
ARTICLE

THE TRAJECTORY OF FEDERAL GUN CRIMES

JACOB D. CHARLES[†] & BRANDON L. GARRETT^{††}

Federal gun prosecutions have been a significant part of the federal docket for decades. In this Article, we explore for the first time the evolution of federal gun crimes. They cover conduct ranging from gun distribution and possession of particular weapons such as machine guns to use by drug traffickers and individual possession of firearms by felons. Second, we describe how in practice gun charges have adapted to criminal law priorities of Congress and federal prosecutors over time. More recently, they became prominent in connection with immigration prosecutions, while in the 1980s, drug gangs were the priority. During this time, gun cases provided vehicles for testing the reach of federal jurisdiction, the use of federal crimes as sentencing enhancements, and the boundaries between federal, state, and local enforcement.

We argue federal gun crimes reflect a unique dynamic in which legislation is shaped by three forces: (1) aggressive interest group lobbying that leads to compromise on harsh punishment; (2) a dichotomizing of gun users into either “law-abiding citizens” or “thugs” and “gangsters”; and (3) prosecutorial power that is magnified in this area due to the ubiquity of firearms in communities and in criminal activity in the United States, which both permits broad federal jurisdiction and allows prosecutors to use their equally broad discretion to leverage severe sentences to obtain plea bargains. Our overall goal is to illuminate the central, but inconsistent and complex, place of gun crimes in federal criminal law. We conclude by asking what principles could guide the development of this body of law through judicial interpretation, future legislation, and in enforcement, towards a new vision in which federal law is designed to reduce disparities in enforcement and to prevent gun violence.

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† Lecturing Fellow, Duke University School of Law & Executive Director, Duke Center for Firearms Law; Associate Professor of Law, Pepperdine University Caruso School of Law (effective summer 2022). Many thanks to participants at a works in progress roundtable and a faculty workshop at Duke Law School, to participants at a junior scholar's workshop organized by David Simon, and to Sara Sun Beale, Jeffrey Bellin, Joseph Blocher, Brian Bornstein, Jamie Boyle, Curt Bradley, Sam Buell, Ajenai Clemmons, Philip Cook, Deborah DeMott, Ben Grunwald, Dave Kopel, Darrell Miller, Justin Murray, Daniel Rice, Eric Ruben, and Jonathan Weiner for invaluable comments on earlier drafts. We thank Brendan Clemente, Zane Martin, and Lily Tran for their excellent research assistance.

†† L. Neil Williams Professor of Law, Duke University School of Law.

INTRODUCTION

Gun violence is a pervasively American problem. More than 100,000 Americans are injured in shootings each year, and nearly 40,000 are killed.¹ The federal government has largely approached this problem through the lens—and with the tools—of the criminal law. Federal gun charges are a mainstay of federal criminal practice, comprising about ten percent of all federal prosecutions for the past several decades, and a higher percentage in recent years.² Some of the most serious mandatory minimum sentences are for gun offenses, when linked to violent and drug-related crimes.³ As of 2016, about fifteen percent of all persons in federal prisons were convicted of gun offenses that carry a mandatory minimum penalty.⁴ The trajectory of these federal gun crimes—and the crime-control approach to gun violence itself—helps to explain the steady growth in prosecutions and the stark racial disparities among gun offenders in federal prisons today.⁵ It also helps suggest a vision for a way forward.⁶

This Article traces the evolution of the wide spectrum of federal gun crimes, which cover conduct ranging from gun manufacturing, distribution, and sales to use by drug traffickers and the individual possession of guns by those with felony convictions.⁷ We show how federal prosecutions adapted to the criminal law priorities of Congress over time. Such charges have increased in recent years, as they did in the early 2000s.⁸ More recently, they have become prominent in immigration-related prosecutions, while in the 1980s,

¹ *WISQARS*[™]—*Web-based Injury Statistics Query and Reporting System*, CTFS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/injury/wisqars> [<https://perma.cc/2EKS-DPY4>] (July 1, 2020).

² See *infra* Part II.B.

³ See *infra* Part II.

⁴ U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 45, 75 n.75 (2018) (reporting that 14.9% of federal prisoners were convicted for violating § 924(c), which carries a mandatory prison sentence); see also U.S. SENT'G COMM'N, QUICK FACTS: FEDERAL OFFENDERS IN PRISON—MARCH 2021 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_March2021.pdf [<https://perma.cc/W3AP-LTM8>] (noting that 19,473 of 135,550 persons serving time for a federal conviction in federal prison were convicted of firearms offenses).

⁵ U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018) (reporting that Black Americans accounted for more than half of all offenders convicted of a firearm offense carrying a mandatory minimum penalty); see also U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1 (2020) (reporting same for offenders convicted of unlawfully possessing a firearm as a felon).

⁶ Although the majority of criminal prosecutions for gun crimes tend to happen at the state and local level, we focus on the federal government because it has often been a focal point for interest-group lobbying on gun issues, holds the most resources for criminal prosecution and punishment, and often influences state-level legislation and enforcement priorities.

⁷ See *infra* Part I.

⁸ *Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRAC REPS. (Nov. 29, 2017), <https://trac.syr.edu/tracreports/crim/492> [<https://perma.cc/95QW-QJD9>].

drug gangs were the target.⁹ Over time, firearms cases have provided vehicles for testing the reach of federal criminal jurisdiction, the use of federal crimes as sentencing enhancements, and the boundaries—and synergies—between federal and local enforcement.

Many observers have raised federalism concerns regarding these developments, including the Supreme Court, in landmark rulings.¹⁰ William Stuntz emphasized: “Local district attorneys can threaten to send drug or gun crime defendants to the nearest U.S. Attorney’s office Federal law acts as an unfunded mandate, raising state sentencing levels without paying for the increase.”¹¹ The focus has been on what Markus Dubber calls the “offense of possession—whether of drugs, of guns, or anything else—[which] has emerged as the policing device of choice in the war on crime.”¹²

We argue that federal gun crimes are not just a microcosm of larger, evolving trends in federal criminal priorities, but rather a distinct—and in many ways unique—body of law that can be better understood as such.¹³ They reflect a dynamic in which three factors dominate: (1) legislation is shaped by aggressive interest group lobbying that ends in compromise on harsh punishment; (2) judges and lawmakers dichotomize guns, as between “law-

⁹ See *infra* Section II.C.

¹⁰ *Printz v. United States*, 521 U.S. 898, 921-22 (1997); *United States v. Lopez*, 514 U.S. 549, 575-77 (1995).

¹¹ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 306 (2011).

¹² Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 855 (2001). Regarding the question of whether possession must be active, see *Bailey v. United States*, 516 U.S. 137, 143 (1995), which holds that the “use” requirement of § 924(c) “requires evidence sufficient to show an *active employment*” of a firearm; and *Bousley v. United States*, 523 U.S. 614, 616 (1998), which applies *Bailey*. See also Angela LaBuda Collins, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court’s Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1349-50 (1999) (“Congress added the term ‘possession’ to § 924(c)(1) in order to broaden the application of the statute beyond the Supreme Court’s prior interpretation of the ‘use’ prong.”).

¹³ The specific combination of these three factors leads us to find the trajectory of federal gun crimes unique, but there are certainly aspects of this trajectory that have been replicated in the history of other federal crimes, such as in drug crimes. Taleed El-Sabawi, for example, has explored how competing interest groups helped frame the government’s approach to drug use and crimes, explaining:

Due in part to the participation of physicians, drug manufacturers, and pharmacists in the problem-definition discourse, the use and possession of morphine, heroin, and cocaine remained licit for medicinal purposes throughout the early 1900s In essence, the medical industry lobbied Congress to keep these substances licit for medicinal purposes, while advocating for the punishment of marginalized populations’ illicit or recreational use.

Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Definition*, 48 U. MEM. L. REV. 1357, 1400 (2018); see also Taleed El-Sabawi, *The Role of Pressure Groups and Problem Definition in Crafting Legislative Solutions to the Opioid Crisis*, 11 NE. U. L. REV. 372, 375 (2019) (explaining that interest groups “have historically been influential in defining problem drug use during nationwide crisis”).

abiding citizens”¹⁴ in contrast to use by thugs and “gangsters”;¹⁵ and (3) prosecutorial power is magnified in this area due to the ubiquity of firearms in communities and in criminal activity in the United States, which both permits broad federal jurisdiction and allows prosecutors to use their equally broad discretion to leverage severe sentences to obtain plea bargains.¹⁶ In surveying the nine decades of federal policymaking around gun crimes, we see an increasingly dynamic, interactive approach that bears the marks of these themes.¹⁷ All three branches of government have been critical in shaping the current framework. In the last forty years, Congress has drafted gun crimes expansively, the Executive has enforced them aggressively, and the Supreme Court has interpreted them frequently.

The severe penalties that Congress has prescribed for crimes connected to guns has led to increased prosecutorial power to wield those penalties. The combination of tough laws and tough enforcers has led to a Supreme Court especially active in construing the federal firearms laws. We count more than seventy-five high court opinions since 1937 interpreting the major pieces of federal legislation; almost all of those cases came after the Gun Control Act of 1968.¹⁸ And the Roberts Court has had a special fondness for federal

¹⁴ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”).

¹⁵ *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways and Means*, 73rd Cong. 136 (1934) (statement of Assistant Attorney General Keenan) (addressing “the problem of the roving gangster”).

¹⁶ Of course, this prosecutorial power is, as we discuss *infra*, enabled and guided by other system actors like legislators and judges, as well as by presidential administrations and Attorney General priorities. See generally Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (discussing how prosecutorial power is circumscribed in myriad ways).

¹⁷ See *infra* Part III.

¹⁸ *Sonzinsky v. United States*, 300 U.S. 506 (1937); *United States v. Miller*, 307 U.S. 174 (1939); *Tot v. United States*, 319 U.S. 463 (1943); *Haynes v. United States*, 390 U.S. 85 (1968); *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Bass*, 404 U.S. 336 (1971); *United States v. Biswell*, 406 U.S. 311 (1972); *Huddleston v. United States*, 415 U.S. 814 (1974); *Barrett v. United States*, 423 U.S. 212 (1976); *Scarborough v. United States*, 431 U.S. 563 (1977); *Simpson v. United States*, 435 U.S. 6 (1978); *United States v. Batchelder*, 442 U.S. 114 (1979); *Lewis v. United States*, 445 U.S. 55 (1980); *Busic v. United States*, 446 U.S. 398 (1980); *Dickerson v. New Banner Inst.*, 460 U.S. 103 (1983); *Ball v. United States*, 470 U.S. 856 (1985); *U.S. Dep’t. of Treasury v. Galioto*, 477 U.S. 556 (1986); *Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Thompson*, 504 U.S. 505 (1992); *Deal v. United States*, 508 U.S. 129 (1993); *Smith v. United States*, 508 U.S. 223 (1993); *Beecham v. United States*, 511 U.S. 368 (1994); *Staples v. United States*, 511 U.S. 600 (1994); *Custis v. United States*, 511 U.S. 485 (1994); *United States v. Lopez*, 514 U.S. 549 (1995); *Bailey v. United States*, 516 U.S. 137 (1995); *Old Chief v. United States*, 519 U.S. 172 (1997); *United States v. Gonzales*, 520 U.S. 1 (1997); *United States v. LaBonte*, 520 U.S. 751 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Rogers v. United States*, 522 U.S. 252 (1998); *Bousley v. United States*, 523 U.S. 614, (1998); *Muscarello v. United States*, 524 U.S. 125 (1998); *Bryan v. United States*, 524 U.S. 184 (1998); *Caron v. United States*, 524 U.S. 308 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999); *Castillo v. United States*, 530 U.S. 120 (2000); *Daniels v. United States*, 532 U.S. 374

firearms crimes. The Court has heard more than thirty cases arising under these laws since 2005.¹⁹

Cases concerning federal gun crimes have made blockbuster constitutional law, including under the Second,²⁰ Fourth,²¹ Fifth,²² Sixth,²³ and Tenth Amendments,²⁴ as well as with respect to Congress's Commerce Clause authority²⁵ and taxing power.²⁶ But these cases have more frequently involved difficult questions of statutory construction,²⁷ requiring the Court

(2001); *Harris v. United States*, 536 U.S. 545 (2002); *United States v. Bean*, 537 U.S. 71 (2002); *Shepard v. United States*, 544 U.S. 13 (2005); *Small v. United States*, 544 U.S. 385 (2005); *Dixon v. United States*, 548 U.S. 1 (2006); *James v. United States*, 550 U.S. 192 (2007); *Logan v. United States*, 552 U.S. 23 (2007); *Watson v. United States*, 552 U.S. 74 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *United States v. Rodriguez*, 553 U.S. 377 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Hayes*, 555 U.S. 415 (2009); *Dean v. United States*, 556 U.S. 568 (2009); *Johnson v. United States*, 559 U.S. 133 (2010); *United States v. O'Brien*, 560 U.S. 218 (2010); *Abbott v. United States*, 562 U.S. 8 (2010); *McNeill v. United States*, 563 U.S. 816 (2011); *Sykes v. United States*, 564 U.S. 1 (2011); *Derby v. United States*, 564 U.S. 1047 (2011); *Alleyne v. United States*, 570 U.S. 99 (2013); *Descamps v. United States*, 570 U.S. 254 (2013); *Rosemond v. United States*, 572 U.S. 65 (2014); *United States v. Castleman*, 572 U.S. 157 (2014); *Abramski v. United States*, 573 U.S. 169 (2014); *Henderson v. United States*, 575 U.S. 622 (2015); *Johnson v. United States*, 576 U.S. 591 (2015); *Welch v. United States*, 136 S. Ct. 1257 (2016); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Voisine v. United States*, 136 S. Ct. 2272 (2016); *Beckles v. United States*, 137 S. Ct. 886 (2017); *Dean v. United States*, 137 S. Ct. 1170 (2017); *United States v. Stitt*, 139 S. Ct. 399 (2018); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Quarles v. United States*, 139 S. Ct. 1872 (2019); *Rehaif v. United States*, 139 S. Ct. 2191 (2019); *United States v. Davis*, 139 S. Ct. 2319 (2019); *Shular v. United States*, 140 S. Ct. 779 (2020).

¹⁹ See cases cited *supra* note 18.

²⁰ See *Miller*, 307 U.S. 174, 175, 183 (upholding the National Firearms Act against a Second Amendment challenge).

²¹ *Biswell*, 406 U.S. 311, 311-13 (finding no Fourth Amendment violation in the authorization for warrantless search of federal firearm licensees).

²² See *Haynes*, 390 U.S. 85, 100 (finding the National Firearms Act's requirement to report an unregistered firearm in violation of the Fifth Amendment's protection against self-incrimination); *Johnson v. United States*, 576 U.S. 591, 597 (2015) (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague, in violation of Fifth Amendment due process); *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (finding § 924(c)'s residual clause void-for-vagueness under the Fifth Amendment).

²³ *Alleyne*, 570 U.S. 99, 117 (holding in a § 924(c) prosecution that the Sixth Amendment requires any fact that increases the punishment for a crime to be proved to a jury); *Rodriguez-Moreno*, 526 U.S. 275, 276 (considering where venue is proper for a § 924(c) charge under the Sixth Amendment).

²⁴ See *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zone Act as exceeding Congress's authority under the Commerce Clause).

²⁵ See *Printz v. United States*, 521 U.S. 898 (1997) (striking down portions of the Brady Act that temporarily required local law enforcement to conduct background checks on gun purchasers).

²⁶ See *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (upholding the National Firearms Act as a valid exercise of the taxing power).

²⁷ In just one decade after the enactment of the Gun Control Act of 1968, the Court decided five major cases interpreting the statute. See *United States v. Bass*, 404 U.S. 336 (1971) (construing the ban on felon firearm possession); *Huddleston v. United States*, 415 U.S. 814, 815 (1974) (construing the law criminalizing false statements in connection with acquiring a firearm); *Barrett v. United States*, 423 U.S. 212 (1976) (construing the ban on a felon's receipt of a firearm);

to, in Justice Kagan's pithy phrase, leave the "lofty sphere of constitutionalism for the grittier precincts of criminal law."²⁸ Since penalties for these crimes have become so severe, the Court's attention to these matters has accordingly taken on heightened importance.²⁹ The Court, for its part, has often read statutes in the harshest light.³⁰ As the Court said in one case construing 18 U.S.C. § 924(c)'s stiff sentences for use, carrying, or possession of a firearm in connection with certain crimes: "We do not gainsay that [the petitioners] project a rational, less harsh, mode of sentencing. But we do not think it was the mode Congress ordered."³¹ And Congress, when it believes the Court has read a statute too leniently, has not hesitated to clarify its purpose by amending statutes to cement more punitive constructions of the law.³²

Scarborough v. United States, 431 U.S. 563 (1977) (construing the ban on felon firearm possession); Simpson v. United States, 435 U.S. 6, 7 (1978) (construing the offense that enhances punishment for use of a gun in a crime).

²⁸ Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1869 (2016); *see also id.* at 1868 (holding that the United States and Puerto Rico are not separate sovereigns for Double Jeopardy purposes in charging gun crimes).

²⁹ *E.g.*, Johnson v. United States, 576 U.S. 591, 602 (2015) (striking down the residual clause of the Armed Career Criminals Act, remarking that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process"); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 507-08 (1992) (plurality opinion) (invoking the rule of lenity in a National Firearms Act case in part because the consequences of deciding for the government on an ambiguous provision were "serious," with the Act carrying "criminal penalties of up to 10 years' imprisonment and a fine of up to \$10,000, or both, which may be imposed without proof of willfulness or knowledge").

³⁰ *See, e.g.*, Abramski v. United States, 573 U.S. 169, 193 (2014) (holding that a misrepresentation as to actual buyer is a materially false statement even if actual buyer and straw buyer could both legally purchase and possess firearms).

The Court has, in recent years, grown seemingly more cognizant of what can sometimes seem like a gratuitous severity in the penalties. *See, e.g.*, Dean v. United States, 137 S. Ct. 1170, 1176 (2017) ("Dean committed the two robberies at issue here when he was 23 years old. That he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether—in connection with his predicate crimes—still more incarceration is necessary to protect the public.").

³¹ Abbott v. United States, 562 U.S. 8, 23 (2010).

³² Consider just two examples. In *Basic v. United States*, 446 U.S. 398, 399-400 (1980), the Court held that § 924(c)'s extra punishment did not apply if the underlying predicate offense was itself a firearm offense. Four years later, Congress rejected that approach and clarified it did apply in those circumstances. *See Abbott*, 562 U.S. at 23 (2010) (describing how Congress' amendment of § 924(c) in 1984 "repudiated" the Court's prior holding in *Basic* (quoting *United States v. Gonzales*, 520 U.S. 1, 10 (1997))). In *Bailey v. United States*, 516 U.S. 137 (1995), the Court held that mere possession of a firearm during a relevant crime does not count as "use" of a firearm for purposes of the § 924(c) enhancements. Three years later, "Congress responded to *Bailey* by amending § 924(c)(1). The amendment broadened the provision to cover a defendant who "merely possesses a firearm in furtherance of a qualifying crime. *Watson v. United States*, 552 U.S. 74, 77 n.3 (2007).

One notable exception is the Firearms Owners' Protection Act, which generally provided greater solicitude for gun dealers and potential dealers and also for those who had received state relief from their convictions. *See infra* Part I.B.

The existing literature on federal gun crimes does not give a holistic picture of the history, trends, and effects of this body of law. Most scholarship on gun regulation tends to focus either on the Second Amendment's right to keep and bear arms or on narrow aspects of criminal enforcement or judicial interpretation.³³ The former literature often includes little or no discussion of criminal enforcement, including the severe mandatory minimums penalties that have become an increasingly important part of the federal framework.³⁴ The latter literature often focuses narrowly on one substantive provision or piece of legislation without linking these to the broader, evolving context.³⁵ The result is separate literatures about "gun control" and about federal criminal law that speak to different audiences and for different purposes.³⁶

This Article bridges that divide. It describes the arc of federal criminal gun laws, from provisions focusing on regulating commercial manufacturing, distribution, and sale of firearms; to an extensive focus on individuals, in order to target a wide range of gun-related but also not-primarily gun-related criminal conduct; to a broader federal, systematic, and collaborative effort to

³³ See, e.g., Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U.L. REV. 1, 4-5 (2015) (discussing the constitutionality under the Fourth Amendment of gun possession as a basis for police search and seizure); Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 832 (2014) (outlining the gap between constitutional rhetoric and doctrine on the issue of firearms); Pratheepan Gulasekaram, "The People" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1538 (2010) (discussing the implications of the protected class identified in the *Heller* decision); Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633, 1646-47 (2014) (arguing that due process would not be violated if police or mental health professionals had the power to confiscate firearms from individuals suffering delusions or hallucinations); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 179, 211-13 (2018) ("[C]ourts should adopt the following test: a place is sensitive under *Heller* when introducing guns into that place seriously threatens core First Amendment interests or activity.").

