IN DEFENSE OF FELON-IN-POSSESSION LAWS

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INTRODUCTION

Assault rifle bans. Gun-free zones. Concealed carry permits. Sentencing enhancements. Of all the firearm regulations we have, or have had, in our country, the most important one is the felon prohibitor, 18 U.S.C. § 922(g)(1). This is the federal statute prohibiting anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"[1] from shipping, transporting, possessing, or receiving firearms.[2] For better or worse, this statutory subsection is the centerpiece of gun laws in the United States in terms of impact, enforcement, overlap with other laws, and spillover effects. While the Second Amendment looms in the background and sets the boundaries for how expansive or restrictive our gun laws can be, the felon prohibitor is the center of the gun-regulation universe. Yet the statute and its operation have received too little academic attention, even among scholars who write about gun rights and gun control. Recent estimates of the number of Americans with felony convictions, thus disqualifying them from gun use or ownership, range from nineteen million to twenty-four million,[3] a significant percentage of the American adult population.

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1 18 U.S.C. § 922(g)(1).

2 *See id.* A qualifying clause in the statute invokes interstate commerce: "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *Id.* § 922(g)(9).

3 *See* Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions [https://perma.cc/946N-D9QD] (citing the nineteen million figure); NICHOLAS EBERSTADT, AM. ENTER. INST., AMERICA'S INVISIBLE FELON POPULATION: A BLIND SPOT IN US NATIONAL STATISTICS 3 (2019), https://www.jec.senate.gov/public/_cache/files/b23fea23-8e98-4bcd-aeed-edcc061a4bc0/testimony-eberstadt-final.pdf [https://perma.cc/BGA3-GU8W] (estimating 2019 number at twenty-four million); *see also* Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795 (2017); Tim Henderson, *Felony Conviction Rates Have Risen Sharply, but Unevenly*, STATELINE (Jan. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/02/felony-conviction-rates-have-risen-sharply-but-unevenly [https://perma.cc/94V7-92XX].

The felon prohibitor functions as the cornerstone of the federal background check system for firearm purchases, being one of the largest categories of names in the FBI's National Instant Criminal Background Check System (NICS) database, the most frequent reason for denials or "do not sell" responses in background checks, the most common federal gun charge in prosecutions, the basis for most prosecutions of "straw purchasers," and one of the primary grounds for revoking licenses of gun dealers.[4] The Supreme Court's landmark decision in *District of Columbia v. Heller*[5] expressly stated, albeit in dicta, that the felon-prohibitor rule remained untouched by the Court's decision. Federal appellate courts that have considered Second Amendment challenges to the felon prohibitor, before and after *Heller*, have upheld the constitutionality of the statute, though some of the most recent as-applied challenges to it have resulted in a federal circuit split. Current members of the Supreme Court have signaled deep differences among themselves about the constitutionality of the statute in its present form, though the Court has denied certiorari in several cases that would have afforded an opportunity to consider the issue.[6]

In recent years, some prominent jurists have criticized the statute as being overly broad.[7] A growing number of academic commentators have joined in; one line of attack from the academy has been consequentialist, focusing on this law's significant contribution to our mass incarceration crisis and the disturbing racial disparities besetting the carceral system overall, from arrests to prosecutions to sentencing.[8] Another line of attack has questioned the historical pedigree of felon-in-possession laws, arguing that this is a modern approach to gun regulation (mid-twentieth century) and not something envisioned by the Founding Fathers.[9] A third approach is a more deontological

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4 *See infra* Part II.

5 554 U.S. 570, 626–27 (2008).

6 *See infra* Part I.

7 *See, e.g.*, Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting); Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897 (3d Cir. 2020) (Bibas, J., dissenting).

8 *See* Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. (forthcoming 2022) (discussing the disproportionate sentencing for federal gun possession crimes and the racial disparities in enforcement and incarceration); Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143 (2018) (arguing that racism was the motivation for enacting felon-in-possession laws, resulting in the disarming and mass incarceration of minorities); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) (presenting critiques on the race- and class-based classifications, the unfettered discretion the law bestows on police and prosecutors, and the law's contribution to the mass incarceration problem).

9 *See* Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous,"* 25 TEX. REV. L. & POL. 245 (2021) (arguing that disarming

approach, arguing that only "dangerous" felons deserve to be dispossessed of firearms, and that permanently disarming those convicted of nonviolent felonies (various forms of fraud, embezzlement, and perhaps drug possession) is inherently unjust, or at least unreasonable.[10] The constitutional implication of a law being unreasonable is that it might not survive whatever level of judicial scrutiny a court applies when faced with a constitutional challenge to the law, especially an as-applied challenge.

This Article, in contrast, sets forth a defense of the felon-prohibitor rule, with some important caveats or suggestions for reform; the argument approaches the problem from four different angles. First, the constitutionality of the law is well settled.[11] Every federal circuit has upheld the constitutionality of the federal felon-in-possession law on its face, and (usually) against as-applied challenges; moreover, the Supreme Court denied certiorari in every one of these cases when appealed, leaving in place the universal consensus of the circuit courts. Constitutional challenges continue, but a sudden reversal of direction by the Supreme Court on this point seems extremely unlikely. Second, it is difficult to overstate the centrality of the felon-in-possession laws within our larger framework of firearms regulation and policy; eliminating or even significantly shrinking its scope would cut a gaping hole in our entire national regulatory framework for guns, leading to

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felons as a class was completely nonexistent for the first 150 years of American history); Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 286 (2020) (arguing that the felon-in-possession laws lack historical pedigree). *But see* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, DUKE L. SCH. PUB. L. & LEGAL THEORY SERIES NO. 2020-80 (2020) (arguing that the Founding-era generation frequently used the law to disarm groups it considered dangerous, which by analogy could justify modern lawmakers disarming felons as a group they consider dangerous).

10 *See* Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L.J. 1429 (2021) (arguing that the felon-in-possession laws are too punitive and unfair); Kari Lorentson, Note, *18 U.S.C. § 922(g)(1) Under Attack: The Case for As-Applied Challenges to the Felon-in-Possession Ban*, 93 NOTRE DAME L. REV. 1723 (2018) (arguing for "nonviolent" felons to be able to bring successful as-applied Second Amendment challenges to their firearm disqualification); Carly Lagrotteria, Note, Heller*'s Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 FORDHAM L. REV. 1963 (2018) (arguing in favor of as-applied challenges for felony convictions of nonviolent crimes); Jeffrey Giancana, Note, *The "Scourge" of Armed Check Fraud: A Constitutional Framework for Prohibited Possessor Laws*, 51 U. MICH. J.L. REFORM 409 (2018) (arguing that felon-in-possession laws are unconstitutionally overbroad); Zack Thompson, Note, *Is It Fair to Criminalize Possession of Firearms by Ex-felons?*, 9 WASH. U. JURIS. REV. 151 (2016) (arguing that a cost-benefit analysis of the felon-in-possession laws yields a net negative); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*?, 32 HARV. J.L. & PUB. POL'Y 695 (2009) (arguing that those convicted of white-collar crimes are not dangerous to the community and should not lose their gun ownership rights).

11 *See infra* Part I.

tremendous disruption in the legal system and myriad unintended consequences.[12] Third, the leading counterproposal by the law's critics—to distinguish between "violent" and "nonviolent" felons for purposes of depriving them of firearms—has already proved completely unworkable and convoluted in other closely related areas of criminal law: sentencing under the Armed Career Criminal Act (ACCA), the ratcheted-up charges under § 924(c) for using a gun in a "crime of violence," and separate federal sentencing guideline provisions that increase sentences for "crimes of violence."[13] In other words, the proposed alternative sounds nice in theory, but would not work well in practice at all, and would be even worse than the current situation. Finally, this Article attempts to show that the felon-in-possession law is necessary because it is currently one of our only ways to limit the supply of guns streaming into vulnerable, poverty-stricken communities, where most of our country's gun violence occurs. Even if an individual felon does not use his gun to commit any crimes after release, the guns brought into these vulnerable communities by law-abiding gun owners too often end up in the hands of roommates, acquaintances, neighbors, and nearby relatives who borrow, buy, or steal the guns to commit gun violence in that locale. Relatedly, the released felons themselves are also vulnerable. Statistically, they have a markedly elevated risk for suicide, which increases exponentially if they own a gun. Suicides are a significant portion of the gun deaths in our country every year, and even felons convicted of "nonviolent" crimes are a special risk group that deserve protection. In addition, from the standpoint of forging a political consensus on reducing mass incarceration or working toward the ideal of prison abolition, removing guns from those who commit crimes makes incarceration less necessary from a public safety standpoint.

On the other hand, the current sentences for felon gun possession are admittedly far too long. The contribution that these laws make to the problem of mass incarceration and racial inequality is a serious downside that merits a serious response and reform. Instead of giving prison sentences for unlawful gun possession, we could simply use firearm forfeiture or confiscation combined with routine administrative inspections for firearms (not inconceivable for supervised release scenarios), with violations of the gun ban resulting in more frequent and comprehensive inspections or other forms of personal accountability.

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12 *See infra* Part II.

13 *See infra* Part III.

A roadmap for what follows: Part I will provide a quick overview of the courts' view of the constitutionality of the statute, starting with the *Heller* decision, but devoting special attention to the Supreme Court's most recent decision, *Greer v. United States*,[14] in which the Court addressed the mens rea requirement for the federal felon-in-possession statute and ignored the Second Amendment challenges to the same statute that went up to the Court as petitions for review in the same term. Part II addresses the centrality of felon prohibition to our gun regulation overall, and it situates the statute within the system of background checks for gun purchases, the gun dealer license regime, and other gun laws. This Part also contains a brief enactment history of § 922(g)(1) and some of its surrounding code sections that define its operative terms and parameters.

Part III explains the impracticality and infeasibility of the proposed alternative to apply the firearm prohibition only to "dangerous" or "violent" felons—or, more accurately, to use as-applied constitutional challenges to ensure that it does *not* apply to nondangerous or nonviolent felons. Part IV focuses on some of the social benefits of the felon-in-possession laws, in protecting vulnerable communities by reducing the supply of guns there, in protecting felons from death by suicide, and in using disarmament as an alternative to long-term incarceration. The conclusion lays out some closing observations and caveats and offers suggestions for further research and academic discussion.

I. CONSTITUTIONAL CHALLENGES TO THE FELON-IN-POSSESSION LAW

A. *Unanimous Circuits and Dozens of Cert Denials*

The Supreme Court's decision in *District of Columbia v. Heller* changed the legal landscape for Second Amendment challenges to statutes because it recognized an individual right to keep and bear arms.[15] The opinion itself, however, included some important caveats:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws

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14 141 S. Ct. 2090 (2021).

15 *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1439 (2018) ("[T]he decade since *Heller* has seen more than one thousand lower court challenges testing the boundaries and strength of the [Second Amendment] right.").

> forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[16]

Although this was dicta in the original opinion, in its follow-up decision two years later, *McDonald v. City of Chicago*, the Court repeated these assurances.[17] More recent opinions suggest the Justices still hold this view.[18]

Since *Heller*, all eleven of the numbered federal circuit courts, as well as the D.C. Circuit, have considered and rejected Second Amendment challenges to the felon-in-possession laws.[19]

As Jacob Charles explains, the circuit courts vary in their methodology—some holding that felons are outside the protection of

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16 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

17 *See* 561 U.S. 742, 786 (2010).

18 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting) ("We recognized that history supported the constitutionality of some laws limiting the right to possess a firearm, such as laws banning firearms from certain sensitive locations and prohibiting possession by felons and other dangerous individuals.").

19 *See, e.g.*, United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011), *cert. denied*, 565 U.S. 1271 (2012); United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013) (per curiam); Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 899 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 2511 (2021); United States v. Moore, 666 F.3d 313, 318–19 (4th Cir. 2012); United States v. Yates, 746 F. App'x 162, 164 (4th Cir. 2018) (per curiam), *cert. denied*, 139 S. Ct. 616 (2018); United States v. Carter, 750 F.3d 462, 470 (4th Cir. 2014), *cert. denied*, 574 U.S. 907 (2014); United States v. Pruess, 703 F.3d 242, 245–46 (4th Cir. 2012); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009), *cert. denied*, 557 U.S. 913 (2009); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010), *cert. denied*, 562 U.S. 867 (2010); United States v. Massey, 849 F.3d 262, 265 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 500 (2017); United States v. Swaggerty, No. 16-6677, 2017 WL 11622737, at *1 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2649 (2018); United States v. Greeno, 679 F.3d 510, 517 (6th Cir. 2012), *cert. denied*, 568 U.S. 922 (2012); United States v. Carey, 602 F.3d 738, 741 (6th Cir. 2010), *cert. denied*, 562 U.S. 895 (2010); United States v. Whisnant, 391 F. App'x 426, 430 (6th Cir. 2010), *cert. denied*, 562 U.S. 1036 (2010); United States v. Khami, 362 F. App'x 501, 507–08 (6th Cir. 2010), *cert. denied*, 560 U.S. 934 (2010); United States v. Frazier, 314 F. App'x 801, 807 (6th Cir. 2008), *cert. denied*, 556 U.S. 1143 (2009); Hatfield v. Barr, 925 F.3d 950 (7th Cir. 2019); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010), *cert. denied*, 562 U.S. 1092 (2010); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011), *cert. denied*, 565 U.S. 1184 (2012); United States v. Hughley, 691 F. App'x 278, 278–79 (8th Cir. 2017) (per curiam), *cert. denied*, 138 S. Ct. 983 (2018); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010), *cert. denied*, 562 U.S. 921 (2010); United States v. Phillips, 827 F.3d 1171 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 56 (2017); United States v. Torres, 789 F. App'x 655 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 960 (2020); United States v. Griffith, 928 F.3d 855, 870–71 (10th Cir. 2019); United States v. Molina, 484 F. App'x 276, 285 (10th Cir. 2012); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 559 U.S. 970 (2010); Flick v. Att'y Gen., 812 F. App'x 974 (11th Cir. 2020) (per curiam), *cert. denied*, 141 S. Ct. 2551 (2021); United States v. Dowis, 644 F. App'x 882, 883 (11th Cir. 2016) (per curiam); United States v. Rozier, 598 F.3d 768, 770–71 (11th Cir. 2010), *cert. denied*, 560 U.S. 958 (2010); Schrader v. Holder, 704 F.3d 980, 991 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 989 (2013); Medina v. Whitaker, 913 F.3d 152 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 645 (2019).

the Second Amendment, others applying intermediate scrutiny and upholding the statute, and one or more suggesting that as-applied challenges are theoretically possible for those with federal felony convictions.[20] In the end, all the circuits have now agreed to uphold § 922(g)(1) against facial challenges based on the Second Amendment. The as-applied challenges by those with "nonviolent" federal felony convictions have also failed.[21] Moreover, since *Heller*, the Supreme Court denied certiorari at least twenty-four times in cases involving Second Amendment challenges to § 922(g)(1).[22]

At this point, it is puzzling that these challenges continue to come, and to generate certiorari petitions most years—but they do. It is hard to imagine a more settled point in Second Amendment jurisprudence than one considered and decided congruently (albeit via different approaches) by every federal circuit, and where the Supreme Court has consistently declined to consider appeals. It seems unlikely that the Court would abruptly reverse course and take one of the appeals and reverse *all* the circuits at once anytime soon, even with the recent turnover on the Court.

Such a settled consensus about the constitutionality of any gun law is a rarity and serves as a stable point of agreement to start discussions of the many unsettled questions in Second Amendment jurisprudence and firearm policy. Even beyond the bipartisan legislative consensus on the issue, the felon-in-possession law also has a *judicial* consensus around it, to such an extent that it is worth preserving.

B. *The* Rehaif *Problem and* Greer

In *Rehaif v. United States*, a 2019 case, the Supreme Court held that to sustain a conviction for unlawful firearm possession under any subsection of § 922(g), "the Government . . . must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it."[23] To violate the statute "knowingly," the defendant (an immigrant) needed to know that his

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20 *See generally* Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS. 53 (2020) (discussing the different approaches circuit courts have taken to the prohibited person question).

21 For an early assessment of the staying power of the felon-in-possession law in the first years after *Heller*, see Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248–49 (2009).

22 *See supra* note 19.

23 139 S. Ct. 2191, 2194 (2019). The Court prefaced this by saying, "We hold that the word 'knowingly' applies both to the defendant's conduct and to the defendant's status." *Id.*

expired student visa meant he was unlawfully in the country.[24] *Rehaif* itself was not about felons, but the Court's holding implied that the same scienter requirement would apply to all sections of § 922(g), including felons; as the Court explained, "Or these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is '*punishable* by imprisonment for a term exceeding one year.'"[25] To clarify: Under *Rehaif*, prosecutors must prove, as elements of a gun possession offense, that the defendant (1) knew he possessed a firearm or ammunition, and (2) knew he was a felon, or an immigrant in the country unlawfully, or dishonorably discharged from the military, or a current user of illegal narcotics, etc. Prosecutors need not show that the defendant had knowledge of the firearm prohibition itself—that is, that the defendant's felon status disqualified the individual from possessing a firearm or ammunition. Knowledge of one's status is necessary, but not knowledge of the gun statute itself.

Greer v. United States, a 2021 case, gave the Supreme Court an opportunity to address the scienter requirement for the federal felon-in-possession law directly.[26] The Court consolidated the *Greer* case[27] with a similar case, *United States v. Gary*.[28] This opinion was a natural follow-up to the Court's 2019 decision in *Rehaif*. In *Greer*, this meant the defendants needed to know that they were, in fact, convicted felons. Justice Kavanaugh wrote a short opinion for the majority. The decision was unanimous on the main points,[29] though Justice Sotomayor concurred in part and dissented in part.[30] Whatever differences there may be among members of the Court about the Second Amendment, there appears to be a consensus about the legitimacy and value of the felon-in-possession statute.

The convictions of Greer and Gary under the felon-in-possession statute occurred prior to the Court's decision in *Rehaif*.[31] Greer's conviction was from a jury verdict, but the jury instruction omitted the

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24 *See id.* at 2195–96.

25 *Id.* at 2198 (citation omitted).

26 Greer v. United States, 141 S. Ct. 2090 (2021). I have written about this case previously on the Second Thoughts blog, and some of my comments here reiterate what I wrote there. *See* Dru Stevenson, *Thoughts on* Greer v. United States, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 25, 2021), https://firearmslaw.duke.edu/2021/06/thoughts-on-greer-v-united-states [https://perma.cc/GBJ4-2M3D].

27 753 F. App'x 886 (11th Cir. 2019).

28 954 F.3d 194 (4th Cir. 2020).

29 *See Greer*, 141 S. Ct. at 2094.

30 *See id.* at 2101 (Sotomayor, J., concurring in part and dissenting in part).

31 *Id.* at 2095 (majority opinion).

mens rea element.[32] Gary pled guilty without knowledge of the additional element.[33] Both defendants raised the issue for the first time on appeal,[34] so the Court analyzed their *Rehaif* claims under plain error review. The Court held that plain error review under *Rehaif* requires that defendants show that they would have presented evidence at trial to prove that they were unaware of their status as convicted felons. Neither Greer nor Gary had done that, so their convictions could stand. Gary and Greer failed to show that the errors affected their substantial rights. Greer had to show that, but for the jury instruction's lack of the *Rehaif* scienter element, there was a reasonable probability that a jury would have acquitted him.[35] Gary had to show that, but for the *Rehaif* error during the plea colloquy, there was a reasonable probability that he would have gone to trial rather than plead guilty.[36] Greer and Gary failed to meet their burdens because there was evidence that they both knew they were felons. The *Rehaif* scienter element is mostly toothless, because as the Court states, "If a person is a felon, he ordinarily knows he is a felon."[37] In sum, the outcome in both cases would not have changed with an additional scienter instruction, as both defendants knew they were felons based on their own criminal records.

