[289] Though that court, like the *Range* court, noted that the modern definition of a felony is far broader than the definition at the founding, it held that the nation's historical tradition of firearm regulation considered horse theft a felony.[290] The court then reasoned that horse theft is a historical analogue to car theft.[291] Because the death penalty was a permissible consequence for such a crime, and because disarmament is a lesser penalty than death, the court concluded that the felon-in-possession law is constitutional as applied to Mr. Diaz.[292] The court did not consider whether Mr. Diaz posed a genuine danger to the physical safety of another person.[293]

The Sixth Circuit Court of Appeals has taken a different but no less narrow tack, interpreting the post–*Rahimi* Second Amendment to allow "disarm[ing] groups . . . deemed to be dangerous."[294] In *United States v. Williams*, the court held that each defendant charged with felon-in-possession has the burden to prove they are not dangerous, and that district courts must then review "each individual's specific characteristics . . . considering the individual's entire criminal record—not just the predicate offense."[295] The court then went on to discuss certain categories of crimes, and their relevance to this analysis. First, it considered "crimes of violence," opining that they "are at least strong evidence that an individual is dangerous, if not totally dispositive on the question."[296] A second category the court considered was those that, "while not strictly crimes against the person, may nonetheless pose a significant threat of danger."[297] The court included drug trafficking in this category, repeating the oft parroted statement discussed elsewhere in this Article, that there is a connection between drug trafficking and violence.[298] Ultimately, the court concluded that Mr. Williams' past convictions for aggravated robbery and attempted murder were not a close call—they could be the basis for taking away his right to possess a firearm even under an individualized determination.[299]

The *Williams* and *Range* courts' analyses demonstrate that even if the Supreme Court ultimately adopts a clear dangerousness exception to the Second Amendment, it will not meaningfully limit the reach of felon-in-possession laws. Though the *Williams* court required an individualized assessment of dangerousness, it stacked the deck against those who have prior drug offenses. And many lower courts would likely follow similar logic to that in Judge Ambro's concurrence in

289. U.S. v. Diaz, 116 F.4th 458, 468–70 (5th Cir. 2024).
290. *Id.*
291. *Id.*
292. *Id.*
293. *See id.*
294. U.S. v. Williams, 113 F.4th 637, 657 (6th Cir. 2024).
295. *Id.*
296. *Id.* at 658.
297. *Id.*
298. *Id.*
299. *Id.* at 662.

Range, assuming that felon-in-possession statutes were enacted because of a considered judgment that those with felony convictions pose a significant, ongoing threat to the community. As discussed in Parts II.C and II.D, *supra*, the history of felon-in-possession laws reflects no such consensus or considered judgment. As demonstrated in Part III, *supra*, many people charged with felon-in-possession offenses have no history of violence and cause no physical harm by possessing a firearm.

This criticism is not new. When Justice Amy Coney Barrett was a circuit court judge, she opined in dissent that the historical record does not reflect that a felony conviction *per se* equates to the dangerousness that would lead someone to be stripped of Second Amendment rights: "History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons."[300]

With *Rahimi*, the Supreme Court moved toward a dangerousness analysis for the Second Amendment, but ultimately issued a ruling that courts have interpreted divergently.[301] At the writing of this Article, there are several challenges to the federal felon-in-possession law with pending petitions for writs of certiorari.[302] It remains to be seen whether the Court will grant any of these petitions, and if it does, whether it will uphold the constitutionality of the law in all circumstances, or permit as-applied challenges. And, if it does the latter, whether it will require individualized determinations based on a rebuttable presumption like that of the *Williams* court, require a categorical analysis like that of the *Diaz* and *Range* courts, or chart some third unknown course.

As-applied challenges, with individualized assessments of dangerousness, provide an attractive path forward that could mitigate the harmful reproduction and amplification of the harms of the War on Drugs on communities of color. Such a system would allow advocates to present evidence that their individual clients either never did or no longer do pose a substantial risk of dangerousness. It would create a regime that, like sentencing, would allow judges to view a defendant as a whole person. A system of individualized determinations, however, would have serious administrability questions that the Sixth Circuit did not consider. Prosecutors often do not and cannot know the type of mitigating information about a defendant prior to charging that could result in the dismissal of charges if the individual proves they are not dangerous. Many individuals who have not committed the crime (because they are not actually dangerous) would be charged and swept up into the criminal legal system only to have the charges dropped.