³⁴ See, e.g., ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* (2001) (surveying in depth the history of federal gun laws but with only passing references to mandatory minimum penalties); William J. Vizzard, *The Current and Future State of Gun Policy in the United States*, 104 J. CRIM. L. & CRIMINOLOGY 879, 879-83 (2015) [hereinafter Vizzard, *Current and Future Policy*] (providing a summary of federal gun regulations but mentioning existing sentencing penalties only in passing); PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* (2018) (providing a history of gun rights and regulation without focusing on criminal penalties).

³⁵ For a detailed exploration of how enhanced sentences have expanded jurisdiction and reshaped enforcement, see Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1643 (2002). For another important exception in the literature—a detailed examination of race and class critiques of federal gun enforcement—see Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2179-84 (2016).

³⁶ Cf. William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation: The Case of Gun Control*, 55 PUB. ADMIN. REV. 341, 345 (1995) [hereinafter Vizzard, *Impact*] ("[O]pponents characterize gun control as the alternative to strategies such as mandatory sentencing, while defining legitimate control strategies as those that exclusively and immediately impact known criminals.").

target gun violence. We question why the crime-control paradigm has been central to federal efforts to combat gun violence, how this focus has ignored the underlying causes of that violence, and how the federal government might play a less punitive role.

In Part I, we describe the enactment and substance of the major federal gun crimes legislation. We start in Section A with the beginning of federal firearms regulation—the 1934 National Firearms Act (“NFA”),³⁷ which levied taxes on manufacturers and owners of certain types of especially dangerous firearms, like machine guns. In Section B, we detail statutes, starting in the late 1960s and continuing through the 1980s and 1990s, that cemented the focus on individual possession offenses and harsh punishment. In Section C, we describe more recent statutes that have focused on upstream regulatory gun laws, like background checks.

In Part II, we discuss how these criminal statutes are enforced. Using U.S. Administrative Office of the Courts data we compiled for this Article, we emphasize how, despite the proliferation of weapons offenses, felon-in-possession offenses have dominated prosecutions beginning in the 1980s, with a steady rise in the number and length of sentences in each decade since. We also describe other changes in enforcement, including the creation of national data-tracking; the building of federal, state, and local partnerships to combat gun violence; and new uses of gun-charges as federal prosecution priorities have changed, including a focus on gun-charges in immigration enforcement.

In Part III, we step back to identify the patterns, probe the pathologies, and chart the path forward to a more reasonable and coherent approach to the federal regulation of guns. We suggest these statutes share a remarkable legislative dynamic, in which powerful interests are arrayed on both sides. A compromise between otherwise antagonistic parties leads to agreement on harsher penalties and more severe punishment. We also describe how institutional forces and administrative enforcement priorities have shaped the use of these statutes. Finally, we examine the two-fold effects of this system on inequality, where under-resourced minoritized communities are both disproportionately victims of gun violence and targeted by federal sentencing. We ask why successful community-based efforts to prevent gun violence have not received strong federal support. And we conclude by asking what principles could guide the development of this body of federal firearms law through judicial interpretation, future legislation, and enforcement towards a new vision in which federal gun efforts serve primarily to prevent gun violence.

³⁷ 26 U.S.C. §§ 5801–72.

I. FEDERAL FIREARMS STATUTES

This Part provides a three-part account of the evolution of federal gun crimes in the United States. In Section A, we set out the origins of the earliest gun crimes. In Section B, we detail federal statutes that cemented a focus on punishing individual firearm possession and imposing severe sentences. In Section C, we describe more recent statutes that have typically focused on regulatory measures, such as background checks.

A. *Early Federal Firearms Crimes*

As early as 1945, political scientist David Fellman observed that “federal criminal jurisdiction has steadily expanded from humble beginnings into the vast complex of power it is today.”³⁸ Two major laws regulating firearms in the 1930s formed part of this federal expansion: the National Firearms Act (“NFA”) and Federal Firearms Act (“FFA”). These, it turns out, would be the federal government’s only major firearm regulations for the next three decades—decades in which the nature of commerce, crime, and national power changed dramatically.

1. The National Firearms Act (1934)

The NFA was the federal government’s first substantial entry into the field of firearms regulation.³⁹ It came at a time ripe for federal intervention: “The late 1920s and early 1930s brought . . . a growing perception of crime both as a major problem and as a national one.”⁴⁰ State and local authorities, which had been expanding their regulation over weapon possession and carrying, were incapable of addressing the increasing mobility of crime and criminals.⁴¹

³⁸ David Fellman, *Some Consequences of Increased Federal Activity in Law Enforcement*, 35 J. CRIM. L. & CRIMINOLOGY 16, 16 (1944).

³⁹ The only prior federal firearms regulation was a 1927 ban on mailing concealable firearms through the U.S. Postal Service (but not through private carriers). Act of Feb. 8, 1927, Pub. L. No. 69-583, 44 Stat. 1059 (codified as amended at 18 U.S.C. § 1715); see also ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 185 (7th ed. 2018) (“This measure passed when other gun control efforts failed because its supporters justified it as a measure that supported, rather than eroded, state sovereignty.”).

⁴⁰ David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 590 (1987).

⁴¹ See Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-38*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 49 (1981) (“This upsurge of federal activism was in large part a response to problems encountered in the enforcement of state legislation.”).

The battle over the NFA was heated.⁴² The primary locus of dispute was not the Second Amendment,⁴³ however, but instead whether the federal or state government should be the entity responsible for firearm regulations.⁴⁴ Another battle concerned what the law should cover. As initially conceived by Attorney General Homer Cummings, the law would have required the registration of machine guns, as well as concealable weapons such as pistols, revolvers, and short-barrel shotguns or rifles.⁴⁵ The inclusion of pistols and revolvers in the law generated significant controversy.

The National Rifle Association proved successful at organizing grassroots support to thwart the handgun registration component.⁴⁶ The NFA ultimately regulated only a small subset of firearms thought particularly useful for criminal activity through a registration and taxation regime.⁴⁷

First, the NFA required all manufacturers, importers, and dealers of “firearms” to register with the government and pay an annual tax.⁴⁸ Reflecting

⁴² See John Brabner-Smith, *Firearm Regulation*, 1 L. & CONTEMP. PROBS. 400, 400 (1934) (“Among these bills sponsored by the Attorney General of the United States, Homer S. Cummings, none has received more general attention and bitter criticism than the bill proposing to regulate the manufacture, importation, and disposition of certain types of firearms.”).

⁴³ The Second Amendment was almost entirely an afterthought. See *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73rd Cong. 53 (1934). Almost all of the debate took place in terms of what level of government—state or federal—was the proper entity to regulate deadly weapons. Indeed, in response to DOJ concerns about gangsters traveling with private arsenals escaping federal authority, Congressman (and future Supreme Court Justice) Fred Vinson, an opponent of the bill, asked the DOJ’s witness whether there would be anything to stop a state “from making it a penalty punishable with death to carry a revolver.” *Id.* at 119. The DOJ’s witness replied he supposed it would be within a state’s police power to do so: “[T]here would be no restriction on a sovereignty to pass a law with respect to anything that affected the public welfare of that sovereignty.” *Id.* Neither suggested such a draconian law enacted at the state level might run afoul of the Second Amendment. But that does not mean the “theory of individual rights” was altogether absent; there was some brief discussion about how prohibition and not regulation could impact the right to keep and bear arms. *Id.* at 18-19.

⁴⁴ See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42 (1996) (“These enactments reflected a willingness on the part of the Congress that had enacted the New Deal social and economic legislation to assert jurisdiction over an increasingly broad range of conduct clearly within the traditional police powers of the states.”).

⁴⁵ See 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, 1533 (2012) (“Cummings was . . . highly interested in gun control. His objective was national registration for all firearms, and the *de facto* prohibition of handguns.”).

⁴⁶ See SPITZER, *supra* note 39, at 186 (“Even in this early stage, the NRA spearheaded the antiregulation movement.”); F.J.K., *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905, 917 (1950) (reporting inclusion of handguns “met strong organized opposition from sportsmen and rifle associations, with the result that reference to pistols and revolvers was deleted, and a pure revenue measure, on its face, enacted”).

⁴⁷ The title says it all: “An Act [t]o provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof.” National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236, 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801, 5849).

⁴⁸ *Id.* § 2.

its narrowed reach, the Act defined “firearms” in a technical way to only include machine guns, short-barrel shotguns or rifles, and silencers.⁴⁹

Second, the NFA created an excise tax on firearm transfers (the first federal excise tax on firearm purchases had been adopted in 1919). It mandated specific paperwork and record-keeping requirements to document payment of the transfer tax, the serial number of the firearm transferred, and the identity of the person taking possession.⁵⁰ With the requirements for documentation accompanying each transfer, the Act created a comprehensive (or nearly so) record of the ownership and chain of title for each covered firearm.⁵¹ To make the system reasonably complete, anyone who already possessed a covered weapon at the time of the NFA’s enactment had 60 days to record, “with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment.”⁵²

In implementing this regime, the NFA created a number of new federal crimes, each carrying a potential prison term of up to five years.⁵³ But, in what would be a harbinger of implementation woes, Congress vested enforcement authority in the Commissioner of Internal Revenue.⁵⁴ The Revenue Bureau did not prioritize enforcement of the Act.⁵⁵ Yet at least one notable prosecution arose, nonetheless. In *United States v. Miller*, two men were charged with violating the NFA by transporting an unregistered short-barrel shotgun across state lines.⁵⁶ The district court quashed the indictments on the ground that the NFA violated the Second Amendment.⁵⁷ The Supreme Court, however, reversed, holding the Act valid.⁵⁸

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well

⁴⁹ *Id.* § 1(a).

⁵⁰ *Id.* § 4.

⁵¹ Leff & Leff, *supra* note 41, at 54 (“The intent [of the NFA] was to regulate firearms with a registration and transfer tax program under which guns could be identified and traced to their owners.”).

⁵² National Firearms Act § 5(a).

⁵³ *Id.* § 14 (articulating punitive measures for any person “who violates or fails to comply with any of the requirements of [the National Firearms Act]”).

⁵⁴ *Id.* § 12.

⁵⁵ See Vizzard, *Impact*, *supra* note 36, at 342 (noting that the law came under the jurisdiction of the IRS’s Alcohol and Tobacco Tax Division, “where it received little attention”).

⁵⁶ 307 U.S. 174, 175 (1939).

⁵⁷ *Id.* at 177.

⁵⁸ *Id.* at 183.

regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.⁵⁹

Similarly, decades later, the Court again confronted a question about how to apply the Act's steep criminal penalties. In *Staples v. United States*, the Court held that to sustain a conviction for possession of an unregistered weapon—there, a machine gun—the Government had “to prove beyond a reasonable doubt that [the defendant] knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.”⁶⁰

The NFA was an attempt to strike at a narrow slice of especially dangerous weapons used by a narrow slice of lawbreakers. Opponents of a broader law effectively ensured that the overwhelming majority of ordinary gun owners would feel no impact from the law.

2. The Federal Firearms Act (1938)

Just a few years later, there was another drive for federal legislation. The Federal Firearms Act, however, resulted more from industry pressure than from pro-regulation impetus. The Department of Justice, under Attorney General Cummings's pressure, had continued in the years after the NFA's passage to push for the inclusion of handguns in the registration and taxation system it established.⁶¹ That did not happen. “Shepherded through the Congress by the National Rifle Association, the 1938 Act was pressed” in large part to deflect from these efforts.⁶²

Nonetheless, the FFA “established the dominant model of federal gun control for the rest of the twentieth century.”⁶³ The FFA's main accomplishments were (1) a more comprehensive manufacturer and dealer licensing system, and (2) the creation of a class of prohibited persons who could not receive, ship, or transport weapons. We look briefly at each.

First, the Act established that any person who manufactured or dealt in firearms of any kind, not just NFA-defined firearms, had to get a license from the Treasury Department if they shipped or received firearms in interstate

⁵⁹ *Id.* at 178. Some scholars see *Miller* as a set-up to validate new congressional power over firearms legislation. See, e.g., Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 50 (2008) (“*Miller* was a Second Amendment test case, teed up with a nominal defendant by a district judge sympathetic to New Deal gun control measures.”).

⁶⁰ 511 U.S. 600, 602 (1994).

⁶¹ See Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 138 (1975) (“When the handgun registration segment of the bill was deleted [from the NFA] in the House, the Justice Department continued to introduce handgun registration proposals, and to fight for them throughout the 1930s, long after crime control had lost its place in the hierarchy of New Deal legislative goals.”).

⁶² *Id.* at 139.

⁶³ JAMES B. JACOBS, CAN GUN CONTROL WORK? 22 (2002).

commerce.⁶⁴ The license requirement was imposed on any person “engaged in the business” of selling, repairing, or manufacturing firearms interstate—a phrase the act did not define.⁶⁵ Notably, a manufacturer or dealer who did not ship or receive firearms in interstate commerce, such as a gun shop serving only local customers, would not need a license under the Act.⁶⁶

Licensees (often referred to as Federal Firearm Licensees or “FFLs”) were forbidden from transferring firearms in interstate commerce to certain classes of persons, including any nonresident who did not present a purchase license if her state required one.⁶⁷ Nor could licensees transfer to any person “knowing or having reasonable cause to believe”⁶⁸ that the person was (1) under indictment for or convicted of a “crime of violence”⁶⁹ or (2) a fugitive from justice.⁷⁰

The Act’s scienter requirement for forbidden transfers proved to be a major enforcement obstacle. Not only had gun-rights advocates effectively removed the bulk of private firearms from the regulatory scope of the NFA, but they also considerably weakened the ambit of the FFA’s criminal prohibitions. As Carol and Mark Leff describe,

[A] keystone of the draft bill had been the power to prosecute shippers and manufacturers who put guns into the hands of fugitives or criminals convicted of crimes of violence. The antiregulation forces, however, protested that this stricture would place an unfair burden on the commercial enterprises engaged in gun sales and transport. They offered modifying phrases that assured the act’s debilitation; businesses would be liable to penalty only if they could be convicted of “knowing or having reasonable cause to believe” that the purchaser had a criminal background.⁷¹

This change allowed, and even encouraged, a head-in-the-sand approach. Licensees had no incentive to check whether someone who wanted to purchase a gun was a convicted criminal, no mechanism to do so even if they

⁶⁴ Federal Firearms Act, Pub. L. No. 75-785, § 2(a), 52 Stat. 1250, 1250 (1938), *repealed* by Pub. L. No. 90-351, § 906, 82 Stat. 197, 234 (1968).

⁶⁵ *Id.* § 1(5).

⁶⁶ Hardy, *supra* note 40, at 598-99 (explaining that the FFA only required licensing for those “engaged in the business” of interstate commerce for firearms).

⁶⁷ Federal Firearms Act § 2(c).

⁶⁸ *Id.* § 2(d).

⁶⁹ *Id.* § 1(6). A “crime of violence” was defined by listing qualifying offenses: “murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.” *Id.*

⁷⁰ *Id.* § 2(d).

⁷¹ Leff & Leff, *supra* note 41, at 55.

wanted, and no legal obligation to perform any due diligence.⁷² Thus, “[f]rom the standpoint of prosecuting dealers for violation of the federal ban against sale to felons, the requirement of knowledge, coupled with the absence of a verification system, rendered the Act stillborn.”⁷³

Second, in addition to these requirements for licensees, the Act imposed restrictions directly on several groups of prohibited persons. Fugitives and those under indictment for or convicted of a crime of violence were forbidden from shipping or transporting firearms in interstate commerce or receiving guns that had been so shipped or transported.⁷⁴ They were not, however, forbidden from merely *possessing* such firearms, as later legislation would provide.⁷⁵ But the Act did make mere possession “presumptive evidence that such firearm or ammunition was shipped or transported or received . . . in violation of this Act.”⁷⁶ As noted *infra*, the Supreme Court later struck down this presumption in *Tot v. United States*.⁷⁷

The proposed bill originally vested authority for enforcement in the Commerce Department, as the measure was justified under Congress’s power over interstate commerce (unlike the NFA, which was a taxing measure).⁷⁸ Ultimately, however, the House amended the bill to place Treasury in charge.⁷⁹ Once again, charging a Treasury Department component with enforcing the Act proved to neuter it further.⁸⁰ “That department could summon up little interest for such a manifestly nonfinancial program.”⁸¹

⁷² Additionally, the ability to prosecute gun sellers was severely hindered:

[T]he key power to prosecute those who bore responsibility for putting guns in the hands of criminals was effectively neutralized when language added in committee made successful federal prosecution dependent on being able to prove that the gun provider sold guns to criminals knowingly, a standard the Justice Department knew it could rarely if ever meet.

SPITZER, *supra* note 39, at 185-86

⁷³ Zimring, *supra* note 61, at 140.

⁷⁴ Federal Firearms Act § 2(e)-(f).

⁷⁵ See 18 U.S.C. § 924(c); Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220-21 (codified as amended at 18 U.S.C. § 921) (barring mere possession for designated classes of people).

⁷⁶ *Id.* § 2(f).

⁷⁷ See *infra* note 84 and accompanying text.

⁷⁸ *Firearms: Hearing on S. 3 Before A Subcomm. of the H. Comm. on Interstate and Foreign Com.*, 75th Cong. 11 (1937) (describing confusion that vesting the two different federal laws on firearms in different departments would have on administration).

⁷⁹ H.R. REP. NO. 75-2663 (1938).

⁸⁰ Zimring, *supra* note 61, at 140 (noting that the FFA was “crippled by a tradition of less-than-Draconian enforcement by the Internal Revenue Service”).

⁸¹ Leff & Leff, *supra* note 41, at 56.

The FFA imposed the same penalties as the NFA: up to five years in prison for a violation.⁸² Like the NFA, the FFA did not become a major law enforcement priority. Robert Spitzer calls it “[s]ymptomatic of the impotency of this legislation” that “fewer than one hundred arrests per year were made under any provision of the act from the 1930s to the 1960s.”⁸³

Yet, like the NFA, the criminal provisions created constitutional doctrine nonetheless. In *Tot v. United States*,⁸⁴ two men challenged their convictions for receiving a firearm after having been convicted of a crime of violence. At issue in the case was the presumption that mere possession by a prohibited person was evidence the person had received the firearm in violation of the Act.⁸⁵ The Supreme Court held the presumption not consistent with due process—“the presumptions created by the law are violent, and inconsistent with any argument drawn from experience”—and reversed the convictions.⁸⁶

After the FFA, the gun issue largely dropped off the national radar. As William Vizzard notes, “crime rates began a decline in 1934 that would continue for almost three decades, and the limited public and congressional interest in gun control abated.”⁸⁷ “It would,” he observes, “take a presidential assassination to rekindle it.”⁸⁸

B. *The Transition to a Focus on Possession*

In this Section, we trace how the turmoil of the 1960s and the rising tough-on-crime politics of the 1980s and 1990s led to types of legislation that ended up cementing a focus on possession offenses and steep punishment. We turn first to (1) the Gun Control Act of 1968, and then examine (2) the Armed Career Criminal Act, (3) the Sentencing Guidelines, and (4) the Firearm Owners Protection Act.

1. The Gun Control Act of 1968

There were no major federal gun laws in the three decades between 1938 and 1968.⁸⁹ Nor, does it seem, had federal law enforcement priorities shifted much: in 1947, the Department of Justice brought a meager 66 criminal cases

⁸² Federal Firearms Act, Pub. L. No. 75-785, § 5, 52 Stat. 1250, 1252 (1938), *repealed by* Pub. L. No. 90-351, § 906, 82 Stat. 197, 234 (1968) (defining punitive measures for any person violating the FFA or “any rules and regulations promulgated hereunder”).

⁸³ SPITZER, *supra* note 39, at 186.

⁸⁴ *Tot v. United States*, 319 U.S. 463, 464-66 (1943).

⁸⁵ *Id.* at 464.

⁸⁶ *Id.* at 468.

⁸⁷ See Vizzard, *Impact*, *supra* note 36, at 342.

⁸⁸ Vizzard, *Current and Future Policy*, *supra* note 34, at 882.