The subtle procedural questions before the Court regarding the application of plain error review in particular[38] may help explain the consensus among Justices who normally would disagree about gun control and Second Amendment rights. *Greer* is indeed consistent with other recent decisions[39] about "plain error review," requiring that a defendant show on appeal "a reasonable probability that, but for the error, the outcome of the proceeding would have been different."[40] This is an "uphill climb" for defendants, as Justice Kavanaugh noted.[41] In that sense, the holding in *Greer* was unsurprising.

Justice Sotomayor wrote separately[42] to concur with the majority's denial of plain error relief to Greer, but would have limited the majority's analysis solely to plain error review, not cases that allege

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32 *See id.* at 2096.

33 *See id.*

34 *See id.*

35 *See id.* at 2097.

36 *See id.*

37 *Id.*

38 *Id.* at 2096.

39 *See, e.g.*, Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904–05 (2018) (alleging plain error in an appeal).

40 *Greer*, 141 S. Ct. at 2096 (quoting *Rosales-Mireles*, 138 S. Ct. at 1904–05).

41 *Id.* at 2097.

42 *Id.* at 2101 (Sotomayor, J., concurring in part and dissenting in part).

harmless error.[43] On the other hand, she disagreed with the portion of the majority opinion that determined that the *Rehaif* error did not affect Gary's substantial rights.[44] Though most of her dissent focused on the different rules for appeals of "harmless error" versus "plain error" (the former are more favorable to defendants), she also took notice of a few relatively commonplace scenarios where someone might misunderstand their status, such as juvenile offenders or those who plead guilty to a felony but serve little or no jail time, being sentenced instead to probation.[45]

For purposes of this Article, it is significant that the Court stated repeatedly that most felons know they are felons, e.g., "As many courts have recognized and as common sense suggests, individuals who are convicted felons ordinarily know that they are convicted felons."[46] Again: "Felony status is simply not the kind of thing that one forgets."[47] Thus, proving this point is usually a mere technicality for prosecutors.[48]

The *Greer* opinion does not mention the Second Amendment even once; neither did the lower court opinions in the cases. The leading advocacy groups for gun rights, such as the National Rifle Association, did not file amicus briefs, and the decision went unnoticed on many popular gun-rights blogs.[49] So, in one sense, this was not a big decision in the field of gun rights or firearm policy. The "new" requirements imposed on prosecutors in *Rehaif* and *Greer* for bringing charges under § 922(g) amount to little more than a formality, and *Greer* sinks all except the most exceptional of post-*Rehaif* appeals from defendants sentenced before that case was decided. From a practical standpoint,

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43 *See id.* at 2102. Justice Sotomayor also agreed that Gary was not automatically entitled to relief on plain error review. *See id.* at 2101.

44 *See id.* at 2104.

45 *Id.* at 2103 ("For example, a defendant may not understand that a conviction in juvenile court or a misdemeanor under state law can be a felony for purposes of federal law. Or he likewise might not understand that pretrial detention was included in his ultimate sentence.").

46 *Id.* at 2095 (majority opinion).

47 *Id.* at 2097 (quoting United States v. Gary, 963 F.3d 420, 423 (4th Cir. 2020) (Wilkinson, J., concurring)). Justice Kavanaugh adds that the jury assumes this as well: "That simple truth is not lost upon juries. Thus, absent a reason to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he *was* a felon." *Id.*

48 *See id.* at 2097–98.

49 For example, I checked the websites for the National Rifle Association, the Firearms Policy Coalition, the Second Amendment Foundation, The Truth About Guns, and No Lawyers Only Guns and Money; these are popular gun-rights websites and seem to be representative of the (very large) constellation of pro-gun blogs. *See, e.g.*, NRA BLOG, https://www.nrablog.com (last visited Feb. 27, 2022); FIREARMS POL'Y COAL., https://www.firearmspolicy.org (last visited Feb. 27, 2022); SECOND AMEND. FOUND., https://www.saf.org (last visited Feb. 27, 2022); TRUTH ABOUT GUNS, https://www.thetruthaboutguns.com (last visited Feb. 27, 2022); NO LAW. ONLY GUNS & MONEY, https://onlygunsandmoney.com (last visited Feb. 27, 2022).

Rehaif and *Greer* left prosecutors and defendants in these cases in the same position they were in before.

On the other hand, there are several reasons that *Greer* matters a lot. As discussed in the first Section of this Part, this statute itself has been the target of numerous Second Amendment challenges in every circuit, and the Court has denied certiorari in two dozen of these cases.[50] Even without the petitioners in *Greer* raising a Second Amendment issue, it was surprising that none of the Justices, even the most ardent supporters of Second Amendment rights, wrote a dissent or concurrence in this case, arguing that the prosecutors should also have to prove the present dangerousness of the felon or that the prior conviction was for a violent felony. The Court could have easily requested briefing on the issue and included a Second Amendment section in the opinion, requiring prosecutors in gun possession cases to also prove that the defendant has a predilection to violence or poses an ongoing danger to the community. *Greer* could have been a Second Amendment case; though I hesitate to argue that silence—the Court's repeated denials of certiorari in the challenges to the statute, combined with seemingly sidestepping the issue in this opinion—sends a signal about the Justices' views on the outer bounds of the Second Amendment.

In terms of day-to-day governance, § 922(g) is the centerpiece of firearm regulation in this country, our most enforced gun law in terms of arrests and convictions. Conservative Justices seem to agree; as Justice Alito stated in his dissent in *Rehaif*:

> And § 922(g) is no minor provision. It probably does more to combat gun violence than any other federal law. It prohibits the possession of firearms by, among others, convicted felons, mentally ill persons found by a court to present a danger to the community, stalkers, harassers, perpetrators of domestic violence, and illegal aliens.[51]

Most of Justice Alito's dissent in *Rehaif* was about the prospect of appeals like the one in *Greer*,[52] and the *Greer* decision addressed most of Justice Alito's concerns in this regard by rendering such appeals futile, with rare exceptions. This stands in contrast with his dissent in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, joined by Justices Gorsuch and Thomas in part, where his absolutism about the Second Amendment might have led readers to think he would be more

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50 *See supra* note 19.

51 Rehaif v. United States, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting).

52 *See id.* at 2201–13.

sympathetic to challenges to the felon prohibitor.[53] If the conservatives and liberals on the Supreme Court represent in microcosm form the long-standing, partisan gridlock on gun policy, § 922(g) appears as a rare point of agreement. It may be the only type of gun regulation that garners such bipartisan support.

C. *Continuing Attacks on the Felon-in-Possession Laws*

Despite how settled the courts are on this issue, commentators continue to argue that the felon-in-possession statute is unconstitutional under a text-history-tradition analysis. Joseph Greenlee, for example, recently argued[54] that the felon-in-possession law lacks historical pedigree, even though federal felon-in-possession laws have been in force for all felons for over fifty years, and sixty years for "violent felons"—around a fourth of the total time since the Second Amendment's adoption in 1789. Greenlee asserts that "there is no historical justification for completely and forever depriving peaceable citizens—even nonviolent felons—of the right to keep and bear arms. Nor . . . unvirtuous citizens."[55] He bases this claim on a selective examination of English and American legal history.[56] Greenlee concludes that precolonial English law went no further than disarming "violent and other dangerous persons."[57] He acknowledges, however, that throughout English history "disloyal" or "seditious" individuals could be disarmed.[58] He then proceeds to survey similar laws from the colonial and founding era in the United States, working around to his conclusion that ideas of "unvirtuous citizens" lack historical justification.[59] Greenlee examines and debunks several sources that are commonly cited in support of the "unvirtuous citizen" theory,[60] concluding that there is no historical justification whatsoever for disarming unvirtuous citizens. "History shows that the right could be denied only to mitigate threats posed by dangerous persons. Therefore, firearm prohibitions on peaceable citizens contradict the original understanding of the Second Amendment and are thus

53 140 S. Ct. 1525 (2020) (Alito, J., dissenting).

54 *See generally* Greenlee, *supra* note 9.

55 *Id.* at 286.

56 *Id.* at 257–75.

57 *Id.* at 258.

58 *Id.* at 258–59.

59 *Id.* at 275.

60 *Id.* at 275–78.

unconstitutional."[61] Greenlee does not address the practical difficulties in courts assessing which individuals are "dangerous," regardless of the charges to which they may have pleaded guilty, or the method by which courts should determine which felonies are "violent."

An article by Professor Royce de R. Barondes makes a similar historical pedigree argument against the constitutionality of modern felon-in-possession laws.[62] He samples numerous sources purporting to discredit the idea that the Second Amendment protects only "virtuous" citizens.[63] He concludes, "The Founding-Era restrictions, detailed in this Article, were tailored to the circumstances and do not provide a foundation for the broad, essentially permanent bans that federal law provides and that courts typically validate."[64]

Some federal circuit court opinions have already considered and debunked these historical arguments.[65] One particularly compelling rebuttal to the historical pedigree argument is the forthcoming article by Joseph Blocher and Caitlan Carberry, who start with the well-documented fact that the founding generation often prohibited gun ownership for groups deemed "dangerous" to society or the local community, some of whom (like Native Americans or political dissidents) would not be subject to such laws today.[66] Reasoning by analogy, they argue that the question should focus not on whether a group or class (like felons) would have been the target of founding-era disarmament laws, but rather on the notion that the founders thought the legislature should decide which groups pose a threat to the social order or the community.[67] In the modern era, those with felony convictions are the group the legislature deems to be in this category, rather than the groups in that category two centuries ago.[68]

There are additional problems that make the historical pedigree argument unconvincing. Most felons in the common law era faced execution, not years of incarceration in a penitentiary followed by release. There were no long-term prison facilities in the founding era.

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61 *Id.* at 286.

62 *See generally* Barondes, *supra* note 9.

63 *See id.*

64 *Id.* at 245; *see also* Marshall, *supra* note 10, at 707–27 (making a similar historical pedigree argument before most circuit courts had a chance to apply *Heller*).

65 *See, e.g.*, Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 903–05 (3d Cir. 2020) (providing historical counterevidence); Kanter v. Barr, 919 F.3d 437, 445–47 (7th Cir. 2019) (concluding that the historical evidence was "inconclusive at best"); *see also* N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting) (noting historical support for the constitutionality of prohibiting felons from possessing guns).

66 *See* Blocher & Carberry, *supra* note 9.

67 *See id.*

68 *See id.*

Of course, there were exceptional cases where felons received various forms of leniency (punishment other than death) or pardons. But these are exceptions that prove the rule. Jury nullification also occurred, but in such cases the defendants were not felons—they received acquittals. The framers could not have intended Second Amendment guarantees to apply to felons if, as a rule, all the felons were dead.[69] There were undoubtedly fewer felonies in the founding era laws than today, as modern technology and the population density in our cities have brought new ways for bad actors to injure large numbers of people indirectly (as with emitting pollutants into the environment) or financially (as with securities fraud, check fraud, and counterfeiting). Rigorous historical inquiries are a complex matter—the domain of an entire field of academia—and are outside the institutional competency of courts.

Most of the recent academic attacks on the felon-in-possession laws have focused not on arcane historical arguments, but on the perceived unfairness of treating "nonviolent" felons the same as "violent" ones.[70] Many of these harken back to the classic (or perhaps clichéd) "Martha Stewart" argument[71]: i.e., a harmless-looking decorating-and-cooking show host like Martha Stewart, who has a felony conviction related to insider trading and lying to authorities, and who is now ineligible to own a gun. These recent publications—mostly student notes—take the unfairness idea and turn it into a constitutional argument for granting as-applied Second Amendment challenges to the felon prohibitor, because a law's reasonableness matters for the intermediate scrutiny analysis most courts apply in these cases. This alternative proposal, to disarm only "dangerous" felons but invoke the Second Amendment to guarantee the gun rights of "nondangerous" ones, is the subject of Part III.[72] The Martha Stewart example, however, merits some discussion.

First, there is no reason to think that she, or most harmless-seeming felons of her ilk, find their lack of gun ownership particularly burdensome, or that they would buy guns if they could. Most

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69 Greenlee argues that forfeiture of property for felons had become uncommon by the late eighteenth century and argues there are few, if any, cases of firearm forfeiture. *See* Greenlee, *supra* note 9, at 268–69. But execution of most or all felons made property forfeiture no more than an undeserved punishment of the defendant's heirs. *Id.* at 268. Greenlee downplays how common the death penalty was for felons in colonial America and the first years of the Republic. *See id.* at 268 n.118.

70 *See generally* Sherwood, *supra* note 10; Lorentson, *supra* note 10; Giancana, *supra* note 10; Thompson, *supra* note 10.

71 *See* Marshall, *supra* note 10, at 695–96.

72 *See infra* Part III.

Americans do not own guns even if they are eligible,[73] so we cannot assume that significant numbers of former white-collar felons are anxious to arm themselves. More importantly, there are striking counterexamples like Al Capone, the notorious Chicago mobster whose eventual conviction was for the nonviolent crime of tax fraud.[74] The "Al Capone problem" for differentiating dangerous from nondangerous felons is that the underlying charges of the felon's conviction may not represent the individual's level of violence or future dangerousness at all. Several courts have recently made similar observations about the Al Capone problem.[75] Moreover, even if an appellate court in an as-applied challenge ignored the category of conviction and instead inquired into the individual's dangerousness, it is not clear what quantum of proof the government would need for the court to uphold the constitutionality of the firearm deprivation in that case. The government may prosecute violent felons like Al Capone for nonviolent felonies because it does not have enough admissible evidence to prove the violence-related charges—some of the most violent criminals are also adept at hiding their tracks or intimidating potential witnesses. Charges like tax fraud, money laundering, or other types of fraud are safer bets for ensuring a conviction and are suitable substitutes for other types of charges. In fact, part of Congress's motivation in passing laws that make nonviolent crimes felonies is to facilitate the arrest and

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73 *See* KIM PARKER, JULIANA MENASCE HOROWITZ, RUTH IGIELNIK, J. BAXTER OLIPHANT & ANNA BROWN, PEW RSCH. CTR., THE DEMOGRAPHICS OF GUN OWNERSHIP 16 (2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership [https://perma.cc/WG7T-MB7R] (stating that sixty-nine percent of American adults do not own a gun).

74 *See Who Took Down Al Capone? "Eliot Ness" Is the Wrong Guess!*, 108 J. TAX'N 317, 317–18 (2008) (discussing the role the IRS played in bringing Al Capone to justice); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583–84 (2005) (recounting the history of Al Capone's capture and conviction for tax fraud); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 551 (2001) ("If an Al Capone cannot be convicted of homicide or large-scale liquor law violations, tax evasion offers a useful alternative. And while tax evasion may be the sort of crime for which people other than Al Capone are prosecuted, that need not always be the case . . . .").

75 *See, e.g.*, United States v. Taylor, 206 F. Supp. 3d 1148, 1163 n.29 (E.D. Va. 2016) ("For example, murder may, in fact, always be committed as a crime of violence, while tax evasion may, in fact, never be committed as a crime of violence (although tax evasion may be a useful crime for convicting violent persons, such as Al Capone)."); *see also* United States v. Meadows, 867 F.3d 1305, 1313 n.2 (D.C. Cir. 2017) ("In 1931, the government famously prosecuted Al Capone for income tax evasion rather than far more serious crimes that it might have had difficulty proving."); Gun Owners of Am., Inc. v. Garland, 992 F.3d 446, 450 (6th Cir. 2021) (citing congressional records indicating that the first federal gun law, the National Firearms Act, was framed as a tax law in order to make it easier to prosecute gun crimes as tax crimes, as had happened with Al Capone).

prosecution of violent criminals who otherwise elude the authorities, a point that William Stuntz and other commentators have observed.[76]

The most valid criticism of the felon-in-possession laws, though not exactly a constitutional argument, is their contribution to the mass incarceration and its concomitant racial inequalities. This is a point eloquently explained by Jacob D. Charles and Brandon L. Garrett in a forthcoming article.[77] Other commentators have similarly observed that the problems that characterized the War on Drugs, like the mushrooming of the carceral state and its troubling racial component, also characterize the penal system's application of gun laws.[78] These are legitimate concerns that deserve attention from lawmakers, but such big-picture social issues do not necessarily translate well into an as-applied constitutional challenge by an individual felon who wants to acquire firearms long after their release from prison. It is instead an argument for shortening or eliminating the prison sentences for unlawful gun possession, a reform that is long overdue. This is a problem with sentencing policy, not with the legality of the felon-in-possession statute itself.[79]

II. THE CENTRALITY OF THE FELON-IN-POSSESSION LAWS IN FIREARMS REGULATION OVERALL

Felon-in-possession laws are at the center of regulating firearms ownership in the United States—the background check system for purchases, federal licensing for gun dealers, concealed carry permitting, and gun-related arrests and convictions. Gun regulations nationwide are a complex fabric of state and federal laws regarding the types of weapons that are legal, age restrictions, transport rules, gun-free zones,

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76 *See also* Gabriel S. Mendlow, *Divine Justice and the Library of Babel: Or, Was Al Capone Really Punished for Tax Evasion?*, 16 OHIO ST. J. CRIM. L. 181 (2018) (arguing that many federal felony statutes are used to punish defendants for crimes other than those for which they are charged); Stuntz, *supra* note 74, at 551 (discussing the Al Capone phenomenon in more recent cases that came before the Supreme Court); Christopher Paul Sorrow, *The New Al Capone Laws and the Double Jeopardy Implications of Taxing Illegal Drugs*, 4 S. CAL. INTERDISC. L.J. 323 (1995) (discussing the use of tax laws to arrest and prosecute illegal narcotics traffickers). *See generally* Richman & Stuntz, *supra* note 74.

77 *See* Charles and Garrett, *supra* note 8, at 54–58 (discussing the severity of sentencing under federal gun laws and the resulting effects on incarceration rates, as well as the racial disparities in enforcement, conviction, and sentencing).

78 *See generally* Levin, *supra* note 8.

79 For a contrary argument that the prohibitions themselves are inherently racist, see Shreefter, *supra* note 8 and CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 138–41 (2021) (discussing the racist impetus for the Gun Control Act and the desire to disarm people of color).

and use restrictions (ranging from hunting regulations to criminal penalties for shootings or even brandishing weapons). From an ex ante perspective—controlling who has weapons in the first place—the felon disarmament is the centerpiece of the policy framework and has the greatest everyday impact. From an ex post perspective—punishing firearm-related misconduct after it occurs—another federal statute in the same volume of the U.S. Code, § 924, is probably the most impactful, seconded by relevant sections of the sentencing guidelines. This latter law is reactive, however—it comes into play only after misconduct (and often tragic injuries or deaths) have occurred. In that sense, after-the-fact punishments for crimes are not "gun control" in the proper sense, but instead they are mostly state retribution against wrongdoers. "Gun control" in its proper sense of ex ante restraints revolves around the felon-in-possession laws, for better or worse.