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300. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (emphasis in original).

301. *Compare* United States v. Diaz, 116 F.4th 458, 468-70 (5th Cir. 2024) (looking for an historically analogous statute to the one that served as Mr. Diaz's predicate felony) *with* Williams, 113 F.4th at 657 (examining the defendant's entire criminal history to determine whether he has met his burden of proving he is not dangerous).

302. For an up-to-date list of pending petitions, see Duke Center for Firearms Law, *SCOTUS Gun Watch* (updated weekly, for example, https://firearmslaw.duke.edu/2025/03/scotus-gun-watch-3-17-25 [web.archive.org/web/20250317131144/https://firearmslaw.duke.edu/2025/03/scotus-gun-watch-3-17-25]).

On the other hand, a framework like that applied in *Range* or *Diaz* that considered prior convictions categorically would be more administrable and more certain, but could lead to the type of legal quagmire the courts have faced in applying the categorical approach to the guideline provisions discussed in Part III.B, *supra*. And, with the broad but untested assumption that there is a connection between gun violence and drug trafficking, if not drug use, courts under either regime are unlikely to use discretion to dismiss felon-in-possession prosecutions for people with drug-related prior offenses.[303] Even an as-applied framework therefore risks repeating the harms of the War on Drugs.

CONCLUSION

The wisdom or constitutionality of the history-based framework for assessing Second Amendment challenges as articulated in *Bruen* are outside the scope of this article. But there is no doubt that *Bruen*, and now *Rahimi*, have created a vast divide on Second Amendment rights between those individuals who have never been convicted of a felony, who have a fundamental constitutional right to own and carry a firearm in an increasingly broad array of circumstances, and those who have been convicted of a felony. The latter group loses that right forever—and instead are prosecuted, and often subjected to severe punishment, for the exact same conduct, possession of a firearm—regardless of the type of felony or the circumstances of that prior conviction. Expanding a right to possess a firearm for self-defense to everyone *except* anyone who has a prior felony conviction will undoubtedly have racially disparate consequences consistent with the harms discussed elsewhere in this Article. The growing divide in rights among those with prior convictions and those without risks compounding prior harms of racially disparate over policing.

The prevalence of felon-in-possession prosecutions in majority-minority urban centers is unlikely to change post–*Rahimi*. Federal enforcement of felon-in-possession statutes has long been concentrated in such places.[304] Promoters of felon-in-possession prosecutions often point to the dangerousness of certain communities with high levels of gun violence to justify the strategy.[305] In *Bruen*, however, the Court relied heavily on the plaintiff's desire to carry a firearm *because* of dangers in his neighborhood.[306]

As Benjamin Levin notes in his comprehensive comparison of firearms and drug prosecutions, the only difference in the behavior of someone who possesses a firearm legally as opposed to illegally may be the existence of a prior conviction.[307] Like drug use, firearm possession is virtually equally common in urban and rural areas when controlled for other factors.[308] Indeed, researchers have found that White Americans are more likely to possess firearms than Americans of color, that firearm ownership peaks among those with a high school degree and then decreases

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303. *See supra* Section II.B.

304. *See supra* Section II.C.

305. *See e.g.*, U.S. v. Jones, 36 F. Supp. 2d 304, 312 (E.D. Va. 1999) ("Those who implemented Project Exile have targeted cities in which violent crime is most prevalent. The evidence does not show that those officials targeted defendants of a particular race.").

306. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 15–16 (2022).