⁸⁹ See Zimring, *supra* note 61, at 133 (remarking that the GCA was “the only major change in federal policy since 1938”).

for federal weapons offenses.⁹⁰ Twenty years later, in 1967, there were still only 371 such cases brought—out of more than 30,000 total federal prosecutions.⁹¹

What became the Gun Control Act of 1968 was debated in Congress for five years, and was eventually “signed at the height of civil unrest”⁹² that resulted from political protests and high-profile political assassinations.⁹³ Part of the original impetus for the law was a post-war increase in cheap, mostly military surplus, firearms imported into the United States.⁹⁴ Another reason for legislative action in the 1960s was the elevation of Connecticut Senator, and former FBI agent, Thomas Dodd to chairperson of the Senate Subcommittee on Juvenile Delinquency in 1961.⁹⁵ Although Senator Dodd’s initial efforts to prohibit mail-order sales of handguns (and later, after JFK’s assassination, of shotguns and rifles too) failed,⁹⁶ federal gun regulation was back on the table as a serious proposal.⁹⁷ Meanwhile, President Lyndon Johnson’s Commission on Law Enforcement and the Administration of Justice issued its influential report in 1967, “The Challenge of Crime in a Free Society,” which included a chapter calling for national gun laws.⁹⁸

In June 1968, in a prelude to the GCA, Congress passed the Omnibus Crime Control and Safe Streets Act.⁹⁹ In addition to its other major provisions, Title IV and Title VII of the Act contained new gun laws. Title IV modified the FFA and also fulfilled part of Senator Dodd’s goal of banning

⁹⁰ ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl.D-2 (1947).

⁹¹ ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl.D-2 (1967).

⁹² 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, 170 (2018).

⁹³ Vizzard, *Current and Future Policy*, *supra* note 34, at 882 (describing how the assassinations of President John F. Kennedy and Martin Luther King, Jr. galvanized support for the GCA).

⁹⁴ William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS UNIV. PUB. L. REV. 79, 79 (1999) [hereinafter Vizzard, *Gun Control Act*].

⁹⁵ John Q. Barrett, *From Justice Jackson to Thomas J. Dodd to Nuremberg* 4 (St. John’s U. Legal Stud. Rsch. Paper Series, Paper No. 05-00, 2005); *see also* Zimring, *supra* note 61, at 145.

⁹⁶ Zimring, *supra* note 61, at 145-46.

⁹⁷ Vizzard, *Gun Control Act*, *supra* note 94, at 80 (“Between 1938 and 1965, Congress had displayed little discernable interest in gun control legislation; however, external events, administration interest, and public opinion altered the policy dynamics within Congress over the next four years and opened the policy window.”).

⁹⁸ *See* Philip J. Cook, *Challenge of Firearms Control in a Free Society*, 17 CRIMINOLOGY & PUB. POL’Y 437, 438 (2018) (“In looking back from today’s vantage point, one can only marvel that a politically diverse national commission could reach consensus on these recommendations, which include universal gun registration and permit-to-purchase requirements. Also remarkable is that the Commission’s analysis in support of these recommendations could not draw on systematic empirical research for the simple reason that no such research had been published yet.”).

⁹⁹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 34 U.S.C. § 10101).

the interstate shipment of handguns to individuals. It also prohibited purchasing handguns out of state.¹⁰⁰ These provisions were amended and re-enacted as part of the GCA, discussed below.¹⁰¹

Title VII of the Act put in place the first federal law barring, for specific categories of people, mere possession of a firearm in or affecting interstate commerce.¹⁰² The categories of people so barred were similar but not identical to those contained in Title IV (amending the FFA), which only barred those people from shipping, transporting, or receiving (but not from possessing) firearms.¹⁰³ In that sense, “Title VII and Title IV are, in part, redundant.”¹⁰⁴ As the Supreme Court recognized a few years after it was signed into law, “Title VII was a last-minute Senate amendment . . . [that] was hastily passed, with little discussion, no hearings, and no report.”¹⁰⁵ One commentator describes the rationale: Title VII “became law with little analysis largely as a political favor to improve its author’s image as tough on crime.”¹⁰⁶

Coming off the heels of that omnibus bill, Senator Dodd introduced “an administration-backed gun bill in the Senate that had as its centerpiece the registration of all firearms and licensing of gun owners.”¹⁰⁷ This was not to be. The fate of these two provisions of the bill, excised after intense lobbying and grassroots organizing by the NRA, showed the group’s political clout and

¹⁰⁰ SPITZER, *supra* note 39, at 187.

¹⁰¹ See *Barrett v. United States*, 423 U.S. 212, 219-20 (1976) (“The Gun Control Act of 1968 was an amended [sic] and, for present purposes, a substantially identical version of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.”).

¹⁰² Vizzard, *Gun Control Act*, *supra* note 94, at 84 (“Title VII addressed simple firearm possession for the first time at the federal level.”). Those classes included: (1) those with a prior felony conviction, (2) those dishonorably discharged from the armed forces, (3) those adjudged mentally incompetent, (4) those who renounced their citizenship, and (5) unlawful aliens. *Id.* at 88 n.77. Although the FFA banned shipment, receipt, and transport, it did not ban mere possession. See *Tot v. United States*, 319 U.S. 463, 472 (1943) (“[I]t is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce.”). The Court was mistaken when it recently described the FFA otherwise. See *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019) (“Congress first enacted a criminal statute prohibiting particular categories of persons from possessing firearms in 1938.”).

¹⁰³ The GCA categories included: (1) those under indictment for or convicted of a crime punishable by more than a year imprisonment, (2) fugitives from justice, (3) unlawful drug users, and (4) those adjudicated as a “mental defective” or who had previously been committed. Gun Control Act of 1968, Pub. L. No. 90-618, sec.102, § 922(h), 82 Stat. 1213, 1220-21 (codified as amended at 18 U.S.C. § 922(h)).

¹⁰⁴ *United States v. Bass*, 404 U.S. 336, 343 (1971).

¹⁰⁵ *Id.* at 344.

¹⁰⁶ Vizzard, *Gun Control Act*, *supra* note 94, at 84.

¹⁰⁷ SPITZER, *supra* note 39, at 188.

influence over the scope of firearms regulations.¹⁰⁸ In the resulting “compromise with the NRA,” observes David Kopel, “[t]here would be no federal licensing of gun owners. Gun sales would be registered, but only by the dealer, not the government.”¹⁰⁹

As signed into law, the GCA had several main components covering both the manufacturing and distribution process as well as individual-level gun use. It extended the FFA requirements mandating licensure for anyone in the business of manufacturing, importing, or dealing firearms, not just those who shipped or received such firearms in interstate commerce.¹¹⁰ The law also (1) banned interstate shipments of firearms to individuals, (2) increased dealer licensing and record-keeping requirements, (3) prohibited the importation of most foreign-made surplus arms, (4) added to the classes of persons prohibited from purchasing guns, and (5) increased the punishment for those who used a gun in a crime.¹¹¹

The GCA set up a dual penalty track for violations. Like the NFA and FFA before it, the GCA generally prescribed a maximum sentence of five years imprisonment for any violation, but it also singled out several acts that merited longer punishment. Anyone who shipped, transferred, or received a gun intending to commit a felony, or with reasonable cause to believe one would be committed, faced up to ten years in prison.¹¹²

It also increased punishment for using a gun in a crime—and set a mandatory sentencing floor. In the first incarnation of 18 U.S.C. § 924(c)’s enhancement offense, the Act provided (1) using a firearm to commit a federal felony or (2) carrying a firearm unlawfully during the commission of a federal felony would be punishable by a mandatory minimum of one year of imprisonment and a maximum of ten years.¹¹³ A second conviction for use or unlawful carrying under this subsection resulted in a mandatory minimum of two years and a maximum of 25 years in prison.¹¹⁴ For that recidivist, “notwithstanding any other provision of law, the court shall not suspend the sentence . . . of such person or give him a probationary sentence.”¹¹⁵

¹⁰⁸ Vizzard, *Gun Control Act*, *supra* note 94, at 80-81 (describing the NRA membership’s radicalization on gun issues, pushing its leadership to reject stricter gun control policies they previously supported).

¹⁰⁹ Kopel, *supra* note 45, at 1545.

¹¹⁰ Vizzard, *Gun Control Act*, *supra* note 94, at 87.

¹¹¹ *Id.* at 87-88 (describing changes enacted in the GCA); Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 924(c), 82 Stat. 1213, 1224 (imposing increased penalties for gun use in a crime) (codified as amended at 18 U.S.C. § 924(c)).

¹¹² 18 U.S.C. § 924(b) (1968).

¹¹³ 18 U.S.C. § 924(c) (1968).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

We pause here to underscore the importance of § 924(c) because of its increasing relevance in federal criminal enforcement. In 2016, for example, about one in every thirty-three offenders sentenced for violating federal law was sentenced under this provision.¹¹⁶ Congress here created, in the Supreme Court's words, a "combination crime . . . [that] punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm."¹¹⁷ It punishes the combination of using or carrying a gun and committing a separate federal crime. Surprisingly, though, this new offense was not a central component of the legislation. The provision was not part of the original House bill but was instead proposed as an amendment on the House floor and swiftly passed.¹¹⁸ "Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports."¹¹⁹

And because of the provision's increasing centrality in firearms prosecutions, Congress has frequently revised the statute, often to expand it and add increasingly severe mandatory minimum sentences where there were once relatively minor ones. Indeed, in the span of just 14 years, "[b]etween 1984 and 1998, Congress expanded the reach or increased the severity of § 924(c) on four occasions."¹²⁰ We detail some of the major changes.

First, Congress amended the statute in 1971, just three years after the GCA's passage, to mandate that "the term of imprisonment imposed under this subsection" shall not "run concurrently with any term of imprisonment imposed for the commission of such felony" that generated the charge.¹²¹

Next, in 1984, concurrently with the Sentencing Reform Act, Congress limited the enhancement to using or carrying a firearm during or in relation to a "crime of violence," but changed the applicable sentences to a flat

¹¹⁶ For the complete text and changes to the statute over time, see the Appendix. *See also* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FEDERAL FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19 (2018) (providing that 1,976 offenders were convicted of at least one offense under § 924(c) in 2016, which represented 2.9% of federal offenders sentenced that year), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf [<https://perma.cc/G9BH-P8KV>].

¹¹⁷ *Rosemond v. United States*, 572 U.S. 65, 75 (2014).

¹¹⁸ *Simpson v. United States*, 435 U.S. 6, 13 (1978) (describing the legislative history of § 924(c)).

¹¹⁹ *Id.* at 13 n.7.

¹²⁰ *Abbott v. United States*, 562 U.S. 8, 23 (2010).

¹²¹ Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, sec. 13, § 924(c), 84 Stat. 1880, 1889-90 (1971) (codified as amended at 18 U.S.C. § 924(c)). The Act did lower the mandatory minimum for second or subsequent offenses from five years to two years, but, in combination with mandatory consecutive sentencing, it is not clear this made the statute more lenient.

mandatory five-year term for first offenders and a ten-year term for a second or subsequent conviction.¹²²

Two years later, as part of the Firearm Owners' Protection Act ("FOPA"), which we discuss in more detail below, Congress again expanded the enhancement. It added drug-trafficking crimes to crimes of violence as predicate offenses and added a ten-year flat sentence for cases involving machine guns or silencers (and twenty years for a second or subsequent offense).¹²³ FOPA also added a definition for both types of predicate offenses, definitions that would serve to generate significant litigation in the years to come.¹²⁴

In 1998, Congress divided § 924(c)(1) from a single paragraph into a set of four detailed subsections, more carefully delineating the sentencing options, and with mandatory *minimum* sentences in place of the prior flat sentence depending on whether and how the firearm was used.¹²⁵ At the same time, Congress also amended § 924(c) to outlaw not only "use" in relation to a predicate offense, but also the possession of a firearm "in furtherance" of a predicate drug-trafficking or violent offense.¹²⁶

Finally, in 2018, as part of the First Step Act, Congress made its first change to make the statute more lenient. In response to *Deal v. United States*,¹²⁷ which held that a "second or subsequent conviction" could be one that came in the same proceeding as the first conviction, Congress revised the provision to clarify that the recidivist enhancement is only available after a prior conviction has become final.¹²⁸

The Gun Control Act of 1968 remains to this day the governing framework for federal firearms laws. But at the time of its enactment, neither side was completely happy with the law; advocates for tighter regulation bemoaned the NRA's success in eliminating stricter requirements, while gun-rights activists claimed the NRA failed them in allowing a gun bill to pass at

¹²² Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, sec. 1005, § 924(c), 98 Stat. 1837, 2138 (1984) (codified as amended at 18 U.S.C. § 924(c)).

¹²³ Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 104(a)(2), § 924(c), 100 Stat. 449, 456-57 (1986) (codified as amended at 18 U.S.C. § 924(c)).

¹²⁴ FOPA provided a "crime of violence" is a felony that either (1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or is a crime that (2) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 104(a).

¹²⁵ *United States v. O'Brien*, 560 U.S. 218, 232-33 (2010) (discussing these substantive changes, which played a role in the Court's ruling).

¹²⁶ An Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, sec. 1, § 924(c), 112 Stat. 3469, 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)).

¹²⁷ 508 U.S. 129, 132-33, 137 (1993).

¹²⁸ First Step Act of 2018, Pub. L. No. 115-391, sec. 403(a), § 924(c)(1)(C), 132 Stat. 5194, 5221-22 (codified as amended at 18 U.S.C. § 924(c)(1)(C)).

all.¹²⁹ Treasury again was tasked with enforcement of the Act. As with the NFA and FFA, enforcement was delegated to the IRS's Alcohol and Tax Division, which just a few years after the law “achieved full bureau status as the Bureau of Alcohol, Tobacco and Firearms.”¹³⁰

Like its predecessor gun crime statutes, the 1968 legislation—both the omnibus bill and the GCA (which are generally collectively referred to as the GCA¹³¹)—generated controversy that reached the Supreme Court.¹³² Indeed, the Court has, over the past three decades, ruled on just § 924(c) so many times that in *United States v. O'Brien*, ruling that the use of a machine gun was a sentencing-enhancer that must be proven to the jury, the Court wearily commented, “[t]he Court must interpret, once again, § 924(c) of Title 18 of the United States Code.”¹³³ We return to § 924(c) when we draw implications in Parts II and III.

2. Armed Career Criminal Act (1984)

Faced with increasing crime rates, Congress sought further ways to deter and punish lawbreakers.¹³⁴ One way it did so was “to target career criminals for punishment in light of social scientific research conducted in the 1970s and 1980s concluding that a relatively small number of habitual offenders are responsible for a large fraction of crimes.”¹³⁵ The Armed Career Criminal Act (“ACCA”) was, in the words of James Jacobs, partly the result of the “law-and-order politics [that] had become firmly entrenched” by the 1980s.¹³⁶

In 1981, Senator Arlen Specter introduced a bill that would eventually become the ACCA.¹³⁷ That bill—the Career Criminal Life Sentence Act of 1981—created a new mandatory life sentence for certain crimes.¹³⁸ Its main provision read:

¹²⁹ DECONDE, *supra* note 34, at 186-88.

¹³⁰ Hardy, *supra* note 40, at 604.

¹³¹ *Id.* at 595.

¹³² See Kopel, *supra* note 45, at 1548-49 (“Because the Federal GCA vastly expanded the scope of federal gun laws, the federal courts were soon hearing plenty of cases about ‘prohibited persons’ (usually, convicted felons) who had violated federal law by possessing a firearm.”).

¹³³ 560 U.S. 218, 221 (2010).

¹³⁴ See Beale, *supra* note 44, at 43 (“The 1980s and 1990s brought increased public concern with violent crime, and Congress responded with the enactment of a number of new federal offenses . . .”).

¹³⁵ James G. Levine, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545 (2009); see also DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 75-85 (2021) (detailing the evolution of ACCA).

¹³⁶ JACOBS, *supra* note 63, at 26.

¹³⁷ Levine, *supra* note 135, at 545.

¹³⁸ S. 1688, 97th Cong. (1981).

Whoever commits, conspires, or attempts to commit a robbery or a burglary in violation of the felony statutes of a State or of the United States while using, threatening to use, displaying or possessing a firearm, after having been twice convicted of a robbery or a burglary in violation of the felony statutes of a State or the United States is a career criminal and upon conviction shall be sentenced to imprisonment for life.¹³⁹

Specter's bill would have vastly expanded the reach of federal criminal law. After criticism about federalizing robbery and burglary crimes, the proponents of harsher punishment turned to a preexisting jurisdictional hook—the federal gun crimes.¹⁴⁰ The new version “eliminated the creation of federal jurisdiction over local robberies and burglaries committed by repeat offenders” and instead “created a sentence enhancement for repeat offenders convicted of violating a preexisting federal law.”¹⁴¹ As signed into law, the ACCA amended Title VII of the 1968 legislation.¹⁴² It provided that any person caught unlawfully possessing firearms (e.g., felons) after three prior robbery or burglary convictions faced a mandatory minimum sentence of 15 years in prison.¹⁴³ The ACCA took away any judicial discretion, providing:

[T]he court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under this subsection, and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.¹⁴⁴

The ACCA was amended two years later in 1986 to substantially expand its reach.¹⁴⁵ Those amendments replaced the qualifying predicate offenses; instead of robbery or burglary, the predicates became “a violent felony or a serious drug offense.”¹⁴⁶ The statute defined a “violent felony” to include felonies that (1) had force as an element, (2) were one of several enumerated crimes—(“burglary, arson, or extortion”) or ones involving explosives, or that (3) “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.”¹⁴⁷ The last clause became known as the “residual

¹³⁹ *Id.* § 2118(a).

¹⁴⁰ Levine, *supra* note 135, at 546-47.

¹⁴¹ *Id.*

¹⁴² Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended at 18 U.S.C. § 1202).

¹⁴³ *Id.* § 1802.

¹⁴⁴ *Id.*

¹⁴⁵ See Taylor v. United States, 495 U.S. 575, 582-83 (1990) (describing the amendment history).

¹⁴⁶ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 (codified as amended at 18 U.S.C. § 942).

¹⁴⁷ *Id.* at 3207-40.

clause.”¹⁴⁸ With these amendments, Congress covered both “crimes against the person” and “certain physically risky crimes against property.”¹⁴⁹

As one scholar has noted, these provisions were quite popular: “[h]eaping punishment on those who supplied firearms to violent criminals and drug traffickers appealed to everyone.”¹⁵⁰ The Supreme Court has noted the focus on recidivism and firearms, observing that “throughout the history of the enhancement provision, Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons.”¹⁵¹

The ACCA has generated a long line of Supreme Court cases considering how to deal with the predicate felonies. In *Taylor v. United States*, the Court concluded that whether a prior conviction counts as an enumerated predicate (there, as “burglary”) should be determined based on comparing the elements of the underlying conviction to the “generic” offense.¹⁵² The Court in *Descamps v. United States* declared that Congress did not want courts looking to the underlying facts; instead, it “meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.”¹⁵³

When it came to ACCA’s residual clause, the Court’s inability to draw clear lines throughout a series of cases led it to eventually scrap the enterprise.¹⁵⁴ In *Johnson v. United States*, the Court struck down the residual

¹⁴⁸ See *Johnson v. United States*, 576 U.S. 591, 594 (2015) (describing the residual clause).

¹⁴⁹ *Begay v. United States*, 553 U.S. 137, 143-44 (2008), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015).

¹⁵⁰ JACOBS, *supra* note 63, at 29.

¹⁵¹ *Taylor v. United States*, 495 U.S. 575, 587-88 (1990).

¹⁵² *Id.* at 600. Treatment of the burglary offense has alone prompted several cases. See, e.g., *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) (holding that for generic burglary, “remaining-in burglary . . . occur[s] when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure”); *United States v. Stitt*, 139 S. Ct. 399, 407 (2018) (holding that generic burglary includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation). But courts cannot rely on police reports to establish a connection to the generic offense. See *Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that the sentencing court making the determination “is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information”).

¹⁵³ 570 U.S. 254, 268 (2013).

¹⁵⁴ Justice Scalia plainly stated in *Derby* the Court’s inability to draw clear lines, commenting:

Since our ACCA cases are incomprehensible to judges, the statute obviously does not give ‘person[s] of ordinary intelligence fair notice’ of its reach. I would grant certiorari, declare ACCA’s residual provision to be unconstitutionally vague, and ring down the curtain on the ACCA farce playing in federal courts throughout the Nation.

clause as unconstitutionally vague.¹⁵⁵ As it said, “this Court’s repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.”¹⁵⁶

3. U.S. Sentencing Guidelines (1986)

As part of the Sentencing Reform Act of 1984, Congress not only enacted the ACCA, but also empowered the newly created U.S. Sentencing Commission to develop sentencing guidelines.¹⁵⁷ The Sentencing Reform Act “was passed at a time of soaring crime rates, and during a period when crime had increasingly become a national political issue.”¹⁵⁸ The push for determinate sentencing guidelines was supported by “both sides of the political aisle.”¹⁵⁹

The main gun-related guideline the Commission drafted, and amended in certain respects since, is U.S.S.G. § 2K2.1.¹⁶⁰ As with other guidelines, it accounts for elements and definitions in key statutes but also seeks consideration of “real offense” aspects of cases that commonly arise across different charges.¹⁶¹

In general, § 2K2.4 states that unless a person is a career offender, the sentence for a violation of § 924(c) will be the mandatory minimum, with other offense-level adjustments not applicable.¹⁶² The offense level may depend on the type of firearm; the number of them; the defendant’s prior convictions for firearms, ammunition, drug or violent felonies; whether the person was prohibited from possession as a convict or a noncitizen without status; or whether the use or possession was in connection with another offense.¹⁶³ For example, the guidelines address sentencing enhancement for

Derby v. United States, 564 U.S. 1047, 1049 (2011) (Scalia, J., dissenting) (alteration in original) (citation omitted) (quoting United States v. Batchelder, 442 U.S. 114, 123 (1979)).

