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Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities

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**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**

Emma Luttrell Shreefter†

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I. "HIS BROTHER'S KEEPER"¹

"Christopher Martinez had no idea what was hidden in his parents' apartment, let alone deep in the closets. He isn't responsible for what the police found during their search." These were the defense attorney's first statements at Mr. Martinez's trial.

Mr. Martinez was born and raised in New York City. His parents were drug addicts, so Mr. Martinez and his younger brother, Manuel, often had to fend for themselves to get food and other necessities. In his early teens, Mr. Martinez and Manuel got caught up with some other young men in their neighborhood and began committing petty crimes to earn some quick cash. About fifteen years before his federal trial, at the young age of nineteen, Mr. Martinez was the get-away driver for the robbery of a convenience store. He was convicted of robbery and sentenced to a short term of imprisonment in state prison. After his release, Mr. Martinez made substantial life changes: he continued his education, sustained steady employment, and started a family.

Although Mr. Martinez turned his life around and was never convicted of another crime, his parents were still addicts, and Manuel picked up several state and federal convictions. Mr. Martinez did what he could to assist his parents, but to no avail. When his mother became ill in 2013, he purchased her a hospital-grade bed, only to find several days later that she had sold it in order to buy drugs. Mr. Martinez did not speak or interact with his brother because he knew that Manuel was up to no good, and Mr. Martinez wanted nothing to do with this. In 2012, Manuel was sentenced to several years of imprisonment for a federal conviction for selling guns.

As his cousin testified for the defense, Mr. Martinez's parents continued to live in the same apartment that Mr. Martinez grew up in; it was a public housing building, in which his grandparents had previously lived before they passed away. Mr. Martinez's parents lived with his adopted sister, Sarah. They were hoarders and kept the apartment rooms, hallways, and closets completely full of boxes, garbage bags, and old clothes. In 2013, Mr. Martinez's mother died, and his father died several months later in 2014.

When his parents passed away, Mr. Martinez became responsible for their apartment, all of their belongings, and Sarah, who was sixteen years old and pregnant. Mr. Martinez entered into family court proceedings to

¹ This section is based on a trial that took place in federal district court. I helped the defense attorneys prepare pre- and post-trial motions, and assisted during trial. I have changed the name of the defendant and some identifying information because I have added some additional information that was not presented at trial to better explain the facts in relation to the themes and arguments of this paper.

adopt Sarah. She was a minor and needed a legal guardian to avoid being placed in the foster care system, and Mr. Martinez was the only family member willing to become her guardian. Although he lived full-time in his home in Queens with his wife and son, Mr. Martinez transferred the lease of his parents' apartment to himself. Mr. Martinez wanted to ensure that Sarah and her soon-to-be-born baby could continue to live there. In order to do so, he had to qualify as a remaining family member under the succession rules of the New York City Housing Authority.²

During 2015—the year in which the alleged crime occurred—Mr. Martinez spent a lot of time in and near his parent's apartment. He visited Sarah and her newborn frequently. He also spent some nights in the apartment to rest after long shifts at work and to avoid the commute. Mr. Martinez's job was near the apartment, as was his son's school.

Several New York Police Department ("NYPD") officers testified for the prosecution. They first testified that on one evening in the fall of 2015, while Mr. Martinez and his friend were visiting his parents' apartment, he and his friend got into an altercation. Sarah called the police and when the police arrived, they heard shouting. The police officers knocked on the door, and Mr. Martinez told them to come in as the door was unlocked. The officers opened the apartment door to see broken items on the living room floor and Mr. Martinez holding down his friend to restrain her from "breaking things," as the officer testified. The officers then asked Mr. Martinez for photo identification and whether this was "his" apartment. He showed his identification, which listed the apartment's address—a requirement to be the leaseholder of a public housing unit. He also responded that it was his apartment, and that he lived there with his sister and her child. He told the officers which bedroom was his, and which bedroom was his sister's.

The officers interviewed the friend in the bedroom that Mr. Martinez identified as his for approximately forty minutes. At some point, either while she was questioned at the apartment or after, Mr. Martinez's friend apparently told the officers that he had threatened her with a gun during their argument. Thereafter, she had a psychotic breakdown and was admitted into a hospital psychiatric unit. Based on her allegations, the police officers obtained a search warrant for the apartment where Mr. Martinez's parents had lived.

The NYPD officers searched the apartment for several hours; for the duration, they detained Sarah, her infant, and her boyfriend in the hallway. In the bedroom that Mr. Martinez indicated as his, a bag hung on the

² See N.Y.C. HOUS. AUTH., RESIDENT POLICIES & PROCEDURES, OCCUPANCY AND SUCCESSION (REMAINING FAMILY MEMBER) POLICY OVERVIEW, <http://perma.cc/8TCN-KTLC> (last visited Apr. 12, 2018).

closed closet door. This bag contained a carton of take-out food, which the officer suspected, from the smell of the food, had been placed there very recently by Mr. Martinez. The officer described the closet in which she discovered a “green plastic box” containing over one hundred rounds of ammunition and a gun cleaning kit. The officer did not take a single photograph during her search of the closet. She “forgot to,” as she admitted to the jury.

The closet was full from top to bottom with hanging clothes and large black garbage bags of old items, old purses, and winter clothes. Under a briefcase, there was the green plastic box of ammunition. The green plastic box was not visible until all other items were taken out of the closet. The briefcase sitting on top of the green plastic box was full of old documents. Not a single document had Mr. Martinez’s name or other information on it. The green plastic box and the gun cleaning kit had no usable fingerprints on them to prove that Mr. Martinez had ever touched either of these items. The ammunition was not tested for fingerprints. Even so, any fingerprints were compromised after the officer organized the ammunition without gloves.

During the trial, the prosecution presented an expert witness who testified about the cell-site data for Mr. Martinez’s cell phone during 2015. The expert witness explained that cell-site data could not show the exact location of a person’s cell phone; it could only estimate the location based on distance from the nearest cell towers. Specifically, he explained that this data did not show that Mr. Martinez was in his parents’ apartment. Rather, the data demonstrated that he was in the “general vicinity,” meaning within a few blocks of the apartment building. Although Mr. Martinez had many reasons to be in and near his parents’ apartment in 2015, the government argued that because Mr. Martinez was near the apartment almost daily, he probably lived in this apartment and, thus, likely kept his own personal belongings in this apartment.

The defense counsel presented photographs of the bedroom after the search. These photographs were mostly of large sports jerseys thrown onto the bed. The officer had testified that during her search she saw mostly old sports jerseys, size XXL or larger, hanging in the closet. The defense counsel also presented to the jury some of the sports jerseys that were in these photographs. Mr. Martinez’s aunt testified that these sports jerseys belonged to Mr. Martinez’s father, not Mr. Martinez. The defense counsel also played some of Manuel’s phone calls for the jury. In these calls—intercepted from a city jail—Mr. Martinez’s brother described his gun selling business to the person on the phone. He bragged about how women would go to his parents’ apartment to get guns from his parents’ bedroom closet, and he would sell these guns.

After the NYPD conducted the search and tested various items for fingerprints, the green plastic box of ammunition remained in the police precinct for several months. No one was arrested. There were no suspects, as no one had committed an offense by keeping a box of ammunition in the back of a closet. There was no active case. Eventually, the NYPD referred the case to federal agents since Mr. Martinez had previously been convicted of a felony. Mr. Martinez was charged with possessing ammunition, in violation of 18 U.S.C. § 922(g)(1), the federal “felon in possession” statute.³

After several days of trial, the prosecution summed up its evidence. The prosecution needed to prove that Mr. Martinez knew that this ammunition was in his home and they argued that the evidence showed just that: Mr. Martinez told the police officer that this was his apartment; he had been in the general vicinity of the apartment nearly every day that year; and there was take-out food hanging on the closet door which indicated that he had recently slept in the room. Moreover, the prosecution emphasized, how could Mr. Martinez possibly fail to notice a “green sportsman dry box” in his closet? This type of box would be found on a fishing trip, the prosecutor noted, not in a small apartment in Manhattan.

The defense argued that this evidence in no way established that Mr. Martinez was aware that the ammunition was hidden in the bottom corner of his parents’ bedroom closet: the items in the closet did not belong to Mr. Martinez but rather to his parents; Mr. Martinez inherited the mess that was in his parents’ apartment and never cleaned out the mess, but let his adopted sister live there; there was no physical evidence linking the ammunition to Mr. Martinez; and the box was buried under many other items—it took even the officers several hours to find the box.

The jury deliberated for about a day and a half. When they reached a verdict, Mr. Martinez, his counsel, and the prosecution, reconvened in the courtroom. Mr. Martinez’s aunt fiddled nervously with some rosary beads. The foreperson stood up and read aloud the verdict for the single count of violating 18 U.S.C. § 922(g)(1). “Guilty.” Everyone was stunned. After comforting Mr. Martinez and his crying family members, the defense team went into the hallway to catch the jury members before they left. About five of them agreed to speak.

“How did you all come to this decision?” They explained that they did not think he knew specifically what was in the closet (which is required), but that he should have known *something* was in there. They came to this conclusion after re-reading the judge’s instruction on “knowledge”—one can “know” something if he “deliberately closed his

³ 18 U.S.C. § 922(g)(1) (2018) (stating that possession of a firearm or ammunition by a person convicted by any court is a crime punishable by imprisonment for over one year).

eyes to what would otherwise have been obvious to him.” Also gleaned from the judge’s instructions was the idea of “joint possession.” Mr. Martinez was capable of jointly possessing the items in the closet. They concluded that Mr. Martinez had knowledge—or rather, that he had closed his eyes to the obvious—after hearing the recordings of Manuel talking about storing guns in that same closet. The foreperson stated, “I understand that Mr. Martinez is not his brother’s keeper, but how could he not have thought something, such as guns or bullets, was in that closet if his brother was using it for his gun dealing?”