A. *The Most Frequently Enforced Gun Laws*

Unlawful possession laws are the most enforced gun laws we have. For example, the most recent comprehensive study of gun-related arrests in Illinois concluded, "The majority of people arrested in Illinois for gun crimes are arrested for the illegal possession of a gun."[80] The proportion of arrests for gun possession out of all gun crimes has been steadily increasing, and in Illinois is currently 72%.[81] There are disturbing racial disparities in the arrests and convictions for gun possession crimes. "Between 2014 and 2019, increases in arrests [in Illinois] for the illegal possession of a gun drove overall increases in gun arrests. . . . Among those arrested specifically for the illegal possession of a gun, 69% were Black, 94% were male, and roughly 50% were under the age of 25."[82] Most of those arrested for unlawful gun possession have prior arrests and most have prior convictions.[83] Approximately two-thirds of the arrests for illegal gun possession also involve charges for other nonviolent crimes, a third of which are felony charges.[84] Practically speaking, unless the police are conducting stop-and-frisk operations, they are most likely to discover unlawfully possessed

80 DAVID E. OLSON ET AL., LOY. UNIV. CHI., ARRESTS IN ILLINOIS FOR ILLEGAL POSSESSION OF A FIREARM: EXAMINING THE CHARACTERISTICS AND TRENDS IN ARRESTS FOR ILLEGAL POSSESSION OF A FIREARM WITHIN THE CONTEXT OF CRIMES INVOLVING GUNS 14 (2020), https://www.luc.edu/media/lucedu/ccj/pdfs/IllinoisGunPosessionArrestBulletinjuly2020%5b9718%5d.pdf [https://perma.cc/9VJP-HXXW].

81 *Id.* at 1–3.

82 *Id.* at 3–4.

83 *Id.* at 5–6.

84 *Id.* at 7–8.

firearms while investigating or making arrests for other crimes, such as drug possession or theft.

A follow-up study in Illinois in 2021 found that 81% of unlawful possessions were for various prior felony convictions and 12% were for other unlawful possessions (armed habitual criminal, serial numbers defaced, stolen firearms, or possession by a gang member).[85] At the same time, the report observes, "The vast majority of those sentenced to prison for firearm possession offenses were not arrested for a violent crime within 3 years of release from prison,"[86] though a prior conviction for violent crime did correlate with subsequent arrests for other violent crimes.[87] Felon-in-possession convictions are increasing as a share of our penal system: "[A]dmissions to prison for firearm possession offenses have accounted for a growing share of total admissions; in 2014, firearm possession offenses accounted for 12% of all prison admissions in Cook County, jumping to 27% of all admissions in 2019."[88]

Also, the sheer number of people who fall under the felon-in-possession statute shows the scope of its impact. As mentioned in the introduction, recent scholarly estimates of the number of former felons range from 19 million[89] to 24 million.[90] This is a surprisingly difficult number to derive, because no government entity tracks the total number of living citizens who have either state or federal felony convictions.[91] The most recent estimates by empirical researchers on the current number of felons who unlawfully have firearms is around 100,000 nationwide.[92] While this is a number large enough to warrant more attention from law enforcement agencies, which was a main conclusion of the researchers,[93] it is a tiny number relative to the total number of felons disqualified from gun ownership, meaning the vast

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85 DAVID E. OLSON ET AL., LOY. UNIV. CHI., SENTENCES IMPOSED ON THOSE CONVICTED OF FELONY ILLEGAL POSSESSION OF A FIREARM IN ILLINOIS: EXAMINING THE CHARACTERISTICS AND TRENDS IN SENTENCES FOR ILLEGAL POSSESSION OF A FIREARM 4–5 (2021), https://www.luc.edu/media/lucedu/ccj/pdfs/firearmpossessionsentencinginillinois.pdf [https://perma.cc/PPS7-WVQD].

86 *Id.* at 2.

87 *See id.*

88 *Id.* at 22.

89 Shannon et al., *supra* note 3, at 1806.

90 *See* EBERSTADT, *supra* note 3.

91 *See id.* at 2–4.

92 *See* Veronica A. Pear et al., *Armed and Prohibited: Characteristics of Unlawful Owners of Legally Purchased Firearms*, 27 INJ. PREVENTION 145, 148 (2021).

93 *See id.* ("The evidence supporting firearm prohibitions and interventions to reduce access to firearms among prohibited populations provides a prima facie reason to expect that recovering firearms from prohibited persons could reduce firearm violence.").

majority of felons are complying with the firearm prohibition at this time.

According to a report by the United States Sentencing Commission, in fiscal year 2020, there were 6,782 convictions in federal court under § 922(g), mostly felon-in-possession cases.[94] That number represents 10.5% of all federal cases, and the 2020 numbers are in the same range as the three preceding years.[95] A high percentage—97.6%—of felon-in-possession offenders were men; the average age was 35 years.[96] More than 96% received prison sentences, with the average being 62 months; the sentences are inconsistent, however, because offenders sentenced under the ACCA receive, on average, sentences more than three times as long as those not sentenced under that statute.[97]

B. *The Origins Story*

How did we get here? Without belaboring the entire legislative history,[98] the original 1938 federal firearm disqualification statute was the first federal law that banned gun sales to and firearm possession by any felons and misdemeanants convicted of a statutorily defined "crime of violence."[99] Twenty-three years later, in 1961, Congress amended these prohibitions to include anyone convicted of a "crime punishable by imprisonment for a term exceeding one year."[100] Following the assassinations of President Kennedy, Robert Kennedy, and Martin Luther King, Jr., Congress passed the Gun Control Act of 1968 (GCA), which further redefined which individuals were ineligible to possess firearms.[101] The felon prohibitor, codified at 18 U.S.C. § 922(g)(1), finalized the definition in its current form—anyone convicted of "a crime punishable by imprisonment for a term exceeding one year."[102] A related section, 18 U.S.C. § 922(d)(1), makes it illegal to sell firearms to

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94 *See* U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf [https://perma.cc/5CJR-SWLM].

95 *See id.*

96 *See id.*

97 *See id.*

98 For a detailed and fascinating recounting of the enactment of the federal firearms laws and an analysis of their impact on the carceral state, see generally Charles & Garrett, *supra* note 8.

99 Federal Firearms Act, Pub. L. No. 75-785, §§ 1(6), 2(d)–2(f), 52 Stat. 1250, 1250–51 (1938). The definition included offenses such as murder, rape, mayhem, and burglary. *Id.* at § 1(6).

100 An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

101 *See* Pub. L. No. 90-618, 82 Stat. 1213.

102 *Id.*

felons, using the same descriptor as § 922(g)(1)—this applies both to licensed gun dealers and private individuals who sell a gun to an acquaintance.[103] Note that the Gun Control Act (GCA) added some additional categories of prohibited persons, outside the scope of this Article, such as illegal drug users.[104]

The Brady Handgun Violence Prevention Act of 1993[105] introduced the background check system that verifies whether the prospective buyer falls within one of the prohibited categories under the GCA.[106] Initially, there was a waiting period and local law enforcement was supposed to verify the person was eligible, but the Supreme Court rejected this arrangement as violative of the Tenth Amendment in *Printz v. United States*.[107] The Brady Act also instructed the FBI to develop a computerized instant background check system, which it did: NICS launched in 1998.[108] The Violent Crime Control and Law Enforcement Act of 1994 added one new category of prohibited persons to § 922(g): those with domestic violence or stalking restraining orders.[109] Congress has twice acted to upgrade the NICS system and bolster reporting by law enforcement and other agencies to the database—the NICS Improvement Amendments Act of 2007,[110] which offered financial incentives and penalties to get more state agencies to contribute records, and the Fix NICS Act of 2018,[111] which mostly directed more federal agencies to submit relevant records directly to the NICS databases.

Two supporting statutes for § 922(g) deserve mention at this point, both of which will receive closer attention in Part III. A definitional exclusion section that appears in § 921(a)(20) exempts from the firearm disqualifier any "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices,"[112]as well as state misdemeanors with punishments of less

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103 *See* 18 U.S.C. § 922(d)(1).

104 *See id.* § 922(g)(3).

105 Pub. L. No. 103-159, 107 Stat. 1536.

106 *About NICS*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/services/cjis/nics/about-nics [https://perma.cc/E6UH-XWZZ].

107 521 U.S. 898 (1997).

108 *See* U.S. DEP'T OF JUST., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS): OPERATIONS REPORT (November 30, 1998–December 31, 1999) iii (2000), https://www.fbi.gov/file-repository/operations_report_98_99.pdf/view [https://perma.cc/S7K4-T6G2].

109 Pub. L. No. 103-322, 108 Stat. 1796.

110 Pub. L. No. 110-180, 122 Stat. 2559.

111 Pub. L. No. 115-141, 132 Stat. 1132, 1132–38.

112 18 U.S.C. § 921(a)(20)(A).

than two years.[113] In addition, § 925(c) contemplates a process for petitions to obtain administrative exceptions or relief from firearm ineligibility,[114] but Congress has expressly defunded implementation of the subsection for many years, making it legally inoperable.[115]

C. *Felon Prohibitions and the Background Check System*

Most firearm purchases from federally licensed dealers (FFLs) require background checks.[116] The background check questionnaire (ATF Form 4473)[117] asks the purchaser to check a box ("Yes" or "No") for each of the nine prohibited categories under § 922(g), starting with whether they have a felony conviction,[118] typically yielding a response within minutes. If the buyer checks "Yes," the FBI's NICS system automatically denies the purchase. If the buyer checks "No," the NICS system will compare the purchaser's name against three federal databases for records of any of the nine prohibited categories. Those with felony conviction records in the system fail the background check. Even so, denials (for all causes) result from only 1.27% of the millions of background checks every year.[119]

When felons fail a gun purchase background check, usually nothing happens to them—they just leave the premises and go on their way—even though they just committed a felony by trying to buy a

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113 *Id.* § 921(a)(20)(B).

114 *See* 18 U.S.C. § 925(c).

115 This has occurred through recurring riders in the annual federal budget. *See infra* Section III.B.

116 ATF considers many states' extensive background checks for concealed carry permits duplicative of the federal purchaser background checks, so in these states, such permit holders are exempt from undergoing a background check when purchasing a firearm from a licensed dealer. *See Permanent Brady Permit Chart*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/rules-and-regulations/permanent-brady-permit-chart [https://perma.cc/JPQ3-M95M]; André Cousin II, *The Ease of Exercising the Right to Bear Arms Reaches a Hollow Point: Louisiana's Right to Bear Arms Secured for the Future*, 45 S.U. L. REV. 270, 294 (2018) (discussing the Permanent Brady Permit system in Louisiana); David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 363–64 (2016).

117 *See* Firearms Transaction Record, 27 C.F.R. § 478.124 (2012).

118 *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, OMB NO. 1140-0020, ATF FORM 4473: FIREARMS TRANSACTION RECORD PART 1—OVER-THE-COUNTER (2020), https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions [https://perma.cc/FR5S-8YTN].

119 *See* U.S. DEP'T OF JUST., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) SECTION: 2019 OPERATIONS REPORT 24 (2019), https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view [https://perma.cc/KJ3P-WTH4].

gun.[120] The Government Accountability Office (GAO) has observed the lack of prosecutions for violations in this area, which thwarts the effectiveness of the law, and the GAO suggested improving this by adopting new policies for notifying local law enforcement.[121] In most states, gun sales by private, unlicensed parties do not entail a background check, so felons who fail a licensed dealer's background check might then go obtain a gun on the secondary market from a private seller.[122] Though such purchases are illegal, there is no easy way to prevent them without universal background checks.

At the time of this writing, there are 4,788,917 individuals with felony records in the NICS database.[123] This is only a small fraction of the 19 to 24 million convicted felons in the United States, as discussed above, which highlights the scale of the NICS underreporting problem. The total records in the NICS system—everyone who would fail a background check—is 24,832,855 as of September 30, 2021.[124] By comparison, there are now more than 10 million records for unlawful immigrants.[125] For many years, felons were the largest category of prohibited persons in the NICS system, but this group has very recently moved into third place, after "Illegal/unlawful Aliens" and those with "Adjudicated Mental Health" disqualifiers, due to increased record sharing between federal agencies.[126]

Even though there are more than twice as many unlawful aliens in the database as convicted felons, felons make up (by far) the largest share of background check *denials* during the period from 1998–2021.[127] As of September 30, 2021, 1,038,235 denials had been for felony convictions, compared with only 38,438 for illegal or unlawful

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120 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-440, FEW INDIVIDUALS DENIED FIREARMS PURCHASES ARE PROSECUTED AND ATF SHOULD ASSESS USE OF WARNING NOTICES IN LIEU OF PROSECUTIONS (2018).

121 *See id.*

122 Note that twenty-one states and Washington D.C. have extended background check requirements to some or all private gun sales, which goes beyond what federal law requires, though only twelve states require background checks on all gun sales and transfers. *See Universal Background Checks*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks [https://perma.cc/PWN5-55TJ].

123 *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., ACTIVE RECORDS IN THE NICS INDICES (2021), https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view [https://perma.cc/683E-7HNV].

124 *See id.*

125 *See id.*

126 *See id.*

127 *See id.*; FED. BUREAU INVESTIGATION, U.S. DEP'T OF JUST., FEDERAL DENIALS: REASONS WHY THE NICS SECTION DENIES (2021) [hereinafter FEDERAL DENIALS], https://www.fbi.gov/file-repository/federal_denials.pdf/view [https://perma.cc/95SC-HXVE].

immigrants.[128] The number of denials from background checks surpassed 300,000 in 2020 (a new all-time record) as firearm sales spiked during the early months of the Covid-19 pandemic and the George Floyd protests around the country, and approximately forty-two percent of the denials were due to felony convictions.[129] In other words, NICS denials due to felony convictions are nearly equal to all other disqualifiers combined.

The felon-in-possession laws facilitate law enforcement investigations by providing alternative grounds for investigators or police to obtain warrants or make arrests.[130] Defendants may plead guilty to felon-in-possession charges in exchange for the prosecutor dropping other charges.[131] This means that a certain number of defendants convicted solely for being a felon in possession had committed other crimes as well, but the other charges disappeared as part of the plea deal. Conversely, defendants may offer to plead guilty to other charges to have the felon-in-possession charge dropped.[132] Plea bargaining occurs, at least partly, in the shadow of the felon-in-possession laws. In many cases, a firearms possession charge is on the

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128 *See* FEDERAL DENIALS, *supra* note 127.

129 *See* Lindsay Whitehurst, *Background Checks Blocked a Record High 300,000 Gun Sales*, ASSOCIATED PRESS (June 22, 2021), https://apnews.com/article/gun-background-checks-blocked-record-high-sales-e0c3105b6632740b8f15858cd930441a [https://perma.cc/N7RT-TCG5]. The NICS system blocked nearly twice as many gun sales in 2020 as in 2019. *See id.*; *see also* Gustaf Kilander, *Background Checks Blocked a Record 300,000 Gun Sales Across US in 2020*, YAHOO! NEWS (June 22, 2021), https://news.yahoo.com/background-checks-blocked-record-300-201246302.html [https://perma.cc/5UT8-UZXB].

130 *See, e.g.*, United States v. Leick, 944 F.3d 1017, 1018 (8th Cir. 2019) (explaining that police had based the warrant application on statements from suspect's girlfriend (part of an assault complaint) regarding suspect's regular drug use and gun possession).

131 *See, e.g.*, United States v. Massey, 758 F. App'x 455, 457–58 (6th Cir. 2018) (explaining that defendant pled guilty to a felon-in-possession charge in exchange for the prosecution dropping drug charges); United States v. Arrazola-Carreno, 260 F. App'x 86, 87 (10th Cir. 2008) (describing how defendant pled guilty to one felon-in-possession count in exchange for the second count being dropped, on advice of counsel); United States v. Brown, 147 F. App'x 124, 125 (11th Cir. 2005) (explaining that defendant pled guilty to a felon-in-possession charge in exchange for the prosecution dropping drug charges and a charge for carrying a firearm in relation to drug trafficking).

132 *See, e.g.*, Shaw v. United States, No. SA-12-CA-352-XR, 2012 WL 13171362, at *4 (W.D. Tex. June 25, 2012) ("[T]he state dropped the felon in possession charge against defendant at the time defendant pleaded guilty to the state charge of possession with intent to distribute cocaine."); United States v. Hailey, 232 F. App'x 300, 301 (4th Cir. 2007) (explaining that felon-in-possession charges were dropped in exchange for defendant pleading guilty to a drug offense); Tobey v. United States, No. DKC 2003–0151, 2007 WL 2826741, at *1 (D. Md. Sept. 25, 2007) (explaining that the defendant agreed to plead guilty to unlicensed dealing in firearms rather than the felon-in-possession charge, which carried a longer sentence); United States v. Hellbusch, 234 F.3d 1050, 1051 (8th Cir. 2000) (describing how a felon-in-possession charge was dropped because defendant agreed to plead guilty to other charges).

table and is one of the items either party could exchange for something else. Even in cases where gun possession charges are absent, any felony conviction—whether by plea agreement or after trial—renders the defendant forever ineligible to own firearms, even if a sentence is complete or the sentence did not include additional jail time. This incentivizes defendants who place a high value on owning guns to plead to misdemeanor charges rather than risk a felony conviction at trial. On the other hand, prosecutors dropping all remaining charges, in exchange for the defendant pleading guilty to a single felony, still offers the benefit of permanently disarming the individual, which could be a valid public safety consideration.

The Department of Justice (DOJ) reported in August 2020 that the Internal Revenue Service (IRS) had finally begun entering records directly into the NICS Indices in 2019.[133] As a result, the IRS entries in the felony category in the NICS database jumped from 119 in November 2019 to 28,277 by March 2020.[134] Similarly, the U.S. Postal Service Office of Inspector General (USPS-OIG) entries increased from just 25 entries in January 2019 to 1,240 by March 2020.[135] These entries are primarily for felonies and indictments, and the agency submitting the records likely indicates the nature of the crimes, such as tax-related crimes for the IRS and mail fraud for the USPS-OIG.[136] These numbers are interesting for several reasons. First, as the DOJ report itself strives to make clear, NICS underreporting of crimes or newly prohibited persons has been a long-standing problem; many prohibited persons can pass a background check and purchase weapons if their personal records are not yet in the system. The 2018 Fix NICS Act imposed new requirements on federal agencies to feed records into the NICS system,[137] and the Semiannual Reports show an increase in records in the NICS system from various federal agencies, states, and tribal authorities.[138] In addition, it is possible that the dearth of cases involving felons with tax fraud convictions, or other regulatory nonviolent offenses, may have been due to such records not being included very often in the NICS system. It will be interesting to see if the dramatic

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133 *See* U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S SEMIANNUAL REPORT ON THE FIX NICS ACT 8 (2020), https://www.justice.gov/archives/ag/page/file/1303171/download [https://perma.cc/Q387-5F47].

134 *See id.*

135 *See id.*

136 From October 2019 to September 2020, the USPS-OIG made 333 arrests for internal mail theft. *See Internal Mail Theft*, U.S. POSTAL SERV. OFF. OF INSPECTOR GEN., https://www.uspsoig.gov/investigations/internal-mail-theft [https://perma.cc/3UK7-YKVG].

137 Pub. L. No. 115-141, 132 Stat. 1132, 1132–38 (codified as amended at 34 U.S.C. § 40917).

138 *See* THE ATTORNEY GENERAL'S SEMIANNUAL REPORT ON THE FIX NICS ACT, *supra* note 133.

increase in record-sharing by federal agencies for regulatory-based felony convictions will result in an increase in court challenges by such individuals when they are unable to purchase weapons.

D. *Felon-in-Possession and Straw Purchaser Cases*

The felon-in-possession laws, in tandem with the background check system, are also the crux of straw purchaser statutes, § 922(a)(6)[139] and § 924(a)(1)(A).[140] A straw purchase occurs when an individual who can pass a NICS background check purchases a firearm on behalf of someone else—a friend, relative, or criminal co-conspirator—who cannot pass a background check.[141] This is typically someone with a felony conviction,[142] as opposed to other prohibited categories under § 922(g).

The laws are not merely to keep guns away from felons, but to enforce the transfer records that enable law enforcement to trace guns recovered from crime scenes. The background check form, officially called the Firearms Transaction Record[143] of ATF Form 4473, expressly asks the applicant:

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139 18 U.S.C. § 922(a)(6) provides:

> [F]or any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

140 18 U.S.C. § 924(a)(1)(A) ("[Whoever] knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter.").