¹⁵⁵ 576 U.S. 591, 597-98 (2015) (determining the clause is too vague because of its failure to provide certainty of “the risk posed by a crime” and “about how much risk it takes for a crime to qualify as a violent felony”).

¹⁵⁶ *Id.* at 598.

¹⁵⁷ Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. § 3551-3586).

¹⁵⁸ David E. Patton, *Guns, Crime Control, and A Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1465-66 (2011).

¹⁵⁹ *Id.*

¹⁶⁰ See also U.S. SENT’G COMM’N, PRIMER ON FIREARMS OFFENSES 22-38 (2021) (summarizing offense levels based on presence of certain characteristics).

¹⁶¹ See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 11-12 (1988) (explaining that the Commission’s approach combines the “base offense level” with “real” aggravating or mitigating factors).

¹⁶² U.S. SENT’G GUIDELINES MANUAL § 2K2.4(b), (c) (U.S. SENT’G COMM’N 2018).

¹⁶³ *Id.* at § 2K2.1. Additional, more specialized guidelines deal with “Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes.” *Id.* at § 2K2.4. There are also specialized guidelines for “Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone” and “Possessing, Purchasing, or Owning Body Armor by Violent Felons.” *Id.* at §§ 2K2.5-6.

felony possession of multiple firearms, increasing the base level of offenses if a person illegally possesses three or more firearms, with the enhancement increasing with the number of firearms involved.¹⁶⁴ The guidelines also create enhancements if a defendant trafficked in firearms.¹⁶⁵ The Sentencing Guidelines are advisory following the Supreme Court's ruling in *United States v. Booker* in 2005, but they are still highly relevant in plea bargain negotiations and at sentencing.¹⁶⁶ Substantial case law has interpreted provisions in these guidelines.¹⁶⁷

4. Firearms Owners Protection Act (1986)

The Gun Control Act generated controversy among gun-rights proponents almost from the beginning.¹⁶⁸ It led to calls to rein in enforcement efforts, fix confusion in the law, and protect law-abiding citizens from becoming "technical" law-breakers.¹⁶⁹ An increasingly hardline NRA and its congressional and grassroots supporters highlighted serious concerns about aggressive enforcement actions conducted by the Bureau of Alcohol, Tobacco, and Firearms ("ATF").¹⁷⁰ ATF's enforcement "generated intense reaction from a small but vocal minority of licensed dealers and unlicensed traffickers, long used to unrestricted trafficking in guns."¹⁷¹

¹⁶⁴ *Id.* § 2K2.1(b)(1); *see also id.* at app. 5 (clarifying that lawfully obtained or possessed firearms do not count towards an enhancement).

¹⁶⁵ *Id.* § 2K2.1(b)(5).

¹⁶⁶ 543 U.S. 220, 246 (2005); *see, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 878-90 (2009) (discussing the impact of the post-*Booker* guidelines on prosecutorial discretion and plea negotiations).

¹⁶⁷ *See, e.g.*, Kendall C. Burman, Comment, *Firearm Enhancements Under the Federal Sentencing Guidelines*, 71 U. CHI. L. REV. 1055, 1055 (2004) (describing the circuit split regarding the meaning of the companion felony enhancement provision).

¹⁶⁸ *See* SPITZER, *supra* note 39, at 191 (observing that "[g]un control opponents nevertheless immediately set to work to erode the [GCA], if not overturn it entirely"). Indeed, President Ford called for its repeal as part of his 1976 presidential campaign. DECONDE, *supra* note 34, at 204.

¹⁶⁹ *See* Hardy, *supra* note 40, at 606-07 ("Beginning in early 1979, Senate hearings publicized a number of cases of serious abuses of enforcement powers. This documentation was later cited as the empirical foundation of FOPA."). These abuses included charging a disabled Vietnam veteran with possession of an unregistered machine gun despite the lack of any proof that he knew the characteristics that made the weapon a regulated one, resulting in an apology from the judge, who directed the verdict for the veteran. *Oversight Hearings on Bureau of Alcohol, Tobacco and Firearms: Hearing of the Comm. on Appropriations*, 96th Cong. 20-30 (1979) (recording testimony of David A. Moorhead). The Congressional Record included the trial transcript of the federal district judge dismissing the indictments after trial and castigating the government for overzealous enforcement: "I don't think this case should have been brought . . . [O]n behalf of the law enforcement officials in this case, they should have used some common sense and a little compassion and taken all the facts into consideration." *Id.* at 27.

¹⁷⁰ *See* Kopel, *supra* note 45, at 1566 (describing FOPA as "conceived in the late 1970s and early 1980s as congressional committees recorded horror stories of abusive BATF prosecutions.").

¹⁷¹ Vizzard, *Impact*, *supra* note 36, at 342.

FOPA made a number of significant modifications to the existing firearms law tapestry. It systemized treatment of prohibited possessors under § 922, combining and revising the poorly-structured and inconsistent provisions in the 1968 legislation.¹⁷² It also added a more robust relief from firearm disabilities process.¹⁷³ The GCA had prohibited possession for those with state convictions, even when state law restored one's civil rights.¹⁷⁴ FOPA changed that¹⁷⁵ and expanded the ability of all prohibited possessors to seek from the Treasury Secretary (and later ATF) relief from that disability.¹⁷⁶

FOPA also repealed some of the GCA's interstate sales provisions, allowing dealers to sell rifles and shotguns to an out-of-state resident as long as the sale is legal in both the seller and buyer's states.¹⁷⁷ In one of its few more restrictive measures, FOPA banned private possession of machine guns manufactured after 1986.¹⁷⁸

Another major set of revisions in FOPA relate to dealers. Indeed, FOPA might accurately be described as the Firearm *Dealers* Protection Act.¹⁷⁹ The NRA, other pro-gun interest groups, and gun-friendly legislators ensured

¹⁷² See Hardy, *supra* note 40, at 639 (“Few portions of the Gun Control Act were as garbled as its core, the definition of ‘prohibited persons’ who were forbidden to acquire, possess or transport firearms.”).

¹⁷³ See *id.* at 644 (“FOPA, while retaining review on an ‘arbitrary and capricious’ standard uniquely expanded district court review by allowing the court to admit evidence outside the record . . .”).

¹⁷⁴ See *United States v. Ziegenhagen*, 420 F. Supp. 72, 74-75 (E.D. Wis. 1976) (holding that the possession ban applied and stating “[t]he purpose of the statutes . . . would be emasculated if every person receiving a restoration of civil rights after completing a state sentence were deemed not to have been convicted within the meaning of these federal laws.”).

¹⁷⁵ Firearms Owners’ Protection Act, Pub. L. No. 99-308, sec. 101, § 921(a)(20)(B), 100 Stat. 449, 450 (1986) (codified as amended at 18 U.S.C. § 921) (“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.”).

¹⁷⁶ See *id.* sec. 105, § 925(c), 100 Stat. at 459 (amending Section 925 of the code “by inserting ‘Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court . . . for a judicial review of such denial.’”); see also Pannal Alan Sanders, *United States v. Bean: Shoveling After the Elephant?*, 35 ST. MARY’S L.J. 555, 564-65 (2004) (explaining that the amendment removed the limitations that made only certain felons eligible); *United States v. Bean*, 537 U.S. 71, 74 (2002) (noting that the Treasury Secretary delegated to ATF the authority to act on applications).

¹⁷⁷ See Firearms Owners’ Protection Act, Pub. L. No. 99-308, sec. 102, § 922(b)(A), 100 Stat. 449, 451 (amending Section 922 of title 18 to make it inapplicable to these sales).

¹⁷⁸ *Id.* sec. 102, § 922(o)(1), (2), 100 Stat. at 453 (codified at 18 U.S.C. § 922(o)). This addition to the bill “was raised with only minutes left in the time allotted [for floor debate] under the rule” and was “passed on a rather irregular voice vote.” Hardy, *supra* note 40, at 625.

¹⁷⁹ See Vizzard, *Current and Future Policy*, *supra* note 34, at 882-83 (explaining that “[a]mong the most significant changes” FOPA made to the existing federal framework were a series of changes affecting dealers); Anthony A. Braga, *More Gun Laws or More Gun Law Enforcement?*, 20 J. POL’Y ANALYSIS & MGMT. 545, 547 (2001) (explaining that FOPA, combined with NRA influence, makes dealer prosecutions more difficult).

that FOPA would make enforcement against dealers more difficult.¹⁸⁰ A number of FOPA's provisions reflect this difficulty.

The Act provided a definition of "engaged in the business" of firearm sales, manufacturing, and repairs that made lots of occasional sellers no longer covered by the requirement to obtain a license. Only those "who devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms" had to be licensed as dealers.¹⁸¹ Other provisions had similar deregulatory effect, including (1) curtailing ATF's rulemaking authority because of concerns over how it had been used with respect to dealers,¹⁸² (2) raising the scienter requirement for dealer violations,¹⁸³ (3) restricting ATF's ability to police dealers,¹⁸⁴ and (4) limiting ATF's authority to acquire licensee records.¹⁸⁵ In short, as historian Alexander DeConde put it, "the act gutted the already feeble federal firearms regulation."¹⁸⁶

FOPA also modified the firearm sentence enhancements. In addition to Title VII of the 1968 legislation, FOPA recodified ACCA into 18 U.S.C. § 924(e), bringing most major firearm crimes into one chapter of the U.S. Code.¹⁸⁷ Substantively, FOPA slightly changed ACCA's definition of burglary and expanded § 924(c)'s sentence enhancement.¹⁸⁸ It provided extra enhancements for the use of machine guns or silencers.¹⁸⁹

¹⁸⁰ See SPITZER, *supra* note 39, at 191 (noting that the NRA was "joined by the Gun Owners of America and the Citizens Committee for the Right to Keep and Bear Arms" in lobbying for FOPA's changes).

¹⁸¹ Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 101, § 921(a)(21)(C), 100 Stat. 449, 450.

¹⁸² See Hardy, *supra* note 40, at 618-20 (explaining that the final version of the bill limited the record-submission power that provided the Treasury with the rulemaking power to make regulations).

¹⁸³ Hardy describes the increase in the scienter requirement for dealer violations, stating:

After negotiations in which Treasury argued that it ought not to be required to prove intent to violate the law for serious offenses such as possession of stolen weapons, felon in possession and illegal importation, a bifurcation was drafted under which these offenses needed proof only of a 'knowing' violation, while the remainder still required proof of willfulness.

Id. at 647-48

¹⁸⁴ See *id.* at 617-18 ("The NRA's core concern had been to prevent the use of inspections to harass dealers or to drum up technical cases by 'fishing expeditions.'").

¹⁸⁵ *Id.* at 655-56; Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 101, § 921(a)(21)(C), 100 Stat. 449, 453 (1986).

¹⁸⁶ DECONDE, *supra* note 34, at 230.

¹⁸⁷ Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended at 18 U.S.C. § 1201); Firearms Owners' Protection Act, sec. 101, § 921(a)(21)(C), 100 Stat. at 458.

¹⁸⁸ Taylor v. United States, 495 U.S. 575, 582 (1990) ("The definition of burglary was amended slightly, by replacing the words 'any felony' with 'any crime punishable by a term of imprisonment exceeding one year and . . .'").

¹⁸⁹ Firearms Owners' Protection Act, sec. 104(a)(2)(D), (E), § 924(c), 100 Stat. at 456-57.

In sum, “FOPA’s impact on enforcement and administration of the federal firearms laws is wide-ranging.”¹⁹⁰ But those impacts are uneven. Dealers and potential dealers get a break; offenders or potential offenders get another book thrown at them. Thus, while FOPA “generally tightens standards for record inspection and disposition, firearm seizures and forfeitures, license revocations and general criminal penalties,” it simultaneously “expand[s] mandatory sentencing for use of firearms in” certain offenses.¹⁹¹

C. *Toward Modern Regulatory Approaches*

On January 17, 1989, a 24-year old white supremacist killed five students and one teacher at an elementary school in Stockton, California and injured 33 more.¹⁹² The shooter, who had a criminal record, used an AK-47 in the attack.¹⁹³ One historian has observed how the Stockton shooting “denoted a marked change in the public reaction to civilian gun violence.”¹⁹⁴ This tragic event helped pave the way for the next major set of gun regulations, which focused on the offender and his weapons.

1. The Brady Act (1993)

During John Hinckley’s assassination attempt on President Reagan in 1981, Hinckley gravely injured Reagan’s press secretary James Brady. Following this incident, James and his wife Sarah became active supporters of more stringent regulation of firearms.¹⁹⁵ To that end, Sarah Brady became involved with one of the largest pro-regulation organizations, Handgun Control Inc.; she was elected to the Board in 1985 and took over as Chair in 1989,¹⁹⁶ where she “stimulated fund-raising, kept the organization focused on what she saw as the need for more effective federal gun regulation, and initiated fresh, aggressive tactics against the gun lobby.”¹⁹⁷

¹⁹⁰ *Id.* at 653-54.

¹⁹¹ *Id.*

¹⁹² DECONDE, *supra* note 34, at 237.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Kopel, *supra* note 45, at 1574-75 (“Brady threw herself into the movement that her husband would later join as well. Eventually, the organization would bear her name As Republican insiders, the Bradys offered the possibility of taking the gun control message to the Republican establishment.”).

¹⁹⁶ *History of Brady*, BRADY UNITED, <https://www.bradyunited.org/history> [<https://perma.cc/V7SP-MUNL>].

¹⁹⁷ DECONDE, *supra* note 34, at 241.

One major focus became a push for a waiting period on handgun purchases.¹⁹⁸ The legislation's goal was twofold: first, it sought to allow time for a background check to assess whether the prospective purchaser was prohibited from possessing firearms, and second, it looked to create a cooling off period.¹⁹⁹

The first version of the Brady bill was introduced in 1987, but it failed to pass the House.²⁰⁰ That did not stop the effort, and the legislation was re-introduced again in the early 1990s. Although the Brady bill did not receive a welcome audience in the George H.W. Bush administration,²⁰¹ it did pick up other major backers. "[T]he Bradys had persuaded former presidents Nixon, Ford, and Carter to endorse the gun-control bill," and "[e]ven Reagan . . . broke with the gun lobby's position on this issue" and announced his support.²⁰² As Reagan said in a *New York Times* op-ed, "[b]ased upon the evidence in states that already have handgun purchase waiting periods, this bill—on a nationwide scale—can't help but stop thousands of illegal handgun purchases."²⁰³ Aided by this cadre of supporters, the bill started to move in Congress.

The House passed the bill in 1991 over a competing alternative, backed by the NRA, that would have eliminated the waiting period and instead instituted an instant background check.²⁰⁴ "The problem with such a proposal at the time was that successful operation of such a system required that pertinent records from all the states be fully automated."²⁰⁵ That was far from a reality. In the Senate, the bill was modified and attached to an omnibus crime bill that had divided the chambers throughout the year.²⁰⁶ A conference committee tried to hash out a compromise between the House and Senate

¹⁹⁸ See James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 97 (1995) ("Gun control advocates proposed a waiting period and a background check . . ."); see also SPITZER, *supra* note 39, at 202 ("From 1987 to 1993, gun control proponents placed their primary emphasis on the enactment of a national waiting period for handgun purchases.").

¹⁹⁹ See SPITZER, *supra* note 39, at 202 (explaining these twin aims).

²⁰⁰ See *id.* ("The Brady bill was introduced in early 1987 . . . [But] opponents led by the NRA succeeded in defeating the bill . . .").

²⁰¹ DECONDE, *supra* note 34, at 242 (noting that President Bush stood firm on the gun issue and threatened to veto the bill).

²⁰² *Id.*

²⁰³ Ronald Reagan, *Why I'm for the Brady Bill*, N.Y. TIMES, Mar. 29, 1991, at A23.

²⁰⁴ See SPITZER, *supra* note 39, at 203 (explaining that the NRA bill would have eliminated one of the Brady bill's aims of creating a cooling-off period but still barred ineligible buyers from purchasing handguns).

²⁰⁵ *Id.* at 203; see also Marc Christopher Cozzolino, *Gun Control: The Brady Handgun Violence Prevention Act*, 16 SETON HALL LEGIS. J. 245, 256-57 (1992) (chronicling the practical objections to the alternative option, including time and cost constraints).

²⁰⁶ See SPITZER, *supra* note 39, at 203 ("A conference version was hammered out in November that rolled the Brady provision . . . and a compromise crime bill together . . .").

versions, but, though that compromise received House support, the resulting bill was filibustered in the Senate.²⁰⁷

The Brady bill would come back again after the 1992 election. During that election, the NRA refused to support Bush for reelection even though Clinton ran on a platform that embraced stricter gun regulation, including support for the Brady bill.²⁰⁸ On the campaign trail and in office, Clinton talked about firearms like other politicians; “[h]e persisted in identifying the gun problem primarily with crime.”²⁰⁹ Once in office, Clinton used his popularity to push for these new laws. And his allies in Congress were happy to oblige, introducing the Brady bill again less than a month after Clinton assumed office.²¹⁰

The bill retained a five-business-day waiting period for handgun purchases, but the House agreed to an amendment to eliminate the waiting period after five years.²¹¹ In the Senate, however, the prospect of another filibuster loomed.²¹² But, “sensing a rising tide of impatience and the inability to win further concessions from Democratic leaders,” Republican legislators backed down and the measure passed the Senate.²¹³ President Clinton signed it into law on November 30, 1993, after “[t]he NRA put up a token effort to stop it, but focused primarily on influencing the final law through amendments.”²¹⁴ “Ultimately, after seven years of struggle, intensive lobbying by organizations such as Handgun Control Inc., and mounting resentment against the tactics of the gun lobby, control proponents cracked the opposition to the Brady bill.”²¹⁵

The law modified several aspects of prior firearms legislation, including most prominently imposing the temporary waiting period.²¹⁶ It also required dealers to verify a buyer’s identity and transmit the buyer’s information to

²⁰⁷ See *id.* (“The Senate finally brought the compromise bill to the floor for a vote . . . , but Republicans used the unique Senate device of the filibuster . . . to force bill sponsors to withdraw the measure after a vote to end debate . . .”).

²⁰⁸ See DECONDE, *supra* note 34, at 245-46 (“Still incensed by [Bush’s] stance on assault guns, the rifle association refused to contribute to his campaign or to endorse him again. It took this position even though . . . Clinton . . . posed a greater danger to the association’s doctrines.”).

²⁰⁹ See *id.* at 250.

²¹⁰ *Id.* at 249.

²¹¹ See SPITZER, *supra* note 39, at 204 (“The Brady bill struggle climaxed in 1993 when supporters promoted a five-business-day waiting period One such amendment, to phase out the waiting period after five years, was adopted.”).

²¹² *Id.* at 204 (“The bill faced a Republican filibuster almost immediately . . .”).

²¹³ *Id.* at 205; see also Adam Clymer, *How Jockeying Brought Brady Bill Back to Life*, N.Y. TIMES, Nov. 22, 1993, at B8 (describing the negotiations that led to the passage of the Brady bill).

²¹⁴ Kopel, *supra* note 45, at 1582.

²¹⁵ DECONDE, *supra* note 34, at 250-51.

²¹⁶ See generally Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, 1536-37 (1993) (codified as amended in scattered sections of 18 U.S.C.).

the chief law enforcement officer (“CLEO”) of the jurisdiction.²¹⁷ CLEOs were then required to make a “reasonable effort” to determine in five days whether the transfer would violate the law.²¹⁸ In *Printz v. United States*, the Supreme Court struck down these temporary Brady provisions as an unconstitutional commandeering of state executive power.²¹⁹

In its most lasting legacy, the law required the Attorney General to establish a national instant background-check system within the five years during which the temporary waiting period was in effect.²²⁰ Pursuant to that directive, and under delegation from the Attorney General, the FBI launched the National Instant Criminal Background Check System (“NICS”) in late 1998 to conduct automated background checks on all firearms sales—not just handgun sales—by licensed gun dealers. By 1999, the Department of Justice called NICS “highly effective in stopping the illegal flow of firearms from federally licensed gun dealers to prohibited persons.”²²¹ During its first twenty-four months of operation, “the system processed over seventeen million inquiries and prevented over 300,000 felons, fugitives, and other prohibited persons from receiving firearms from federally licensed dealers.”²²²

2. Violent Crime Control and Law Enforcement Act of 1994

The same pro-regulation forces that passed the Brady bill continued to push for more stringent regulations. The 1994 crime bill was a result of this effort. The bill, formally known as the Violent Crime Control and Law Enforcement Act of 1994, reflects an increasing agreement on tough-on-

²¹⁷ *Id.*

²¹⁸ *Id.* at 1537-38. There was not much clarity, however, on what this requirement obligated CLEOs to do. See Jacobs & Potter, *supra* note 198, at 99 (“On its face, this law could mean an effort as cursory as checking local criminal records or as comprehensive as making inquiries of federal, state, local, and private institutions and agencies responsible for dealing with crime, mental health, immigration, and drugs.”).