II. EXAMINING THE “FELON IN POSSESSION” LAWS

Mr. Martinez was found guilty of being a “felon in possession” not because he consciously engaged in illegal conduct, but because he was a dependable son and brother. When Mr. Martinez took legal responsibility of his sister and vowed to provide her with stable housing, he also became legally responsible for the items left behind by his parents. From the perspective of the federal prosecutor’s office, someone needed to be punished for possessing a box of ammunition and solely—by virtue of his previous conviction and living situation—that someone was Mr. Martinez. Unfortunately, given the federal “felon in possession” statute, and courts’ interpretation thereof, Mr. Martinez’s conviction is not at all surprising. Indeed, given his race, and that this alleged offense occurred in a city with a dense population of minorities, convictions and circumstances like that of Mr. Martinez are overwhelmingly typical.

A. Elements of the Crime: “Felon in Possession”

Pursuant to 18 U.S.C. § 922(g)(1), otherwise known as the “felon in possession” law:

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . 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.⁴

This federal offense has many elements, so it is important to begin by explaining what the government must prove to obtain a conviction.

⁴ 18 U.S.C. § 922(g)(1) (2018); *see also* 18 U.S.C. § 921(a)(20) (2018) (“What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter . . .”).

Indeed, what the government *does not need to prove* is quite telling about how courts have broadly interpreted this statute, and other connected statutes, to penalize a wide breadth of conduct.

The government need only prove three elements to convict someone under the “felon in possession” law.⁵ First, the government must prove that the defendant was previously “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.”⁶ “Any court” means any domestic state or federal court, not a foreign one.⁷ The actual sentence that the defendant received for the prior conviction is irrelevant; the only inquiry is “whether the prior conviction could have included a term of imprisonment exceeding one year, i.e., whether the statutory maximum was in excess of one year.”⁸ As the U.S. Supreme Court has held, even a sentence of probation falls under the purview of a qualifying conviction.⁹ Moreover, many circuits have held that the government does not need to prove that the defendant knew he had previously been convicted of a felony.¹⁰ Therefore, defendants who may have been confused about the outcome of a previous criminal case—perhaps because they received a sentence of probation rather than jail or prison time—cannot claim ignorance of the law and avoid a conviction under this statute.¹¹

Second, the government must prove that the defendant knowingly possessed the firearm or ammunition specified in the indictment.¹² The “felon in possession” law states: “Whoever *knowingly* violates [this law] . . . shall be fined as provided in this title, imprisoned not more than 10 years, or both.”¹³ Although a plain reading of this statute implies that a defendant must know that they committed the crime, many circuits have held that possession is the only element for which knowledge is required.¹⁴ Essentially, in regards to the *mens rea*, the government only

⁵ Kevin A. McDonald, Note, *Felon in Possession Sentencing Under the Federal Guidelines, Considering State Sentences*, 36 SETON HALL LEGIS. J. 106, 111 (2011); see also *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir. 1988).

⁶ 18 U.S.C. § 922(g)(1) (2018).

⁷ *Small v. United States*, 544 U.S. 385, 387 (2005) (reversing conviction under § 922(g)(1) where defendant’s felony conviction was imposed by a court in Japan).

⁸ McDonald, *supra* note 5.

⁹ *Dickerson v. New Banner Inst. Inc.*, 460 U.S. 103, 114 (1983) (affirming conviction under § 922(g)(1) for defendant who had successfully served probationary term imposed for conviction of felony punishable by maximum of five-year imprisonment).

¹⁰ *United States v. Games-Perez*, 667 F.3d 1136, 1140-41 (10th Cir. 2012) (citing 18 U.S.C. § 922(g)(1)).

¹¹ *Id.* at 1142.

¹² *United States v. Daniel*, 134 F.3d 1259, 1263 (6th Cir. 1998). Shipping, transporting, and receiving any firearm or ammunition are also proscribed by this statute, but these acts are not the focus of this article. See 18 U.S.C. § 922(a)(1)(A) (2018).

¹³ 18 U.S.C. § 924(a)(2) (2018) (emphasis added).

¹⁴ See *Games-Perez*, 667 F.3d at 1140.

needs to prove that the defendant knowingly possessed an instrument that he knew was a firearm or ammunition.¹⁵

Third, the government must prove that the defendant's possession "was in or affecting interstate commerce."¹⁶ To do so, the government need only demonstrate that the firearm or ammunition "travelled in interstate commerce," which means that the firearm or ammunition "had once crossed a state line."¹⁷ This can be accomplished by establishing that the firearm or ammunition "was manufactured in a state other than that in which it was found."¹⁸ Because *mens rea* does not apply to this element, as discussed above, "a defendant's knowledge or ignorance of the interstate nexus is irrelevant," and, therefore, the government need not prove that the defendant knew the firearm or ammunition he possessed had traveled in interstate commerce.¹⁹

Within the second element of "knowingly possessed," "firearm" and "possession" are sub-elements that must be explained further. To begin, for the purpose of this statute, "firearm" is defined as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive"²⁰ As such, a defendant may be convicted as a "felon in possession" for possessing a firearm that is unloaded and seized without officers ever discovering ammunition to be used with that firearm.²¹ Moreover, in contemplation of the words "which will *or is designed to*," each circuit that has considered the issue of whether an inoperable firearm falls within the statute's definition of a firearm has concluded that it indeed does.²² As the Second Circuit has explained:

Where a weapon designed to fire a projectile is rendered inoperable, whether on purpose or by accident, it is not removed from the

¹⁵ See *id.*; see also *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir. 1988).

¹⁶ *Daniel*, 134 F.3d at 1263.

¹⁷ *United States v. Carter*, 981 F.2d 645, 648 (2d Cir. 1992) (quoting *Scarborough v. United States*, 431 U.S. 563, 567 n.5 (1977)).

¹⁸ *McDonald*, *supra* note 5, at 112 n.49 (citing *United States v. Younger*, 398 F.3d 1179, 1193 (9th Cir. 2005) ("The evidence in this case was undisputed that defendant's guns were manufactured in Massachusetts and found in California. Consequently, . . . the evidence [was] sufficient")).

¹⁹ *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995) (citing *Dancy*, 861 F.2d at 81).

²⁰ 18 U.S.C. § 921(a)(3)(A) (2018).

²¹ See, e.g., *United States v. Sneed*, 742 F.3d 341, 343 (8th Cir. 2014) (affirming sentence for defendant convicted in part for possession of an unloaded firearm found in his car, and where no ammunition was found).

²² *United States v. Rivera*, 415 F.3d 284, 286 (2d Cir. 2005) (emphasis added).

statute’s purview; although it is temporarily incapable of effecting its purpose, it continues to be “designed” to fire a projectile.²³

As such, a defendant who knowingly possesses a non-functioning firearm—and thus cannot cause harm—may nevertheless violate the “felon in possession” statute.

Next, courts have interpreted the statute’s use of “possession” to comprise both “actual” and “constructive” possession.²⁴ As the U.S. Supreme Court explained, “[a]ctual possession exists when a person has direct physical control over a thing,” and “[c]onstructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.”²⁵ Actual or constructive possession is not limited to one person; possession over an item can be joint with two or more people.²⁶ Moreover, the length of time in which the defendant allegedly possesses a firearm or ammunition is irrelevant. As the First Circuit held, “[e]ven if the evidence established only that [the defendant] held the firearm for a few seconds, he could properly be convicted of possession within the meaning of [the statute].”²⁷

Constructive possession encompasses many circumstances. It includes any situation in which another person actually possesses a firearm or ammunition and that person is “willing to give the felon access to [the firearm or ammunition] or to accede to the felon’s instructions about the[] future use [of the firearm or ammunition].”²⁸ Moreover, constructive possession can be established through circumstantial evidence if the defendant exercised dominion and control “over the premises in which the [contraband is] located.”²⁹ Therefore, even if the defendant does not have the means of physical access—such as the key to unlock a padlock or door—to the room/area in which the firearm or ammunition is kept, the court may still find that the defendant constructively possessed the firearm or ammunition if he exercised ownership, dominion, or control over the premises as a whole.³⁰ In fact, some courts have chipped away at the government’s evidentiary burden. The government is merely “required to

²³ *Id.* (citing *United States v. Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993)).

²⁴ *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

²⁵ *Id.*

²⁶ 2A KEVIN F. O’MALLEY, JAY E. GREINIG & HON. WILLIAM C. LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 39:12 (6th ed. 2018).

²⁷ *United States v. Mercado*, 412 F.3d 243, 251 (1st Cir. 2005).

²⁸ *Henderson*, 135 S. Ct. at 1784.

²⁹ *United States v. Dhinsa*, 243 F.3d 635, 676 (2d Cir. 2001) (quoting *United States v. Layne*, 192 F.3d 556, 571 (6th Cir. 1999)).

³⁰ *See, e.g., United States v. Balanga*, 109 F.3d 1299, 1301 (8th Cir. 1997) (affirming conviction for § 922(g)(1) where defendant alleged he did not possess a key to his basement door’s padlock where his brother stored firearms).

show *some nexus* between [the defendant] and the firearms and ammunition.”³¹ As such, “the conviction depends on whether ‘there [is] some evidence supporting *at least a plausible inference* that the defendant had knowledge of and access to the weapon or contraband.’”³²

Finally, and perhaps most disconcertingly, the government may present a theory of “deliberate ignorance” in order to convict a defendant.³³ Constructive possession requires that the defendant must have the power and intent to exercise control over the object, and thus “a defendant must, in fact, know of the [object’s] existence in order to exercise dominion and control over it.”³⁴ As a result, constructive possession requires a “knowing exercise of or the knowing power or right to exercise dominion and control over the [object].”³⁵ Despite this clear law, “conscious avoidance” can be used to show that a defendant constructively possessed a firearm or ammunition; “knowledge of a criminal fact may be established where the defendant consciously avoided learning the fact while aware of a high probability of its existence.”³⁶ Where the facts give rise to such an instruction, most circuits hold that the court give the following model federal jury charge:

In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with (*or* that the defendant’s ignorance was solely and entirely the result of) a conscious purpose to avoid learning the truth . . . , then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken. If you find that the defendant was aware of a high probability that . . . and that the defendant acted with deliberate disregard of the facts, you may find the defendant acted knowingly. However, if you find that the defendant actually believed that . . . , he may not be convicted.³⁷

³¹ United States v. Wilson, 107 F.3d 774, 780 (10th Cir. 1997) (emphasis added).