141 *See, e.g.*, Abramski v. United States, 573 U.S. 169 (2014) (appealing from a conviction for a straw purchase); News Release, U.S. Att'ys Off., N. Dist. of Okla., Former Police Officer Sentenced for Making a False Statement to a Firearms Dealer to Purchase a Gun for Boyfriend (Aug. 10, 2021) (2021 WL 3510737); News Release, U.S. Att'ys Off., E. Dist. of Pa., Upper Darby Man Pleads Guilty to Straw Purchasing 20+ Handguns Last Summer at Dealers in Southeast PA (June 28, 2021) (2021 WL 2646897).

142 *See, e.g.*, Bruce Vielmetti, *Feds Say "Straw Buyer" Purchased 39 Handguns for a Felon Since July, Paid More than $25,000 Cash to Firearms Dealers*, MILWAUKEE J. SENTINEL (Mar. 19, 2021, 11:21 AM), https://www.jsonline.com/story/news/crime/2021/03/19/pair-indicted-wisconsin-gun-buying-spree-felon/4749872001 [https://perma.cc/Z72V-DNDK]; Angela Jacqueline Tang, Note, *Taking Aim at Tiahrt*, 50 WM. & MARY L. REV. 1787, 1791 (2009) (describing felons who received guns from straw purchasers).

143 *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *supra* note 118.

> Are you the actual transferee/buyer of the firearm(s) listed on this form and any continuation sheet(s) (ATF Form 5300.9A)? Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you.[144]

Purchasers who are in fact buying the gun for someone else must untruthfully answer this question in the negative for the NICS system to approve the transaction, so the charges for straw purchasers are "making false statements" to a gun dealer under § 922(a)(6) and § 924(a)(1)(A).[145] "The overwhelming majority of gun purchasers are male, and most straw purchasers are male. However, when a woman buys a gun, she is disproportionately likely to be buying it illegally for a prohibited purchaser."[146] Researchers indicate that straw purchasers are a significant source of guns for street gangs.[147] The straw purchaser prohibitions, and the enforcement of the law, would mostly disappear without the felon-in-possession laws. Relatedly, a main function of the federal licensing regime for gun dealers (Federal Firearm Licensees, or FFLs) is to prevent sales to felons.[148]

E. *Do the Laws Work?*

From the standpoint of picking gun laws to repeal or invalidate, the felon-in-possession law is one that would leave the biggest hole. Whether the felon-in-possession law is "working" is another question, and any answer to that question depends on a host of assumptions and definitions. Does a penal law "work" only if it reduces the targeted crime

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144 *Id.* at 1.

145 *See, e.g.*, United States v. Karani, 984 F.3d 163, 166–70 (1st Cir. 2021) (providing a detailed description of two straw purchases, how the defendant completed the forms, relevant statutes, and the charges in the indictment); *see also Gun Control Act of 1968—Material Misrepresentation*—Abramski v. United States, 128 HARV. L. REV. 391 (2014) (discussing the facts in the Supreme Court's *Abramski* case in detail).

146 David Hemenway, *Reducing Firearm Violence*, 46 CRIME & JUST. 201, 221 (2016) (emphasis added) (citing empirical studies for support).

147 Philip J. Cook, Richard J. Harris, Jens Ludwig & Harold A. Pollack, *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. CRIM. L. & CRIMINOLOGY 717, 724 (2014) ("Straw purchases seem to be a more important source of crime guns to gangs compared to other types of dealer sales. As one indication of the volume of straw purchases, we estimate that 15% of new guns that were sold within two years of confiscation and were taken from male gang members were first sold to a woman.").

148 *See* A-TAC Gear Guns Uniforms LLC v. U.S. Dep't of Just., 2021 WL 1210024, at *8–9 (D. Colo. Mar. 31, 2021) (describing sales of firearms to three felons, due to omitting background checks, and the fines that resulted from these violations).

to zero? Can we consider a policy effective if it reduces the targeted crime to a measurable degree? In terms of cost-benefit analysis, costs of enforcement are hard to quantify (do we include some prorated share of the collateral social costs of mass incarceration?), as are benefits (statistical lives saved, or public perceptions of safety and security?). This Article will not attempt to answer these questions definitively here. That said, there would be significant costs to removing the rule in its present form from our firearm regulatory framework in terms of disruption, confusion, and unforeseeable consequences.

Empirical evidence shows that the felon-in-possession laws, combined with the modernized background check system that has emerged in recent years, have a significant positive impact. As Garen Wintemute wrote in 2013:

> Some argue that denial simply prevents ineligible persons from acquiring firearms from licensed retailers and note that firearms can easily be obtained from private parties. . . . The evidence is, however, that criminal firearm markets do not function smoothly; firearms are not always easily obtained through them. We have no data on how frequently firearm acquisitions are merely redirected by purchase denials and not prevented.[149]

Wintemute cites studies showing that background checks, together with sales record-keeping requirements imposed on licensed dealers, induce many prohibited persons, such as felons, to avoid licensed gun dealers.[150] In states with universal background checks—where even private sellers must have a nearby licensed dealer run a background check and create a record of the sale—there is measurable interference with the criminal firearms markets.[151] And other studies suggest that those who fail a background check, meaning a denial of their attempted gun purchase, are less likely to commit new crimes, as indicated by a reduction in arrest rates after the denial.[152] One study found the same phenomenon—lower rates of arrest following denials of background checks—specifically for those with felony convictions.[153] On the other hand, it is important to remember that most of those who commit gun crimes do not have prior felony convictions, nor do they have other

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149 Garen J. Wintemute, *Broadening Denial Criteria for the Purchase and Possession of Firearms: Need, Feasibility, and Effectiveness*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 77, 84 (Daniel W. Webster & Jon S. Vernick eds., 2013) (citations omitted).

150 *See id.* (mentioning one study of prison inmates that showed fewer than four percent had obtained their weapons from licensed firearms dealers).

151 *See id.*

152 *See id.* at 85.

153 *See id.* at 85–87.

disqualifications under the Gun Control Act. "This evidence suggests that most of those who commit firearm-related violent crimes are eligible to purchase firearms, under federal standards at least, at the time the crimes are committed."[154]

Regarding transaction-cost analysis, background checks raise the transaction costs of gun crime—any distribution or ownership restrictions affect price. Firearm prices (legal or black market) are subject to supply and demand, though gun prices are unique because of the commodity's durability and how well guns hold their resale value over time. Easy availability or ownership of guns lowers the transaction costs for certain criminal or borderline activities.

These laws' central role means abolishing them or significantly narrowing them would have far-reaching consequences for firearm policy and public safety overall. Abolishing or curbing the felon-in-possession rule, either by legislative repeal or judicial invalidation, would jeopardize our entire regulatory framework for gun control.

F. *Unlawful Possession Removal Petitions: The Ayres-Vars Proposal*

In their 2020 book *Weapon of Choice*,[155] Ian Ayres and Fredrick Vars suggest innovative proposals for firearms regulation, including a detailed proposal for privatized enforcement of the felon-in-possession laws.[156] The book's final chapters propose legislative initiatives to permit third party Unlawful Possession (UP) petitions—that is, to let individuals petition for gun removals from others whom they know are prohibited persons, such as felons.[157]

Historically, the fact that there is no way to know who possesses firearms illegally has been a major barrier to enforcement of the felon dispossession laws,[158] unless police receive a tip or happen to be

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154 *Id.* at 78.

155 IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS (2020).

156 I have written similar comments about this book on the Second Thoughts blog. *See* Dru Stevenson, *The Ayres/Vars Proposal for Unlawful Possession Removal Petitions*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (July 28, 2021), https://firearmslaw.duke.edu/2021/07/the-ayres-vars-proposal-for-unlawful-possession-removal-petitions [https://perma.cc/QYG5-4TRU]. The first part of the book discusses the authors' proposals for "Libertarian Gun Control," i.e., self-imposed legal restrictions on gun purchases, which they set forth in a previous article. Ian Ayres & Fredrick E. Vars, *Libertarian Gun Control*, 167 U. PA. L. REV. 921, 921–25 (2019). I have argued something similar. Dru Stevenson, *Going Gunless*, 86 BROOK. L. REV. 179, 179–90 (2020). I believe millions of conscientious Americans would benefit from an official mechanism to renounce gun ownership for good. *Id.*

157 *See* AYRES & VARS, *supra* note 155, at 120–68.

158 *See id.* at 128–35.

searching the person or their property pursuant to an investigation of or arrest for another crime. As a result, large numbers of prohibited persons currently have firearms.[159] Ayres and Vars estimate that there are tens of millions of individuals who cannot possess guns legally, based on statistics about drug use and hospital admissions for mental health problems.[160] They claim, plausibly, that hundreds of thousands of prohibited persons nationwide possess firearms despite the legal prohibition.[161] Law enforcement officials often view illegal firearm possession by itself as a low-priority item for enforcement, but these same officials would give higher priority to a gun removal order issued by a court.[162]

Ayres and Vars propose increasing enforcement by harnessing the resource of private information.[163] When prohibited persons unlawfully possess guns, a few of their acquaintances, roommates, relatives, and neighbors undoubtedly know about it. The legislation proposed would permit these adjacent individuals to submit petitions in court for the firearms' removal and/or for the unlawful possessor's arrest.[164] Even without this proposed legislation, these same individuals could just tip off their local police department, but Ayres and Vars explain that currently, police departments often ignore such tips.[165] Their proposed legislation, however, purports to solve this problem because the petition would come before an impartial judge, who would make an evidentiary determination as to whether the individual is, in fact, ineligible to have firearms, and has firearms nonetheless.[166] After reviewing the petition and supporting evidence in an ex parte hearing, the court would then issue an order for firearm removal that the police could carry out.[167] Ayres and Vars believe this would mitigate the massive underreporting by states and some federal agencies to the NICS databases.[168]

Ayres and Vars discuss the various means by which prohibited individuals end up having guns despite the legal prohibition.[169] Unsurprisingly, many people who already owned guns legally become ineligible for gun ownership, due to a felony conviction or other

159 *See id.* at 139–40.
160 *See id.* at 132.
161 *See id.* at 139.
162 *See id.* at 126.
163 *See id.* at 122–25.
164 *See id.*
165 *See id.* at 136–37.
166 *See id.* at 140–43.
167 *See id.*
168 *See id.* at 128–33.
169 *See id.* at 134–35.

reasons, but they retain the guns they already have.[170] Some buy their firearms from licensed dealers, passing the background check because their name is not yet in the NICS database, as a result of chronic underreporting.[171] Others, who are in the NICS database, bypass the background check system through private unlicensed sellers, such as acquaintances, internet sales, or the few unlicensed vendors who run booths at gun shows.[172] Some receive guns as gifts or inheritances from friends or relatives, and still others acquire them through theft. Only three states—California, Connecticut, and Nevada—currently have statutes or regulations expressly mandating that individuals who become prohibited persons submit "proof of compliance to courts or law enforcement verifying that they relinquished their guns after conviction."[173] Ayres and Vars believe police could conduct such removals with a minimal risk of violent resistance.[174]

Importantly, Ayres and Vars buffer their proposed legislation with some large categorical exceptions. Their proposed statute would require courts to dismiss petitions in cases involving "nonviolent felons" and "violent" felons twenty years postconviction, which would be outside the legal purview of the unlawful possession petitions, and similar exemptions would apply to anyone whose ineligibility is due solely to being a marijuana user, an undocumented resident, or a citizenship renouncer.[175] Yet Ayres and Vars never define "violent" versus "nonviolent" felonies. Even so, without defining the category, they assert that "nonviolent felons" and even "violent" felons who are at least two decades past their last conviction pose no elevated risk to the community, according to a few empirical studies.[176] On the other hand, Ayres and Vars concede that simply including all the federal categories in the UP law they propose, without exceptions, would reduce the overall number of guns, and would therefore be likely to save lives;[177] nevertheless, they feel that "political prudence" and "justice" weigh against this more straightforward approach.[178]

Acknowledging that gun possession laws have contributed to troubling racial disparities in arrests and incarceration, Ayres and Vars

170 *See id.*

171 *See id.*

172 *See id.* at 134.

173 *See id.* at 135–36.

174 *See id.* at 151.

175 *See id.* at 143–44.

176 *See id.*

177 *See id.* at 144.

178 *See id.*

contend that their exceptions will help mitigate such inequalities.[179] Their proposal emphasizes the safeguards inherent in having an impartial magistrate involved from the start; importantly, their proposal would entail punishments for anyone who submits a removal petition in bad faith.[180] The threat of such penalties would help deter misuse or abuse of the system. Building on this proposal, Ayres and Vars then suggest incentivizing enforcement by paying cash rewards to those who file unlawful possession petitions that result in the removal of firearms from prohibited persons.[181] Further, they suggest *mandatory* reporting requirements (with threat of fines and tort liability) for universities and private employers if they know of a student or employee who is (or ought to be) a prohibited person who threatens gun violence against others.[182]

Underreporting to NICS has certainly been a perennial problem. While Ayres and Vars propose increasing the existing carrots and sticks of federal funding to states based on their NICS reporting,[183] efforts have been underway for the last fifteen years to increase reporting with more funding and duties for state and federal agencies.[184] It would be a game-changing event to expand the scope of who can report to the NICS databases via partial privatization. In addition, private citizen petitions would make the NICS system more robust because they would flag individuals who are already in the NICS system but, unknown to law enforcement, possess firearms. This reporting can already occur through police tip lines, but court petitions would add layers of formality, create a public record, and provide some judicial due process protections for the accused.

One problem with their proposal is their exception for "nonviolent" or "nondangerous" felonies, a line of thinking that has gained some traction in the academic literature[185] and among some conservative judges.[186] Making this distinction would inevitably prove to be as indeterminate and unworkable as "crime of violence" has been for years in the sentencing context, under 18 U.S.C. § 924(c), the federal

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179 *See id.* at 148–52.

180 *See id.* at 151–52.

181 *See id.* at 155.

182 *See id.* at 162–64.

183 *See id.* at 164–65.

184 *See, e.g.*, Fix NICS Act of 2018, Pub. L. No. 115-141, 132 Stat. 348; NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559; *see also NICS Act Record Improvement Program*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/programs/nics-improvement-amendments-act [https://perma.cc/8JSF-LWNT].

185 *See supra* Section I.C and sources discussed therein.

186 *See, e.g.*, Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting); Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897 (3d Cir. 2020) (Bibas, J., dissenting).

sentencing guidelines, and the ACCA, codified in relevant part at 18 U.S.C. § 924(e). This problem is the subject of the following Part.

III. THE UNWORKABLE DISTINCTION BETWEEN "VIOLENT" AND "NONVIOLENT" CRIMES, OR "DANGEROUS" AND "NONDANGEROUS" FELONS

The counterproposal offered by recent commentators and jurists to the current regime would have the felon-in-possession ban apply only to those convicted of nondangerous or nonviolent felonies.[187] This limitation on the ban could come in the form of a judicial rule for as-applied constitutional challenges to § 922(g)(1), or through legislation, such as an amendment to the relevant federal and state statutes. Limiting the felon-in-possession statute to those convicted of "crimes of violence" poses numerous problems for the judiciary, for law enforcement, for public safety, and even for the felons who would be subject to the statute.

An exception for "nonviolent" felonies would prove as indeterminate and unworkable as "crime of violence" distinctions have been in the sentencing context of the ACCA, the sentence-enhancement provisions of 18 U.S.C. § 924(c), and the federal sentencing guidelines.[188] Deciding in each individual case whether a specific conviction was for a crime of violence has become extremely labor intensive for the judiciary, fraught with uncertainty and inconsistency. Academic commentators have lamented the inconsistency[189] or indeterminacy of this approach (noting discrepancies in whether state manslaughter charges constitute "violent" crimes),[190] as well as its

187 *See, e.g.*, *Folajtar*, 980 F.3d 897 (Bibas, J., dissenting). *See generally* Greenlee, *supra* note 9; Marshall, *supra* note 10.

188 *See* Mathis v. United States, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring) (calling the Court's approach "unworkable").

189 *See generally* Rachel E. Barkow, Comment, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 207–09 (2019) (describing problems with how the ACCA's statutory structure incorporates state law); Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act*, 70 OKLA. L. REV. 623, 649–52 (2018) (explaining inconsistencies that result from the ACCA due to state laws forming the basis of sentencing enhancements). Note that a few scholars have defended the ACCA categorical approach for its attempt to create more uniformity. *See, e.g.*, Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISCOURSE 132, 150 (2019) (claiming that the categorical approach can produce uniformity); Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1470 (2017) (similar argument).

190 *See* Meaghan Geatens, Comment, *Correcting Corrections: Discrepancies in Defining State Manslaughter as a "Crime of Violence" for Federal Sentencing Purposes*, 64 VILL. L. REV. 309

unfairness[191] and inappropriateness (at least for nonjury determinations).[192] Forcing a limit on felon-in-possession laws based on dangerousness or "violent felonies" would merely import these same burdens and conundrums into our most frequently enforced firearms law.[193]

A. *The Unworkability of Categorizing "Crimes of Violence" in the ACCA and Sentencing Context*

The federal felon-in-possession law has been in effect since before most Americans were born.[194] This is a well-known, bright-line rule. More recently, Congress imposed additional penalties on those who use a firearm while committing a violent felony or a drug trafficking crime.[195] In addition, felons with three prior crimes of violence are subject to stiffer sentences under the ACCA.[196] Unlike the bright-line felon-in-possession rule, however, § 924(c) and (e) require intensive case-by-case, statute-by-statute analysis to determine if the predicate crimes qualify as "crimes of violence."

A recent decision by the Eleventh Circuit illustrates the problem.[197] In *United States v. Simmons*, the court explained that federal *kidnapping* did not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(1)(A)(ii), which prohibits brandishing a firearm in furtherance of a "crime of violence."[198] On the other hand, the appellants' convictions for Hobbs Act robbery *could* be used as predicate offenses

(2019) (calling for consistent rules across jurisdictions for whether state manslaughter statutes constitute a "crime of violence" under the ACCA).

191 *See, e.g.*, Michael O'Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a "Violent" Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165 (2019) (raising concerns about the fairness and prudence of increasingly long sentences imposed for "violent" offenses and the resulting impact on post-incarceration reintegration into society).

192 *See* Mary Frances Richardson, Comment, *Why the Categorical Approach Should Not Be Used When Determining Whether an Offense Is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(c)*, 67 AM. U. L. REV. 1989 (2018) (explaining the unacceptable outcomes yielded by the current categorical approach for classifying crimes of violence).

193 *See, e.g.*, OLSON ET AL., *supra* note 80.

194 Approximately seventy percent of the population was born after the enactment of the 1968 Gun Control Act, and even more since the original felon prohibition in the 1961 Federal Firearms Act. *See Population Distribution by Age*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/distribution-by-age/?currentTimeframe=0&selectedDistributions=adults-55-64—65&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/5Y2H-SZWY].

195 18 U.S.C. § 924(c).

196 *Id.* § 924(e).

197 *See* United States v. Simmons, 847 F. App'x 589 (11th Cir. 2021).