²¹⁹ The Court in *Printz* describing the practice and holding it unconstitutional stated:

[T]he central obligation imposed upon CLEOs by the interim provisions of the Brady Act—the obligation to ‘make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General,’ . . . is unconstitutional.

Printz v. United States, 521 U.S. 898, 933 (1997).

²²⁰ See Brady Handgun Violence Prevention Act, *supra* note 216, at 1541 (“Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system . . .”).

²²¹ U.S. DEP’T OF JUST., GUN VIOLENCE REDUCTION: NATIONAL INTEGRATED FIREARMS VIOLENCE REDUCTION STRATEGY § 4 (1999) [hereinafter DOJ Strategy], <https://www.justice.gov/archive/opd/Strategy.htm> [<https://perma.cc/SRB8-G23W>].

²²² *Id.*

crime politics.²²³ As one scholar noted at the time, the liberal-conservative divide that marked differing approaches to crime in the 1960s (root cause focus vs. harsh punishment) had “largely disappeared” by the 1990s.²²⁴ By then, “measures emphasizing punishment far overshadow[ed] any consideration of crime prevention” and “[b]oth conservatives and liberals attempt[ed] to outdo each other in their posturing and proposals to be increasingly punitive toward criminals.”²²⁵

The Senate passed its version of the crime bill in November 1993, around the same time the Brady bill passed the Senate.²²⁶ It took the House until April 1994 to pass its own crime bill, and the resulting legislation that emerged from conference committee passed both chambers in August 1994.²²⁷ Clinton signed it into law the next month.²²⁸

Title XI of the Act included a host of new gun regulations. First, it contained the Public Safety and Recreational Firearm Use Protection Act, also known as the assault weapons ban.²²⁹ The law banned specific firearms by name, gave the ATF authority to ban other models, and banned semi-automatic rifles with at least two enumerated features.²³⁰ It also banned magazines that could hold more than ten rounds. But the Act grandfathered in all then-legally owned weapons and magazines. “Not surprisingly, there was a huge increase in sales in the year before the ban became effective.”²³¹ The ban contained a sunset clause, repealing the provisions ten years after its effective date.²³² Congress did not renew the ban in 2004.²³³

Second, Title XI also contained the Youth Handgun Safety Act.²³⁴ The provision prohibits the possession of handguns or handgun ammunition by anyone under age 18.²³⁵ Any juvenile violating the provision or person knowingly providing a handgun to a juvenile faced up to a year of imprisonment.²³⁶ But the Act provided criminal sanctions of up to ten years

²²³ See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²²⁴ Tony G. Poveda, *Clinton, Crime, and the Justice Department*, 21 SOC. JUST. 73, 73 (1994).

²²⁵ *Id.*

²²⁶ *Id.* at 73-74.

²²⁷ *Id.*

²²⁸ See Kopel, *supra* note 45, at 1585.

²²⁹ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (1994) (codified as amended in scattered sections of 18 U.S.C.).

²³⁰ JACOBS, *supra* note 63, at 31.

²³¹ *Id.* at 32.

²³² Public Safety and Recreational Firearms Use Protection Act § 110105.

²³³ *Assault Weapon Ban Expires*, CBS NEWS (Sept. 13, 2004, 9:42 AM), <https://www.cbsnews.com/news/assault-weapon-ban-expires> [<https://perma.cc/YR7L-5PUH>].

²³⁴ Public Safety and Recreational Firearms Use Protection Act § 110201.

²³⁵ *Id.*

²³⁶ *Id.*

in prison for anyone providing the juvenile a gun “knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence.”²³⁷

Third, the law created a new category of prohibited persons.²³⁸ It prohibited individuals subject to an order that restrained them from “harassing, stalking, or threatening” an intimate partner or child of their intimate partner from possessing guns if the order met specific requirements.²³⁹ As David Kopel notes, this “was a measure that the NRA had not resisted.”²⁴⁰

The law also created several firearm-related sentence enhancements. It directed the Sentencing Commission “to provide an appropriate enhancement of the punishment” if a crime of violence or drug-trafficking crime was committed with *any* semi-automatic firearm (not just a semi-automatic banned as an assault weapon).²⁴¹ It did the same for anyone convicted of a counterfeiting or forgery crime if the defendant “used or carried a firearm . . . during and in relation to the felony.”²⁴² It also required an enhancement for anyone convicted under 922(g) if the person had a prior violent felony or serious drug-offense conviction.²⁴³

The law was also notable for what it did not include. Senator Alfonse D’Amato introduced a provision that would make it a federal crime to engage in any crime using a handgun that had travelled in interstate commerce, potentially covering 900,000 offenses annually, which engendered noteworthy opposition from the Chief Justice and the Judicial Conference of the United States, as Sara Sun Beale has described.²⁴⁴ The amendment was passed by both the House and the Senate, but was omitted in conference.²⁴⁵ Chief Justice William Rehnquist repeatedly spoke out against the amendment as “inconsistent with long-accepted concepts of federalism” and as an approach that would have “overburdened” federal courts and “swamped” prosecutors.²⁴⁶

²³⁷ *Id.*

²³⁸ *Id.* at § 110,401.

²³⁹ The order had to be issued after a hearing in which the person had actual notice and an opportunity to participate. It also must have either contained a finding that the person was a threat to the intimate partner or child, or it expressly prohibited use or threats of force. *Id.*

²⁴⁰ Kopel, *supra* note 45, at 1586.

²⁴¹ Public Safety and Recreational Firearms Use Protection Act § 110,501.

²⁴² *Id.* at § 110,512.

²⁴³ *Id.* at § 110,513.

²⁴⁴ *See* Beale, *supra* note 35, at 1649-51 (detailing D’Amato’s proposal and criticisms of it).

²⁴⁵ *Id.* at 1650.

²⁴⁶ *Id.* at 1650-51 (quoting William H. Rehnquist, Chief Justice’s 1991 Year-End Report on the Federal Judiciary, Jan. 1992, 1-3, and 140 CONG. REC. 11, 177-78 (1994)).

3. The NICS Improvement Amendments Act of 2007

The NICS Improvement Act of 2007 was designed to enhance the NICS system's access to state criminal records and records concerning persons prohibited from receiving firearms due to mental illness.²⁴⁷ It was primarily motivated by the April 16, 2007 shooting at Virginia Tech, in which a student with a history of mental illness was able to purchase two firearms, with which he shot to death thirty-two students and faculty members, wounded seventeen more, and then took his own life.²⁴⁸ In the Act's findings section, Congress explained that this shooting "renewed the need to improve information-sharing that would enable Federal and State law enforcement agencies to conduct complete background checks on potential firearms purchasers."²⁴⁹ The Act incentivizes state sharing of information to the NICS by offering new grant programs for state executive and judicial agencies to improve information available to the NICS.²⁵⁰ It also provides for penalties for states that do not comply with the Act's record completeness goals.²⁵¹

Following initial opposition raising concerns about both gun rights and privacy rights, as well as the law's impact on veterans, lawmakers amended the statute—and ultimately, the NRA supported the Act.²⁵² In June, when the Act passed the House, the NRA explained its support for using NICS to screen "those who have been adjudicated mentally incompetent."²⁵³ It also explained its support for the Act's removal of prohibitions of persons who have been relieved of adjudications of mental illness.²⁵⁴ The Act would help restore gun rights for veterans and others who were prohibited from purchasing firearms under the Brady Act.²⁵⁵ Finally, the legislation ensured there would be no tax or fee associated with obtaining a NICS check.²⁵⁶

²⁴⁷ See NICS Act Record Improvement Program, BUREAU OF JUST. STATS., <https://www.bjs.gov/index.cfm?ty=tp&tid=49> [<https://perma.cc/ZK47-BT6M>] (explaining the purpose and context of the Act).

²⁴⁸ See NICS Improvement Amendments Act of 2007, 121 Stat. 2559, 2560 (2008).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 2567, 2571.

²⁵¹ *Id.* A state must also certify, to the satisfaction of the Attorney General, that the state has implemented a program permitting persons who have been adjudicated as having a mental defect or committed to a mental institution to obtain relief from the firearms disabilities as a result of such adjudication or commitment. *Id.* at § 101(c)(2)(A)(i).

²⁵² 'NICS Improvement Amendments Act' Not Gun Control!, NRA INST. FOR LEGAL ACTION (Jun. 23, 2007), <https://www.nra.org/articles/20070623/nics-improvement-amendments-act-not-g> [<https://perma.cc/HVD9-XT86>]; James Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 No. 3 CRIM. L. BULL. Art. 2, 402-03, 404 (2011).

²⁵³ 'NICS Improvement Amendments Act' Not Gun Control!, *supra* note 252.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

The states have lagged considerably in updating records in the NICS system,²⁵⁷ despite the potential grant program penalties for noncompliance. In 2011, Lindsey Lewis presented data that paints a stark picture of the lag in updated state records:

At the end of 2005, the NICS had over 234,000 records for people with disqualifying mental health histories. Yet in January 2006, there was an estimated 2.7 million people who had been involuntarily committed for mental health disorders. And as of April 2007, only 22 states contributed any mental health records to the NICS. . . . This means prohibited individuals are still able to buy guns without being caught by the NICS.²⁵⁸

The federal government has not forcefully responded to this noncompliance—the penalties under the Act have never been enforced.²⁵⁹

* * *

The vast array of federal firearm offenses, from the initial strict regulation of highly dangerous and unusual weapons to the increasingly punitive approach to use and possession offenses, display a number of significant features that we explore in the next two Parts.

II. FEDERAL ENFORCEMENT OF GUN OFFENSES

We described the evolution of a wide range of criminal gun offenses in Part I, including offenses designed to regulate manufacturing and distribution, limit possession, and require registration and tracking of firearms purchases. Yet federal enforcement has focused largely on three offenses: (1) § 922(g)(1) (felon possession); (2) § 924(c) (gun use during a crime); and (3) § 924(e) (ACCA). Moreover, as we describe in this Part, such enforcement has increased, as has sentence length, over the past four decades. This Part explores what accounts for the changing federal firearms prosecution dynamic by presenting data concerning federal firearms charging and sentencing, examining policy positions taken by federal enforcers, and describing the rise of the current task-force-based model for federal firearms enforcement.

²⁵⁷ Cf. NICS PARTICIPATION MAP, FBI (July 2019), <https://www.fbi.gov/file-repository/nics-participation-map.pdf> [<https://perma.cc/8GAD-86GG>] (showing state by state participation in the National Instant Criminal Background Check System).

²⁵⁸ Lindsey Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL'Y 149, 162-63 (2011).

²⁵⁹ See Alyssa Dale O'Donnell, *Monsters, Myths, and Mental Illness: A Two-Step Approach to Reducing Gun Violence in the United States*, 25 S. CAL. INTERDISC. L.J. 475, 500 (2016) (“[T]hese penalties have never been enforced. It is impossible to intimidate states into meeting compliance requirements if they know that realistically they will face no consequences for failure to do so.”).

A. Data on Federal Gun Prosecutions

We examine first the data from the Administrative Office of the Courts (“AOC”) regarding federal gun prosecutions. The data we extract and present here represents the most comprehensive picture of how the federal government has treated gun crime since 1942, however it also has certain limitations due to changes in reporting over time.²⁶⁰ Analyzing these data does allow us to observe longer-term trends and draw certain conclusions about the coherence and cohesiveness of the federal government’s approach to firearms crimes, a theme we return to in Part III. We first present data on firearms charges and then place these trends in context. Figure 1 shows the number of cases commenced for federal gun crimes in absolute numbers and as a percentage of all federal criminal cases from 1942 to 2011. In 2012, the AOC stopped reporting case commencements by offense, and for that reason, Figure 2 reports the number of defendants charged with such crimes from 2012 to 2019.

²⁶⁰ Starting 1976, the AOC stated that changes in reporting required by the Speedy Trial Act made the data from that year onward “not directly comparable” to criminal statistics published in previous years. *See* ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 77, 225-26 (1976) (describing the new district court criminal data collection system implemented in October 1975). In 2005, the AOC changed its offense classification system for reporting statistics, just regarding petty offenses, and thus cautions that pre- and post-2005 offense data are not comparable, since totals regarding petty offenses changed. ADMIN. OFF. OF THE U.S. CTS., 2005 JUDICIAL BUSINESS: ANNUAL REPORT OF THE DIRECTOR 23 (2005). The second change affected the inclusion of any petty offenses within the firearms category. Despite these two caveats, we think the complete picture demonstrates longer-term trends, which are also consistent with statements by enforcers, Sentencing Commission reporting, and analyses from other experts. *See, e.g.*, EMILY TIRY, KELLY ROBERTS FREEMAN & WILLIAM ADAMS, URB. INST., PROSECUTION OF FEDERAL FIREARMS OFFENSES 2000-16 (2021), <https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf> [<https://perma.cc/7BZD-FRSS>] (describing trends in federal prosecutions of firearms offenses from 2000 to 2016); LAWRENCE A. GREENFELD & MARIANNE W. ZAWITZ, U.S. DEP’T JUST., WEAPONS OFFENSES AND OFFENDERS (1995) (detailing trends in state and federal weapons-related prosecutions from 1965 through 1993).

FIGURE 1: FEDERAL GUN CRIME CASES COMMENCED (1942–2011)²⁶¹

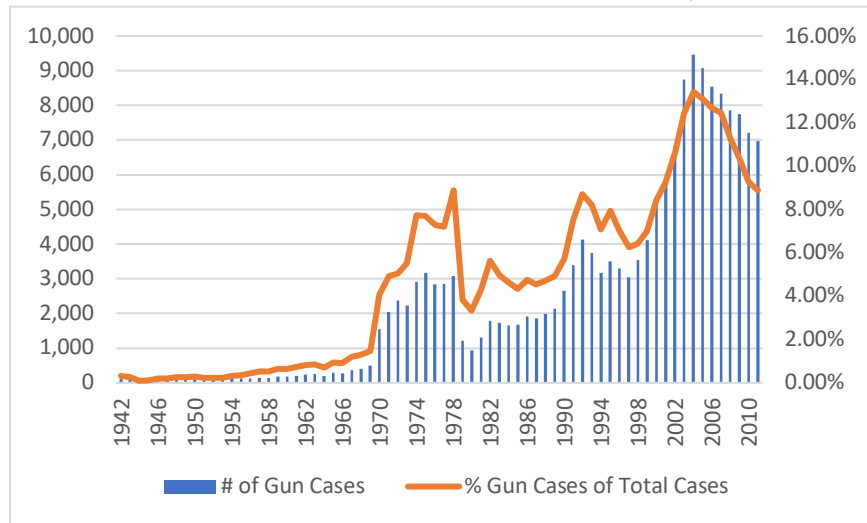
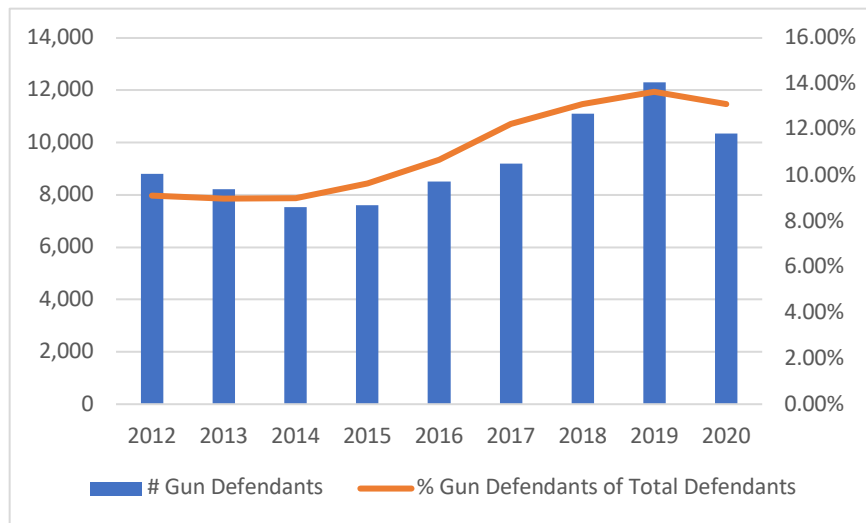


FIGURE 2: FEDERAL GUN CRIME DEFENDANTS COMMENCED (2012–2020)²⁶²



As one would expect from the structure and enforcement mechanism of the early firearms acts, few prosecutions were brought for violation of these laws. Even though the laws prohibited possession without registration of

²⁶¹ Source data on file with author.

²⁶² Source data on file with author.

certain types of especially dangerous weapons, and all but forbid firearm possession for violent felons, the crimes were apparently not an important federal law enforcement priority.²⁶³

With the GCA's enactment in 1968, things began to gradually change.²⁶⁴ Consider that more firearms charges were brought in just one year, 1975, than in the entire twenty-year period from 1945 to 1965.²⁶⁵ Even when enforcement picked up following the GCA, scholars estimate DOJ was declining to prosecute approximately 40% of referrals from ATF, more than almost any other agency.²⁶⁶ Part of this may have been due to societal attitudes. As Robert Rabin notes, "in many types of cases prosecution may stir up either intense local sentiment against attaching a criminal label to the activity in question, or strong personal sympathy for the type of defendant caught in the meshes of the criminal system, making it extremely difficult to obtain a conviction."²⁶⁷ This was almost certainly true for some violations of gun laws.

Prosecutions started to decline in the late 1970s, likely due in part to high-profile negative scrutiny of ATF enforcement actions,²⁶⁸ leading to a plateau during much of the Reagan administration. Beginning in the 1990s, prosecutions increased and continued in an upward, if not linear, progression. As Sara Sun Beale notes, as federal drug prosecutions increased by the early 1990s, "[f]irearms prosecutions also quadrupled, from 931 prosecutions in 1980 to 3,917 in 1992."²⁶⁹ No doubt this reflects increased resource allocation to these efforts. ATF, though itself often under siege, "received a 299 percent increase in its budget and a 20 percent increase in the number of positions" from the mid-1970s to the mid-1990s.²⁷⁰ During this same time period, the number of federal prosecutors nearly tripled.²⁷¹

By the late 1990s, federal enforcers innovated new methods to coordinate and enforce firearms statutes to reduce gun violence. Some were technological. The federal government began creating and investing in a new National Integrated Ballistics Information Network (NIBIN) designed to

²⁶³ See *supra* fig.1 (showing small numbers of prosecutions).

²⁶⁴ Vizzard, *Gun Control Act*, *supra* note 94, at 87-88.

²⁶⁵ See *supra* fig.1. During the twenty-year period from 1945-1965, federal prosecutors brought 2,981 firearms cases. In 1975 alone, they brought 3,165.

²⁶⁶ See Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1091 (1972) (estimating DOJ declination rates for federal-agency criminal referrals).

²⁶⁷ *Id.* at 1055.

²⁶⁸ See, e.g., Kopel, *supra* note 45, at 1566 ("FOIPA . . . was conceived in the late 1970s and early 1980s as congressional committees recorded horror stories of abusive BATF prosecutions.").

²⁶⁹ Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 984 (1995); see also *supra* fig.1.

²⁷⁰ Beale, *supra* note 44, at 44.

²⁷¹ *Id.* at 45 (noting an increase from approximately 3,000 to more than 8,000 prosecutors in U.S. Attorneys' Offices between the mid-1970s and 1990s).

create a national database of images from bullet and cartridge casings intended to better link spent ammunition recovered from crime scenes to firearms.²⁷² By the late 1990s, new funds supported hiring additional ATF officers and federal investigators.²⁷³

In the early 2000s, during the George W. Bush administration, federal weapons prosecutions initially rose, but then declined during the latter half of the Bush presidency. This trend of decreasing prosecution continued throughout the Obama Administration, before reversing during the Trump Administration.²⁷⁴ This is not necessarily the pattern one might expect, given the Bush and Trump Administrations' support for gun rights and the Obama Administration's support for gun regulations,²⁷⁵ but it may reflect attitudes towards aggressive use of federal criminal prosecutions for a variety of other non-firearm related goals.