307. Levin, *supra* note 13, at 2196–97.

308. Philip J. Cook & Harold A. Pollack, *Reducing Access to Guns by Violent Offenders*, 3 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 2, 7–8 (2017).

with additional education, and that men are more likely to own firearms than women.[309] There does not appear to be any research that specifically considers the likelihood that someone with a drug-related prior felony conviction will commit any act of future violence.[310] Many people have felony records simply because they have lived in historically overpoliced communities. Prohibiting anyone with any felony conviction from possessing a firearm therefore creates a second class of citizens whose fundamental rights are limited, in part because of their race, class, and the community in which they live.[311]

Given that felon-in-possession laws were largely passed as a response to broad civil unrest, and not founded on research substantiating them as an effective tool for promoting public safety, policy makers should be cautious about expanding their use. Prosecuting more felon-in-possession cases and seeking longer penalties for those convictions may seem like a palatable and logical compromise for decreasing gun violence. In reality, it is a blunt instrument that risks exacerbating historical trends of overpolicing and criminalizing behavior that would otherwise be constitutionally protected. More research is needed on what, if any, connection exists between different types of prior felony convictions and propensity to commit violent crimes. Without such research, collateral consequences of existing prosecution priorities may continue to affect different communities disparately, and ultimately make those communities less safe and stable.

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309. *Id.*

310. There is one study, from 1996, that compared the criminal histories of gun offenders and violent crime offenders and found little difference, but that study did not disaggregate offenders by different types of prior conviction to specifically look at whether prior individuals who committed violent acts were more likely to have one types of prior conviction than another (i.e., drug offenses as opposed to prior violent offenses). *See* Anthony A. Braga & Philip J. Cook, *The Criminal Records of Gun Offenders*, 14 GEO. J.L. & PUB. POL'Y 1, 15 (2016).

311. *See also* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (holding that flight in a high-crime area justified a warrantless stop, thereby diminishing Fourth Amendment protections for those who live in high-crime areas).

APPENDIX A

Client 1 (federal conviction in 2018)		**Client 2 (federal conviction in 2018)**	
Prior convictions	*Criminal history points*	*Prior convictions*	*Criminal history points*
2006 possession of marijuana–probation	0 (beyond 10 years old)	2002 possession of controlled dangerous substance–probation	0 (beyond 10 years old)
2006 possession with intent to distribute narcotics–90 days of incarceration	0 (beyond 10 years old)	2002 manufacturing controlled dangerous substance–1 year of incarceration	0 (beyond 10 years old)
2008 possession of marijuana–2 years of incarceration	3	2002 attempted first degree murder–12 years of incarceration	3
2008 possession of narcotics–2 years of incarceration (concurrent to previous case)	3	2011 possession of a telecommunications device in a place of incarceration–6 months	2
2010 possession of marijuana–time served	2		
2010 possession of controlled dangerous substance packaging material–fined	1		
2015 obtaining controlled dangerous substance by fraud–91 days of incarceration (time served plus 1 day)	2		
2016 possession with intent to distribute narcotics–2 days of incarceration and 2 years of probation	1		
Criminal History Category[312]	**VI**	**Criminal History Category**	**III**

Table A1: Comparing Offense Levels of Two Clients Convicted of Possession of a Firearm by a Prohibited Person

Each client discussed above was convicted of possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 922(g). Their offense levels are set forth below:

Client 1

Count 1: Felon in Possession of a Firearm

Base Offense Level: The guideline for a violation of 18 U.S.C. § 922(g) is USSG § 2K2.1. Since the defendant committed the instant offense subsequent to sustaining one felony conviction for a controlled substance offense, the base offense level is 20. USSG § 2K2.1(a)(4)(A). **(20)**

312. Client 1 was on probation at the time of the offense and received two additional criminal history points. U.S. SENT'G GUIDELINES MANUAL § 4B1.1(d) (U.S. SENT'G COMM'N 2016).

Specific Offense Characteristics: If any firearm had an altered or obliterated serial number, increase by 4 levels. USSG 2K2.1(b)(4)(B). **(+4)**

Adjusted Offense Level (Subtotal): **24**

Acceptance of Responsibility: The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG § 3E1.1(a). **(-2)**

Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG § 3E1.1(b). **(-1)**

Total Offense Level: **21**

Client 2

Count 1: Felon in Possession of a Firearm

Base Offense Level: The guideline for 18 U.S.C. §922(g)(1) offenses is found in USSG § 2K2.1 of the guidelines entitled *Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition*. USSG § 2K2.1(a)(4)(A) provides that because the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense, the base offense level is 20. **(20)**

Adjusted Offense Level (Subtotal): **20**

Acceptance of Responsibility: The defendant has demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG § 3E1.1(a). **(-2)**

Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG § 3E1.1(b). **(-1)**

Total Offense Level: **17**

APPENDIX B–METHODOLOGY

Question: Are there differences in 18 U.S.C. § 922(g)(1) sentences for offenders who have a criminal history containing drug-related crimes relative to those with a criminal history containing violent crime?