³² *Id.* (quoting United States v. Mills, 29 F.3d 545, 549 (10th Cir. 1994) (emphasis added)); see United States v. Hampton, 585 F.3d 1033, 1041 (7th Cir. 2009) (“The government must ‘establish a nexus between the accused and the contraband, in order to distinguish the accused from a mere bystander.’”).

³³ See, e.g., United States v. Little, 829 F.3d 1177, 1185 (10th Cir. 2016).

³⁴ United States v. Gonzalez, 71 F.3d 819, 834 (11th Cir. 1996).

³⁵ United States v. Mieres-Borges, 919 F.2d 652, 657 (11th Cir. 1990) (quoting United States v. Poole, 878 F.2d 1389, 1392 (11th Cir. 1989)).

³⁶ United States v. Sicignano, 78 F.3d 69, 71 (2d Cir. 1996).

³⁷ 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL ¶ 3A.01 3A-2 (Matthew Bender 2012).

Therefore, “knowing exercise of or the knowing power or right to exercise dominion and control over the [object]” can be proven if the defendant consciously avoided learning the truth about the existence of an object over which he possibly could have exercised dominion and control, had he not consciously avoided learning the truth about the existence of that object.³⁸

B. What These Laws Seek to Prevent and Punish: Criminalizing the Status of Being a Felon, Rather Than Harmful Action

The first federal statute preventing felons from possessing firearms was enacted in 1938, under the Federal Firearms Act.³⁹ It prohibited the possession of a firearm or ammunition by any person who had been convicted of a “crime of violence” or was a “fugitive from justice.”⁴⁰ A “crime of violence” was demarcated within this Act by several specific offenses, such as murder, manslaughter, rape, kidnapping, and assault with intent to kill, rape, or rob.⁴¹

The Federal Firearms Act was amended in 1968 and replaced with the Gun Control Act⁴²—which includes the “felon in possession” statute as it exists today. The “history of the 1968 Act reflects a similar concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons.”⁴³ In enacting this Act, Congress explicitly noted that those previously convicted of a felony “may not be trusted to possess a firearm without becoming a threat to society.”⁴⁴ The assumption is:

[P]ossession of a gun gives rise to *some* risk that the gun may be used in an act of violence. By definition, without possessing a gun, one cannot use a gun for the commission of a violent act; with a gun, one can. Possession of a gun greatly increases one’s ability to inflict harm on others and therefore involves some risk of violence.⁴⁵

³⁸ See *Mieres-Borges*, 919 F.2d at 657 (quoting *Poole*, 878 F.2d at 1392).

³⁹ Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 113 (2013) (citing Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (repealed 1968)).

⁴⁰ Federal Firearms Act of 1938, Pub. L. No. 75-785, § 2, 52 Stat. 1250, 1251 (repealed 1968).

⁴¹ *Id.* at 1250.

⁴² Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 26 U.S.C.).

⁴³ *Barrett v. United States*, 423 U.S. 212, 220 (1976).

⁴⁴ *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (quoting 114 CONG. REC. 13,868, 14,773 (1968)).

⁴⁵ *United States v. Dillard*, 214 F.3d 88, 93 (2d Cir. 2000)(emphasis in original).

Based on the assumptions underlying the “felon in possession” statute, it is clear that this statute criminalizes a possibility of harm rather than actual harm.⁴⁶ Consequently, the statute “serve[s] as a means of regulating dangerous products,” and presumptively dangerous persons, “just as much as (if not more so than) dangerous conduct.”⁴⁷ By regulating the simple possession of potentially “dangerous products” within only a distinct group of people, i.e., those who have previously been convicted of a felony, the statute proscribes a “status offense” rather than an “action crime.”⁴⁸ A “status offense” is “[a] crime of which a person is guilty by being in a certain condition or of a specific character.”⁴⁹ Those previously convicted of a felony—regardless of the underlying violent or non-violent conduct of that felon—are categorically considered a threat for the rest of their lives. Their status of being a criminal in turn makes otherwise lawful acts (like possessing a firearm or ammunition) unlawful.

Moreover, the “felon in possession” statute is in essence a strict liability crime.⁵⁰ This offense penalizes the alleged possessor’s status as a felon by criminalizing his presence in a home in which a firearm or ammunition is found.⁵¹ Although the government must prove that the defendant “knowingly” possessed the firearm or ammunition,⁵² this purported knowledge is assumed where the government demonstrates “*some nexus* between [the defendant] and the firearms and ammunition,”⁵³ as discussed above. This nexus, which establishes constructive possession, is most commonly proven by a defendant’s residency.⁵⁴ As long as the government can show that the defendant resided in, or at some point “occupied,” the home in which the firearm or ammunition is found, the government need not prove any knowledge on the defendant’s part that the firearm or ammunition was stored in the home.⁵⁵ For example, “documents, receipts, photographs, and identification cards bearing [the defendant’s] likeness and name” found in plain view during a search will provide sufficient evidence for constructive possession of a “handgun

⁴⁶ Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2205 (2016).

⁴⁷ *Id.* at 2214.

⁴⁸ Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 920 (2001); *see also* United States v. Leviner, 31 F. Supp. 2d 23, 26 n.5 (D. Mass. 1998).

⁴⁹ *Status Crime*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵⁰ *See* Dubber, *supra* note 48, at 859.

⁵¹ *See, e.g.*, United States v. Shorter, 328 F.3d 167, 172 (4th Cir. 2003).

⁵² *See, e.g.*, United States v. Games-Perez, 667 F.3d 1136, 1140 (10th Cir. 2012).

⁵³ United States v. Wilson, 107 F.3d 774, 780 (10th Cir. 1997) (emphasis added).

⁵⁴ *See, e.g.*, Shorter, 328 F.3d at 172; United States v. Surratt, 172 F.3d 559, 564 (8th Cir. 1999).

⁵⁵ *See Shorter*, 328 F.3d at 171-72.

[found] inside a hall closet, concealed in a car battery having a false lid.”⁵⁶ Similarly, a single “bill addressed to [the defendant] at the apartment,” where he presumably lived with his wife, is sufficient to link the defendant to the residence, and thus sufficient to prove constructive possession of a “pistol in a bedside table and a shotgun in a box in the kitchen pantry.”⁵⁷

In some cases, persons previously convicted of a crime will be convicted under the “felon in possession” statute for having a connection to the residence, even where their residency or occupation of the premises is not proven.⁵⁸ Therefore, this offense penalizes the alleged possessor’s status as a felon by criminalizing his relationship with those who live in the home in which a firearm or ammunition is found. In *United States v. Spruill*, the Second Circuit held that there was sufficient evidence to convict the defendant under the “felon in possession” statute.⁵⁹ The government proved that the defendant “regularly stored his belongings in the attic; that additional garbage bags were found in the attic containing [his] clothing; and that nearby garbage bags were found in the attic containing a bulletproof vest, three handguns, and four boxes of ammunition.”⁶⁰ Although the attic was in the building where the defendant’s girlfriend lived, and not the defendant, the court found that based on this evidence of garbage bags only, “a rational trier of fact [could] find beyond a reasonable doubt that [the defendant] had the power and intention to exercise dominion and control over the firearms found in the attic.”⁶¹ In another Second Circuit case, the defendant’s conviction was affirmed, even though the “dismantled .38 caliber revolver and three live .38 caliber bullets” were found in “a bag on top of a dresser” in the defendant’s mother’s home, and the defendant’s mother testified that the firearm belonged to her.⁶² Constructive possession was based on the defendant’s testimony that “he told the police his mother owned a revolver so as to cooperate with the investigation,” and his mother’s testimony that the defendant occasionally spent the night at her home.⁶³

⁵⁶ See *Surratt*, 172 F.3d at 562.

⁵⁷ See *Shorter*, 328 F.3d at 171.

⁵⁸ See, e.g., *United States v. Spruill*, 634 F. App’x. 312, 314 (2d Cir. 2015) (summary order), *cert. denied*, 137 S. Ct. 407 (2016); *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

⁵⁹ See *Spruill*, 634 F. App’x. at 314.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *Payton*, 159 F.3d at 53-54.

⁶³ See *id.* at 54. Additionally, the defendant testified that he lived with “his wife and children, and that he was only visiting [his mother’s home] on the night of the search.” *Id.*

As exhibited, persons who have previously been convicted of a felony are assumed to pose a risk to others and to be engaging in criminal activity just by their status and “nexus” with a firearm and/or ammunition.⁶⁴ Mere possession of a firearm or ammunition—especially of ammunition on its own or inoperable firearms—presents harm to no one, but is treated as presenting a harm to others because of the criminal history of the person who allegedly possesses the item. Puzzlingly, other federal statutes criminalize the *sale or transportation*, by persons other than licensed dealers, of inherently dangerous weapons, but not the *mere possession* of such weapons.⁶⁵ These weapons are those which have no purpose other than to cause great injury or death to others: destructive devices, machine guns, short-barreled shotguns, and short-barreled rifles.⁶⁶ Because mere possession encompasses such a broad range of conduct—much more than the sale or transportation of a weapon—these inherently dangerous weapons statutes underscore the paradox of the “felon in possession” statute: there is a hyper-concern for the passive and harmless conduct of felons, but a decreased concern for the intrinsically violent conduct of non-felons.