198 *See id.* at 593.

for the defendant's conviction of brandishing a firearm in relation to a crime of violence under the same statutory provision, § 924(c)(1)(A)(ii).[199] Then again, Hobbs Act robbery did *not* qualify as a "crime of violence" under the career-offender sentencing guideline, U.S.S.G. Section 4B1.2(a).[200] The appellants in this consolidated appeal had robbed four jewelry stores at gunpoint in Florida and Georgia, and all of those charges arose from the same crimes.[201] Suppose, then, that courts adopted a rule for Second Amendment as-applied challenges to the felon-in-possession statute that distinguished between convictions for "violent" and "nonviolent" crimes. Would an individual with a federal kidnapping conviction (and a string of armed robberies) count as "violent," if their crime is *not* a "crime of violence" under the federal law that specifically addresses using firearms in crimes of violence?[202] Should a conviction for robbery under the Hobbs Act[203] count as a "crime of violence" for Second Amendment purposes, if the crime constitutes a "crime of violence" for purposes of the elements clause in § 924(c)(3)(A),[204] but *not* as a "crime of violence" under the federal sentencing guidelines for career offenders?[205]

Because § 924(c) and (e) punish firearm possession in relation to the commission of a crime of violence or as a habitual offender penalty after three crimes of violence, courts interpreting these sections use a "categorical approach" or, in some cases, a "modified categorical approach" to determine whether the predicate crimes qualify as "crimes of violence."[206] Courts first examine the statute of conviction in the relevant jurisdiction for the predicate offense. If the statute in question is not "divisible" (which is a separate judicial determination), courts then apply the categorical approach to determine whether the crime fits within the "generic" elements of burglary, arson, or extortion, or if the crime in question has as an element "the use, attempted use, or threatened use of physical force against the person or property of another."[207] If the statute criminalizes a range of actions broader than

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199 *See id.*

200 *See id.*

201 *See id.* at 591.

202 *See also* United States v. Gillis, 938 F.3d 1181 (11th Cir. 2019) (emphasizing that federal kidnapping, 18 U.S.C. § 1201(a), does *not* qualify as a crime of violence under § 924(c)).

203 18 U.S.C. § 1951(a).

204 *See, e.g.*, United States v. St. Hubert, 909 F.3d 335, 345 (11th Cir. 2018).

205 *See* United States v. Eason, 953 F.3d 1184 (11th Cir. 2020) (holding that Hobbs Act robbery (18 U.S.C. § 1951(a)) does not count as a crime of violence under the career-offender guideline in U.S.S.G. § 4B1.2(a)).

206 *See* Mathis v. United States, 136 S. Ct. 2243, 2247–49 (2016); Descamps v. United States, 570 U.S. 254, 257 (2013); Taylor v. United States, 495 U.S. 575, 598 (1990).

207 *See* 18 U.S.C. § 924(c)(3)(A), (e)(2)(B).

generic burglary, arson, or extortion, and it lacks an element of physical force, it does not qualify as a "crime of violence" under the ACCA or § 924(c). Courts do not look to the underlying facts of the crime; this determination is based solely on the elements of the offense.[208]

If the underlying statute of conviction is divisible, meaning the statute sets forth alternative ways of committing the crime, a court may conduct a limited examination of the charging documents along with the statute to determine which section of the statute furnished the basis for that conviction, and then conduct the element-comparison test in the categorical approach. Even so, the court does not rely on the underlying facts of the individual's actual crime under either method. This is a complex and labor-intensive analysis requiring a judicial examination of the elements of statutes, state by state, to make individual determinations of whether the specific charging statute in the relevant jurisdiction qualifies as a crime of violence.[209]

During the Supreme Court's October 2018 oral arguments in *Stokeling v. United States*, Justice Alito lamented, "[W]e have made one royal mess," with respect to the interpretation of the ACCA.[210] The Justices expressed frustrated disagreement about the degree of "force" necessary to constitute "violence" under the ACCA, discussing pinching or pulling a dollar bill out of someone's hands when they are grasping it tightly.[211] As the Court moved on in the same oral argument to *United States v. Stitt* and *United States v. Sims*, Justice Gorsuch declared, "If you survey circuit judges across the country, one gripe they have with this Court's jurisprudence . . . may be the ACCA."[212] The Justices agree that neither the statute that distinguishes violent crimes, nor their own evolving approaches to the same distinction, have worked well. Introducing this same distinction into Second Amendment jurisprudence would prove just as problematic.

Consider the following example: Clay O'Brien Mann, while in a drunken rage, shot three people, killing one of them.[213] He had visited a rural lot owned by his wife to drink alcohol and set off fireworks. The adjacent landowners were having a small bonfire party as a charity

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208 *Mathis*, 136 S. Ct. at 2247–48; *Descamps*, 570 U.S. at 257.

209 For an excellent and comprehensive discussion of the problems with the categorical approach, see Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771 (2020).

210 Rory Little, *Argument Analysis: Trying to Define "Robbery" and "Burglary," Justices Confront the Jurisprudential "Mess" of the ACCA*, SCOTUSBLOG (Oct. 10, 2018, 6:43 AM), https://www.scotusblog.com/2018/10/argument-analysis-trying-to-define-robbery-and-burglary-justices-confront-the-jurisprudential-mess-of-the-acca [https://perma.cc/4MUG-F6EA].

211 *See id.*

212 *Id.*

213 *See* United States v. Mann, 786 F.3d 1244, 1246–47 (10th Cir. 2015).

fundraiser event.[214] Around 2:30 A.M., Mann drunkenly threw an artillery shell firework at the bonfire from his property line.[215] The explosion sent the guests running and screaming.[216] He then used his rifle to shoot two men and a woman who ran toward him from the explosion.[217] At trial, the jury convicted him of one count of involuntary manslaughter and two counts of assault resulting in serious bodily injury.[218] Did Mann commit a "crime of violence"? Not for purposes of § 924(c)(3); the district court held: "Involuntary manslaughter is not a crime of violence."[219] It would count as a "crime of violence" for some other subsections of § 924, and for certain other firearms statutes about misdemeanors for domestic violence, but the shootings would not constitute a "crime of violence" under the charged statute, the sentencing guidelines, or 18 U.S.C. § 113(a)(6) (statute covering assault causing serious bodily injury on a reservation, relevant in this case).[220]

Or consider Jose Antonio Martinez, indicted for conspiracy to commit murder for the purpose of maintaining and advancing his position in a racketeering enterprise.[221] It is an unsettled question of law whether a murder-related charge as only *one* of the two predicate acts supporting a RICO conviction should allow the RICO conviction to constitute a "crime of violence" under § 924(c). As the Second Circuit explained:

> It might surprise a reader unfamiliar with the history of the Supreme Court's interpretation of this statute to learn that there is any question as to whether participating in the affairs of a street gang dedicated to committing violent crimes through a pattern of criminal acts that included the murder of a person who was standing innocently on the street constitutes a "crime of violence" under either of these definitions, or for that matter under any common-sense understanding of the term "crime of violence." But two strands

214 *See id.*

215 *See id.* at 1247.

216 *See id.*

217 *See id.*

218 *See id.* at 1248.

219 United States v. Mann, 982 F. Supp. 2d 1251, 1256 (D.N.M. 2013).

220 *See* United States v. Mann, No. CR 14-3092, 2017 WL 3052521, at *3–5 (D.N.M. June 16, 2017); *see also Mann*, 786 F.3d 1244 (discussing "crime of violence" under other sections of § 924).

221 *See* United States v. Martinez, 991 F.3d 347 (2d Cir. 2021). Note that more recently, the Fifth Circuit has held that RICO conspiracy convictions are not "crimes of violence" for § 924 purposes. *See* United States v. McClaren, 998 F.3d 203 (5th Cir. 2021); United States v. Jones, 873 F.3d 482 (5th Cir. 2017).

> of the Supreme Court's case law regarding the statute combine to give Martinez a plausible argument that it does not.[222]

Another example is former cartel boss Juan Garcia Abrego, who "was the hub of a narcotics smuggling syndicate of staggering dimension" for approximately two decades.[223] Throughout the 1970s and 1980s, his cartel smuggled massive quantities of cocaine and marijuana from Mexico into the United States,[224] provided "protection" to (extorted) other Latin American drug cartels,[225] ordered the murders of rivals and disloyal employees,[226] and bribed Mexican government officials.[227] Mexican authorities eventually apprehended Garcia Abrego and extradited him to the United States.[228] A jury convicted him of money laundering, conspiracy to launder money, possession with intent to distribute cocaine, and conducting a continuing criminal enterprise; he received concurrent life sentences.[229] None of these convictions would count legally as a "crime of violence" under the Supreme Court's categorical approach for that phrase under various sections of § 924.[230]

In 2006, Reynaldo Roblero-Ramirez killed someone in a fight and pled guilty in a Nebraska state court to "sudden quarrel manslaughter."[231] When Roblero-Ramirez faced charges for other crimes years later, the state manslaughter statute did not constitute a "crime of violence" under the categorical approach and federal sentencing guidelines because the statute encompassed both intentional and negligent manslaughter.[232] Assuming the same approach applied for Second Amendment challenges to felon disarmament, Roblero-Ramirez would be a nonviolent or nondangerous felon and, therefore, entitled to have any number of firearms.[233] Only statutes with the same

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222 *Martinez*, 991 F.3d at 352.

223 United States v. Garcia Abrego, 141 F.3d 142, 147 (5th Cir. 1998).

224 *See id.*

225 *See id.* at 148.

226 *See id.* at 148–49.

227 *See id.* at 149.

228 *See id.* at 150.

229 *See id.*

230 Note that he would be subject to the "drug trafficking crime" sentencing enhancement of § 924(c)(1)(a).

231 United States v. Roblero-Ramirez, 716 F.3d 1122, 1124, 1126 (8th Cir. 2013).

232 *See id.* at 1126–27.

233 In Mr. Roblero-Ramirez's case, however, his immigration status would disqualify him from firearm possession under 18 U.S.C. § 922(g)(5). Nonetheless, this case illustrates that what might have counted as common-law voluntary manslaughter—such as killing in the heat of passion or during a fistfight—does not necessarily constitute a "crime of violence" under many federal statutes and sentencing guidelines that contain this as an operative phrase.

scienter requirement as the federal manslaughter statute—recklessness or intentionality—count as "crimes of violence," even for those who kill someone during a fight.[234] On the other hand, the same court considers a conviction under the *federal* manslaughter statute to be a "crime of violence."[235] As the Seventh Circuit has said, "[N]ot all involuntary manslaughter convictions are necessarily crimes of violence."[236]

In a recent Seventh Circuit case, *Guenther v. Marske*,[237] the defendant in a felon-in-possession case had "two convictions for first-degree burglary (in 1990 and 1992), one for second-degree burglary (in 1986), and one for kidnapping (in 1990), all under Minnesota law."[238] While these felony convictions currently count as firearm disqualifiers under § 922(g)(1), the court had to review his sentencing enhancement under the ACCA.[239] Applying Minnesota law and interpretations from the relevant sister circuit (Eighth Circuit), the court concluded that *none* of these convictions counted as "violent felonies" under the ACCA.[240] If his gun possession conviction also depended on whether the prior convictions were for "violent felonies," would his convictions for two burglaries and kidnapping qualify, even though they do not qualify under the Supreme Court's rubric for the ACCA?[241]

If the "crime of violence" qualifier applied to the felon-in-possession statute, courts would have to engage in the laborious process of determining, after the fact, that the statute of conviction required the element of the use, attempted use, or threatened use of physical force or had the narrow elements to fit generic burglary, arson, or extortion. If, as with the other sections that require a crime of violence, courts followed the categorical or modified categorical approach, they would not look to the facts of the crime committed but

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234 *See Roblero-Ramirez*, 716 F.3d at 1126–27.

235 *See, e.g.*, McCoy v. United States, 960 F.3d 487 (8th Cir. 2020) (upholding sentencing enhancement for federal manslaughter conviction and firearm use).

236 United States v. Hernandez, 309 F.3d 458, 462 (7th Cir. 2002).

237 997 F.3d 735 (7th Cir. 2021).

238 *Id.* at 738.

239 *See id.*

240 *See id.* at 738–40.

241 *See Guenther*, 997 F.3d 735. Note also that there is an emerging circuit split on the question of whether a conviction for involuntary manslaughter for drunk driving accidents should constitute a "crime of violence" for purposes of the federal sentencing guidelines. *Compare* United States v. Trujillo, 4 F.4th 287 (5th Cir. 2021) (holding that conviction in Texas for intoxication manslaughter was not a crime of violence that imposed the twenty-year statutory maximum sentence on a subsequent conviction), *and* Bazan-Reyes v. Immigr. Naturalization Serv., 256 F.3d 600 (7th Cir. 2001) (holding that a Wisconsin conviction for drunk driving involuntary manslaughter was not a crime of violence), *with* United States v. Malagon-Soto, 764 F.3d 925 (8th Cir. 2014) (holding that, under Kentucky law, previous manslaughter conviction *was* a crime of violence).

to the statute of conviction. Many felons who use violence in their crimes and are convicted of a broader felony could be eligible to possess a firearm. Oftentimes, the prosecution cannot prove cases for violent crimes like murder ordered by cartel bosses; instead, the government pursues charges of other nonviolent crimes to get these dangerous individuals off the streets. We should not assume that these individuals are not violent, and therefore that they are entitled to own firearms, just because the ultimate crime of conviction does not involve physical force.

Further, the proposed alternate regime would encumber the background check system built upon the NICS database by requiring an ex ante determination regarding whether a particular person is a violent felon in order to add them to the database. This type of screening of new entries would require the administrative personnel involved to anticipate the convoluted categorical/hybrid-categorical approach courts would undertake, often reaching inconsistent and counterintuitive outcomes. In turn, this would generate a host of litigation over whether each crime of conviction is a "crime of violence." As the First Circuit observed in considering a proposed as-applied Second Amendment challenge to the felon-in-possession law, allowing "such an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning."[242]

Adding a "crime of violence" qualifier would also harm both the law-abiding public and felons who are unsure of their status. For the law-abiding public, the qualifier would allow many individuals previously barred from gun ownership to have one, regardless of the actual facts of their crimes.[243]

In other words, distinguishing between "dangerous" and "nondangerous" felons is not as easy as we might imagine; in the current federal ACCA and sentencing context, this requires complex

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242 United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011); *see also* Binderup v. Att'y Gen. of the U.S., 836 F.3d 336, 384 (3d Cir. 2016) (Fuentes, J., concurring).

243 The narrowed classification would apply regardless of the actual facts of their crimes, so long as the convicting offense did not involve as an element the use, attempted use, or threatened use of force, or fall within the narrow "generic" definitions of burglary, arson, or extortion as they have been interpreted by the courts. Indeed, courts have decried the "continued 'protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence'" that defendants employ to argue that their heinous crimes do not technically qualify. *See* Jackson v. United States, No. 1:00-CR-00074, 2020 WL 1542348, at *5 (W.D.N.C. Mar. 31, 2020) (quoting United States v. Doctor, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring)) ("Such arguments undermine the public's confidence in lawyers, the legal system, and the Court. . . . [T]he Court cannot allow a lawyer's zealous representation of a client to undermine the principles of justice.").

statutory interpretation rather than a review of the facts of the crime committed or the felon's present dangerousness. This categorical approach, in turn, has forced lower courts to parse numerous state statutes, reaching the inconsistent and counterintuitive results delineated in the commentary above. In the end, distinguishing "violent" and "dangerous" felonies from nonviolent and nondangerous ones will require a one-or-the-other approach—either a categorical-statutory approach or an extensive factual inquiry into the felon's original crime and/or present "dangerousness," which is discussed in the next Section. Neither of these approaches has worked well in answering this same question in other areas of criminal law.

Of course, one might anticipate the objection that Congress could at least list all the federal statutes it considers "violent" or "dangerous" enough to disqualify someone permanently from having guns and then prohibit the counterpart crimes at the state level. A statute listing which felonies disqualified felons from having firearms and which did not could preempt such determinations by courts and administrative officials.

There are several problems with this argument. First, suppose Congress included something like "racketeering," "espionage," "carjacking," or even "extortion."[244] Individuals with convictions under these statutes would still bring as-applied challenges, arguing that their commission of extortion involved only threats of publicly disclosing incriminating or embarrassing information, that their racketeering or espionage all occurred via the internet and involved no violence or even threats of violence, or that their carjacking involved hacking remotely into a car's onboard computer and taking over its controls to take possession of it. In other words, delineating certain crimes as "violent" or "dangerous" by statute would not solve the problem because it would still be just as susceptible to as-applied Second Amendment challenges as the current all-inclusive version of § 922(g)(1). Besides basing challenges on the nonviolent nature of their own offense, individuals would also challenge entire categorizations, arguing that drug distribution is not inherently or necessarily violent, that burglary does not necessarily involve violence or threats of violence, and so forth. State criminal statutes vary by jurisdiction in their verbiage and elements, so there would be endless challenges to whether the federal ban applied to a given state felony; it is currently unclear whether "kidnapping" and "manslaughter" qualify as crimes of violence for purposes of the ACCA and the sentencing guidelines, so it is plausible

244 Extortion is a delineated category under the ACCA. *See* 18 U.S.C. § 924(e)(2)(B)(ii).

that the same would not apply if Congress added a list of crime types to § 922(g)(1).

Moreover, Congress already delineated such a determination in the 1968 Gun Control Act, answering the question with "*a* crime punishable by imprisonment for a term exceeding one year."[245] In fact, decades before the 1968 Gun Control Act, Congress adopted a delineated list of crimes of violence for other federal gun laws, which defined a "crime of violence" as "[m]urder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, housebreaking, larceny, any assault with intent to kill, commit rape, or robbery, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment in the penitentiary" or "an attempt to commit any of the same."[246] Congress deliberately removed the "crime of violence" limitation in 1961,[247] presumably because it was underinclusive. Thus, in effect, those currently advocating in favor of as-applied constitutional challenges want the judiciary to apply the pre-1961 statutes instead of the statute as it now reads.

B. *Individualized, Fact-Based Determinations of Dangerousness*

The only alternative to a statutory-interpretation or "categorical" approach for distinguishing between "dangerous" and "nondangerous" felons would be to undertake an individualized, fact-based determination of the person's past and present dangerousness. Congress tried, and abandoned, this approach already—not for whether the felon-in-possession law would apply initially, but as a way for felons to petition to have their gun rights restored. Codified at 18 U.S.C. § 925(c), there was a provision for administrative exceptions to legal "firearm disability"—the Attorney General could

> grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.[248]

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245 18 U.S.C. § 922(g)(1) (emphasis added).

246 Act of July 8, 1932, ch. 465, Pub. L. No. 72-275, 47 Stat. 650.

247 Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757.

248 18 U.S.C. § 925(c).

This statute is now inoperable for individual felons, due to express defunding (or more precisely, disappropriation[249]) by Congress twenty-three years later through a targeted appropriations rider that states, "[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§]925(c)."[250] The Supreme Court has acknowledged this appropriation bar approvingly,[251] and noted that Congress had renewed the ban every year.[252] Reviewing these administrative exception petitions had turned out to be "a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made."[253] House reports from the era state that "too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms."[254]

This funding bar remains in place. The legislative history of this decision reveals that Congress believed the program was far too labor intensive for the Bureau of Alcohol, Tobacco, Firearms and Explosives

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249 *See* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 25–26 (2020) (defining "disappropriation" for Congressional defunding of programs it committed to by statute); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1094 (2021) (discussing the same phenomenon).

250 Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732.

251 *See* United States v. Bean, 537 U.S. 71, 74–75 (2002) ("Since 1992, however, the appropriations bar has prevented ATF, to which the Secretary has delegated authority to act on § 925(c) applications, from using 'funds appropriated herein . . . to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§]925(c).'" (citation omitted)). Prior to this decision, lower courts had recognized this disappropriation as the equivalent of an express repeal, so they treated it more deferentially than they normally would an implied repeal by appropriation. *See, e.g.*, Pontarelli v. U.S. Dep't of Treasury, 285 F.3d 216, 219 (3d Cir. 2002) (observing that "Congress can use an appropriations act to modify substantive law if the act clearly states its intention to do so," and holding that the annual appropriation restriction, together with its detailed legislative history, expressly superseded the provision that still remains in the United States Code). Courts usually disfavor implied repeals via appropriation bills. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) ("The doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an *appropriations* measure.'" (citation omitted)); *see also* NORMAN SINGER & SHAMBIE SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:10 (7th ed. 2020) ("This presumption also applies 'with full vigor' to the claim that an appropriation measure has the effect of excepting something from the operation of a prior general statute." (footnote omitted)). In this case, the legislative history is extremely clear, not only from the initial year of adoption, but from subsequent years as well. *See Pontarelli*, 285 F.3d at 226–30 (quoting various sources of legislative history (e.g., "The goal of this provision has always been to prohibit convicted felons from getting their guns back—whether through ATF or the courts.")).