Despite the welter of different firearms statutes described in Part I, what particularly stands out is that the most common charge, accounting for nearly two-thirds of cases, is the bread and butter felon-in-possession statute.²⁷⁶ Indeed, for the past decade, just two charges—922(g) (possession by prohibited persons) and 924(c) (furtherance of violent/drug trafficking crimes)—alone have accounted for more than 80% of all federal firearm

²⁷² See National Integrated Ballistic Information Network (NIBIN), ATF (June 7, 2019), <https://www.atf.gov/firearms/national-integrated-ballistic-information-network-nibin> [<https://perma.cc/2934-R4BK>].

²⁷³ See Daniel C. Richman, "Project Exile" and The Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 388-89 (2001).

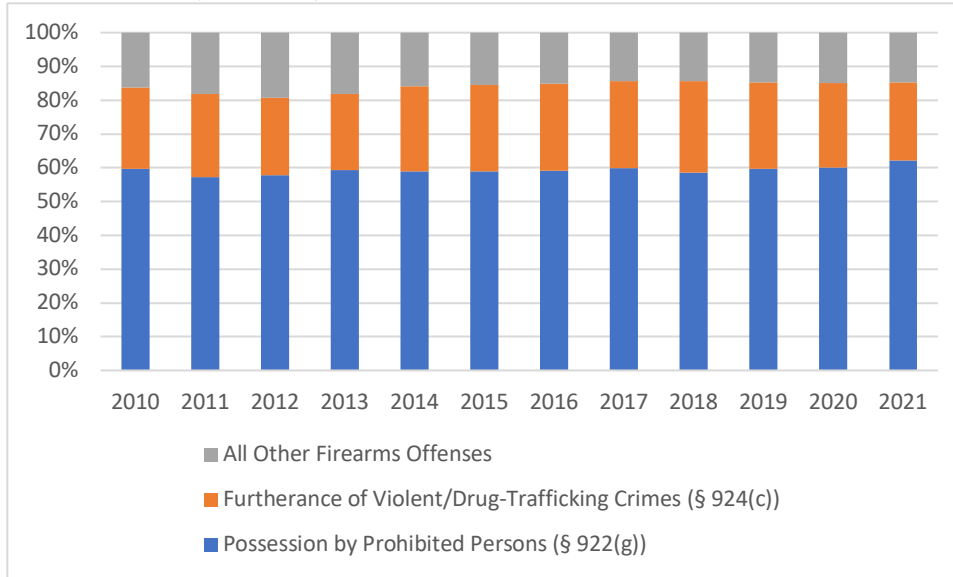
²⁷⁴ See *Federal Weapons Prosecutions Continue to Climb in 2019*, TRAC REPS. (June 5, 2019), <https://trac.syr.edu/tracreports/crim/560> [<https://perma.cc/95QW-QJD9>] (depicting firearms prosecution trends).

²⁷⁵ See *EACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer*, OBAMA WHITE HOUSE (Jan. 4, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our> [<https://perma.cc/KV34-DEM>] (describing the Obama administration's commitment to act against gun violence through gun reform); Elizabeth Thomas, *A Timeline of Trump's Record on Gun Control Reform*, ABC NEWS (Aug. 5, 2019, 2:45 PM), <https://abcnews.go.com/Politics/timeline-trumps-record-gun-control-reform/story?id=64783662> [<https://perma.cc/T7T7-3S2Y>] (describing the Trump administration's control reform history).

²⁷⁶ Technically, the 18 U.S.C. § 922(g) category contains unlawful possession charges no matter the underlying reason for disqualification, but the overwhelming majority of unlawful possession charges are predicated on felony status. See U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1 (2021) (stating that felony conviction is the "most common[]" disqualification under 922(g)).

charges, as Figure 3 shows.²⁷⁷ The lead investigative agency for these prosecutions has been ATF.²⁷⁸

FIGURE 3: PERCENTAGE OF FEDERAL GUN CRIME DEFENDANTS COMMENCED (2010–2021)²⁷⁹



Also noteworthy is the relative importance of firearms crimes in relation to other federal crimes, as Figure 2 displays, showing the steadily growing share of federal criminal prosecutions. Firearms prosecutions have steadily grown in number over the past decade (particularly since 2015), reaching over 6,000 cases per year.²⁸⁰ In contrast, drug cases have modestly declined (to about 20,000 cases per year), fraud cases have declined (from almost 9,000 to about 6,000 cases), while immigration cases have dramatically increased in

²⁷⁷ See ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 2019 tbl.D-2 (2019) (providing firearms offense data from 2015 to 2019); see also ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 2014 tbl.D-2 (2014) (providing firearms offense data from 2010-2014).

²⁷⁸ See Beale, *supra* note 44 at 44 (noting that the “key criminal investigative agencies” included the Bureau of Alcohol, Tobacco and Firearms); see also Rabin, *supra* note 266, at 1054-55 (describing and cataloging agency referrals, including from ATF).

²⁷⁹ Source data on file with author.

²⁸⁰ See U.S. SENT’G COMM’N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 5, 7 (2019) (describing recent prosecutorial trends).

number.²⁸¹ Changes in federal enforcement approaches shed light on why these trends can be observed, and also suggest that firearms prosecutions have played a role in the accompanying the rise in immigration cases.

B. Collaborative Enforcement

In contrast to those federal statistics, which demonstrate rising numbers of federal prosecutions, longer sentences, and generally suggest a more punitive federal role, some of the most effective enforcement efforts by the late 1990s were collaborative federal, state, and local (and sometimes also public/private) partnerships designed to reduce youth and gang violence.²⁸² Since the 1990s, these efforts “resulted in a ten-fold increase in the number of federal felon-in-possession prisoners at a cost of several billion dollars.”²⁸³ As David Patton observes, “the stated reason for the federalization of gun cases was, and remains, stiff federal sentences in the name of reducing violent crime.”²⁸⁴

Our focus in this Article is on the trajectory of *federal* firearms crimes. Yet state firearms crime enforcement has also shifted over the past few decades. Many state offenses have long involved conduct that included possession of firearms.²⁸⁵ All states and the District of Columbia have statutes regarding carrying firearms, and all have criminal laws concerning possession, use, sales, and trafficking of firearms, just as the federal government does.²⁸⁶ Relying upon FBI data, the Bureau of Justice Statistics reports that arrest rates for such firearms offenses more than doubled in the three decades after 1965, with arrests concentrated in urban areas, arrest rates rising dramatically for teenage males, and arrest rates five times greater for Black than White persons.²⁸⁷ Nor is the move towards harsher sentencing exclusively federal. In the 1980s, average weapons sentences were higher for state prisoners; however, by the 1990s, as revisions to the sentencing guidelines took effect, they were much higher for federal cases.²⁸⁸ By the mid-1990s, most states had

²⁸¹ See *id.* (noting the dramatic increase in immigration prosecutions in fiscal year 2018, when “[t]he 23,883 immigration cases represented a 16.5 percent increase from the 20,496 cases reported in fiscal year 2017,” and that almost 43% of federal defendants were noncitizens).

²⁸² See DOJ STRATEGY, *supra* note 221, at 2 (“In response to the President’s directive, the Secretary of the Treasury and the Attorney General directed all U.S. Attorneys and ATF Field Division Directors jointly to develop locally coordinated gun violence reduction strategies in each of the 94 federal judicial districts across the United States.”).

²⁸³ Patton, *supra* note 158, at 1429-30.

²⁸⁴ *Id.* at 1430.

²⁸⁵ CAROLINE WOLF HARLOW, BUREAU OF JUST. STATS., FIREARMS USE BY OFFENDERS 1 (2001).

²⁸⁶ LAWRENCE A. GREENFELD & MARIANNE W. ZAWITZ, BUREAU OF JUST. STATS., WEAPONS OFFENSES AND OFFENDERS 1 (1995).

²⁸⁷ See *id.* at 2-3 (graphing these statistics).

²⁸⁸ See *id.* at 5 (comparing federal and state sentence lengths).

mandatory minimum sentences for certain weapons offenses.²⁸⁹ While state court verdicts account for the vast bulk of felony convictions in the U.S., which is true for weapons offenses as well, about 10% of felony weapons convictions occurred in federal court by the mid-1990s (whereas only 4% of felony convictions in total occurred in federal court).²⁹⁰ Some of these statutory and sentencing-related changes occurred in tandem between state and federal lawmakers and enforcers. Some of the shift in the states towards more severe and aggressive state firearms enforcement can also be accounted for by federal resources and efforts.²⁹¹

The modern federal-state-local collaboration formally began in 1991 when Attorney General Richard Thornburgh “announced the federal initiative Project Triggerlock, which directed federal prosecutors to work with state and local authorities to federally prosecute gun possession cases in order to impose stiffer sentences than state courts would otherwise impose.”²⁹² Its effects can be seen in data in Figures 1 and 2 from Part II.A, which show an upward trend beginning in the early 1990s. This represents an almost ten-fold increase in the two decades after the initiative went into effect.²⁹³ The main driver of the program was increased and consistent prosecution of felon-in-possession cases.²⁹⁴ By 1992, the Justice Department already noted “the increase in firearms prosecutions resulting from the implementation of Project Triggerlock,” and stated that as a result “federal prosecutors have been faced with a variety of legal issues relating to federal firearms law.”²⁹⁵ But carrying out this goal of greater enforcement meant “[t]he systematic involvement of the federal government in prosecuting gun cases that were the result of local police arrests, and that would have otherwise been prosecuted in state court.”²⁹⁶ This would raise many questions as such programs expanded throughout the ensuing decades.

²⁸⁹ *See id.* at 6 (“41 States have mandatory minimum sentences to prison for certain weapons offenses.”).

²⁹⁰ *Id.* at 5; *see also id.* at 6 (“[I]n 1991 an estimated 12,700 weapons offenders were in State prisons, and 3,100 were in Federal prisons”).

²⁹¹ *See, e.g., id.* at 6 (noting the use of increased penalties for gun use in a crime at both the state and federal level).

²⁹² Patton, *supra* note 158, at 1440.

²⁹³ *See infra* Section II.A figs. 1 & 2; *see also* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1012 (2020) (“In the first twenty years after Thornburgh’s announcement, the number of people serving time in federal prison for weapons possession jumped dramatically, a nearly tenfold increase from approximately 3,400 (5.8% of all federal prisoners) in 1990 to over 32,000 (15.1% of all federal prisoners) in 2011.”).

²⁹⁴ *Id.*

²⁹⁵ U.S. DEP’T OF JUST., CRIMINAL RESOURCE MANUAL, § 1431 (1992), <https://www.justice.gov/archives/jm/criminal-resource-manual-1431-department-memorandum-prosecutions-under-922g> [<https://perma.cc/4ULN-EP7N>].

²⁹⁶ Patton, *supra* note 158, at 1441.

In Boston, “Operation Ceasefire” efforts began in 1996 when “researchers from Harvard’s Kennedy School of Government joined with local federal law enforcement agencies and prosecutors to begin a focused, deterrence-based program” to combat youth gun violence.²⁹⁷ The program involved targeted enforcement against gangs, but also messaging “zero tolerance” for gun violence, combined with “sessions with targeted offenders, law enforcement and their community partners—such as, the clergy, youth advocates and job counselors”—to “use moral suasion and offer access to such things as social and medical services, jobs, and educational opportunities that provide alternatives to violence.”²⁹⁸ Thus, police and prosecutors “make clear that offenders have a choice: they can continue to break the law and face severe sanctions, or they can turn their lives around, with the help of service providers.”²⁹⁹ In Boston, these included the “Boston Jobs Project” by the U.S. Attorney, the Boston Police Commissioner, the District Attorney, and others, supported by federal funding.³⁰⁰

In 1997, the Department of Justice launched Project Exile in Richmond, Virginia, funneling gun-related state and local arrests into federal court to get the “benefit” of harsher federal penalties.³⁰¹ This occurred “at a time when Richmond had one of the highest homicide rates in the country.”³⁰² As Dan Richman observed, the project received bipartisan praise, as well as praise both from gun-regulation proponent Sarah Brady and the NRA, which funded educational programs as part of the program in Richmond schools.³⁰³ The project involved the allocation of federal resources and prosecutorial power to support local efforts, raising federalism concerns.³⁰⁴ A federal court, while dismissing a constitutional challenge to the program, expressed

²⁹⁷ *Id.* at 1447; see also DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 44-75 (2012) (describing the history and implementation of Boston’s Operation Ceasefire).

²⁹⁸ DOJ STRATEGY, *supra* note 223.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ See Jeffrey Fagan, *Policing Guns and Youth Violence*, THE FUTURE OF CHILDREN, Summer/Fall 2002 135 tbl.1 (describing various police approaches across the country that were aimed at curbing, *inter alia*, gun violence).

³⁰² Patton, *supra* note 158, at 1447.

³⁰³ See Richman, *supra* note 273, at 372-73 (describing the praise received from various individuals and entities); see also Patton, *supra* note 158, at 1448 (“[Project Exile] was touted at the time as a tremendous success and received bipartisan praise.”).

³⁰⁴ See Richman, *supra* note 273, at 411 (“[T]he legacy of Project Exile . . . may be a serious challenge to the idea of federal enforcement policy in areas where federal, state, and local authority most overlap.”).

concerns regarding discrimination and noted that federal prosecutions avoided local and far more diverse juries.³⁰⁵

Project Exile received so much positive attention as a local experiment that it soon provided a template for a national program. In the early 2000s, DOJ launched Project Safe Neighborhoods (“PSN”), building on those earlier efforts.³⁰⁶ PSN became “the federal government’s most formal and extensive expansion into local law enforcement.”³⁰⁷ President George W. Bush announced the expansion as based on a need for a “focused national strategy” to curtail violent crime.³⁰⁸ Then-Attorney General John Ashcroft explained the program as “disarmingly simple: federal, state and local law enforcement officers and prosecutors working together to investigate, arrest and prosecute criminals with guns to get the maximum penalties available under state or federal law.”³⁰⁹ The PSN program “resulted from public discourse of the ‘gun problem’ amid a tough-on-crime political backdrop.”³¹⁰

Bonita Gardner observes that the federal government “committed more than \$900 million for [PSN] over the first three years,” the result of which was that “federal gun prosecutions nationwide increased by seventy-three percent” from 2000-2005.³¹¹ Once again, concerns arose and were litigated regarding the manner in which largely Black neighborhoods were selected as

³⁰⁵ See *United States v. Jones*, 36 F. Supp. 2d 304, 311-12 (E.D. Va. 1999) (“[I]f, as proponents of Project Exile maintain, there are disparities in the effectiveness of federal and state prosecutions, then those disparities only increase the potential for discriminatory diversions for federal prosecution absent some form of review.”).

³⁰⁶ See, e.g., Edmund F. McGarrell, Nicholas Corsaro, Natalie Kroovand Hipple & Timothy S. Bynum, *Project Safe Neighborhoods and Violent Crime Trends in US Cities: Assessing Violent Crime Impact*, 26 J. QUANT. CRIMINOLOGY 165, 168 (2010) (“After some degree of problem analysis, all [precursors to PSN] moved from responding to crime generally to having a very specific and proactive focus on gun crime.”).

³⁰⁷ Patton, *supra* note 158, at 1449.

³⁰⁸ William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1676 (2019).

³⁰⁹ John Ashcroft, Att’y Gen., Prepared Remarks at Project Safe Neighborhoods National Conference (Jan. 30, 2003).

³¹⁰ Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 225 (2007).

³¹¹ Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 311 (2007); see also, Comment, Victoria L. Killion, *No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789, 797 (2009) (“In 2005, the Department of Justice . . . reported a seventy-three percent increase in the number of firearms cases filed nationwide in federal courts in the five years since the federal government had launched the program.”). The funding has now topped \$1 billion. See Ben Grunwald & Andrew V. Papachristos, *Project Safe Neighborhoods in Chicago: Looking Back a Decade Later*, 107 J. CRIM. L. & CRIMINOLOGY 131, 132 (2017) (“Since 2001, Congress has allocated over a billion dollars to the U.S. Attorney’s Office to oversee PSN programs in the 94 federal districts.”).

sites for these prosecution efforts.³¹² Research on the effectiveness of the programs has been decidedly mixed.³¹³ Nevertheless, such programs have continued to expand. In 2017, then-Attorney General Jeff Sessions stated that “Project Safe Neighborhoods is . . . the centerpiece of our crime reduction strategy.”³¹⁴ President Trump described a commitment to “restore” the project as “one of the most effective crime prevention strategies in America.”³¹⁵

And in November 2019, the Trump Administration launched Project Guardian. As then-Attorney General Barr said when announcing the program, “Project Guardian is a national initiative to comprehensively attack gun violence through the aggressive enforcement of existing gun laws.”³¹⁶ Guardian, he said, “will be in every district. The idea is to use our existing gun laws to incapacitate the most dangerous and violent offenders.”³¹⁷

In contrast to PSN and Project Guardian, in which cooperative federalism has been championed, the cooperative federalism approach to improving compliance with NICS has been less successful, and the federal government has not sought to impose penalties for noncompliance.³¹⁸ Prosecutors play the role, in individual cases, as the enforcers of gun prosecution priorities. Financial incentives and penalties, in contrast, provide more indirect (and it seems less effective) means to carry out federal priorities.

³¹² See Gardner, *supra* note 311, at 316-17 (“According to statistics presented in the Eastern District of Michigan, almost ninety percent of those prosecuted under Project Safe Neighborhoods are African American.”); see, e.g., *United States v. Hubbard*, Crim. No. 04-80321, 2006 WL 1374047, at *1 (E.D. Mich. May 17, 2006) (“Petitioner argues that Project Safe Neighborhoods is targeted at African-Americans, and therefore that he was subject to racially selective prosecution.”); see also Shreefter, *supra* note 2, at 160 (“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.”).

³¹³ See, e.g., Papachristos, Meares & Eagan, *supra* note 310, at 254 (reporting Chicago’s implementation of PSN showed promise in reducing the city’s homicide rate); *id.* at 227-28 (discussing conflicting studies on the effectiveness of Operation Ceasefire and Project Exile); Grunwald & Papachristos, *supra* note 310, at 135 (finding minimal long-term effects of PSN Chicago).

³¹⁴ Press Release, U.S. Dep’t of Just., Attorney General Sessions Announces Reinvigoration of Project Safe Neighborhoods and Other Actions to Reduce Rising Tide of Violent Crime (Oct. 5, 2017).

³¹⁵ President Donald Trump, Remarks at the Safe Neighborhoods National Convention (Dec. 7, 2018) (transcript available via C-SPAN).

³¹⁶ William Barr, Att’y Gen., Remarks at the Launch of Project Guardian (Nov. 13, 2019).

³¹⁷ *Id.*

³¹⁸ Regarding penalties for non-compliance states, see NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 104, 121 Stat. 2559, 2568-69. More recent legislation, enacted in 2018, once again aims to remedy non-compliance. However, given poor compliance in the past, “[i]t remains to be seen, however, how effective the Fix NICS Act will be.” Jaclyn Schildkraut & Collin M. Carr, *Mass Shootings, Legislative Responses, and Public Policy: An Endless Cycle of Inaction*, 69 EMORY L.J. 1043, 1065 (2020); see also O’Donnell, *supra* note 5, 1425.

C. *Immigration Prosecution and Guns*

Federal gun prosecutions play an increasing role in immigration-related enforcement. Federal arrests of non-U.S. citizens have increased sharply in contrast to the overall rate of arrests: between 1998 and 2018, arrests of immigrants increased by 233.5%, while arrests of U.S. citizens increased by only 10%.³¹⁹ These arrests also represent a cooperative federalism story: The bulk of these arrests are initiated only after local and state law enforcement make arrests and conduct immigration screening.³²⁰

Weapons charges represent a substantial portion of these federal immigration arrests, although to be sure, they still represent a far larger portion of arrests of citizens than of noncitizens. In 2018, law enforcement conducted 10,562 arrests for weapons charges, and 10,077 (95.6%) persons arrested were U.S. citizens.³²¹ This figure represents 14.3% of total arrests of U.S. citizens.³²² Meanwhile, 468 (4.4%) were of noncitizens, and these arrests represented only 0.4% of arrests of noncitizens.³²³ Prosecution rates, on the other hand, tended to be higher: in 2018, 4% of suspects prosecuted on weapons charges in U.S. District Court were noncitizens.³²⁴ ICE also reports non-criminal administrative arrests. In 2019, there were 10,278 total weapons offenses for such administrative arrests.³²⁵ There were 3,281 total criminal charges and 6,997 criminal convictions.³²⁶

In a related cooperative federalism point, civil immigration enforcement has made greater use of state, not federal, gun offenses. ICE also highlights its work: “[F]irearms, ammunition, and explosives smuggling investigations have resulted in unprecedented bi-lateral interdictions, investigations and information-sharing activities that identify, disrupt, and dismantle transnational criminal networks operating within the United States, Mexico, Canada, Central America, the Caribbean, and around the World.”³²⁷ In 2015,

³¹⁹ MARK MOTIVANS, IMMIGRATION, BUREAU OF JUST. STATS., CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998-2018 7 tbl. 4 (2019).