Approach: Data were compiled from the U.S. Sentencing Commission's Individual Offender and Criminal History of Federal Offenders datafiles for Fiscal Years 2018–21. The final sample (N = 23522) consists of offenders who (1) do *not* have an Armed Career Criminal Status and (2) *do* have a current (2018–21) 18922G1 charge.

Groups were created for analysis (pertaining to the question of interest), divided by offender criminal history: Individuals with who had (1) neither drug nor violent crimes in their criminal history (n = 2096), (2) drug crimes and no violent crimes in their criminal history (n = 9952), (3) violent crimes and no drug crimes in their criminal history (n = 3493), and (4) both drug and violent crimes in their criminal history (n = 7981). For offenders with drug crimes in their criminal history, additional subgroups were identified: (1) trafficking-related criminal history (n = 2321), (2) possession-related criminal history (n = 8259), and (3) both trafficking- and possession-related criminal history (n = 6696). For these subgroups, an additional group of offenders with no drug-related criminal history were utilized for comparisons (n = 5372).

The overall average 18 U.S.C. § 922(g)(1) sentence for all offenders, regardless of prior criminal history, is 61.82 months (SD = 60.13, Range: 0.03 months–1860 months).

Analytic Strategy:

Analysis 1: Two one-way analysis of variance tests were conducted to determine differences in mean sentences between (a) offender criminal history groups and (b) the specific subgroups for offenders with drug-related criminal history.

Analysis 2: A series of Chi-square tests of independence were utilized to determine any association between receiving a sentence one standard deviation above the mean ("above average") or one standard deviation below the mean ("below average") and (a) offender criminal history groups as well as (b) for the specific subgroups of drug-related criminal history.

Results:

Analysis 1a: The assumption of homogeneity of variance was violated, as indicated by a statistically significant Levene's test. Therefore, a Welch test for Equality of Means was employed to account for violations of homogeneity of variance. The omnibus test was significant, $F(3, 7161.46) = 127.056$, $p < .001$. Post-hoc testing was conducted to determine which group means were significantly different. Given violations of homogeneity of variance, Games-Howell corrections were utilized.

All groups differed significantly from each other. Sentences are measured in months.

<u>Group 1 (Neither)</u>: Neither violent nor drug crimes in criminal history (M = 44.60, SD = 49.27)

Lower mean sentence than drug only (M_{diff} = -16.39, SE_{diff} = 1.25, p < .001)

Lower mean sentence than violent only (M_{diff} = -11.42, SE_{diff} = 1.49, $p < .001$)

Lower mean sentence than both violent and drug (M_{diff} = -25.09, SE_{diff} = 1.33, $p < .001$)

Group 2 (Drug Only): Drug crimes in criminal history, no violent crimes (M = 60.99, SD = 56.92)

Higher mean sentence than neither violent nor drug (M_{diff} = 16.39, SE_{diff} = 1.25, $p < .001$)

Higher mean sentence than violent only (M_{diff} = 4.97, SE_{diff} = 1.16, $p < .001$)

Lower mean sentence than both violent and drug (M_{diff} = -8.70, SE_{diff} = 0.94, $p < .001$)

Group 3 (Violent Only): Violent crimes in criminal history, no drug crimes (M = 56.02, SD = 58.48)

Higher mean sentence than neither violent nor drug (M_{diff} = 11.42, SE_{diff} = 1.49, $p < .001$)

Lower mean sentence than drug only (M_{diff} = -4.97, SE_{diff} = 1.16, $p < .001$)

Lower mean sentence than both violent and drug (M_{diff} = -13.67, SE_{diff} = 1.25, $p < .001$)