Finally, the fact that the “felon in possession” statute criminalizes merely a status rather than a harmful action is blatantly emphasized by the mandatory minimums of imprisonment imposed for offenses during which a firearm is present. Pursuant to the federal criminal code that sets out the penalties for each offense, there is a five-year mandatory minimum when the defendant possesses a firearm in furtherance of a crime of violence or drug trafficking, a seven-year mandatory minimum if the firearm is “brandished” during such a crime, and a ten-year mandatory minimum if the firearm is “discharged.”⁶⁷ Any person sentenced under this provision a “second or subsequent” time faces a mandatory minimum of

⁶⁴ See *United States v. Wilson*, 107 F.3d 774, 780 (10th Cir. 1997).

⁶⁵ 18 U.S.C. § 922(a)(4) (2018) makes it unlawful for “any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun, . . . short-barreled shotgun, or short-barreled rifle . . .” Under 18 U.S.C. § 922(b)(4) (2018), it is also unlawful for “any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . to any person any destructive device, machinegun, . . . short-barreled shotgun, or short-barreled rifle . . .”

⁶⁶ 18 U.S.C. §§ 922(a)(4), 922(b)(4).

⁶⁷ 18 U.S.C. § 924(c)(1)(A) (2018). The interpretation of how one “uses,” “carries,” or possesses “in furtherance of any such crime” a firearm under 18 U.S.C. § 924(c)(1)(A) is not universally defined. The U.S. Supreme Court and many courts of appeals have addressed the definitions of these actions under certain circumstances, and there is not a single approach. See, e.g., *Bailey v. United States*, 516 U.S. 137, 138-39 (1995); *United States v. Henry*, 819 F.3d 856, 865 (6th Cir. 2016); *United States v. Gurka*, 605 F.3d 40, 44 (1st Cir. 2010). However, while the interpretation of this statute certainly affects the sentencing of a “felon in possession,” a further discussion of the various interpretations is outside the purview of this paper.

twenty-five years' imprisonment, regardless of how the firearm is used, i.e., possessed, brandished, or discharged.⁶⁸ As for the inherently dangerous weapons discussed above, any person sentenced under this provision who possessed "a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon," faces a mandatory minimum of ten years' imprisonment, and if the person possessed instead a "machinegun or a destructive device," he faces a mandatory minimum of thirty years' imprisonment.⁶⁹ Where the person is convicted under this provision a "second or subsequent" time and possessed a "machinegun or a destructive device," he will be sentenced to imprisonment for life.⁷⁰

Thus, a person previously convicted of a felony who uses or possesses a firearm to commit or during the commission of "a crime of violence or drug trafficking crime" is not only subject to conviction and the associated punishment under the "felon in possession" statute, but also faces a mandatory minimum of five, seven, or ten years' imprisonment for the use of that firearm.⁷¹ If he uses an inherently dangerous weapon, these mandatory minimums are even greater. If the fear is that persons previously convicted of a felony are more dangerous than others, and even more dangerous when able to possess a firearm and/or ammunition, or when in the presence of a firearm and/or ammunition, then the mandatory minimums provided under the federal criminal code sufficiently address this fear and deter possibly harmful conduct.

III. UNEQUAL AND RACIALLY DISPROPORTIONATE CRIME CONTROL EFFORTS AND ENFORCEMENT OF "FELON IN POSSESSION" LAWS

A. Those Previously Convicted of a Felony are Disproportionately Black

The "felon in possession" statute only applies to those previously convicted of a felony in any domestic court.⁷² On its face, this law is clearly race-neutral. However, when analyzing the rates at which Blacks are arrested, prosecuted, and convicted of felony offenses, in comparison to those of whites, it is apparent that this law disparately affects Black populations.

The United States has the highest per capita prison population in the world.⁷³ Black males are overrepresented in the prison population, which

⁶⁸ 18 U.S.C. § 924(c)(1)(C)(i).

⁶⁹ *Id.* at § 924(c)(1)(B).

⁷⁰ *Id.* at § 924(c)(1)(C)(ii).

⁷¹ *Id.* at § 924(c)(1)(A).

⁷² See *Small v. United States*, 544 U.S. 385, 394 (2005).

⁷³ See ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (2013), <https://perma.cc/TK22-2CL2>. There are currently over 2.2 million people incarcerated in the United States. *Id.*

is disproportionate to the percentage of Blacks in the general population.⁷⁴ To clarify, prisons, rather than jails, are typically facilities in which persons convicted of felonies spend their term of incarceration.⁷⁵ Since 1850, when the first prison statistics were published, it has been evident that Blacks are overrepresented in state and federal prisons.⁷⁶ Despite the low general national population, “the combined percentage of . . . [B]lacks and other minority groups incarcerated by the criminal justice system has ranged between 40% and 50% of all inmates present.”⁷⁷ For example, in 1923, not long before the federal “felon in possession” law was enacted, people who are Black made up only 10% of the national population, but 31% of the national prison population; this same year, whites made up nearly 90% of the general population, but only 68% of the national prison population.⁷⁸

Over the years, the Black prison population has steadily increased at a faster rate than their proportion of the general population, while the white prison population has decreased more in line with their slow decrease in the general population.⁷⁹ The Black prison population had risen from 31% in 1923 to 34% by 1950, while Blacks as a portion of the general population remained around 10%; over the same period, the white prison population decreased from 68% to 65% while white people remained at about 90% of the general prison population.⁸⁰ Ten years later, by 1960, the Black prison population had risen, yet again, to 37%, while their representation of the general population only rose to 10.5%.⁸¹ In that decade, the white prison population decreased to 61%, but the general white population decreased by a little over one percent to 88.6%.⁸² With the rising levels of incarcerated Blacks in the 1960s, the federal govern-

⁷⁴ See Janice Williams, *White Men Vs. Black Men Prison Statistics 2016: Why Are More African American Males Incarcerated?*, INT’L BUS. TIMES (Oct. 5, 2016, 11:41 AM), <https://perma.cc/8EPP-NWXR>.

⁷⁵ See *FAQ Detail: What Is the Difference Between Jails and Prisons?*, BUREAU JUSTICE STAT., <https://perma.cc/U5JN-F7QJ> (last visited May 18, 2018).

⁷⁶ Robert Johnson, Ania Dobrzanska & Seri Palla, *The American Prison in Historical Perspective: Race, Gender, and Adjustment*, in *PRISONS: TODAY AND TOMORROW* 23 (Joycelyn M. Pollock ed., 2005), <https://perma.cc/DJ8F-JNMW>; see also MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984* 92 (1986), <https://perma.cc/A2DK-EXJ3>.

⁷⁷ Johnson, Dobrzanska & Palla, *supra* note 76, at 23.

⁷⁸ See CAHALAN, *supra* note 76, at 64; see also FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, *DEMOGRAPHIC TRENDS IN THE 20TH CENTURY: CENSUS 2000 SPECIAL REPORTS* 77 (2002), <https://perma.cc/3BJB-MEK3>.

⁷⁹ See CAHALAN, *supra* note 76, at 64; see also HOBBS & STOOPS, *supra* note 78, at 77.

⁸⁰ See CAHALAN, *supra* note 76, at 65; see also HOBBS & STOOPS, *supra* note 78, at 77.

⁸¹ See CAHALAN, *supra* note 76, at 65; see also HOBBS & STOOPS, *supra* note 78, at 77.

⁸² See CAHALAN, *supra* note 76, at 65; see also HOBBS & STOOPS, *supra* note 78, at 77.

ment passed the Gun Control Act of 1968—a harsher “felon in possession” law compared to its predecessor—the Federal Firearms Act of 1938.⁸³

This disproportionate rate of incarceration of Blacks has continued in the last half century and continues today. In 2015, approximately 13.3% of the national population was Black, but the national state prison population consisted of 38% Black male inmates.⁸⁴ The federal prison population of Black inmates was nearly the same at 37.8%.⁸⁵ In the same year, white males made up approximately 77% of the national population, and the national white population in state prisons was less than that of the national Black population in state prisons at 35%.⁸⁶ The federal prison population of white inmates was slightly higher at 58.7%.⁸⁷ Overall, it is estimated that Blacks are five times more likely than whites to be incarcerated in a prison at some point in their lives.⁸⁸

Imprisonment rates for drug charges are even more imbalanced. In 2003, for example, Blacks comprised approximately 12% of the national population, and 14% of drug users and sellers, as reported on national household surveys.⁸⁹ In the same year, 34% of those arrested for drug offenses were Black, and 45% of the national state prison population serving a period of incarceration for a drug offense were Black.⁹⁰ As such, Black men were about twelve times more likely to serve a period of imprisonment for a felony drug offense than white men.⁹¹ Clearly, Blacks—and Black men in particular—are much more likely to have been convicted of a felony than whites.

B. Federally Endorsed Disparate Treatment of Black Communities

The pre-existing disproportionate numbers of Blacks who have been convicted of a felony translates into similarly disproportionate numbers of Blacks who are convicted under the federal “felon in possession” law. For example, in fiscal year 2015, 51% of all persons convicted under the

⁸³ See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (prohibiting all convicted felons, drug users and mentally ill people from buying guns, raising the age to purchase drugs to 21, and expanding licensing requirements). *Cf.* Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (prohibiting only people under indictment and convicted of crimes of violence from buying guns and requiring gun dealers to record their sales).

⁸⁴ Williams, *supra* note 74.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Marc Mauer & David Cole, *Five Myths About Incarceration*, WASH. POST (June 17, 2011), <http://perma.cc/GXX4-E9J8>.

⁹⁰ *Id.*

⁹¹ *Id.*

law were Black, while only 26.1% were white.⁹² However, the disproportionate rates at which Blacks are convicted of felonies—and thus susceptible to a “felon in possession” charge—are only a small component of why Blacks are disparately affected by federal “felon in possession” laws.