³²⁰ See Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1477 (2019) (“Since 2013 . . . every custodial criminal arrest . . . has triggered immigration screening.”); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1858 (2011) (“[B]ecause the federal government has exercised minimal post-arrest discretion, the key decisionmaking moment has been the initial identification of a potentially removable noncitizen by some form of arrest.”).

³²¹ MOTIVANS, *supra* note 319, at 10.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 18.

³²⁵ 2019 U.S. IMMIGR. & CUSTOMS ENF’T U.S. IMMIGR. & CUSTOMS ENF’ FISCAL YEAR 2019 ENF’ & REMOVAL OPERATIONS REP. 14.

³²⁶ *Id.*

³²⁷ U.S. IMMIGR. & CUSTOMS ENF’T, FIREARMS, AMMUNITION, AND EXPLOSIVES SMUGGLING INVESTIGATIONS (2018).

ICE implemented a Priority Enforcement Policy in order to focus on particular categories of undocumented immigrants.³²⁸ Firearms possession was contained in the Priority 2 category, which included misdemeanants and new immigration violators.³²⁹ In 2015, 14,869 out of 139,368 convicted criminal removals, or 11%, fell into priority 2.³³⁰ In 2016, 31,936 out of 238,466 civil priority removals, or 13.3%, fell into Priority 2.³³¹ Thus, many of these civil removals include state, not federal, firearms offenses.

What both Project Safe Neighborhoods and ICE's Priority Enforcement Policy have in common is that local and state cases are shifted over to federal authorities, who take custody of an individual and impose civil immigration and sometimes additional criminal consequences based on gun-involved conduct.

III. TOWARDS A UNIFIED VIEW OF FEDERAL GUN CRIMES

In Part I, we described the evolution of three families of federal crimes: early gun statutes, possession-focused statutes, and modern regulatory statutes that aim higher upstream by trying to deter unlawful transfers. In Part II, we turned to how these statutes have been enforced. In this Part, we turn to implications for this entire body of law, which has not been treated as unified and has evolved piecemeal, often based on distinct policy interests. We (1) identify patterns and observations from descriptions and data in the previous Parts, (2) lay out pathologies with the current federal criminal legal approach to firearms, and (3) chart the path forward to a more just, reasonable, and coherent approach to federal regulation of guns.

A. *The Patterns*

We find three themes in the trajectory of the laws traced in Parts I and II: the legislative compromise on severe punishment; the dichotomizing treatment that aims to secure guns for the “good guys” and keep them from the “bad guys”; and the limited judicial check on federal prosecution of gun crimes.

³²⁸ 2015 U.S. IMMIGR. & CUSTOMS ENF'T ICE ENF'T & REMOVAL OPERATIONS REP. FISCAL YEAR 2015 1.

³²⁹ *Id.* at 18. For these purposes, a “significant misdemeanor” is “an offense of domestic violence; 1 sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence) . . .” *Id.*

³³⁰ *Id.* at 3.

³³¹ 2016 U.S. IMMIGR. & CUSTOMS ENF'T ICE ENF'T & REMOVAL OPERATIONS REP. 3 (2016).

1. The Severity Compromise

Gun laws operate uniquely in the space of social regulatory policy.³³² First and foremost, the core federal gun crimes often serve as sentencing enhancers for a range of other federal offenses: as the Department of Justice puts it simply, “Federal firearms laws provide severe penalties for firearms use by the violent offender or drug trafficker.”³³³ The § 924(c) sentencing provisions require lengthy five-, seven-, ten-, or even thirty-year mandatory minimum sentences for possessing, brandishing, or discharging a gun in the course of a drug trafficking crime or a crime of violence, with twenty-five year mandatory sentences for each subsequent conviction.³³⁴ Further, these sentences cannot be concurrent with any other felony or state sentence.³³⁵ Similarly, the related Armed Career Criminal Act (ACCA), contained in 18 U.S.C. § 924(e), requires a fifteen-year mandatory minimum sentence.³³⁶

Over time, Congress has extended the length of these mandatory minimum sentences, transforming a single sentence of § 924(c) into a detailed sentencing code, which in turn has engendered a detailed case law.³³⁷ As the Department of Justice summarizes: “Firearms violations should be aggressively used in prosecuting violent crime. They are generally simple and quick to prove. The mandatory and enhanced punishments for many firearms violations can be used as leverage to gain plea bargaining and cooperation from offenders.”³³⁸ And, as Benjamin Levin observes, “gun possession statutes bear the heavy mark of the sharply retributive turn that U.S. criminal justice policy took over the latter portion of the twentieth century.”³³⁹ Firearms possession offenses constituted the second most common type of non-violent life without parole sentences at the federal level from 1999 to 2011.³⁴⁰

The U.S. Sentencing Commission, in a 2018 report on mandatory minimums in firearm offenses, found “[f]irearms offenses accounted for 16.8 percent of offenses carrying a mandatory minimum penalty in fiscal year

³³² See SPITZER, *supra* note 39, at ch.1 (explaining how gun regulations are best described as part of social regulatory policy).

³³³ U.S. DEP’T OF JUST., CRIMINAL RESOURCE MANUAL 112 (2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-112-firearms-charges> [<https://perma.cc/E5GE-9432>].

³³⁴ 18 U.S.C. § 924(c)(1)(A)-(C).

³³⁵ 18 U.S.C. § 924(c)(1)(D)(ii).

³³⁶ 18 U.S.C. § 924(e).

³³⁷ See *supra* Part I.

³³⁸ U.S. Dep’t of Just., *supra* note 333.

³³⁹ Levin, *supra* note 35, at 2214-15.

³⁴⁰ See ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 24 (2013), <https://www.aclu.org/files/assets/11813-lwop-complete-report.pdf> [<https://perma.cc/F5E7-V9M6>] (documenting that of federal inmates admitted for nonviolent offenses between 1999 and 2011, 19.9% were incarcerated for nonviolent firearms offenses).

2016—the second largest category following drug offenses—increasing from 14.4 percent in fiscal year 2010.”³⁴¹ The Commission also reported stark racial disparities in those convicted of federal firearms offenses, where over half of those convicted under § 924(c) were Black and almost 30 percent Latinx.³⁴² Those disparities, however, may arise not from sentencing, but from the targeting of federal firearms prosecutions through programs such as those described in Part II.

As a matter of politics, these enhancements are fairly uncontroversial.³⁴³ “Mandatory sentencing or sentence-enhancement for crimes committed with a gun are politically popular because they offer an apparent means of controlling gun violence without apparent cost to law-abiding gun owners.”³⁴⁴ They are often the one measure both pro- and anti-gun regulation advocates can agree on, leading to a “crucial point of consensus” on guns: “Both sides of the gun control debate have occasionally compromised, and these compromises have generally yielded criminal statutes designed to impose harsh punishments on unlawful gun owners.”³⁴⁵ Or, as Jonathan Simon puts it: “both sides of the gun debate share a remarkably similar perception that lethal violence poses a significant and ongoing threat to their personal security, and their ability to protect their homes and families.”³⁴⁶

This emphasis on severity in the statute has sometimes resulted from congressional response to narrowing constructions by the Supreme Court, but just as often due to the Court’s own interpretations. As we have discussed, § 924(c) has undergone several revisions, often in response to Supreme Court rulings that Congress thought had construed it too narrowly.³⁴⁷ In *Simpson v. United States*, the Court held that a defendant could

³⁴¹ U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 16 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf [<https://perma.cc/G9BH-P8KV>].

³⁴² *Id.* at 6.

³⁴³ See Milton Heumann, Colin Loftin & David McDowall, *Federal Firearms Policy and Mandatory Sentencing*, 73 J. CRIM. L. & CRIMINOLOGY 1051, 1051 (1982) (noting that policy “requiring a mandatory sentence for the use of a firearm in the commission of a federal felony . . . is widely supported by the public and the police . . .”).

³⁴⁴ Colin Loftin, Milton Heumann & David McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 L. & SOC’Y REV. 287, 312 (1983).

³⁴⁵ Levin, *supra* note 35, at 2192. Elizabeth Hinton makes a similar point about early efforts to restrict firearm use and ownership. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 265 (2016) (ebook) (“[President Gerald] Ford’s attack on low-cost firearms did, however, receive an outpouring of support from ardent gun control *opponents* such as Republican National Committee chairman Bob Dole and Senate Republican leader Hugh Scott, even if the measure seemed to contradict the Republican Party’s strong commitment to the second amendment.”).

³⁴⁶ Jonathan Simon, *Guns, Crime, and Governance*, 39 HOUS. L. REV. 133, 134 (2002).

³⁴⁷ See *supra* Part I.B.1.

not be sentenced for both the § 924(c) offense and an underlying crime that already provided enhanced penalties for using a weapon.³⁴⁸ Two years later in *Busic v. United States*, it explained that *Simpson* did not give the Government the authority to choose whichever of the two offenses generated a greater sentence.³⁴⁹ Instead, “prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision.”³⁵⁰ Congress was not that harsh, thought the Court. “[B]y rejecting double enhancement,” the Court said, its decision in *Simpson* had “expose[d] the stark and unidimensional quality of any calculus which attempts to construe the statute on the basis of an assumption that in enacting § 924(c) Congress’ sole objective was to increase the penalties for firearm use to the maximum extent possible.”³⁵¹ Congress clarified its unidimensional intent when it amended the provision in 1984.³⁵² As the Court later said, “Congress thus repudiated the result” from *Simpson* and *Busic*.³⁵³

Similarly, in its 1995 ruling in *Bailey v. United States*, the Court interpreted “use” as active employment of the firearm and more than “mere possession.”³⁵⁴ Congress’s “*Bailey* fix” amended § 924(c) again to clarify that mere possession in furtherance of a crime is, in fact, grounds for enhancement.³⁵⁵

But with these few exceptions, many of the Court’s decisions under § 924(c) rejected interpretations of the statute that might have narrowed its reach.³⁵⁶ In 1993, in *Deal v. United States*, for example, the Court read the statute broadly, ruling that additional penalties for a “second or subsequent conviction” could result from a second 924(c) conviction in the same proceeding as the first.³⁵⁷ That same year, it concluded that “use” of a gun in a crime included trading the gun for drugs.³⁵⁸ In *Muscarello v. United States*,

³⁴⁸ See *Simpson v. United States*, 435 U.S. 6, 16 (1978) (holding defendant could not be sentenced under both § 924(c) and another statute arising from the same bank robbery because the other statute already provided for more severe penalties when a firearm was involved in the offense).

³⁴⁹ See *Busic v. United States*, 446 U.S. 398, 399-400 (1979) (“We hold that the sentence received by such a defendant may be enhanced only under the enhancement provision in the statute defining the felony he committed and that § 924(c) does not apply in such a case.”).

³⁵⁰ *Id.* at 404.

³⁵¹ *Id.* at 409.

³⁵² See *United States v. Gonzales*, 520 U.S. 1, 10 (1997) (describing Congress’s amendment to § 924(c), “thus repudiate[ing] the result [the Court] reached in *Busic*”).

³⁵³ *Id.*

³⁵⁴ *Bailey v. United States*, 516 U.S. 137, 143 (1995) (holding the word “use” in § 924(c) “must connote more than mere possession of a firearm by a person who commits a drug offense.”).

³⁵⁵ *Abbott v. United States*, 562 U.S. 8, 16-17 (2010).

³⁵⁶ *Id.* at 13 (rejecting a technical reading that would have restricted the scope of the statute).

³⁵⁷ *Deal v. United States*, 508 U.S. 129, 135 (1993).

³⁵⁸ *Smith v. United States*, 508 U.S. 223, 236-37 (1993).

the Court held a person “carries” a gun during a crime even when the gun is locked in the trunk or glove compartment of a traveling vehicle.³⁵⁹

Writing in the early 1980s, as harsh mandatory sentences began to sweep across the country and eventually through Congress, some researchers initially described these laws as “something like a criminological wonder drug—a plan to reduce violent crime at minimal cost with no serious side effects.”³⁶⁰ Black community leaders initially supported many of the laws that prescribed harsh sentences for unlawful gun use because they wanted to show that Black victims of gun violence mattered.³⁶¹ As James Forman thoroughly documents, law enforcement had for so long neglected the crime in Black communities and shrugged off the deaths of Black citizens that the response of those living in these communities was to call for greater enforcement and tougher punishment.³⁶² Many joined in the increasingly common calls that were then epitomizing the American criminal justice system: “When you want to stop people from doing something, take away discretion and impose more prison time.”³⁶³

There is, then, a dual pressure in gun laws toward increasingly punitive treatment. Proponents of “gun control” want legislation to control firearms based on the harm they can cause. Opponents of gun control want to make sure that law-abiding citizens are not inconvenienced in their sporting, hunting, and defense uses. As sociologist Jennifer Carlson writes, “[t]his is the often-overlooked common ground of the gun control and gun rights lobbies in the late twentieth century: both endorsed policies that harshly sanctioned the kinds of gun criminals associated with urban street crime.”³⁶⁴ We see this play out in the types of gun crimes that gain the attention of federal prosecutors and the public.

2. The Enforcement Emphasis

The severity framework reveals a related fact about the federal criminal framework: the entire structure revolves around aiming to secure, protect, and defend the rights of law-abiding citizens to keep and bear guns while visiting extreme punishment on the bad apples. We recognize both the devastating harm guns can do and the impulse to use all the levers to punish criminal misuse. We also recognize the impulse to protect some beneficial use

³⁵⁹ *Muscarello v. United States*, 524 U.S. 125, 126-27 (1998).

³⁶⁰ Heumann, Loftin & McDowall, *supra* note 343, at 1052. Researchers came to disavow this view. *Id.*

³⁶¹ JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 60-63 (2017).

³⁶² *See id.* at 56 (describing police indifference to Black crime deaths).

³⁶³ *Id.* at 61.

³⁶⁴ JENNIFER CARLSON, *POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE* 56 (2020).

of guns. As Forman notes, “a gun may be the only dangerous item that can plausibly be viewed as a solution to the very danger it poses.”³⁶⁵

Those competing impulses have resulted in an approach to drafting, enforcing, and applying the federal gun laws that focuses on possession offenses. Instead of prioritizing holding manufacturers, distributors, and dealers to account, federal prosecutors focus on bringing charges against street-level offenders, often in conjunction with prosecuting other statutes.³⁶⁶ Instead of licensing or registration systems to vet gun users and track the flow of guns, Congress passes laws stacking mandatory minimums for use or possession of a gun in a crime.³⁶⁷ Indeed, this disjunction was intentional. As William Vizzard chronicles:

For most of the Reagan and Bush administrations, the opponents of [firearm] controls dominated the agenda. ATF shifted its attention away from commerce in firearms and concentrated almost exclusively on armed felons and drug traffickers. With this change, ATF’s resources began to increase markedly as it became an integral part of the administration’s war on drugs. Within the agency, the message was clear: avoid all contact with any activity perceived as gun control.³⁶⁸

As a result, gun crime policy at the federal level is largely reactive and not proactive,³⁶⁹ focusing on severely punishing those who have already broken the law (regardless of whether the present firearms-related activity is deserving of severe punishment). It seizes on the outgroups that are often unpopular with legislators and the voters they represent.³⁷⁰ As Benjamin Levin points out, “the NRA and other opponents of gun control regulation have frequently made an exception for criminal statutes. These statutes reflect a popular motto of the NRA—‘guns don’t kill people; people kill people.’”³⁷¹

³⁶⁵ FORMAN, *supra* note 361, at 64.

³⁶⁶ Gardner, *supra* note 311, at 312 (observing that prosecutors focus almost exclusively on 922(g) and 924(c) while “[t]he other twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form—are almost never prosecuted.”).

³⁶⁷ See *Abbott v. United States*, 562 U.S. 8, 17 (2010) (discussing several steps Congress took to increase the severity of § 924(c) offenses).

³⁶⁸ Vizzard, *Impact*, *supra* note 36, at 343 (footnotes omitted); see also *id.* at 345 (“ATF has characterized itself as a law enforcement agency using the gun laws to impact crime and not as a gun control agency.”).

³⁶⁹ The laws may still be prevention oriented, at least in theory, based on a belief these groups will misuse firearms. See Shreefter, *supra* note 92, at 154 (“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.”).

³⁷⁰ See Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437, 479 (2004) (“Felons, drug users or illegal aliens who are punished for unlawful gun possession are unlikely to attract much sympathy from a public that tends to believe that our state treats criminals too leniently.”).

³⁷¹ Levin, *supra* note 35, at 2222.

3. The Limited Judicial Check

Federal gun crimes have been frequently litigated, and these cases have affected the interpretation of the statutes. But if there is one key lesson from what we have described, it is that the body of case law that has developed has left the core power of these statutes and of prosecutors largely intact. As one example, consider § 924(c), providing enhanced punishment for certain uses or possession of firearms in the commission of a felony. The Congressional Research Service has noted that this provision has withstood constitutional challenges based on the Second Amendment's right to bear arms; the Eighth Amendment's cruel and unusual punishments prohibition; the Sixth Amendment's right to a jury trial; the Fifth Amendment's double jeopardy and due process prescriptions; and the Constitution's structural limitations on the preservation of the separation of powers and on Congress's authority under the Commerce Clause.³⁷²

Nor has the Second Amendment posed much, if any barrier, to the other federal criminal statutes. Separating a firearm rights-bearer from a firearm lawbreaker can be a fine line that often depends on unobservable factors like criminal or mental health history or present intent.³⁷³ Those lines have been largely defined by the criminal statutes described. They have not (to date) been reconsidered by the U.S. Supreme Court, which in *District of Columbia v. Heller* struck down a Washington D.C. handgun ban, but highlighted that it did not call into question “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws 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.”³⁷⁴ Lower courts have largely agreed that §§ 922, 924(c), and ACCA are not affected by *Heller*.³⁷⁵

Similarly, the federalism restrictions that accompany a government of limited power have not posed much of a barrier. Gun crimes have been the

³⁷² CHARLES DOYLE, CONG. RSCH. SERV., R41412, FEDERAL MANDATORY MINIMUM SENTENCING: THE 18 U.S.C. 924(C) TACK-ON IN CASES INVOLVING DRUGS OR VIOLENCE (2015), <https://fas.org/sgp/crs/misc/R41412.pdf> [<https://perma.cc/VR77-HASD>].

³⁷³ Husak, *supra* note 372, at 454 (“The same characteristics that make a gun useful for criminal purposes are those that make it useful for legitimate purposes as well—most notably, for self-protection. Whatever may be the case with illicit drugs, it is impossible to identify a kind of gun that is widely used unlawfully but lacks a legitimate purpose.”).

³⁷⁴ 554 U.S. 570, 626-27 (2008).

³⁷⁵ *United States v. Napolitan*, 762 F.3d 297, 311 (3d Cir. 2014); *United States v. Bryant*, 711 F.3d 364, 368-70 (2d Cir. 2013) (per curiam); *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011) (per curiam); *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009). *But see, e.g.*, *Binderup v. Att’y Gen.*, 836 F.3d 336, 357 (3d Cir. 2016) (en banc) (upholding Second Amendment challenge to § 922(g)(1) for two individuals as the government failed to present enough evidence to bar two individuals from possessing firearms in their homes).

subject of several U.S. Supreme Court rulings regarding the reach of enumerated federal power and federalism.³⁷⁶ In this Article, we have not focused on the jurisdictional questions that firearms raise when federal prosecutions are brought largely because the Supreme Court has made clear that federal prosecutors have broad-reaching authority to apply federal firearms statutes to local offenders.³⁷⁷

The Court first ruled on the 1968 felon-in-possession statute in *United States v. Bass*, rejecting the Department of Justice's position that the criminal statute created jurisdiction over any felon possessing a firearm, and interpreting the statute to require a connection with interstate commerce.³⁷⁸ However, the *Bass* Court explained that a firearm itself that "previously travelled in interstate commerce" might satisfy the Commerce Clause,³⁷⁹ as applied to a particular federal possession prosecution. The Court then adopted that approach in its 1977 ruling in *Scarborough v. United States*, stating that the government need only show that the firearm had at some time previously travelled in interstate commerce.³⁸⁰ In its important federalism ruling in *United States v. Lopez*, the Court nevertheless indicated that any Commerce Clause concern can be satisfied through the use of a jurisdictional element connected to a firearm, an item that itself travels in interstate commerce.³⁸¹

The ubiquity of firearms, almost all of which have previously travelled across state lines simply by virtue of their manufacture and distribution, makes the reach of federal firearms statutes extremely broad and readily satisfies the jurisdictional requirements as defined by the U.S. Supreme Court.³⁸²

The overlapping provisions in the statute, however, mean that judicial review plays only a haphazard role in restraining prosecution efforts; thus while the Court in *United States v. Watson* stated that acquiring a gun during a drug transaction did not amount to "use,"³⁸³ lower courts have held that

³⁷⁶ Beale, *supra* note 35, at 1643.