Group 4 (Both): Both violent and drug crimes in criminal history (M = 69.69, SD = 65.67)

Higher mean sentence than neither violent nor drug (M_{diff} = 25.09, SE_{diff} = 1.33, $p < .001$)

Higher mean sentence than drug only (M_{diff} = 8.70, SE_{diff} = 0.94, $p < .001$)

Higher mean sentence than violent only (M_{diff} = 13.67, SE_{diff} = 1.25, $p < .001$)

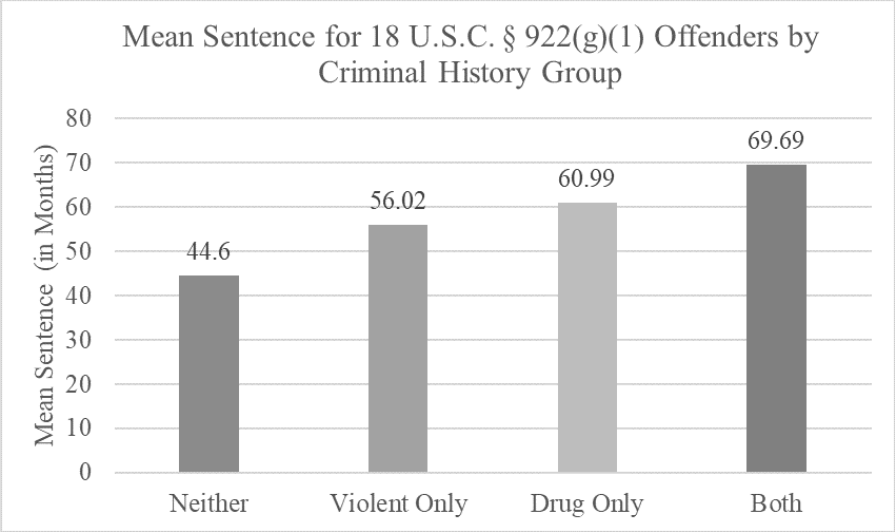

Figure B1: Mean Sentence for 18 U.S.C. § 922(g)(1) Offenders by Criminal History Group

Analysis 1b: The assumption of homogeneity of variance was violated, as indicated by a statistically significant Levene's test. Therefore, a Welch test for Equality of Means was employed to account for violations of homogeneity of variance. The omnibus test was significant, F (3, 8054.18) = 184.50, $p < .001$. Post-hoc testing was conducted to determine which group means were significantly different. Given violations of homogeneity of variance, Games-Howell corrections were utilized.

All groups differed significantly from each other. Sentences are measured in months.

Group 1 (None): No drug crimes in criminal history (M = 51.80, SD = 55.52)

- Lower mean sentence than trafficking only (M_{diff} = -16.67, SE_{diff} = 1.71, $p < .001$)
- Lower mean sentence than possession only (M_{diff} = -4.46, SE_{diff} = 0.95, $p < .001$)
- Lower mean sentence than both trafficking and possession (M_{diff} = -23.57, SE_{diff} = 1.11, $p < .001$)

Group 2 (Trafficking Only): Trafficking-related drug crimes in criminal history, no possession-related drug crimes (M = 68.47, SD = 72.85)

- Higher mean sentence than no drug crimes in criminal history (M_{diff} = 16.67, SE_{diff} = 1.71, $p < .001$)
- Higher mean sentence than possession only (M_{diff} = 12.21, SE_{diff} = 1.64, $p < .001$)
- Lower mean sentence than both trafficking and possession (M_{diff} = -6.89, SE_{diff} = 1.73, $p < .001$)

Group 3 (Possession Only): Possession-related drug crimes in criminal history, no trafficking-related drug crimes (M = 56.26, SD = 51.46)

Higher mean sentence than no drug crimes in criminal history (M_{diff} = 4.46, SE_{diff} = 0.95, $p < .001$)

Lower mean sentence than trafficking only (M_{diff} = -12.21, SE_{diff} = 1.64, $p < .001$)

Lower mean sentence than both trafficking and possession (M_{diff} = -19.10, SE_{diff} = 0.99, $p < .001$)