Federal programs have existed for twenty-six years to ensure the most aggressive enforcement of gun laws and have been set up to systemically target Black communities.⁹³ All states have their own penal law similar to the federal “felon in possession” statute.⁹⁴ In 1991, the Attorney General of the Bush Sr. Administration announced “Project Triggerlock.”⁹⁵ Under this program, the U.S. Attorneys’ offices allocated additional resources to prosecute gun offenses with local law enforcement agencies.⁹⁶ The program primarily focused on the enforcement of the federal “felon in possession” law.⁹⁷ The program was implemented in just several jurisdictions within the country.⁹⁸ The Criminal Division of the U.S. Department of Justice directed the U.S. Attorney from each district to create a task force between federal, state, and local representatives to establish and develop an enforcement strategy.⁹⁹

The U.S. Attorneys’ offices collaborated with local police departments to prosecute offenders brought in by police officers in federal court, where the offenders “would face ‘the full force of federal sentences with a commitment to no plea bargaining.’”¹⁰⁰ The intended goal was to “protect the public by putting the most dangerous offenders in prison for as long as the law allows.”¹⁰¹ Indeed, federal sentences for gun offenses, such as 18 U.S.C. § 922(g)(1) or the “felon in possession” statute, are

⁹² U.S. SENTENCING COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1, <http://perma.cc/8QKA-RH26>. Of all persons convicted of this offense, 98.4% were male. *Id.*

⁹³ See Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 305 (2007).

⁹⁴ Professor Gardner reported in her 2007 article *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, that all states except Vermont have laws prohibiting persons previously convicted of a felony from possessing a firearm. *Id.* at 314. In 2015, Vermont passed a bill that makes firearm possession a misdemeanor by a person previously convicted of a violent or drug trafficking felony. See Morgan True, *Senate OKs Bill That Prohibits Certain Criminals from Owning Guns*, VTDIGGER (Mar. 25, 2015), <https://perma.cc/LY7W-R6AG>.

⁹⁵ Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 374 (2001).

⁹⁶ *Id.* at 374-75.

⁹⁷ David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1440 (2011).

⁹⁸ Gardner, *supra* note 93, at 309.

⁹⁹ Richman, *supra* note 95, at 374-75.

¹⁰⁰ See *id.* at 374 (quoting AP, *Thornburgh Orders Drive on Gun Violence*, N.Y. TIMES (Mar. 27, 1991), <http://perma.cc/4E6G-55MK>).

¹⁰¹ See *id.* (citation omitted).

more severe, resulting in terms of incarceration far longer than their state counterparts.¹⁰² Within the first six months of project Triggerlock's announcement, over 2,600 defendants were charged under the federal "felon in possession" law nationwide.¹⁰³

Based on the concept and perceived successes of Project Triggerlock, the U.S. Attorney of the Eastern District of Virginia began its own sub-project, Project Exile, in 1997.¹⁰⁴ The U.S. Attorney was determined to prosecute "all felons with guns," so that these offenders would be held without bail under federal bond statutes, subjected to lengthier incarceration terms under federal law, and "'exiled' to federal prison," rather than be able to serve time closer to their communities.¹⁰⁵ Similar to Project Triggerlock, local police departments in the Eastern District of Virginia would review the firearm possession crimes and determine whether the conduct violated a federal crime, mainly the "felon in possession" statute and the statute that criminalizes the possession of a firearm during a crime of violence or drug trafficking.¹⁰⁶ If the conduct allegedly violated federal law, the police department would refer the case to the United States Attorney for the Eastern District of Virginia.¹⁰⁷ Essentially, a state police officer was initially responsible for informing federal prosecutorial officials, and then the case would be diverted from state to federal court, subject to the United States Attorney's review and discretion.¹⁰⁸ After two years of the project's implementation, the district had obtained 302 "felon in possession" convictions.¹⁰⁹ Additionally, the average incarceration sentences were over fifty-three months, or at least four and a half years.¹¹⁰

Project Exile's extreme racial disparities in federal prosecution was clearly discussed in *United States v. Jones* by a three-judge panel of the Eastern District of Virginia court.¹¹¹ In 1998, Chad Ramon Jones, a Black resident of Richmond, Virginia, was charged in state court for violating several state criminal laws.¹¹² However, Mr. Jones's case was transferred to federal court as a result of Project Exile.¹¹³ Mr. Jones moved to dismiss the indictment based on the argument, *inter alia*, that Project Exile resulted in selective federal prosecution based on race and thus violated his

¹⁰² Patton, *supra* note 97, at 1440, 1442.

¹⁰³ See Richman, *supra* note 95, at 375.

¹⁰⁴ See Gardner, *supra* note 93, at 309.

¹⁰⁵ See *id.* at 309-10 (citation omitted).

¹⁰⁶ *United States v. Jones*, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999).

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* at 311-12.

¹⁰⁹ Gardner, *supra* note 93, at 310.

¹¹⁰ *Id.*

¹¹¹ See *Jones*, 36 F. Supp. 2d at 311-13.

¹¹² *Id.* at 306-07.

¹¹³ *Id.* at 307.

due process rights under the Fifth Amendment of the U.S. Constitution.¹¹⁴ “Constrained by equal protection and selective prosecution case law,”¹¹⁵ the court ultimately denied Mr. Jones’ motion to dismiss. The court nevertheless “t[ook] th[e] opportunity to express . . . concern about the discretion afforded individuals who divert cases from state to federal court for prosecution under Project Exile.”¹¹⁶ The court stated, “[t]he inability of the prosecutors to explain the procedure clearly is disquieting and casts some doubt on the assertion that race places no role in deciding whether a particular case is to be federally prosecuted.”¹¹⁷ Moreover, the court explained the resulting racial disparities of federal prosecution:

Prosecutors have implemented Project Exile in Richmond and Norfolk [T]he population of each [city] is substantially African-American. In these areas, federal firearms statutes are aggressively enforced. The same statutes, however, are rarely enforced in more rural areas of the [same district]. This geographic variance means that defendants charged with firearms offenses in outlying areas of the [district], who are more likely to be Caucasian, evade federal prosecution . . . [for] identical conduct. Additionally, the record is that approximately *ninety percent* of the Project Exile defendants are African-American. Accordingly, there is *little doubt* that Project Exile has a disparate impact on African-American defendants.¹¹⁸

Although the court found that there was a disparate impact on Black defendants, it stated that it was “unwilling to ascribe an unconstitutional intent to those responsible for Project Exile absent clear evidence of a racially discriminatory intent.”¹¹⁹

Despite the justices’ unambiguous concerns regarding Project Exile, the project continued, and was supported by both Democrats and Republicans.¹²⁰ In 1999, the same year that *United States v. Jones* was decided, the National Rifle Association (“NRA”) contributed \$125,000 to adver-

¹¹⁴ See Gardner, *supra* note 93, at 311.

¹¹⁵ *Id.*

¹¹⁶ *Jones*, 36 F. Supp. 2d at 311.

¹¹⁷ *Id.* at 311 n.9.

¹¹⁸ *Id.* at 312 (emphasis added).

¹¹⁹ *Id.* at 313.

¹²⁰ Gardner, *supra* note 93, at 310. Project Triggerlock continued despite the change in presidential administration. Under the Clinton Administration, the federal program “remained ‘in full force,’” and in fact was explained to be “an ‘important component’ of the Anti-Violent Crime Initiative,” which was announced in 1994. Richman, *supra* note 95, at 375-76 (quoting *Prosecution of Federal Gun Crimes: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Judiciary Comm.*, 103d Cong. 4 (1994)).

tise for Project Exile and the NRA's President applauded the federal prosecutors during hearings on the project.¹²¹ NRA opponents and gun control advocates also supported the project.¹²² Between 1991 and 2001, while Project Triggerlock and Project Exile were enforced, federal prosecutions under the "felon in possession" law doubled.¹²³ The projects were deemed successes and were the "footprint" for today's national program, "Project Safe Neighborhoods."¹²⁴

Project Safe Neighborhoods started in May 2001 under the Bush Jr. Administration.¹²⁵ The Administration allocated more than \$900 million for the first three years of the program, primarily to hire additional Assistant U.S. Attorneys and ATF agents (agents of the Justice Department's Bureau of Alcohol, Tobacco, Firearms and Explosives).¹²⁶ The national federal firearm prosecutions increased by approximately 73% from 2000 to 2005.¹²⁷

Project Safe Neighborhoods, much like Project Exile, as determined in *United States v. Jones*, targets Black communities and disparately impacts Black defendants.¹²⁸ This disparate impact is evidenced by two practices: the targeted implementation of this project in certain jurisdictional districts, and the federal prosecutors' imbalanced exercise of their discretion to remove cases from state court and to indict under the might of federal law. First, the districts in which this project is implemented are disproportionately Black.¹²⁹ More than half of the national Black population lives in thirty metropolitan areas.¹³⁰ Project Safe Neighborhoods targets every single one of these thirty metropolitan areas, which have the largest Black populations of all metropolitan areas.¹³¹ Moreover, of the fifty-four cities with populations exceeding 100,000—where African Americans make up 30% or more of the population—Project Safe Neighborhoods focuses on at least forty-four of those communities.¹³² Of these

¹²¹ Gardner, *supra* note 93, at 310.

¹²² *See id.*

¹²³ Patton, *supra* note 97, at 1441.

¹²⁴ Gardner, *supra* note 93, at 311.

¹²⁵ *Id.*

¹²⁶ *Id.*; see also *About the Bureau of Alcohol, Tobacco, Firearms and Explosives*, ATF BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://perma.cc/FK4Y-GHKG> (last visited May 18, 2018).

¹²⁷ Gardner, *supra* note 93, at 311.

¹²⁸ *United States v. Jones*, 36 F. Supp. 2d 304, 312 (E.D. Va. 1999).

¹²⁹ Gardner, *supra* note 93, at 316.