252 *See Bean*, 537 U.S. at 75 n.3.

253 S. REP. NO. 102-353, at 19 (1992).

254 H.R. REP. NO. 104-183, at 15 (1995); *see also* Binderup v. Att'y Gen. of the U.S., 836 F.3d 336, 381 (3d Cir. 2016) (Fuentes, J., concurring).

(ATF),[255] and too many mistakes occurred in granting the applications. Processing the applications involved interviewing witnesses, verifying extensive documentation submitted with the application, and so on—a thorough investigation of the individual's recent activities and compliance with the law. The House reports claimed that many felons who regained gun rights committed more violent crimes and noted that the government should not waste taxpayer resources on giving convicted criminals access to firearms.[256]

There is some debate among commentators about Congress's original motive in enacting § 925(c), with some claiming it was initially for corporations, not individuals, and specifically one corporation, the Olin Mathieson Corporation.[257] Olin Mathieson was found guilty of felony kickback charges related to pharmaceutical exports.[258] The problem was that this large conglomerate owned the Winchester firearms company as a subsidiary, so its firearm disqualification would have prevented Winchester from selling guns—ensuring its bankruptcy.[259] On this theory, the provision for certain felons to petition to have their gun rights restored was for Olin Mathieson; the judge in this case "stayed judgment of conviction to give the firm an opportunity to seek legislative change. After a few visits and donations, [Senator] Dodd sponsored the amendment which allowed the firm to obtain a 'relief from the disabilities.'"[260] One commentator has argued to the contrary: based on quotes from the legislative history committee reports, it is possible that Congress truly intended the provision primarily to benefit individuals who no longer posed a threat to the community.[261] The text of § 925(c) itself begins with "a person," supporting the idea that the original intent was to help individuals. On the other hand, the appropriations bar currently contains a second clause that provides, "[S]uch funds *shall* be available to investigate and act upon applications filed by corporations for relief from Federal

255 S. REP. NO. 102-353, at 20 (noting that processing the petitions took "approximately 40 man-years" of ATF personnel resources every year).

256 H.R. REP. NO. 104-183, at 15 (1995).

257 *See, e.g.*, Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 FORDHAM URB. L.J. 1759, 1769 (2003); Ryan Laurence Nelson, Comment, *Rearming Felons: Federal Jurisdiction Under 18 USC § 925(C)*, 2001 U. CHI. LEGAL F. 551, 554.

258 *See* United States v. Olin Mathieson Chem. Corp, 368 F.2d 525 (2d Cir. 1966).

259 *See* 141 CONG. REC. S10569 (daily ed. July 24, 1995) (statement of Sen. Frank Lautenberg).

260 *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 598 n.73 (1987).

261 *See* Ronald C. Griffin, Note, *Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?*, 23 OKLA. CITY U. L. REV. 977, 995–96 (1998).

firearms disabilities under [§]925(c) of title 18, United States Code."[262] This clause arguably supports the idea that Congress's primary concern was saving corporations (gun manufacturers and their parent corporations), because the appropriations ban does not apply in that rare case—ATF could still process petitions from a company like Olin Mathieson.

If Congress did intend this program primarily to help corporations, things quickly went in a different direction.[263] Throughout the 1970s and 1980s, ATF received and processed tens of thousands of such petitions, many from violent felons.[264] "In the 10-year period from 1982 until 1992, the Bureau of Alcohol, Tobacco and Firearms processed more than 22,000 applications. Between 1985 and 1990 ATF granted 'relief' in approximately one third of those cases."[265] Processing the petitions involved a labor-intensive inquiry, and by the late 1980s, ATF invested forty man-years of labor annually solely to these petitions.[266] This was an expensive program, a burden on the public fisc.[267] By 1992, the mood in Congress was unfavorable to the program,[268] so it adopted an express repeal-by-disapportionment in the budget, and subsequent Congresses have included it every year since. The National Rifle Association has lobbied repeatedly over the years to have the apportionment ban lifted.[269]

Moreover, some serious mistakes occurred, with tragic consequences—many felons who had gun rights restored then proceeded to commit horrific violent crimes.[270] Some of the ATF's

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262 BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF), FISCAL YEAR 2022 CONGRESSIONAL BUDGET SUBMISSION: SALARIES AND EXPENSES 20 (2021) (emphasis added), https://www.justice.gov/jmd/page/file/1399371/download [https://perma.cc/7DZF-XB9L].

263 *See* Nelson, *supra* note 257, at 554–55; KRISTEN RAND, JOSH SUGARMANN & CAROLINE LEEDY, VIOLENCE POL'Y CTR., GUNS FOR FELONS: HOW THE NRA WORKS TO REARM CRIMINALS 1 (2000), https://vpc.org/wp-content/uploads/2020/03/Guns-for-Felons-2000.pdf [https://perma.cc/8Z7B-8ZYH].

264 *See* RAND, SUGARMANN & LEEDY, VIOLENCE POL'Y CTR., *supra* note 263.

265 *Id.* at 1.

266 *See* Pontarelli v. U.S. Dep't of Treasury, 285 F.3d 216, 227–28 (3d Cir. 2002) (citing congressional records).

267 *See id.* (citing congressional records stating that by 1992, the program cost $3.75 million annually).

268 *See id.*; *see also* 138 CONG. REC. S13,238 (1992) ("This program just does not make any sense. At a time when gun violence is exacting terrible costs upon our society, it seems absolutely crystal clear to me that the government's time and money would be far better spent trying to keep guns out of the hands of convicted felons, not helping them regain access to firearms.") (statement of Sen. John Chafee).

269 *See* RAND, SUGARMANN & LEEDY, VIOLENCE POL'Y CTR., *supra* note 263, at 8–10.

270 *See id.* at 6–8.

decisions to grant restoration of gun rights were dubious, as the Violence Policy Center report explained:

> The crimes committed by those individuals granted "relief" were not limited to non-violent, "white collar" crimes like those committed by Olin. Through the Freedom of Information Act (FOIA) the Violence Policy Center obtained 100 randomly selected files of felons granted "relief." Among those 100 cases were: five convictions for felony sexual assault; 11 burglary convictions; 13 convictions for distribution of narcotics; and, four homicide convictions. In fact, of the 100 sample cases, one third involved either violent crimes (16 percent) or drug-related crimes (17 percent).[271]

This influential study by the Violence Policy Center, published in 1992 before Congress debated the issue, included 100 case studies of individuals who had obtained "relief" from the firearm prohibition.[272] The report recounted numerous crimes and arrests among beneficiaries of the program, including many whose previous convictions had been for nonviolent crimes.[273]

After Congress defunded the program, felons continued to file petitions, which ATF would return explaining that the agency could not process them. Section 925 authorized judicial review whenever ATF denied any of these petitions, so when ATF returned the petitions, some of the felons sought relief in court, asking the courts to restore their firearm rights instead. One of these cases, *United States v. Bean*,[274] went up on appeal to the Supreme Court, and the Court said that there was no final agency action.[275] "Inaction by ATF does not amount to a 'denial' within the meaning of § 925(c),"[276] Justice Thomas wrote for a unanimous Court.[277]

In a passage that is relevant for the modern as-applied Second Amendment challenges to the felon-in-possession statute, the Court added:

> Whether an applicant is "likely to act in a manner dangerous to public safety" presupposes an inquiry into that applicant's

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271 *Id.* at 1 (emphasis omitted).

272 *See* JOSH SUGARMANN & KRISTEN RAND, VIOLENCE POL'Y CTR., PUTTING GUNS BACK INTO CRIMINALS' HANDS: 100 CASE STUDIES OF FELONS GRANTED RELIEF FROM DISABILITY UNDER FEDERAL FIREARMS LAWS (1992), https://vpc.org/wp-content/uploads/2020/03/Putting-Guns-Back-Into-Criminals-Hands-100-Case-Studies-of-Felons-Granted-Relief-From-Disability-Under-Federal-Firearms-Laws-1992.pdf [https://perma.cc/744R-W9AQ].

273 *See id.*

274 537 U.S. 71 (2002).

275 *Id.* at 75.

276 *Id.*

277 *See id.* at 72.

> background—a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation. Similarly, the "public interest" standard calls for an inherently policy-based decision best left in the hands of an agency.[278]

This type of inquiry, however, is exactly what these as-applied challenges would purport to do, restoring gun rights to felons that a court determines are not truly dangerous.[279] The petition process in § 925(c) was admittedly an ex post administrative remedy for undoing the firearm deprivation of those who did not pose a discernible danger to others, whereas some proposals for amending the statute contemplate an ex ante legislative determination of dangerousness. The proposals by commentators and some judges for distinguishing dangerous/nondangerous felons for purposes of Second Amendment challenges (i.e., as-applied challenges) appear to have both ex post and ex ante features. On the ex post side, the cases arise after conviction (as an appeal seeking reversal) or after an adverse administrative action, like the denial of a firearm dealer's license in *Folajtar*.[280] Presumably, trial courts would eventually embrace these challenges in an ex ante motion for dismissal or an injunction to a government agency. These proposals for making the violent/nonviolent distinction in Second Amendment adjudication—both in the academic literature and in appellate court opinions—are under-theorized on how they would work in practice.

Writing a partial concurrence in *Binderup*, Judge Fuentes recounted the history of defunding § 925(c) petitions, and concluded, "Congress reviewed the evidence from its prior regime of what were, in effect, as-applied challenges to § 922(g)(1) and concluded that such a system was unworkable."[281] In the more recent Third Circuit consideration of an as-applied challenge to the same statute, the majority quotes this section of Judge Fuentes's concurrence in its opinion, seemingly endorsing it in a footnote.[282] Other circuits have also

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278 *Id.* at 77.

279 *See* Harley v. Wilkinson, 988 F.3d 766, 774 (4th Cir. 2021) (Wynn, J., concurring) ("Finally, I note that the Supreme Court has (unanimously) indicated a concern with courts engaging in analyses to determine whether individuals may safely possess firearms after having lost their rights to do so.").

280 *See* Folajtar v. Barr, 369 F. Supp. 3d 617, 619–20 (E.D. Pa. 2019) (discussing Lisa Folajtar's FFL issue).

281 Binderup v. Att'y Gen. of the U.S., 836 F.3d 336, 403 (3d Cir. 2016) (Fuentes, J., concurring).

282 Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 906 n.10 (3d Cir. 2020).

discussed § 925(c) petitions for relief from firearm disability, upholding the constitutionality of the felon-in-possession statute.[283]

Judge Barrett's dissent in *Kanter v. Barr*[284] focused so much on the present dangerousness (or lack thereof) of the individual felon that it gives the impression she envisions a hybrid approach—a categorical ban for those convicted of "violent" felonies, and for nonviolent felons, a factual investigation like that conducted by the ATF for petitions prior to 1992, except in cases where the conviction was for a "violent" crime. This would mean an intensive look at the individual petitioner and a judicial assessment of whether the person, on balance, presents any special danger to the community, though Judge Barrett mostly referenced superficial checks like recent arrests or convictions.[285] Judge Barrett's dissent mentions a few felonies she thinks are obviously violent—"murder, assault, and rape"[286]—and then discusses an example where the conviction was for robbery and the felon "was in no position to challenge" the application of the felon firearm ban.[287] She did not explain what rubric courts should use to determine whether a felony is violent or nonviolent—for example, whether the statute would have to include an element of violence or force, as with the ACCA categorical rule, or if the felon prohibitor could apply to the many felons who used violence or violent threats in committing their crimes, but who pleaded to a nonviolent felony charge to secure a shorter sentence. The last two pages of her dissent describe a bizarre proposal whereby the government could present evidence (meet a burden of proof) that a nonviolent felon was indeed dangerous or likely to commit violent crimes and could then permanently deprive the person of firearm rights.[288] There is no federal law that permits some government officials (prosecutors? FBI?) to compile evidence that someone is a high-risk candidate for committing violent crimes (which, again, she does not define or suggest how to define) and, before any additional offenses

283 *See, e.g.*, *Harley*, 988 F.3d at 774 (Wynn, J., concurring) (discussing the statute and its defunding, as well as subsequent litigation over ATF inaction); Mai v. United States, 952 F.3d 1106, 1111 (9th Cir. 2020) ("Congress defunded the program because, among other reasons, determining eligibility had proved to be a 'very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made.'"); Hatfield v. Barr, 925 F.3d 950, 952 (7th Cir. 2019) (discussing § 925(c) and its defunding); *see also* Kelerchian v. Bureau of Alcohol Tobacco Firearms & Explosives, No. 20-3065, 2021 WL 2910934 (3d Cir. July 12, 2021) (affirming the dismissal of a case seeking judicial review of an ATF inaction on § 925(c) relief petition, because the plaintiff failed to state a claim).

284 Kanter v. Barr, 919 F.3d 437, 451–69 (7th Cir. 2019) (Barrett, J., dissenting).

285 *See id.* at 466–69.

286 *Id.* at 466.

287 *Id.* at 467.

288 *See id.* at 468–69.

occur that would warrant an arrest or conviction, may permanently deprive the individual (whether a felon or not) of firearms. If a felon like Mr. Kanter had a conviction for a "nonviolent" crime like mail fraud, they would simply be eligible to have their guns under her proposed analysis, and there would be no case before the courts regarding unlawful possession of weapons by the individual. She closes by saying, "This does not mean that Wisconsin and the United States cannot disarm Kanter."[289] She continues, "Even though the mail-fraud conviction, standing alone, is not enough, they might still be able to show that Kanter's history or characteristics make him likely to misuse firearms."[290] But there is no legal mechanism to do that, apart from state extreme-risk protection orders for those with mental impairments or who make actual threats. In effect, her position meant that neither the state nor the federal government could disarm Mr. Kanter, regardless of his history and characteristics.

In practice, there are only two ways to distinguish between "dangerous" and "nondangerous" or "violent" and "nonviolent" felons—either by categorizing statutes, discussed above, *or* by an individualized factual assessment of each felon's character. The latter would either have to be an ex ante determination at the time of sentencing, or a post-release petition for relief from firearms disability (restoration of gun rights), such as that described in the now-moribund § 925(c). There is no existing statutory framework that gives courts discretion to impose permanent firearms disability ex ante, at the time of sentencing, on individual felons the judge deems dangerous. Even if there were, the question would remain of how subjective this determination could be—would a judge be free to make such determinations on the "totality of the circumstances," referencing some supporting evidence in the record? Or would prosecutors have to prove each allegation supporting a "dangerousness" finding beyond a reasonable doubt? Defendants would appeal these judgments, arguing that a more conservative or pro-gun judge would not have imposed firearms disability.

C. *The New* Rehaif *Problem with Distinguishing Felony Types*

Currently, convicted felons know that they have a felony conviction and are presumptively aware that the firearm ban for felons

289 *Id.* at 468.

290 *Id.*

applies to them, with rare exceptions.[291] Given the foregoing discussion, however, if the courts adopted a "violent/nonviolent" distinction for Second Amendment analysis, it would be *very* difficult for an individual to know ex ante—say, at the time of purchasing or borrowing a firearm from an acquaintance—whether their felony counts as "violent." Given the Supreme Court's ever-evolving jurisprudence with the ACCA, § 924(c), and the sentencing guidelines, the answer to that question could also change overnight.

In other words, the proposed "dangerousness" would open the floodgates of *Rehaif*-based claims and undo the clarification the Court provided recently in *Greer*. *Greer* presumed that "individuals who are convicted felons ordinarily know that they are convicted felons,"[292] but many felons would *not* know whether their conviction satisfies the definition of "dangerousness" that would disqualify them from gun possession under the statute, if indeed courts were to impose such a qualifier via as-applied constitutional rulings. This same legal question in the ACCA context requires extensive research and briefing by lawyers and judges and would lie beyond the competency of nonlawyer defendants. In practice, most defendants in felon-prohibitor cases could plausibly assert that they were confused about whether their felony disqualified them from firearm possession, and the burden would be on the prosecutor in every case to show that *this* defendant had actual knowledge that their conviction qualified. Some judges might include this in sentencing—informing the defendant that their conviction disqualifies them from gun possession under § 922(g)(1)—but even then, one can imagine *Rehaif* challenges where the defendant acknowledges the judge warned that the felon prohibitor would apply, but the court hearing the challenge disagrees with the sentencing judge on that point, and therefore decides after the fact that § 922(g)(1) does not apply.

Due process requires notice and an opportunity for hearing. Currently, the bright-line felon-in-possession rule places all felons on notice that it would be unlawful for them to purchase or possess a gun under federal law. There is no similar mechanism in place for individualized prohibitions and tailored notices for violent felons. There is no standardization of the "crime of violence" felon status in

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291 *See* Melissa Barragan et al., *Prohibited Possessors and the Law: How Inmates in Los Angeles Jails Understand Firearm and Ammunition Regulations*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 141, 149 (2017) ("Prohibition of acquisition and possession, based on an existing criminal record, was by far the most common regulation mentioned and described by respondents: 80.8 percent (n=97) indicated some knowledge of this prohibition. Their knowledge was accurate, if fairly generalized.").

292 Greer v. United States, 141 S. Ct. 2090, 2095 (2021).

this country, and even federal application of the "crime of violence" standard requires an examination of individual statutes from all over the country and across all jurisdictions. Many felons would not know about their "crime of violence" status (thus activating a firearm disability) or would simply misunderstand it. Placing the qualifier of "violent felony" raises significant due process issues even if the defendants are told under the convicting jurisdiction's understanding of the law that they do not have a "crime of violence" tag on their record because the case-by-case (or rather statute-by-statute) in-depth analysis required to determine whether a particular crime is a crime of violence is, many times, an ex post judicial determination and not an ex ante one.

The current bright-line felon-in-possession rule, in contrast, places each felon on notice that they may not possess a firearm. It allows law enforcement to make a quick and accurate determination as to whether the arrestee is a felon-in-possession at the time of the arrest. It protects the public because it includes dangerous felons who commit violent acts but are finally convicted of nonviolent felonies like tax fraud. Finally, it eliminates the uncertainty by having a standard that is easy to understand and easy to enforce.[293]

Gun *sellers* would have the same problem, especially private sellers who cannot conduct a NICS background check themselves for a prospective purchaser. It would become impossible to enforce the laws prohibiting private sellers from knowingly selling firearms to prohibited persons if the law applied only when the buyer's felony conviction counted as a "violent" felony, because there would be no way for sellers to ascertain that. Imagine a private seller who supplies guns to any of the defendants described in the examples above, knowing full well that the buyers have committed (or are committing) armed robberies, kidnappings, money laundering for drug cartels, etc. Even with this knowledge, it would not be possible to show that they knew that an individual buyer's robberies, kidnappings, or racketeering did, in fact, count as "violent" under the law.

This problem would also apply to straw purchasers who buy guns on behalf of active criminals. They could purchase guns from licensed dealers and pass the background check (by buying on behalf of someone who fears he would not pass it), but the straw purchaser could always plausibly claim, if caught, that they could not have known whether the person on whose behalf they bought the guns would qualify as a

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293 In terms of conviction errors, the current felon-in-possession law is a low-error rule compared to many other criminal statutes, as the evidentiary burden is simple: status (easily documented) + possession (easy to prove). *Cf.* Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 859–61 (2012) (discussing social costs of erroneous convictions and other errors in criminal trials).