Group 4 (Both): Both trafficking- and possession-related drug crimes in criminal history (M = 75.36, SD = 65.28)

Higher mean sentence than no drug crimes in criminal history (M_{diff} = 23.57, SE_{diff} = 1.11, $p < .001$)

Higher mean sentence than trafficking only (M_{diff} = 6.89, SE_{diff} = 1.73, $p < .001$)

Higher mean sentence than possession only (M_{diff} = 19.10, SE_{diff} = 0.99, $p < .001$)

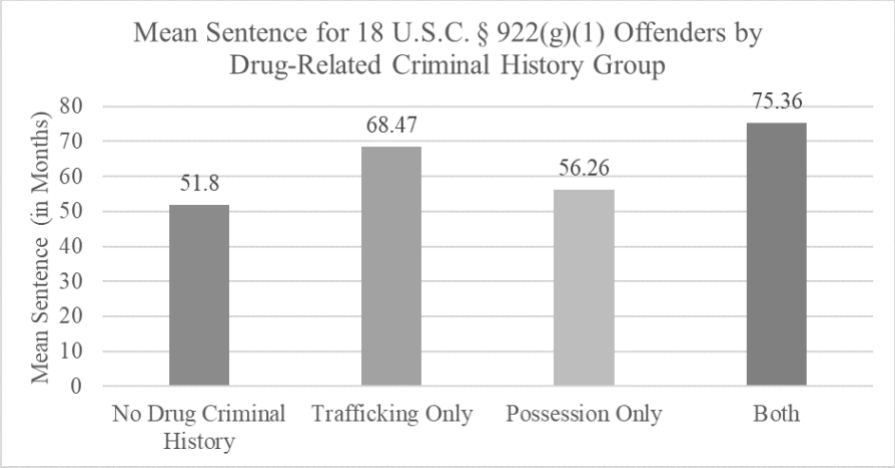

Figure B2: Mean Sentence for 18 U.S.C. § 922(g)(1) Offenders by Drug-Related Criminal History Group

Analysis 2a: A Chi-square test of independence was employed to determine the association between receiving a sentence one standard deviation above the mean (above average) or one standard deviation below the mean (below average) and offender criminal history groups.

A significant association between sentence and criminal history group was identified, $\chi^2(3) = 94.49$, $p < .001$.

Specifically, the following groups displayed a significant deviation from expected counts:

Neither violent nor drug crimes in criminal history (n = 122)

Individuals with neither violent nor drug crimes in their criminal history were more likely than expected to receive a below average sentence (49.2% observed vs. 22.70% expected, adjusted residual = 7.2).

Violent crimes in criminal history, no drug crimes (n = 264)

Individuals with violent crimes in their criminal history but no drug crimes were more likely than expected to receive a below average sentence (33.7% observed vs. 22.73%, adjusted residual = 4.6).

Both violent and drug crimes in criminal history (n = 723)

Individuals with violent and drug crimes in their criminal history were more likely than expected to receive an above average sentence (85.5% observed vs. 77.28% expected, adjusted residual = 6.5).