¹³⁰ *See id.* (citing DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 62 (1993)).

¹³¹ *Id.*

¹³² *Id.*

metropolitan areas, people who are Black make up 30% or more of the population, but make up less than 14% of the national population.¹³³

Second, defendants whose cases are removed from state court are disproportionately Black as well.¹³⁴ For example, in the Eastern District of Michigan, nearly 90% of defendants prosecuted under federal law through Project Safe Neighborhoods are Black.¹³⁵ Over 80% of defendants prosecuted under federal law through Project Safe Neighborhoods in the Southern District of New York are Black.¹³⁶ Under Cincinnati's Project Safe Neighborhood's initiative, over 90% of all defendants are Black.¹³⁷ Despite numerous cases in many of these targeted districts, in which defendants raise arguments of selective prosecution resulting from Project Safe Neighborhoods, these defendants do not see relief.¹³⁸ The nationwide pursuit to prosecute these offenses under the clout of federal law continues, and the harsh sentences are imposed, as the Project guarantees.¹³⁹

IV. HOW WE GOT HERE: THE RACIALLY-MOTIVATED HISTORY OF GUN LAWS AND CRIME CONTROL

A. The Early History of Disarming Blacks

In the context of the social and legal history of the United States, it is not surprising that federal gun control laws are overbroad, criminalize even innocent behavior, and are disparately enforced against Black communities. Indeed, since the first colonists set foot on the New World, fire-arm and weapon control laws were enacted to suppress the enslaved and free Black populations.¹⁴⁰

¹³³ *Id.*

¹³⁴ *Id.* at 316-17.

¹³⁵ Gardner, *supra* note 93, at 317 (citing *Hubbard v. United States*, No. Crim. 04-80321, 2006 WL 1374047, at *2 (E.D. Mich. May 17, 2006) (“Of the 61 defendants prosecuted under the program, 54 were African-American, 2 were Native American, 3 were Hispanic or Latino, and 2 were Caucasian.”)).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See id.* at 344-45; *see, e.g., United States v. Thorpe*, 471 F.3d 652 (6th Cir. 2006) (reversing lower court's decision to grant defendant's motion for discovery of documents relating to Project Safe Neighborhoods and reinstating defendant's indictment under § 922(g)(1)).

¹³⁹ In fiscal year 2015, of those convicted solely under the “felon in possession” statute, the average sentence of imprisonment was sixty-one months. U.S. SENTENCING COMM'N, *supra* note 92, at 2. Of those convicted solely under the “felon in possession” statute and sentenced with three previous convictions for a violent felony or a serious drug offense, the average sentence of imprisonment was one hundred and ninety-one months, approximately sixteen years. *Id.*

¹⁴⁰ *See* MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 8 (2014).

The Second Amendment of the U.S. Constitution was interpreted to confer upon individuals the right to keep and bear arms,¹⁴¹ “arms” meaning weapons, including firearms.¹⁴² However, this amendment was never intended or construed—until the passing of the Fourteenth Amendment—to confer a right onto Blacks.¹⁴³ U.S. Supreme Court Justice Roger B. Taney unequivocally stated in 1857 how the Court, the states, and the majority of people at the time understood the rights of people who were Black under the Constitution and summarized the common fear of the supposed chaos that would result were rights provided.¹⁴⁴ Justice Taney wrote:

[Were the Constitution interpreted to include Blacks within the meaning of citizens or the people,] [i]t would give to persons of the negro race . . . the full liberty of speech in public and in private . . . ; to hold public meetings upon political affairs, and *to keep and carry arms* wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.¹⁴⁵

“A well regulated Militia,” for which people should have the right to “keep and bear Arms,” has always existed in this nation.¹⁴⁶ Given the laws and political philosophy in England, which deemed the “natural right of resistance and self-preservation” a primary right,¹⁴⁷ colonists formed militias as soon as they arrived in the New World.¹⁴⁸ The colonists, specifically white male landowners, strongly believed that militia service was a duty within their civic responsibilities.¹⁴⁹ As such, all free men were automatically enlisted at the age of sixteen and were thereafter required to own a suitable gun and report to military duty when called by the colonial

¹⁴¹ *District of Columbia v. Heller*, 554 U.S. 570, 581, 595 (2008). The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

¹⁴² *District of Columbia*, 554 U.S. at 581.

¹⁴³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416-17 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ *See* U.S. CONST. amend. II.

¹⁴⁷ Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 323 (1991) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143-44 (1st ed. 1765)).

¹⁴⁸ WALDMAN, *supra* note 140, at 8.

¹⁴⁹ *Id.* at 7.

governments.¹⁵⁰ Initially, militias were viewed as necessary to protect against Native Americans.¹⁵¹ Native Americans frequently attacked the settlers for possessing and taking ownership over their land, and in some instances to free enslaved Native Americans.¹⁵² Only twenty African slaves were first brought to Virginia in 1619; therefore, this group was not perceived as a threat.¹⁵³ However, this number rapidly increased within the next few decades and, with it, the perceived need to control people who were Black via militia force and law.¹⁵⁴

Both Northern and Southern colonial governments were greatly concerned with fighting off Native Americans, but they had a competing concern: an armed and trained Black population. For example, in Massachusetts, freed slaves were prohibited from participating in militia drills, and instead were required to perform alternative service on public works projects.¹⁵⁵ In New Jersey, Blacks were excused from compulsory militia service.¹⁵⁶ These colonies, however, did not expressly prohibit Blacks from being armed.¹⁵⁷ In New York, a law passed in 1683 was even harsher; not only were Blacks and Native Americans prohibited from owning guns, but they were also prohibited from assembling in groups larger than four people.¹⁵⁸ These laws were enforced by the militias that were organized by the colonial governments.¹⁵⁹

In the Southern colonies, there was an even greater concern regarding Blacks' access to arms. Because the Southern colonies had a larger Black population, the majority of which was enslaved, colonial governments and individual plantation owners feared slave rebellions.¹⁶⁰ As such, the Southern colonies ensured by law that Blacks were disarmed.¹⁶¹ In Virginia, for example, a statute enacted in 1680 prohibited all Blacks, free or enslaved, from possessing any type of weapon.¹⁶² Moreover, militias not only performed traditional military duties, but were also required to serve as patrollers who "ke[pt] order" within the slave populations.¹⁶³

¹⁵⁰ *Id.* at 8.

¹⁵¹ *See id.*

¹⁵² *See* Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1369 (1993).

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ Cottrol & Diamond, *supra* note 147, at 325-26 (citing LORENZO JOHNSTON GREENE, *THE NEGRO IN COLONIAL ENGLAND* 127 (1968)).

¹⁵⁶ *Id.* at 326.

¹⁵⁷ *See id.* 325-26.

¹⁵⁸ Bogus, *supra* note 152, at 1370 n.31.

¹⁵⁹ WALDMAN, *supra* note 140, at 8.

¹⁶⁰ *See* Cottrol & Diamond, *supra* note 147, at 326 n.67.

¹⁶¹ *Id.*

¹⁶² *Id.* at 325.

¹⁶³ *Id.* at 324.

By law, militia detachments would report to patrol the slave plantations and living quarters.¹⁶⁴ The militia and the slave patrol system were one organization.¹⁶⁵

During the early 1700s, laws in both the Northern and Southern colonies were enacted to further neutralize the possible threat of armed Blacks. For example, in Boston, a city with a strong militia presence to protect against the “near neighborhood of [Native Americans] and French,”¹⁶⁶ enacted an ordinance that prohibited all Blacks, people who were multiracial, and Native Americans from carrying any weapons, meeting in groups larger than two people, and “from being on the streets from one hour after sundown until one hour before sunrise.”¹⁶⁷ In South Carolina, slave owners were mandated by law to search the living quarters of slaves every fourteen days for weapons.¹⁶⁸

After the Revolutionary War, Congress ratified the Constitution, but without the Bill of Rights, which included the Second Amendment.¹⁶⁹ Article I, section 8 granted certain powers to Congress, including the power to regulate a federal army and the state militias.¹⁷⁰ The Framers set forth a dual system of state and federal government to regulate armed forces.¹⁷¹ Each of the thirteen states would retain their right to maintain a militia, and their citizens would have the right to bear arms in the service of the militia.¹⁷² But, at the same time, the federal government could also call upon the militias for federal service and set the terms for how the militias were trained and armed.¹⁷³

Although the Constitution was ratified, many delegates were very concerned about the power that the federal government held over the state militias.¹⁷⁴ Delegates feared that the federal government could use the Army as an oppressive force, and that the less equipped militias would be unable to protect the freedom of the states.¹⁷⁵ Southern delegates feared what could result in a weaker militia system—indeed, the militias had prevented slave revolts and maintained the slavery institution.¹⁷⁶ Delegate

¹⁶⁴ Bogus, *supra* note 152, at 1371 n.39.

¹⁶⁵ *See id.*

¹⁶⁶ WALDMAN, *supra* note 140, at 8.

¹⁶⁷ Bogus, *supra* note 152, at 1370 (citing A. LEON HIGGINBOTHAM, JR., RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 76 (1978)).

¹⁶⁸ *Id.* n.31 (citing HIGGINBOTHAM, *supra* note 167, at 184).

¹⁶⁹ *See* WALDMAN, *supra* note 140, at 39-40.

¹⁷⁰ *See* U.S. CONST. art. I, § 8, cl. 12-16.

¹⁷¹ *See* WALDMAN, *supra* note 140, at 22-23.

¹⁷² *Id.*

¹⁷³ *Id.* at 22.

¹⁷⁴ *See id.* at 31-38.

¹⁷⁵ *See id.* at 23.

¹⁷⁶ *See id.* at 38.