"violent" felon. Prosecutors must prove some amount of knowledge as an element of straw purchaser charges, but the predicate fact, in practice, would typically be unknowable.

D. *Law Enforcement*

Besides the problem of judicial economy, the proposed alternative regime would require police officers to ascertain, during a lawful search, an arrest, or in a warrant application, whether an individual's felony conviction would satisfy an unclear judicial standard for "dangerousness." This scenario would pose an insurmountable problem for law enforcement. Police already make some good-faith errors in the context of enforcing the felon-prohibitor rule by mistaking serious misdemeanor convictions for felony convictions,[294] and this new proposed inquiry would, in practice, stymie any enforcement of the statute.

Those proposing that the Second Amendment requires a distinction between violent/dangerous felons and nonviolent felons seem to assume that this classification of convictions will be immediately obvious to law enforcement officers when they are checking a suspect's record to prepare an application for a search or arrest warrant, or (even more infeasibly) during a roadside traffic stop to decide whether to detain an individual. Should police use the categorical approach, or an underlying-facts approach? Police do not have immediate access to all the underlying facts behind an individual's recorded convictions or arrests, so there would be no way for an officer to know if an individual had used violence or threats, even though the arrests or conviction was for a crime like obstruction of justice, possession of contraband, or some type of fraud. If police had to use the categorical approach, they would have to undertake the same type of confusing inquiry that judges now use for sentencing, analyzing (say, in their police cruiser during a roadside traffic stop) the elements of each predicate statute, whether state or federal, and for each recorded conviction, with reference to controlling judicial precedent in their state

294 *See* Rothgery v. Gillespie County, 554 U.S. 191, 195 (2008) ("Although petitioner . . . has never been convicted of a felony, a criminal background check disclosed an erroneous record that he had been, and on July 15, 2002, Texas police officers relied on this record to arrest him as a felon in possession of a firearm."). For a more recent example, see Burns v. City of Santa Fe, No. 3:19-cv-338, 2021 WL 2651159, at *1 (S.D. Tex. June 28, 2021) (explaining that the police sergeant who reviewed suspect's criminal history before making the arrest "'did not realize that Burns's final sentence [for the possession charge] was deferred until after Burns served a probationary period' and that his 'final conviction was reduced to a misdemeanor based on a plea bargain agreement.'").

about whether "robbery" or "kidnapping" counts as a "crime of violence." This is simply not possible—police could not do it, and the felon-in-possession laws would become completely unenforceable, even for the most violent of felons. In sum, the law codified at § 922(g)(1) would quickly become inoperable, fall into desuetude, and the "dangerousness" proposal could eventually eliminate the rule.

E. *Lessons Learned from the Existing Statutory Exemptions for Certain Felonies*

As mentioned in Part II, certain felonies are statutorily exempt from the felon-in-possession laws. Congress has already spoken about which felonies it considers nonserious enough to exclude from the firearm disqualification, and Congress could easily have exempted many others—but it chose not to. As the common law canon would counsel, *expressio unius est exclusio alterius*, which "instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions."[295] Section 921(a)(20) provides:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.[296]

Of course, it is not always clear what counts as "antitrust violations," "unfair trade practices," or "restraints of trade."[297] Even more litigation arises about the expressly *ejusdem generis* residual clause, "or other similar offenses relating to the regulation of business practices."[298] The few cases that have arisen under § 921(a)(20)(A) have already generated a circuit split with three different approaches being

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295 NORMAN J. SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2020) (citations omitted).

296 18 U.S.C. § 921(a)(20).

297 *See* United States v. Miller, 678 F.3d 649 (8th Cir. 2012) (deciding whether involvement in a fraudulent check-cashing scheme was a type of "unfair trade practice" for purposes of this statutory exemption).

298 18 U.S.C. § 921(a)(20)(A).

used to interpret and apply the provision.[299] Some federal circuits, unsurprisingly, adopted an "elements" approach very similar to the "categorical" approach used by federal courts for ACCA cases and § 924(c) cases, described above, with similar untoward results.[300] Others circuits use a "purpose"-matching approach between the delineated statutes and statutes that could potentially fall under the residual clause, and still others combine *both* of these approaches into a two-step "holistic approach."[301]

In other words, even if Congress tried legislatively to exempt more "nonviolent" or "nondangerous" felonies from the firearms ban, unless the statute identified felonies by code section number, results would vary depending on the circuit and the methodology used, and each of the approaches would produce some manifestly unfair or counterintuitive results. Felons convicted of violations that *could* fall under the exemptions would have uncertainty about their legal status, creating both a *Rehaif*-type mens rea problem and a fundamental fairness or due process problem for these individuals. Similarly, sellers and proxy purchasers (whether criminal straw purchasers, purchasing agents, or those thinking they were buying someone a firearm as a gift) would also have to operate under an unacceptable degree of uncertainty about the prohibited status of potential purchasers.

This history here is worth recounting, albeit briefly. Originally, the statute read, "or other similar offenses relating to the regulation of business practices as the Secretary [of the Treasury] may by regulation designate."[302] Eighteen years passed, and multiple Treasury Secretaries, and none made any such designations. Then, as part of the 1986 Firearms Owners' Protection Act,[303] Congress dropped the phrase that delegated additional designations to the Treasury Secretary. The legislative history suggests that Congress intended to make "the court, rather than the Secretary, the final arbiter as to what constitutes a 'similar offense relating to the regulation of business practices.'"[304] Although there is no consensus among the courts about what approach to use in deciding which unspecified felonies should come under the exemption, the results are usually not favorable to the defendant regardless of the approach used. One notable exception is the District Court for the District of Columbia, in its 2018 decision in *Reyes v.*

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299 *See* Reyes v. Sessions, 342 F. Supp. 3d 141, 149 (D.D.C. 2018) (describing a split among the circuits on which test to use).

300 *See id.*

301 *See id.*

302 Pub. L. No. 90-618, § 921(a)(20)(A), 82 Stat. 1213, 1216 (1968).

303 Pub. L. No. 99-308, 100 Stat. 449, 449 (1986).

304 *See* S. REP. NO. 98-583, at 7 (1984).

Sessions,[305] which held that the exemption applied to felony convictions for securities fraud, falsifying corporate books and records, and making false statements to accountants.[306] In contrast, the Eighth Circuit has held that selling tainted meat in violation of federal law did not come under the residual clause exemption,[307] and in another case, that a scheme to defraud also did not.[308] The Seventh Circuit concluded that trafficking in counterfeit telecommunications instruments was not exempt.[309] The Fifth Circuit did not apply the exemption to pirating encrypted satellite signals and to infringe a copyright,[310] or to mail fraud and conspiracy to commit mail fraud.[311] Regardless of the approach used in construing the phrase "or other similar offenses," courts usually do not find that the exemption applies to the individual defendant, even for convictions for felonies like mail fraud or digital piracy.

Several published student notes or comments have discussed this statutory section and used it to contend that the felon-in-possession laws are fundamentally unfair and arbitrary.[312] One student commenter has suggested that an amendment expanding the list of exempt felonies would reduce the unfairness or severity of the gun ban for most felons,[313] which is unlikely given the political gridlock surrounding gun policy in Congress. Expanding the list legislatively would certainly be better than doing it through a series of hodgepodge judicial responses to as-applied challenges under the Second Amendment. Even so, expanding the list would pose some practical problems for judicial interpretation. There would be some uncertainty about what constitutes each of those crimes (say, counterfeiting), just as there is some debate about what should be classified as an "unfair trade practice."[314] Moreover, each new item on the delineated list opens the door for a new

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305 342 F. Supp. 3d 141 (D.D.C. 2018).

306 *See id.* at 142–44.

307 United States v. Stanko, 491 F.3d 408, 414–17 (8th Cir. 2007).

308 *See* United States v. Miller, 678 F.3d 649, 652–53 (8th Cir. 2012).

309 United States v. Schultz, 586 F.3d 526, 530 (7th Cir. 2009).

310 United States v. Coleman, 609 F.3d 699, 705 (5th Cir. 2010).

311 Dreher v. United States, 115 F.3d 330, 332–33 (5th Cir. 1997).

312 *See* Sherwood, *supra* note 10, at 1452–53 ("[O]ne must wonder what makes those convicted of nonviolent crimes unrelated to business practices more dangerous [than those whose convictions are in this exempted group]."); *see also* Alexander C. Barrett, Note, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 187 (2013); Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 137–41 (2013) (making a similar point).

313 *See* Lagrotteria, *supra* note 10, at 1993 ("Congress can either add other offenses that are exempted from the felon-in-possession prohibition or, alternatively, provide a list of offenses that should result in the prohibition.").

314 *See, e.g.*, United States v. Miller, 678 F.3d 649, 652–53 (8th Cir. 2012) (discussing whether a particular type of check fraud is an "unfair trade practice").

set of arguments by analogy ("my cryptocurrency felony is analogous to counterfeiting regular printed currency, so the firearm disqualification should not apply to me"), as well as more arguments by comparison ("if ___ felony is exempt, then certainly my felony should be as well, for it is even less dangerous or violent").

If a court truly felt compelled to grant relief from the firearm disqualification to some unusually deserving felon, this outcome is more readily achievable under this statute, even in its current form, than by approving a constitutional as-applied challenge. A court considering such a challenge could invoke the avoidance canon to justify interpreting the residual clause of § 921(a)(20)(A) broadly enough to cover the special-case defendant. The avoidance canon counsels courts to "avoid the question about an act's constitutionality in the first place, if possible,"[315] by favoring an interpretation of the statutory terms that skirts the constitutional issues. "Courts even have found that a 'strained construction' is desirable if it is the only construction that will save an act's constitutionality . . . ."[316] Avoidance via a more elastic interpretation would eliminate the need to decide as-applied cases on constitutional grounds, as the Supreme Court did to avoid First Amendment issues in *NLRB v. Catholic Bishop of Chicago*.[317]

Though other traditional canons of construction have fallen out of favor with the modern judiciary, the avoidance canon remains popular among judges, especially those on the federal bench.[318] Some recent commentators have even criticized the Supreme Court for relying too often on the avoidance canon in major cases affecting public policy.[319] If it were truly necessary to restore gun rights to certain special-case reformed felons, rather than creating disruptive new constitutional precedent (under the Second Amendment), or delving into a daunting factual determination of the individual's "dangerousness," a court could employ the avoidance canon and simply interpret the § 921(a)(20)(A)

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315 NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:11 (7th ed. 2020).

316 *Id.*

317 440 U.S. 490, 500 (1979); *see also* Skilling v. United States, 561 U.S. 358, 405–11 (2010) (invoking constitutional avoidance and the rules of lenity to narrow a fraud statute in an Enron-related prosecution, to avoid invalidating the statute entirely); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197, 199–200 (2009) (avoiding constitutional question via circuitous interpretation); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 17 (1963) (interpreting statute in a way that would avoid deciding constitutional questions); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961) (same).

318 *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1331–32 (2018).

319 *See generally* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015) (critiquing the current Court's frequent and sometimes innovative applications of constitutional avoidance).

exemption definition broadly enough to include the activities that generated the conviction. This should be in rare cases, though, because Congress did in fact delineate very few felonies as exempt from the firearms ban, so it would be inappropriate to use the statute to shoehorn broad categories of additional felonies into the exception.

IV. UNDERAPPRECIATED BENEFITS OF THE FELON-IN-POSSESSION LAW

A. *Vulnerable Communities*

The felon-prohibitor rule helps reduce the flow of guns into vulnerable communities—impoverished neighborhoods with elevated rates of gun violence. Our nation's gun violence concentrates disproportionately in urban areas.[320] While individual felons themselves may not pose a danger or engage in gun crimes, any guns they own become more easily accessible to neighborhood thieves, borrowing by roommates and nearby relatives, informal trades, and or misplacement.[321] Social science research about gun violence has found that most guns used in crime are borrowed/shared (sometimes stolen),[322] which means geographic proximity of the guns increases the incidents of gun violence in the neighborhood.[323] The supply of guns flowing into vulnerable communities can impact rates of gun violence, even if the guns are brought there initially by owners who do not perpetrate the crimes.[324]

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320 Though gun violence mostly occurs in densely populated poor areas, on the state level, rural states have higher rates of gun deaths per population. For example, "Oklahoma, a mostly rural state, has the 11th-highest gun death rate in the US; the rate of gun deaths there increased 17% from 2009 to 2018. Oklahoma has the 15th-highest gun homicide rate, and the 6th highest gun suicide rate." Shannon Watts (@shannonrwatts), TWITTER (July 15, 2021, 10:10 AM), https://twitter.com/Shannonrwatts/status/1415675256279224324 [https://perma.cc/QE52-V985].

321 *See, e.g.*, Elizabeth Roberto, Anthony A. Braga & Andrew V. Papachristos, *Closer to Guns: The Role of Street Gangs in Facilitating Access to Illegal Firearms*, 95 J. URB. HEALTH 372, 372–82 (2018).

322 *See* Philip J. Cook, Susan T. Parker & Harold A. Pollack, *Sources of Guns to Dangerous People: What We Learn by Asking Them*, 79 PREVENTIVE MED. 28, 30 (2015).

323 *See* Sung-suk Violet Yu, Daiwon Lee & Jesenia M. Pizarro, *Illegal Firearm Availability and Violence: Neighborhood-Level Analysis*, 35 J. INTERPERSONAL VIOLENCE 3986 (2017) (showing that geographic proximity to a gun supplier increases incidents of gun violence).

324 *See* Philip J. Cook, Harold A. Pollack & Kailey White, *The Last Link: From Gun Acquisition to Criminal Use*, 96 J. URB. HEALTH 784 (2019). Note that the RAND Corporation has a meta-survey of the literature about the correlation between gun prevalence and gun violence—including some of the contradictory studies. *See The Relationship Between Firearm Prevalence and Violent Crime*, RAND CORP. (Mar. 2, 2018), https://www.rand.org/research/gun-policy/analysis/essays/firearm-prevalence-violent-crime.html [https://perma.cc/35TW-4MRL].

Disproportionately, released felons return to these vulnerable communities.[325] "Racial minorities are disproportionately represented in the ex-felon population and based on lower socio-economic status disproportionately live in poor and high-crime neighborhoods . . . ."[326] Other writers have also noted that released felons tend to concentrate in poor, marginalized communities, so that the greatest impact of the felon prohibitor—both the good and the bad—falls there.[327] The concentration of felons in vulnerable communities has received academic attention in other respects, such as the problem with felons being disqualified for most federal welfare or social safety net programs, which in turn means their communities are disproportionately cut off from such aid.[328] Similar observations about the concentration of felons in poor, minority neighborhoods are prevalent in the literature about the loss of voting rights.[329] Not only are poor neighborhoods and communities more vulnerable to violent crimes, but also the anemic response of law enforcement to reports of violence in these locales exacerbates the problem; as William Stuntz observed years ago, "Violent felonies are underenforced in poor neighborhoods; drug crimes in those same neighborhoods are punished too harshly."[330]

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325 Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 13–14 (2018) ("At the furthest end, people returning home after prison generally go home to poor neighborhoods and struggling families, and have a very difficult time raising themselves out of poverty—especially if they are people of color."); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 116 (2008) ("[D]isenfranchised [felons] tend to concentrate in poor neighborhoods . . . .").

326 Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218, 228 (2013) (citing David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 101 (2007)).

327 "To be sure, as Blacks and Latinos are disproportionately prosecuted and punished in the criminal justice system with felony convictions, their communities are systemically more vulnerable." SpearIt, *Firepower to the People! Gun Rights & the Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 189, 231 (2017) (using this as an argument against the felon prohibitor, claiming that minorities should arm themselves to use lethal force against police aggression).

328 *See* Meghan Looney Paresky, *Changing Welfare as We Know It, Again: Reforming the Welfare Reform Act to Provide All Drug Felons Access to Food Stamps*, 58 B.C. L. REV. 1659, 1686–87 (2017) (discussing felon ineligibility for federal food stamps and the disproportionate effect this has on poor communities where they tend to settle).

329 *See, e.g.*, V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1744 (2003) ("Go into the poor, urban, minority neighborhoods of this nation and try to round up voters and you will find vast numbers of people disenfranchised by the rule that felons cannot vote.").

330 William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2033 (2008). He continues: "That combination is natural: massive levels of drug punishment exist in part as a substitute for direct enforcement of violent crimes." *Id.*

This is not to say that felons themselves never pose a risk. As the Third Circuit observed in the *Folajtar* decision,[331] nonviolent felons are statistically almost as likely as those with violent felony convictions to commit subsequent violent felonies: "And there is good reason not to trust felons, even nonviolent ones, with firearms. . . . [N]onviolent offenders are at higher propensity for committing violent crimes."[332] The court cited statistics showing that those with convictions of fraud or forgery were a little less likely to commit violent crimes after their release than those convicted of burglary or drug offenses, but the difference is not enough to make a blanket firearm prohibition illegitimate.[333] The Seventh Circuit made similar observations in the *Kanter v. Barr* majority opinion.[334] There is the additional problem of criminal-enterprise felons who rely on others to carry out violence on their behalf. As Judge Posner once observed, "We can tie these cases to the underlying statutory purpose of felon-in-possession laws by noticing that the felon is no less dangerous when he arms his associates in a criminal endeavor than when he arms himself."[335]

Leaving aside whether or which drug crimes are inherently dangerous or violent, most of the remaining nonviolent, nondrug felonies are types of fraud—securities fraud, check fraud, mail fraud, counterfeiting, and so forth.[336] Those who commit fraud run a risk of violent retaliation from their victims. While critics of the felon prohibitor might say that this is even more reason to let them have guns for self-defense, the problem is that the individuals have created this specific risk themselves by defrauding the victims, and one party arming themselves (i.e., the potential target of retaliation) can induce the other party to use a gun as well, thereby escalating the violence. Moreover, it presents a moral hazard problem, as some fraudsters will feel emboldened to commit crimes because they have armed themselves against retaliation by their victims. Many individuals who engage in a fraud scheme will do so more aggressively or recklessly if they arm themselves with guns for self-defense against their victims.

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331 Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 909 (3d Cir. 2020).

332 *Id.*

333 *See id.*

334 *See* Kanter v. Barr, 919 F.3d 437, 449 (7th Cir. 2019).

335 United States v. Rawlings, 341 F.3d 657, 659 (7th Cir. 2003).

336 The *Folajtar* court addressed the issue of nonviolent fraudsters in terms of their demonstrated contempt for laws or the harm they cause to others; individuals such as Bernie Madoff (operator of the largest Ponzi scheme in history, masqueraded as a charity) and Jeffrey Skilling (Enron) "flouted the laws of the land and show[ed] utter disregard for the welfare of their fellow citizens." *Folajtar*, 980 F.3d at 909.

B. *Felons, Firearms, and Suicide*

In discussions about felons having firearms, the focus is typically on whether they pose a danger to others; the elevated risk of suicide for felons is an overlooked problem. While suicides *within* prisons are a long-standing problem,[337] "[t]he transition into the community is also a high-risk period for suicide."[338] Programs and policies to prevent suicides serve a legitimate policy goal (reducing premature and avoidable fatalities), and more targeted interventions are appropriate for individuals who are at an especially high risk for suicide. Released felons are one such group.[339] This is another reason to reduce firearm access for felons, even if it is not the primary policy reason for doing so: "[I]t is well-established that prisoner suicide rates are elevated compared with age-matched general populations."[340]

In the general nonfelon population, suicide accounts for almost two-thirds of the gun-related fatalities in the United States.[341] Approximately sixty-one percent of all gun-related deaths in the United States are suicides, though the number varies from state to state.[342] Explanations for the variation in suicide rates between states often start by comparing the relative prevalence of diagnosed mental illness, suicidal ideations, or past suicide attempts.[343] Even so, household gun ownership is the best predictor for the differences in suicide rates[344]—the percentage of suicides correlates so highly with the percentage of gun-owning households "that the weapon mix in suicide serves as an accurate proxy for the prevalence of gun ownership in the

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337 *See* David E. Patton & Fredrick E. Vars, *Jail Suicide by Design*, 68 UCLA L. REV. DISCOURSE 78, 80 (2020) ("The leading cause of death in jails, where people are detained pretrial, is suicide. People incarcerated while awaiting trial are an astonishing six times more likely to die by suicide than people imprisoned after being convicted and sentenced.").