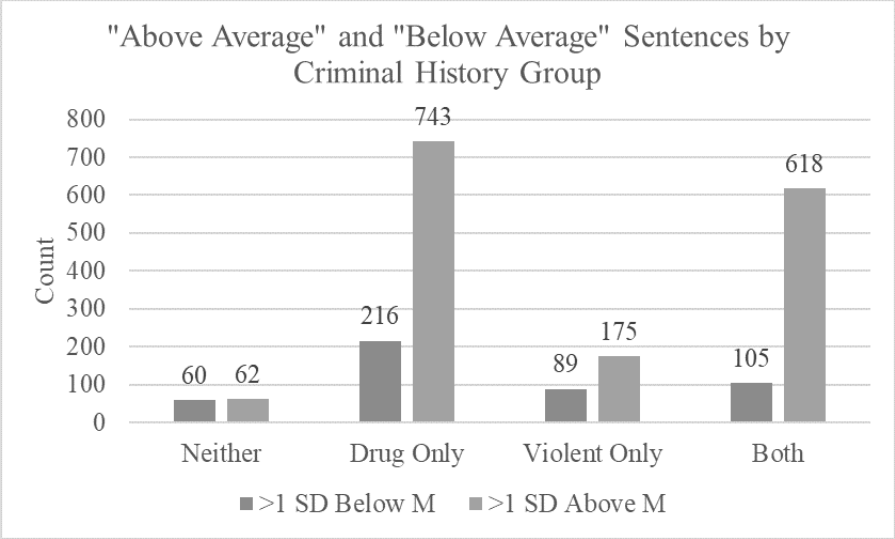

Figure B3: Above Average and Below Average Sentences by Criminal History Group

Analysis 2b: A Chi-square test of independence was employed to determine the association between receiving a sentence one standard deviation above the mean (above average) or one standard deviation below the mean (below average) and the specific subgroups for offenders with drug-related criminal history.

A significant association between sentence and criminal history group was identified, $\chi^2(3) = 98.18$, $p < .001$.

Specifically, the following groups displayed a significant deviation from expected counts:

No drug-related crimes in criminal history (n = 386)

Individuals with no drug-related crimes in their criminal history were more likely than expected to receive a below average sentence (38.6% observed vs. 22.41% expected, adjusted residual = 8.5).

Both trafficking- and possession-related crimes in criminal history (n = 828)

Individuals with trafficking- and possession-related crimes in their criminal history were more likely than expected to receive an above average sentence (86.6% observed vs. 77.58% expected, adjusted residual = 8.1).

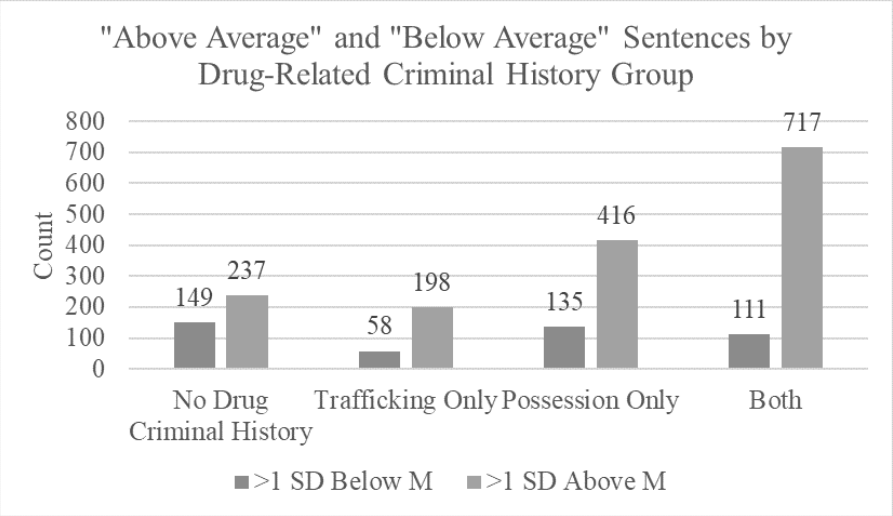

Figure B4: Above Average and Below Average Sentences by Drug-Related Criminal History Group

Conclusion: There are significant differences in 18 U.S.C. § 922(g)(1) sentences for offenders who have a criminal history containing drug-related crimes compared to those with a criminal history containing violent crimes.

Most notably, on average, offenders with a criminal history which contains drug-related offenses (but no violent offenses) are sentenced to more months for their U.S.C. § 922(g)(1) crime than offenders whose criminal history contains violent offenses (but no drug-related offenses). Offenders who commit a U.S.C. § 922(g)(1) offense and whose criminal history contains both violent and drug-related offenses are given, on average, the longest sentences of any group that was examined in this analysis.

Of offenders with a drug-related offense in their criminal history, offenders with a criminal history containing drug crimes related to drug trafficking (but not possession) are sentenced to more months for their 18 U.S.C. § 922(g)(1) offenses than offenders who criminal history contains drug crimes related to drug possession (but not trafficking). Offenders with criminal histories that contain crimes related to both drug possession and trafficking receive the longest sentences of all subgroups examined in this analysis.