Patrick Henry of Virginia, the largest state at the time, warned against vesting too much power in Congress, speculating that it would contribute to the end of slavery.¹⁷⁷ He drew on the other delegates' anxiety with the notion that Black men could be called to federal military service and thereafter made free.¹⁷⁸ This apprehension that Blacks could be armed and trained rang true not only for the Southern delegates; at the time, the majority of states barred Black people, free or enslaved, from joining the militia, and some states prohibited Black people from owning any weapons.¹⁷⁹ Out of this lingering concern for the fate of state militias grew the Second Amendment.¹⁸⁰

After the Civil War and the official abolition of slavery, Southern states enacted Black Codes as a means to continue to oppress and subdue the Black population.¹⁸¹ Black Codes controlled Blacks' employment by forcing them to enter labor contracts; Black people were unable to serve on juries or serve as witnesses against whites; vagrancy laws criminalized unemployment and idling.¹⁸² Of course, these Codes also prohibited Blacks from possessing firearms altogether or subjected them to licensing laws that whites did not need to follow.¹⁸³ These Codes, which denied Blacks of their civil rights and "rendered [them] defenseless against assaults,"¹⁸⁴ were what led to the Civil Rights Act of 1866 and the corresponding Constitutional amendments.

When the Fourteenth Amendment was enacted in 1868, states were required to amend their laws that prohibited Blacks from possessing firearms or weapons.¹⁸⁵ Southern states replaced their facially discriminatory gun laws with those that were facially race-neutral.¹⁸⁶ Essentially, many Southern states enacted laws that prohibited the sale and ownership of particular classes of firearms, specifically handguns that were categorically less expensive than other types of firearms—indeed, the only type

¹⁷⁷ See WALDMAN, *supra* note 140, at 37.

¹⁷⁸ *Id.* at 39.

¹⁷⁹ *Id.* at 32.

¹⁸⁰ *See id.*

¹⁸¹ *See* Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent at *9, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 345044 [hereinafter *Brief of Amicus Curiae Congress of Racial Equity*].

¹⁸² Cottrol & Diamond, *supra* note 147, at 344.

¹⁸³ *See id.*; *see also* *Brief of Amicus Curiae Congress of Racial Equity*, *supra* note 181, at *6.

¹⁸⁴ *See Brief of Amicus Curiae Congress of Racial Equity*, *supra* note 181, at *9-10 (quoting THE RADICAL REPUBLICANS AND RECONSTRUCTION 1861-1870 219 (Harold M. Hyman ed., 1967)).

¹⁸⁵ *See, e.g., id.* at *16.

¹⁸⁶ *Id.*

of firearm poor Blacks would have the financial means to purchase.¹⁸⁷ Similarly, some states made only costly firearms legal. For example, in 1879, Tennessee passed a law “bann[ing] the sale of any pistol[] other than the expensive army or navy model revolvers.”¹⁸⁸ Alabama, Texas, and Virginia employed tax laws to disarm the Black population, by imposing “exorbitant business or transaction taxes” on all firearms to ensure that Blacks would be unable to purchase such goods.¹⁸⁹ Moreover, extra-legal systems were established in some Southern jurisdictions, in which firearm retailers were mandated to report any firearm purchase by a Black person to the local police department.¹⁹⁰ The sheriff would then arrest the buyer and confiscate the weapon.¹⁹¹ In 1906, Mississippi established a similar state-wide system when it enacted a law “requiring retailers to maintain records of all pistol and pistol ammunition sales, and to make such available to authorities for inspection.”¹⁹² These authorities and police department sheriffs were often members of the Ku Klux Klan (“KKK”).¹⁹³

During this time, in the early 1900s, World War I erupted and ended several years later. After the war, two major changes in this country occurred. First, the Prohibition Era began and, with it, an increase in organized crime.¹⁹⁴ Second, Black men returned from the war.¹⁹⁵ Approximately 370,000 joined the Armed Forces during World War I.¹⁹⁶ These men returned home both trained to use firearms and inspired to demand racial justice from the government that they had risked their lives to protect.¹⁹⁷ Homecoming parades for the Black soldiers occurred in the North and South, with thousands of people present, creating a sense of racial pride.¹⁹⁸ In February 1919, an all-Black army unit, the 369th Infantry Regiment, marched into Harlem before nearly a quarter million onlookers.¹⁹⁹ This showing of self-dignity and defiance of the racial segregation and

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *17 (quotation marks omitted).

¹⁸⁹ *Brief of Amicus Curiae Congress of Racial Equity*, *supra* note 181, at *17.

¹⁹⁰ *See id.* at *18.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See id.* at *20.

¹⁹⁴ Kahn, *supra* note 39, at 115.

¹⁹⁵ *See Brief of Amicus Curiae Congress of Racial Equity*, *supra* note 181, at *23.

¹⁹⁶ CHAD WILLIAMS, N.Y. PUB. LIBRARY, SCHOMBURG CENTER FOR RESEARCH IN BLACK CULTURE, AFRICAN AMERICANS AND WORLD WAR I, <http://perma.cc/B73S-A33E> (last visited May 18, 2018).

¹⁹⁷ *See Brief of Amicus Curiae Congress of Racial Equity*, *supra* note 181, at *23; *see also* WILLIAMS, *supra* note 196.

¹⁹⁸ *See* WILLIAMS, *supra* note 196.

¹⁹⁹ *Id.*

violence endured by the soldiers prior to and throughout the war sparked a new surge of violence against Blacks.²⁰⁰ From 1918 to 1919, the number of lynchings increased by 30%, and eleven of the victims in 1919 were Black veterans.²⁰¹ During this time, the KKK reemerged as a “major force” in the South.²⁰² KKK groups also became more forceful in some non-Southern states, such as New Jersey, Illinois, Indiana, Michigan, and Oregon.²⁰³ All five of these states enacted gun control laws between the years of 1913 and 1934.²⁰⁴ These new gun control laws, and those pre-existing in Southern and some Northern states, ensured that Blacks had limited means of protection against this brutality.²⁰⁵ As discussed above, it was during this time in which the first federal “felon in possession” law was enacted—the Federal Firearms Act of 1938.²⁰⁶

B. The Civil Rights Movement and the Increase in Gun Control Laws and Decrease of Protections Under the Fourth Amendment

On October 22, 1968, President Johnson signed the Gun Control Act,²⁰⁷ the first federal Act making it a crime for persons previously convicted of a *nonviolent* felony to possess a firearm and/or ammunition.²⁰⁸ This Act dramatically changed the federal laws that had existed before, as set out in the Federal Firearms Act of 1938.²⁰⁹ The timing of the enactment of the Gun Control Act is quite telling; the government needed to maintain law and order in an environment where Blacks armed themselves and demanded civil rights.

The Gun Control Act of 1968 was signed at the height of civil unrest and Black mobilization. In the South and other areas where the KKK terrorized Black communities, Black individuals had no protection from local authorities, and, in some instances, the local police departments aided the violence.²¹⁰ Leaders, such as Martin Luther King, Jr., requested, to no avail, that President Kennedy send federal troops for security.²¹¹ Left with

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Brief of Amicus Curiae Congress of Racial Equity*, *supra* note 181, at *23.

²⁰³ *See id.* at *24.

²⁰⁴ *Id.*

²⁰⁵ *See id.* at *26.

²⁰⁶ *See Kahn*, *supra* note 39, at 116.

²⁰⁷ David B. Kopel, *The Great Gun Control War of the Twentieth Century – and Its Lessons for Gun Laws Today*, 39 *FORDHAM URB. L.J.* 1527, 1547 (2012).

²⁰⁸ *See Kahn*, *supra* note 39, at 127.

²⁰⁹ Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250, 1250-51 (repealed 1968).

²¹⁰ Cynthia Deitle Leonardatos, *California’s Attempts to Disarm the Black Panthers*, 36 *SAN DIEGO L. REV.* 947, 949-51 (1999).

²¹¹ *Id.* at 950.

no alternative, Black communities began forming groups and arming themselves with guns for self-defense. In 1964, the Deacons for Defense and Justice established itself in Louisiana.²¹² One Deacons for Defense and Justice group “obtained a charter and weapons, and vowed to shoot back if fired upon.”²¹³ In 1965, the Lowndes County Freedom Organization formed in Lowndes County, Alabama, which evolved into the Black Panther Party.²¹⁴

Using the political and organizational philosophies of the Lowndes County Freedom Organization, Huey Newton and Bobby Seale began the Black Panther Party in California in 1966.²¹⁵ The Black Panthers opened up “survival programs” within Black communities, where members gave out free food and provided health services.²¹⁶ Members would also monitor police interactions with Black community members, primarily in Oakland, California.²¹⁷ Panthers would follow police cars and provide arrested Blacks with their Miranda rights.²¹⁸ Panthers would usually carry unconcealed guns and law books during these interactions.²¹⁹ Panthers would also hold protests and speak to crowds about police brutality.²²⁰ At the time, carrying an unconcealed weapon was not a crime in California and, in fact, was quite common.²²¹ As such, to subdue the Panthers, police officers would frequently confiscate their weapons and charge them with disturbing the peace.²²² Televisions and other mass-media outlets showed images of Black leaders shouting “Black Power!”²²³ Whites became frightened as the media suggested a Black violent revolution was on the horizon.²²⁴

During the summer of 1967, there were over 100 riots across the country, including cities such as Boston, Chicago, Cincinnati, Detroit, Hartford, Minneapolis, Newark, New Haven, New York, Philadelphia, Pittsburgh, Tampa, and Washington D.C.²²⁵ The most violent riots occurred in Newark, N.J., July 12 to 17; it is estimated that seventy-two

²¹² *Id.* at 963.

²¹³ Cottrol & Diamond, *supra* note 147, at 357.

²¹⁴ See Leonardatos, *supra* note 210, at 957.

²¹⁵ *Id.*

²¹⁶ *Id.* at 958.

²¹⁷ *Id.* at 962.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Leonardatos, *supra* note 210, at 968-69.

²²¹ *Id.* at 969.