338 Jakov Zlodre & Seena Fazel, *All-Cause and External Mortality in Released Prisoners: Systematic Review and Meta-Analysis*, 102 AM. J. PUB. HEALTH 67, 72 (2012).

339 *See* Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 119 (2008) (discussing studies about the elevated mortality rates for ex-convicts, including elevated risks of suicide).

340 Zlodre and Fazel, *supra* note 338, at 67.

341 Jeffrey W. Swanson, E. Elizabeth McGinty, Seena Fazel & Vickie M. Mays, *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 370 (2015).

342 *Id.*

343 David Hemenway, *Guns, Suicide, and Homicide: Individual-Level Versus Population-Level Studies*, 160 ANNALS OF INTERNAL MED. 134, 134 (2014).

344 *Id.*; GIANNI PIRELLI, HAYLEY WECHSLER & ROBERT J. CRAMER, THE BEHAVIORAL SCIENCE OF FIREARMS: A MENTAL HEALTH PERSPECTIVE ON GUNS, SUICIDE, AND VIOLENCE 289 (2019) ("A wealth of research evidence links firearm ownership with an elevated risk for [suicide]." (citation omitted)).

population."[345] Suicide rates correlate with firearm availability (i.e., the presence of guns in the home, regardless of which housemate owns it).[346] Studies show that those living in households where guns are present are far more likely to die of suicide than those without access to firearms in the home;[347] in fact, the published literature "shows that firearm ownership is associated with an approximate three times increase in the likelihood of suicide."[348] Individuals having suicidal ideations who have a gun readily available in the home are much more likely to follow through with their ideations because they can act quickly on their impulses.[349] Researchers have suggested that reducing access to guns would reduce acts of suicide, which account for approximately 61% of gun-related deaths.[350] Without firearms, those who attempt suicide are much more likely to survive: nonfirearm suicide attempts succeed only 4% of the time, while suicide attempts with guns succeed at least 85% of the time.[351] It is also worth noting that those who survive suicide attempts (mostly those who do not use a gun) are unlikely to commit suicide later by other means,[352] so increasing the chance of survival for an initial attempt means saving lives long-term. To put it another way, individuals are quite likely to survive an impulsive suicide attempt if they do not use a gun, and almost no one survives if they do use a gun. Firearms change everything for suicide risks.[353]

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345 PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 155 (2d ed. 2020).

346 *See id.* at 42; JOSHU HARRIS, ABA STANDING COMM. ON GUN VIOLENCE, NICS SELF REPORTING (2019) (discussing suicide statistics); *The Relationship Between Firearm Availability and Suicide*, RAND CORP. (Mar. 2, 2018), https://www.rand.org/research/gun-policy/analysis/essays/firearm-availability-suicide.html [https://perma.cc/8ZRJ-8AGA]; DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 35–45 (2d ed. 2017) (surveying public health research).

347 *See The Relationship Between Firearm Availability and Suicide*, *supra* note 346; COOK & GOSS, *supra* note 345, at 155.

348 PIRELLI, WECHSLER & CRAMER, *supra* note 344, at 289.

349 Kevin Loria, *Gun Control Really Works—Here's the Science to Prove It*, BUS. INSIDER (Aug. 27, 2018, 9:55 AM), https://www.businessinsider.com/science-of-gun-control-what-works-2018-2 [https://perma.cc/V759-RFB6].

350 *See* Swanson, McGinty, Fazel & Mays, *supra* note 341, at 370.

351 *See* AYRES & VARS, *supra* note 155, at 15 (citing Matthew Miller, Deborah Azrael & Catherine Barber, *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 ANN. REV. PUB. HEALTH 393, 397 (2012)).

352 *See* Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1466–67 (2015) ("The overwhelming majority of people who survive a suicide attempt die at a later date from a cause other than suicide, suggesting that suicidal impulses usually dissipate with time."); *see also* Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 NEW ENG. J. MED. 989, 989 (2008).

353 *See* David Hemenway & Matthew Miller, *Association of Rates of Household Handgun Ownership, Lifetime Major Depression, and Serious Suicidal Thoughts with Rates of Suicide Across*

Empirical studies have shown that red-flag laws, which allow via petition and judicial order for law enforcement to remove (temporarily seize) firearms from high-risk individuals, significantly reduce suicide rates.[354] While I am not aware of any studies analyzing the effects of the felon-in-possession laws on felon suicide rates, the laws accomplish the same thing that red-flag laws effectuate—limiting access to firearm by high-risk individuals—and presumably the reduction in suicide rates would be similar.

Views differ about whether suicide should be a public policy concern. For example, the National Rifle Association's website declares, "Gun owners are notably self-reliant and exhibit a willingness to take definitive action when they believe it to be in their own self-interest. Such action may include ending their own life when the time is deemed appropriate."[355] Predictably, public attitudes toward former felons are often uncharitable, so undoubtedly some would not see their suicides as a matter of concern. The alternative view is to see suicide as a social problem, a tragic loss of life that could have been avoided, and that merits some modicum of government intervention for the purposes of prevention.[356] "Every year, suicide attempts take immense social and economic tolls on society. They can devastate families and communities while raising healthcare costs."[357] Some recent commentators have even argued suicide prevention as an international human rights issue.[358] "Firearm suicide has both economic and social costs for the United States. Accounting for medical and indirect expenses, deaths by suicide and suicide attempts cost the nation over $93 billion in 2013."[359]

Suicide risk is significantly more pronounced for those released after serving prison sentences. One study found that ex-convicts commit suicide at 3.4 times the rate of the general population in their

US Census Regions, 8 INJ. PREVENTION 313 (2003) (showing that local or regional handgun ownership rates correlate with elevated suicide rates).

354 *See generally* Rachel Dalafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867 (2021) (containing an empirical analysis of red-flag laws and their effectiveness at decreasing suicide rates).

355 *Suicide and Firearms*, NRA-ILA (Nov. 6, 1999), https://www.nraila.org/articles/19991106/suicide-and-firearms [https://perma.cc/KVX5-7X9U].

356 A particularly compelling example of this viewpoint is the award-winning 2013 article published by Madeline Drexler in the magazine of the *Harvard T.H. Chan School of Public Health*. *See* Madeline Drexler, *Guns & Suicide: The Hidden Toll*, HARV. PUB. HEALTH, Spring 2013, at 24.

357 Mason Marks, *Emergent Medical Data: Health Information Inferred by Artificial Intelligence*, 11 U.C. IRVINE L. REV. 995, 1035 (2021).

358 *See, e.g.*, Hannah S. Szlyk, Enoch Azasu & Sean Joe, *Firearm Suicide as a Human Rights Priority for Prevention*, 60 WASH. U. J.L. & POL'Y 133 (2019).

359 *Id.* at 136 (citing Donald S. Shepard, Deborah Gurewich, Aung K. Lwin, Gerald A. Reed, Jr. & Morton M. Silverman, *Suicide and Suicidal Attempts in the United States: Costs and Policy Implications*, 46 SUICIDE & LIFE-THREATENING BEHAV. 352, 358 (2016)).

first year or two out of prison.[360] A number of factors contribute to this elevated suicide rate. "A high prevalence of underlying mental illness and the psychological stress of reentry may have contributed to the excess risk of suicide."[361] Other factors may be felons' lack of employment opportunities, social isolation, and untreated substance abuse problems.[362]

Recent empirical studies tracking the former prison population in North Carolina also concluded, "Risk for homicide and suicide deaths were substantially higher among former inmates."[363] Again, a combination of factors contributes to this problem: "Suicides were associated with risk of reincarceration, relationship problems, depression, and other life circumstances."[364] Almost five percent of the deaths of released male inmates were suicides.[365]

A more recent study of the same cohort of formerly incarcerated individuals in North Carolina was even more dire.[366] In this study, the researchers stated their conclusion in the article abstract: "Violent death rates for persons released from prison were more than 7 times higher than for the general adult population."[367]

The situation is even worse for the one-third of former inmates who were subjected to solitary confinement at some point during their incarceration.[368] Prison officials impose solitary confinement not due to

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360 *See* Alan Zarembo, *Ex-Convicts Die at High Rate in First Weeks out of Prison*, BALT. SUN (Jan. 11, 2007), https://www.baltimoresun.com/news/bs-xpm-2007-01-11-0701110188-story.html [https://perma.cc/MH8R-UDQR].

361 Ingrid A. Binswanger et al., *Release from Prison—a High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 164 (2007).

362 *See* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 26 (2001) ("Most ex-convicts live menial or derelict lives and many die early of alcoholism or drug use, or by suicide." (quoting NEAL SHOVER, GREAT PRETENDERS: PURSUITS AND CAREERS OF PERSISTENT THIEVES 146 (John Hagan ed., 1996)).

363 Mark Jones, Gregory D. Kearney, Xiaohui Xu, Tammy Norwood & Scott K. Proescholdbell, *Mortality Rates and Cause of Death Among Former Prison Inmates in North Carolina*, 78 N.C. MED. J. 223, 223 (2017).

364 *Id.* at 224.

365 *See id.* Note that the deaths of felons by *homicide* were also higher than average. *See id.* This study noted that previous studies showed much higher suicide and homicide rates for released inmates. *See id.* at 228.

366 *See* Steven Edward Lize et al., *Violent Death Rates and Risk for Released Prisoners in North Carolina*, 30 VIOLENCE & VICTIMS 1019 (2015).

367 *Id.* at 1019.

368 *See* LAUREN BRINKLEY-RUBINSTEIN ET AL., ASSOCIATION OF RESTRICTIVE HOUSING DURING INCARCERATION WITH MORTALITY AFTER RELEASE 1 (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350 [https://perma.cc/V3BB-HFKL]. The report opens with a discussion that mentions that approximately one-third of those released from the state prison system in North Carolina between 2000 and 2015 experienced solitary confinement at some point during the incarceration. *Id.*

the underlying crimes that resulted in the inmate's incarceration, but rather to punish violations of prison rules or for security: i.e., the inmate poses a threat or is the target of threats.[369] Those who experienced any period of solitary confinement had much higher rates of suicide after release, as well as drug-overdose deaths and homicides, especially for those who experienced it more than once.[370]

In commenting on this study, Andrea Fenster noted, "These preventable deaths aren't outliers; in the U.S., where the use of solitary confinement is widespread, an estimated 80,000 people are held in some form of isolation on any given day, and in a single year, over 10,000 people were released to the community directly from solitary."[371] People with one placement in solitary confinement were 55% more likely to commit suicide within the first year of release.[372] Those with multiple placements in solitary confinement were 129% more likely to commit suicide after release.[373]

Many of the factors that lead felons to commit suicide after release—unemployment, debt, lack of housing, disqualification for many public assistance programs, loss of family relationships, social stigma, or lingering trauma from their incarceration itself—affect felons regardless of the charges underlying their original conviction.[374] One whose conviction was for check fraud or violating campaign finance laws will face the same dismal prospects for employment, housing, and relationships as one whose conviction was for drug charges or burglary. Distinguishing between "violent" and "nonviolent" felons for purposes of the Second Amendment and gun possession fails to recognize the

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369 *Id.* at 2.

370 *Id.* at 8 ("In addition, our results demonstrated that death by suicide and homicide in the first year . . . after release [was] more common among those who had experienced restrictive housing compared with those who were incarcerated but never in restrictive housing.").

371 Andrea Fenster, *New Data: Solitary Confinement Increases Risk of Premature Death After Release*, PRISON POL'Y INITIATIVE (Oct. 13, 2020), https://www.prisonpolicy.org/blog/2020/10/13/solitary_mortality_risk [https://perma.cc/3Z5X-9D52].

372 *Id.*

373 *Id.*; *see also* Aaron Stagoff-Belfort, *Study Links Solitary Confinement to Increased Risk of Death After Release*, VERA INST. JUST.: THINK JUST. BLOG (Dec. 4, 2019), https://www.vera.org/blog/study-links-solitary-confinement-to-increased-risk-of-death-after-release [https://perma.cc/2S7B-732Y] (discussing the same study of North Carolina former inmates).

374 *See* Gene Nichol, *Race, Poverty, and "Current Conditions,"* 49 WAKE FOREST L. REV. 791, 796 (2014) ("Felons are frequently tagged for life—effectively barred from employment, housing, public benefits, access to educational opportunity, and even food stamps."); Kaylynn Johnson, Comment, *One Mistake Does Not Define You: Why First-Time Felony Drug Convictions Should Be Automatically Expunged After Five Years*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRACTICE 107, 108 (2020) ("[P]ublic access to criminal records negatively impacts employment and housing opportunities for convicted felons."); Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 200–01 (2004) (discussing unemployment and related issues faced by released felons).

similarities between these two groups when it comes to firearm suicide risks. A number of states have adopted laws for Extreme Risk Protection Orders to remove firearms temporarily from those who pose an elevated risk to themselves or others.[375] Felons are categorically in the elevated-risk group for suicide, so the same logic that allows gun removal for individuals at risk for suicide would apply to felons—except that we can apply the protection as an ex ante prohibition on acquiring guns, rather than a reactive removal of guns.

C. *Reducing the Need for Incarceration*

Even though the felon-in-possession laws have contributed to mass incarceration—offenders convicted of weapons violations in 2019 comprised eighteen percent of the federal prison population[376]—the same laws can also serve as part of the antidote to the incarceration crisis. Disarmament answers one of the main justifications for imprisoning offenders: the need to protect the public from violent criminals. As mentioned in an earlier section of this Article, recent estimates by empirical researchers suggest that the vast majority (over ninety-nine percent) of released felons comply with the firearm ban and abstain from owning firearms.[377] Some of this compliance must be due to the deterrent effect of the long prison sentences that these individuals could face for having a gun. On the other hand, adding years to the length of prison sentences has a diminishing marginal effect on deterrence,[378] and there is an early threshold after which the negatives of an additional year in prison (in aggregate social costs) outweigh the

375 *See generally* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020) (explaining the adoption of these laws in various states and how they operate); Coleman Gay, Note, *"Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491 (2020) (same); Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683 (2019) (advocating for the adoption of ERPOs).

376 E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2019, at 22 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/V9AY-J4TJ].

377 *See* Pear et al., *supra* note 92 and corresponding text.

378 *See* United States v. Presley, 790 F.3d 699, 701–02 (7th Cir. 2015); *see also* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954–55 (2003) ("Thus, as a prison term continues, it can become increasingly less painful in effect, although its cost per unit time remains constant, making it increasingly less cost effective.").

penological benefits.[379] As the Seventh Circuit observed, "The length of a sentence . . . has less of a deterrent effect on such a person than the likelihood that he'll be caught, convicted, and imprisoned."[380] The prison abolition movement has made a great contribution to developing preemptive solutions to prevent the need for incarceration. I believe felon disarmament—through proactive and consistent gun removal—will be a necessary component of the future of prison abolition.

California is one of the few states with a system in place for proactively disarming those who lawfully owned guns before becoming prohibited persons, by garnering felony convictions, but the program has been chronically underutilized and understaffed.[381] California has a gun owner registry, so it has a record of everyone who purchased a gun at some time (but not records of who no longer has those guns due to loss, theft, etc.).[382] The surge in gun sales in 2020 and 2021 made the process of checking and cross-referencing records (by hand) overwhelming, as this process is not automated, so the chronic backlog ballooned out of proportion.[383] The system is supposed to notify local police departments each month about residents in their locale who were gun owners but who have now become prohibited persons under state or federal law; but many departments claim they do not receive these monthly notices.[384] Other police complain that the program, as designed, is hard to enforce.[385] Police are unable to obtain search warrants based merely on the notifications, unless they burnish it with evidence that the individual in fact has guns,[386] a problem that might be solved if these were administrative searches instead. For many police departments, going door-to-door to ask for unlawfully possessed guns seems futile; understandably, many departments believe their resources are better spent solving crimes.[387] Making matters worse, many state judges do not take the time to enter gun removal orders immediately when a conviction occurs, though they could do so.[388]

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379 *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 3–6 (1999) (comparing relative disutilities of sentences to different types of offenders and the social cost of imprisonment).

380 *Presley*, 790 F.3d at 701.

381 Robert Lewis, *Outgunned: Why California's Groundbreaking Firearms Law Is Failing*, CALMATTERS (July 27, 2021), https://calmatters.org/justice/2021/07/california-gun-law-failing [https://perma.cc/XC2X-JUBN].

382 *See id.*

383 *See id.*

384 *See id.*

385 *See id.*

386 *See id.*

387 *See id.*

388 *See id.*

Each link in this chain could improve with more focused attention from policymakers. Staffing and automation at the state level require resources and accountability through proactive oversight. A regulatory agency should be handling the gun removals as a regulatory process, bringing police or sheriffs along when necessary. In the other forty-nine states that lack a registry of one-time gun owners, judges could have a court process to automatically issue warrants for law enforcement to search for and remove weapons when someone in their court receives a felony conviction, and states could cobble together a partial registry of known gun owners by aggregating databases of those with concealed carry permits, hunting licenses, and so forth.

CONCLUSION

While felon-in-possession laws may have fallen out of fashion in academic circles, they retain support in the federal judiciary, at least for now. This Article contributes to the literature by exploring the interconnectedness of our other gun laws with the felon-in-possession statutes, to show how narrowing the scope of the laws would have far-reaching and unforeseeable consequences. It also unpacks the proposed alternative of distinguishing between violent and nonviolent felons for purposes of applying Second Amendment protections to felons who want to acquire firearms. As discussed in the foregoing pages, this new approach would prove completely unworkable, beset with the same problems that the violent/nonviolent distinction has encountered in related areas of sentencing law.

Felon-in-possession laws serve larger policy goals than merely preventing convicted criminals from committing more gun crimes, though that is certainly a valid policy goal on its own. Disarming felons helps reduce the constant influx of firearms into the most vulnerable communities, thereby disrupting underground gun markets and limiting the supply of weapons available to other would-be criminals—not just the felons themselves. Felons themselves are also safer; as a high-risk group for gun suicide, reducing their access to firearms has the potential to save many lives. Though the current sentences for simple gun possession are unnecessarily long, the problem is with the sentences, not the gun ban itself. In fact, felon disarmament on its own—without a lengthy prison sentence—can play a vital role in the decarceration movement, helping preserve public safety without imprisoning so many individuals.

The felon-in-possession law merits further research in several areas. One point for future scholars to explore is the idea proposed in this Article of using periodic administrative searches combined with

forfeiture orders to keep felons disarmed, and to use disarmament in lieu of imprisonment for many or most felons. Another area that deserves more research is the role that felons play in underground gun markets, and if the type of felony conviction correlates with either trafficking activities or being an inadvertent link in the supply chain via lending, sharing, and theft of their guns. Researchers could also investigate why felons are so disproportionately likely to try to buy firearms from gun dealers compared to the other eight categories of prohibited persons under § 922(g). Finally, scholars could help develop innovative ways to expand the reporting of felony convictions to the NICS database by entities other than law enforcement, who already have federally funded financial incentives to participate; some nonprofit community organizations, for example, could partner with local courts to ensure more consistent reporting of convictions to NICS, and could encourage more local judges to issue firearm confiscation orders in every felony conviction case. There is still much work to be done.