²²² *Id.*

²²³ See Kopel, *supra* note 207, at 1538.

²²⁴ *Id.*

²²⁵ *Id.* at 1540.

people were killed, 750 injured, and over 1,000 put in jail.²²⁶ In response to the Newark riots, over 3,000 National Guardsmen were dispatched.²²⁷ The National Guardsmen went into predominantly Black neighborhoods and conducted house-to-house searches for firearms.²²⁸

After these riots, three states passed new gun control laws in 1967. New York already regulated handguns but enacted a law that required registration for additional classes of guns.²²⁹ Illinois, which had not previously regulated the ownership of any class of gun, enacted a law that all owners of firearms obtain a gun license from the state police.²³⁰ In direct response to the efforts of the Panthers, the California Senate passed a law in late July 1967, which criminalized the possession of a loaded firearm in a vehicle or on the person in public place—but only within the limits of an “incorporated city.”²³¹ The statute also provided that a police officer could “examine” the firearm “to determine whether or not [the] firearm [wa]s loaded for the purpose of enforcing this section.”²³² The statute did not specify that the firearm needed to be visible and no requisite suspicion was required for the officer to initiate such examination.²³³ Panthers known to local police officers were frequently stopped and arrested under this statute after its enactment.²³⁴

Due to the social unrest, large protests in cities, and mass-media imagery of armed Black militants, police departments and governments perceived a need for greater crime control.²³⁵ Predominantly white police forces began heightening the patrolling of predominantly Black neighborhoods, further aggravating suffering race relations and leading to more riots—specifically in response to police brutality.²³⁶ In the summer of 1968, a riot began in Cleveland, Ohio, ending in a shootout between the police department and members of the Black Power movement.²³⁷ It was this same summer in which the U.S. Supreme Court held, for the first time, in *Terry v. Ohio*, that police officers could conduct a limited search

²²⁶ *Id.*; Tabitha C. Wang, *Newark Riot (1967)*, BLACKPAST.ORG, <http://perma.cc/E6ZF-8846> (last visited May 18, 2018).

²²⁷ Wang, *supra* note 226.

²²⁸ Kopel, *supra* note 207, at 1540-41.

²²⁹ *Id.* at 1541.

²³⁰ *Id.*

²³¹ See Leonardatos, *supra* note 210, at 976-79; see also Act of July 28, 1967, ch. 960, 1967 Cal. Stat. 2459, 2459-63.

²³² Act of July 28, 1967, ch. 960 at 2459-63 (1967).

²³³ *Id.*

²³⁴ See Leonardatos, *supra* note 210, at 987.

²³⁵ See Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 883, 887 (2013).

²³⁶ *Id.*

²³⁷ *Id.* at 891.

of a person absent probable cause.²³⁸ Specifically, the Court held that “there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”²³⁹

It was within this national social and legal context that the Gun Control Act of 1968 was enacted only several months after the *Terry v. Ohio* decision. Black communities demanded civil rights and protection from police brutality. White America and politicians feared an armed revolution. Police departments increased their patrol of Black communities to suppress riots and keep order. Several states passed gun control laws. Police officers could now legally search a person without probable cause—with a mere reason to believe that the suspect was armed. The Gun Control Act was just another part of the government’s efforts to intensify “law and order,” disarm people who threatened this “order,” and in turn, further ensnare Blacks in the criminal justice system.

C. The “War on Drugs,” Current Crime Control, and the Shaping of Today’s Federal Programs

Not long after the enactment of the Gun Control Act of 1968, a new federal initiative began which shaped today’s reality of the disparate enforcement of federal firearm offenses, such as the federal “felon in possession” law. A defining feature of the 1980’s was the “War on Drugs.”²⁴⁰ During this time, federal initiatives “significantly increased federal penalties for drug offenses and markedly increased federal funds for state anti-drug efforts.”²⁴¹ Once the “War on Drugs” had commenced, the racial disparities between national and prison populations grew even greater. In 1985, Blacks made up 10% of the total national population but 46% of the national state and federal prison population.²⁴² This same year, whites made up 52% of the national state and federal prison population and 86% of the population.²⁴³

²³⁸ *Id.* at 886; *see also* *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²³⁹ *Terry*, 392 U.S. at 27.

²⁴⁰ Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 257 (2009).

²⁴¹ *Id.* at 262.

²⁴² *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1985 6 (1987), <http://perma.cc/8293-P2FH>.

²⁴³ *See id.*

By 1994, after nine years of the “War on Drugs” raging on, the total state and federal prison population increased by over 100%,²⁴⁴ and the population of those imprisoned for drug offenses increased by approximately 300%.²⁴⁵ The national population, on the other hand, increased by only about 4% from 1990 to 1994.²⁴⁶ Over this time, the Black prison population had increased by 212% and that of white prisoners had gone up by 172%.²⁴⁷ In 1993-1994, Black individuals made up approximately 11% of the national population but almost 50% of the state and federal prison population.²⁴⁸ Whites, on the other hand, made up approximately 82% of the national population but a little over 50 % of the state and federal prison population.²⁴⁹

Essentially, the “War on Drugs” shaped today’s reality of the disparate enforcement of federal firearm offenses by significantly increasing the number of Black people with felony convictions.²⁵⁰ As such, more Blacks can now be prosecuted under “felon in possession” laws. These felony convictions were not only for drug offenses, which were the target of the war on drugs, but for other offenses as well.²⁵¹ As reported in FBI nationwide crime reports in 1995, the weapons arrest rate was five times greater for blacks than whites.²⁵² Indeed, given the holding in *Terry v. Ohio*, an officer’s fear of a weapon may justify a search.²⁵³ This search thus can be a pretext to a search for other contraband and/or evidence of a crime.²⁵⁴

These tactics continue today and Blacks continue to be disparately targeted by law enforcement. The Justice Department reported that in 2011, Black drivers were 31% more likely to be stopped by an officer than a white driver.²⁵⁵ Moreover, prior to 2013, once stopped, officers were twice as likely to search the driver’s person and vehicle if the driver was Black.²⁵⁶ Beyond traffic stops, Blacks are also much more likely to

²⁴⁴ See ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 1994 8 (1995), <http://perma.cc/LC3X-5CHX>.

²⁴⁵ Mauer & Cole, *supra* note 89.

²⁴⁶ See EDWIN BYERLY & KEVIN DEARDORFF, ECON. & STATISTICS ADMIN., U.S. DEP’T OF COMMERCE, NATIONAL AND STATE POPULATION ESTIMATES: 1990 TO 1994 68 (1995), <http://perma.cc/BEB8-BP8B>.

²⁴⁷ See BECK & GILLIARD, *supra* note 244.

²⁴⁸ See *id.*; see also BYERLY & DEARDORFF, *supra* note 246, at 68.

²⁴⁹ See BECK & GILLIARD, *supra* note 244, at 8; see also BYERLY & DEARDORFF, *supra* note 246, at 68.

²⁵⁰ Levin, *supra* note 46, at 2197.

²⁵¹ See *id.* at 2194.

²⁵² *Id.*

²⁵³ *Id.* at 2203.

²⁵⁴ *Id.* at 2206.

²⁵⁵ Williams, *supra* note 74.

²⁵⁶ See *id.*

be stopped-and-frisked by police officers.²⁵⁷ These stops and searches, occurring at widely different rates for Blacks and whites, contribute to the widely different and disproportionate rates of incarceration for Black and white populations.

V. CONCLUSION

U.S. prison populations are the highest per capita in the world, and the racial make-up of the prison population is very disproportionate.²⁵⁸ If we seek to understand this disturbing phenomenon, we must look at underlying causes and laws that allow for this occurrence. One source of this disproportionality is federal gun control laws. “Felon in possession” laws criminalize the status of being a felon, rather than harmful behavior. Given the slight evidence necessary to prove possession, as well as certain presumptions about possession, these laws are harsher than it would seem on their face. These laws are disparately enforced against Black defendants, and federal initiatives that charge offenders in the federal rather than state system target Black communities.

Due to the history of gun laws, the ways in which “felon in possession” laws have been drafted, interpreted, and enforced are not surprising. Since the first group of Africans were kidnapped and enslaved in this country, the state and federal governments established laws to disarm Black individuals in order to suppress rebellions, and later, movements for civil rights. The ghost of these past eras indeed does not lurk in the past. Gun control regimes—together with the colonial militia system—began as a way to preserve the slavery system, and have morphed over the centuries into a way to preserve the hyper-criminalization and over-incarceration of Black communities.

Evidently, “felon in possession laws,” and their disparate effect on Black communities, are only a continuation of centuries of laws and law enforcement tactics enacted and employed to disarm Black people. This is distressing, and even more so knowing that legal challenges to this disparate treatment are time and time again rejected by federal courts.²⁵⁹ It is also seemingly insurmountable. However, by identifying specific areas of law that contribute to the over-incarceration and hyper-criminalization of Black communities, we are one step further to understanding where legal challenges and increased efforts of defense are necessary. Moreover, by understanding the history of gun laws, and how these laws have progressed and have been altered to respond to shifts in legal initiatives and landscapes, we are better equipped to predict the ways in which gun laws

²⁵⁷ Levin, *supra* note 46, at 2195-96.

²⁵⁸ See WALMSLEY, *supra* note 73, at 3; *see also* Williams, *supra* note 74.

²⁵⁹ Gardner, *supra* note 93, at 344-45.

may be crafted to further criminalize Black communities, rather than implemented to protect all communities against increasing gun violence.²⁶⁰ Finally, with this two-pronged understanding—in tandem with an understanding of how past legal challenges have failed—we are further enabled to amend these challenges in new and creative ways, so these challenges can finally be successful.

²⁶⁰ *Gun Death Rate Rises For Second Year in a Row*, CBS NEWS (Nov. 6, 2017, 12:50 PM), <https://perma.cc/UCF9-BBPN>.