³⁷⁷ Patton, *supra* note 293, at 1011 (noting how in the 1990s prosecutors "shifted their focus away from crimes with obvious interstate connections to crimes that were once thought of as purely local" when they started pursuing gun crimes with increased fervor).

³⁷⁸ 404 U.S. 336, 340 (1971).

³⁷⁹ *Id.* at 350 (finding prosecutors must allege and prove a connection to interstate commerce in a federal firearms prosecution but noting how readily that standard can be satisfied).

³⁸⁰ 431 U.S. 563, 566-67, 577 (1977) ("[T]here is no question that Congress intended no more than a minimal nexus requirement.").

³⁸¹ 514 U.S. 549, 561 (1995) ("[The statute] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

³⁸² See David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 519 (2009) (describing Congress's post-*Lopez* addition of a requirement that a gun move in interstate commerce and noting that it covers "virtually all guns"); Jeff Asher & Mai Nguyen, *Gun Laws Stop at State Lines, But Guns Don't*, FIVETHIRTYEIGHT (Oct. 26, 2017), <https://fivethirtyeight.com/features/gun-laws-stop-at-state-lines-but-guns-dont> [<https://perma.cc/4ZYY-GCVP>].

³⁸³ 552 U.S. 74, 76 (2007).

doing so may be “in furtherance” of the predicate drug crimes under § 924(c).³⁸⁴ The aiding and abetting offense, even as interpreted in a modestly more narrow fashion by the Court, remains quite broad.³⁸⁵

Similarly, in its Sixth Amendment rulings, such as *Alleyne v. United States*, the Court has held that elements, such as the brandishing element, are sentence enhancers that must be presented to the jury.³⁸⁶ The severity of the sentencing enhancements plays a role in the Court’s reasoning; as it put it in *United States v. O’Brien*, “[t]he immense danger posed by machineguns, the moral depravity in choosing the weapon, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor.”³⁸⁷ Yet, where the vast majority of federal prosecutions settle in plea bargaining,³⁸⁸ such rulings do not significantly impact prosecution efforts.³⁸⁹ Further, where Congress has perceived a problem in how courts have interpreted federal gun crimes, it has reacted swiftly, such as in its § 924(c) post-*Bailey* fix.³⁹⁰

That said, things might be changing. The Supreme Court has recently, in the past half-decade, struck down or severely restricted the scope of several major federal gun crimes. The Supreme Court’s 2015 ruling in *Johnson v. United States* struck down as unconstitutionally vague the residual clause in ACCA that included as a predicate offense a nonenumerated felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”³⁹¹ Just a few years later, the Court in *United States v. Davis* said part of § 924(c) was infected with the same vagueness problems.³⁹²

³⁸⁴ *United States v. Gurka*, 605 F.3d 40, 44 (1st Cir. 2010) (“We join the three circuits holding *Watson* does not affect the prong of 18 U.S.C. § 924(c)(1)(A) concerned with ‘possession in furtherance.’”).

³⁸⁵ See, e.g., *Rosemond v. United States*, 572 U.S. 65, 74 (2014) (“Rosemond therefore could assist in §924(c)’s violation by facilitating either the drug transaction or the firearms use (or of course both).”).

³⁸⁶ 570 U.S. 99, 117 (2013) (“Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt.”).

³⁸⁷ 560 U.S. 218, 230 (2010).

³⁸⁸ CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 22 (2021) (“[S]ince 1995 the guilty plea rate has remained above 90 percent [of adjudicated cases]”).

³⁸⁹ Stephen Schulhofer and Ilene Nagel documented in the late 1980s the degree to which federal prosecutors use § 924(c) for charge bargaining, following the enactment of the Sentencing Guidelines. See Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 281 (1989) (describing how federal prosecutors can induce a plea from a defendant by offering to drop corresponding weapon counts under § 924(c)).

³⁹⁰ See *Abbott v. United States*, 562 U.S. 8, 16-17 (2010) (describing Congressional legislation to bring possession of a firearm within the scope of § 924(c) in reaction to the holding in *Bailey* three years earlier).

³⁹¹ See 576 U.S. 591, 594 602 (2015) (“Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.”); 18 U.S.C. § 924(e)(2)(B)(ii).

³⁹² 139 S. Ct. 2319, 2336 (2019).

Similarly, the 2019 ruling in *Rehaif v. United States* found a problem affecting all firearm possession crimes.³⁹³ There, the petitioner, a noncitizen, had been expelled from a university in Florida, ending his lawful status on a student visa.³⁹⁴ He was arrested after using firearms at a shooting range under § 922(g), which prohibits certain persons, including those without lawful immigration status, to possess a firearm in or affecting interstate commerce; the penalty provision in § 924(a)(2) imposes punishment on one who “knowingly violates” § 922.³⁹⁵ The Court concluded that this mens rea term from § 924 applies to all § 922(g) offenses (relying on the Model Penal Code, no less).³⁹⁶ Further, the Court discussed legislative history, finding that it was inconclusive on the question of mens rea.³⁹⁷

Justice Breyer, writing for the majority, in holding the statutes required knowledge of status as well as conduct, noted that the revised legislation included statements by drafters that “the absence of a scienter requirement in the prior statutes had resulted in ‘severe penalties for unintentional missteps.’”³⁹⁸ “The firearms provisions before us,” he explained, “are not part of a regulatory or public welfare program, and they carry a potential penalty of 10 years in prison that we have previously described as ‘harsh.’”³⁹⁹

The opinion might have broader implications for the Court’s interpretation of statutory mens rea or, as Jessica Roth notes, “it could all just be about the guns.”⁴⁰⁰ What the opinion represents, though, is the Court interpreting across firearms provisions—from the sentencing provisions in § 924, to the elements set out in § 922—considering both the legislative history and the harshness of the resulting penalties. Such reasoning, with echoes of the Court’s reasoning in *Bass* and other prior rulings, does represent increasing judicial engagement. In the past, such rulings, as noted, have not strongly affected core enforcement. In many cases, showing knowledge will not be challenging for prosecutors. The Court, given Congress’ response to past rulings, might be unlikely to go farther than a holistic interpretation of text across provisions in the statute. If so, then any more lasting change would need to be legislative.

³⁹³ 139 S. Ct. 2191 (2019).

³⁹⁴ *Id.* at 2194, 2201.

³⁹⁵ *Id.* at 2194.

³⁹⁶ *Id.* at 2195 (quoting ALI, Model Penal Code § 2.02(4), p. 22 (1985)).

³⁹⁷ *Id.* at 2197-99.

³⁹⁸ *Id.* at 2199 (citing 132 Cong. Rec. 9590 (1986) (statement of Sen. Hatch)).

³⁹⁹ *Id.* at 2197.

⁴⁰⁰ Jessica A. Roth, *Rehaif v. United States: Once Again, a Gun Case Makes Surprising Law*, 32 FED. SENT’G REP. 23, 26 (2019).

B. *The Pathologies*

Although many of the pathologies of the federal gun crime regime stand out just from the description of the patterns in the prior Section, we highlight here two deeper ones: the irrationality of the severe sentencing approach and the race and class inequities in the system.

1. A Broken Proportionality

Even as sentencing enhancements form a core bedrock of federal gun crime policy, they are imposed sporadically and haphazardly. Prosecutors have nearly unlimited discretion to choose which gun cases to take federal, resulting in a system of wide disparity. As a result,

[O]ffenders are subject to a kind of cruel lottery, in which a small minority of the persons who commit a particular offense is selected for federal prosecution and subjected to much harsher sentences—and often to significantly less favorable procedural or substantive standards—than persons prosecuted for parallel state offenses.⁴⁰¹

This leads to outcomes at odds with sound penal theory and with the stated goals of the Sentencing Guidelines themselves: to reduce unwarranted sentencing disparities for similar conduct.⁴⁰²

The lack of relationship between culpability and punishment—that the same gun crime can be punished much more severely if it happens to occur on “federal day”—is one sign of a severely broken system.⁴⁰³ But even if the punishment were imposed consistently, that would not be much better. The research is clear that imposing increasingly harsh sentences is not an effective way to reduce gun crime.⁴⁰⁴ Consider *United States v. Rivera-Ruperto*.⁴⁰⁵ The defendant served as an armed guard during what were, unknown to him, sham

⁴⁰¹ Beale, *supra* note 269, at 997.

⁴⁰² Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 32 (1988) (describing the intended effect of the Guidelines as rationalization and lessening of observed disparities among criminal sentences).

⁴⁰³ Patton, *supra* note 293, at 1030 (“[F]ederal gun possession prosecutions are particularly vulnerable to deterrence critiques because they do nothing to increase the perceived odds of detection (which remains almost entirely dependent on local police activity).”).

⁴⁰⁴ See, e.g., Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME AND JUST. 279, 284-85 (2008) (describing evidence that a mandatory minimum sentence for use of a gun in a robbery did not make offenders less likely to carry a gun); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 CRIMINOLOGY 247, 269 (1995) (“We found little evidence to support the intended purposes of firearm sentencing enhancements, reducing crime rates and gun use.”). *But see* David A. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, 4 AM. ECON. J. 32, 53 (2012) (finding small deterrent effects of state “add-on” gun laws).

⁴⁰⁵ 852 F.3d 1 (1st Cir. 2017).

drug deals orchestrated by the FBI to catch police corruption in Puerto Rico.⁴⁰⁶ In addition to the underlying drug charges, the government charged the defendant with violating § 924(c) for possessing the gun in furtherance of the drug trafficking crimes.⁴⁰⁷ The gun crimes created an enormous sentence, even though the defendant had no prior criminal record. “[O]f the combined 161 years and 10 months to which Rivera-Ruperto was sentenced, the lion’s share of the sentence—130 years to be exact—was the result of minimum sentences required by statute for Rivera-Ruperto’s six firearms convictions under 18 U.S.C. § 924(c)(1)(C).”⁴⁰⁸ The court rejected an Eighth Amendment challenge to the sentence.⁴⁰⁹ In an opinion concurring in the denial of rehearing en banc in the case, Judge Barron concluded:

Rivera faces the longest and most unforgiving possible prison sentence only because Congress has been deemed to have made a blanket judgment that even an offender like Rivera—who has no prior criminal record and whose series of related crimes resulted in no harm to an identifiable victim—should have no hope of ever living free. And he does so even though virtually every comparable jurisdiction punishes comparable criminal conduct less harshly, and even though the federal government itself punishes nearly the same or seemingly worse conduct more leniently.⁴¹⁰

Although Congress has prospectively fixed the type of sentencing calculation that led to Rivera’s lengthy sentence with the First Step Act, it left in place all of the mandatory minimum penalties for gun crimes and refused to cede discretion to judges to consider offender and offense circumstances.⁴¹¹

2. Race- and Class-Based Inequities

Gun violence itself is a symptom of and driver of inequality. Black Americans are disproportionately victims of gun homicides; Black men constitute over half of victims, while only 6% of the population.⁴¹² The social

⁴⁰⁶ *Id.* at 4-5.

⁴⁰⁷ *Id.* at 5, 13.

⁴⁰⁸ *Id.* at 16-17.

⁴⁰⁹ *See Id.* at 18 (“The crime of possessing a firearm in furtherance of such a drug trafficking offense is a grave one, and Congress has made a legislative determination that it requires harsh punishment. Given the weight of the case law, we see no Eighth Amendment route for second-guessing that legislative judgment.”).

⁴¹⁰ *United States v. Rivera-Ruperto*, 884 F.3d 25, 48 (1st Cir. 2018) (Barron, J., concurring in the denial of rehearing en banc).

⁴¹¹ First Step Act of 2018, *supra* note 128.

⁴¹² *See* THE EDUC. FUND TO STOP GUN VIOLENCE & THE COAL. TO STOP GUN VIOLENCE, A PUBLIC HEALTH CRISIS DECADES IN THE MAKING: A REVIEW OF 2019 CDC GUN MORTALITY DATA 14 (2021), <https://efsgv.org/wp-content/uploads/2019CDCdata.pdf> [<https://perma.cc/A63Y-QBFS>] (“Fifty-three [percent] of all firearm homicide victims (63% of male

and economic costs of gun violence are also visited disproportionately on poor and minority communities.⁴¹³ Unfortunately, federal enforcement has not addressed inequality but instead exacerbates it.⁴¹⁴

This enforcement works to reinforce race and class-based hierarchies by using the blunt instrument of incarceration to counteract what are often other and deeper-rooted problems. As Benjamin Levin writes, the federal “criminal gun possession statutes exacerbate the pathologies identified in the context of the War on Drugs.”⁴¹⁵ Thus, the federal felon-in-possession statute works by penalizing gun possession by persons already-convicted of drug, violent felony, and other offenses. We know that those inputs—who gets convicted and for what—are already the result of systematic practices that work against Black Americans. And if Black Americans are more likely to be charged with a crime than White Americans, then they are that much more likely *both* to get a gun-disqualifying conviction *and* to be the one with a gun-disqualifying conviction who gets caught unlawfully possessing a firearm.⁴¹⁶ Further, as we have described, enforcement priorities can further exacerbate inequality by tending to remove local cases to federal courts where there are less diverse juries, harsher sentencing options, and less overall local political accountability.⁴¹⁷

As criticism has resulted in some efforts to address drug sentencing disparities and mandatory minimums, a similar movement has not occurred with the same urgency in regard to federal gun offenses. If anything, the trend toward increasing the number and severity of federal gun prosecutions has deepened over the past few years. In 2011, the U.S. Sentencing Commission made detailed recommendations to change the severity and mandatory nature of § 924(c) in several respects, but those proposals have not been followed to date except for the minor revisions we noted in the First Step Act.⁴¹⁸ And

victims) in 2019 were Black males.”); JESSE D. MCKINNON & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, *WE THE PEOPLE: BLACKS IN THE UNITED STATES* 1 tbl. 1 (2005).

⁴¹³ See PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* 21 (2000) (describing an overrepresentation of young minority males and people of low socioeconomic status in victims of gun violence).

⁴¹⁴ Patton, *supra* note 293, at 1038 (“[Increased enforcement has] led to a dramatic, and largely unquestioned, increase in prison sentences for poor people of color.”).

⁴¹⁵ Levin, *supra* note 35, at 2179.

⁴¹⁶ See Shreefter, *supra* note 92, at 157, 159-60 (noting that felon-in-possession statutes both disproportionately affect Black populations and are aggressively enforced in Black communities).

⁴¹⁷ See Richman, *supra* note 273, at 397-98 (considering “over-federalization” objections to Project Exile); Levin, *supra* note 35, at 2212 (discussing use of federal gun charges to secure a federal forum to avoid a more racially diverse local jury pool). For many of these reasons, Christopher Lewis argues that, instead of sentencing *enhancements* for repeat offenders, there should be a sentencing *discount*. Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209 (2021).

⁴¹⁸ See U.S. SENT’G COMM’N, *REPORT TO CONGRESS: FEDERAL MANDATORY MINIMUM PENALTIES* 364-65 (2011) (recommending that Congress amend § 924(c) to reduce the length of mandatory minimum penalties, make increased penalties only applicable to prior convictions, provide

when prosecutorial leniency options expanded, even the Obama Administration made sure that guns were treated differently: “gun possession remained an exclusionary factor for the criteria announced by Attorney General Holder allowing prosecutors to charge below a mandatory minimum in certain drug cases.”⁴¹⁹

Thus, the problem of inequality in federal enforcement is two-fold: it visits extremely severe sentences on individuals, often only for tangentially firearm-related reasons, but it ignores the underlying causes of firearms violence, which disproportionately burdens underserved and minority communities. Changes in judicial interpretation of statutes, legislative efforts, and enforcement have not addressed this disconnect, and instead may have magnified it.

C. *The Path Forward*

What would a system look like that did not use guns as a proxy to impose severe sentences on individuals, often for non-gun-related reasons, but rather was designed primarily to reduce gun violence? We first look at what answers might come from within the criminal legal system and then how to expand outside that system.

1. Reforms Internal to the Criminal-Law Paradigm

While Congress responded to growing concerns regarding racial disparities in drug sentencing in the Fair Sentencing Act of 2010 (focusing on cocaine sentencing and the crack/powder distinction),⁴²⁰ there has been only minimal effort in the area of firearms prosecution and sentencing. Yet, as Benjamin Levin has highlighted, “any criminal regulation of gun possession need not resemble ACCA, Project Exile, or the current web of mandatory minimum sentencing provisions.”⁴²¹

For one thing, even when it has substantially increased criminal liability or penalties, Congress has not always been especially deliberative about it. The Supreme Court itself has remarked on “Congress’ less-than-meticulous drafting” of certain firearms laws,⁴²² noting that particular provisions have

sentencing courts more discretion to impose concurrent sentences for multiple § 924(c) violations, and clarify statutory definitions of underlying and predicate offenses); *supra* subsection I.B.1.

⁴¹⁹ Patton, *supra* note 293, at 1039.

⁴²⁰ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in scattered sections of 21 U.S.C.).

⁴²¹ Levin, *supra* note 35, at 2177-78, 2224 (“[D]espite Holder’s public criticism of mandatory minimum sentences in the drug context, little has been said about similar sentences for pure possessory offenses in the gun context.”).

⁴²² *United States v. Hayes*, 555 U.S. 415, 423 (2009).

been “the source of much perplexity in the courts”⁴²³ or that clarifying language was perhaps “an inadvertent casualty of a complex drafting process.”⁴²⁴ Sometimes it has chalked up “syntactical awkwardness”⁴²⁵ or “[p]artially overlapping provisions”⁴²⁶ to last minute changes to major pieces of legislation. More focus on the provisions might lead to more attention to their possible effects.

The research on those effects emphasizes the need for deterrence, but not by increasing sentences. Rather, there is strong evidence that likelihood of detection matters: predictable consequences for illegal firearms use are key. As Philip Cook and Jens Ludwig emphasize, public safety and public health are not incompatible goals.⁴²⁷ While lengthy federal sentences may not deter gun violence, at the same time, Cook and Ludwig point out that “the dismal clearance rates for shootings we have seen in recent years in the U.S. are a source of concern.”⁴²⁸ Community-based programs seek to provide early intervention to individuals, including behavioral health support, in order to reduce gun violence.⁴²⁹

2. Reforms That Take Us Beyond the Criminal Law

Many of the patterns and pathologies of the current system bring us back to the question: why crime? Why has the criminal legal system been the prime way the federal government has conceptualized the problem of gun violence?

Firearms are ubiquitous in American society. Thirty percent of adults own a gun, and eleven percent more live with someone who does.⁴³⁰ Most recent estimates count more guns in civilian hands than people in the United States.⁴³¹ Indeed, the FBI experienced record numbers of background checks

⁴²³ *Bailey v. United States*, 516 U.S. 137, 142 (1995).

⁴²⁴ *Taylor v. United States*, 495 U.S. 575, 589-90 (1990).

⁴²⁵ *Hayes*, 555 U.S. at 428.

⁴²⁶ *U.S. Dep’t of Treasury v. Galioto*, 477 U.S. 556, 558 (1986).

⁴²⁷ Philip J. Cook & Jens Ludwig, *Understanding Gun Violence: Public Health v. Public Policy*, 38 J. POL’Y ANALYSIS & MGMT. 788, 791 (2019).

⁴²⁸ *Id.* at 791.

⁴²⁹ AM. PSYCH. ASS’N, WHAT WORKS TO REDUCE GUN VIOLENCE (2014), <https://www.apa.org/monitor/2014/02/gun-violence> [<https://perma.cc/C74K-6ZG8>]; see also Vizzard, *Current and Future Policy*, *supra* note 34, at 904 (“Ceasefire projects would seem to offer more near-term hope for reducing violence than does the frustrated pursuit of new national gun laws.”).

⁴³⁰ Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states> [<https://perma.cc/YHP9-Y9MS>].

⁴³¹ Christopher Ingraham, *There are More Guns Than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership> [<https://perma.cc/6T7U-W2KF>].

in 2020, early in the COVID-19 pandemic, with over 3.7 million total in March, mostly for gun purchases.⁴³² Guns can end up in the hands of those who cannot legally possess them. Guns can then be used as a proxy for solving other crimes and social problems; that is how § 924(c) and ACCA are structured: to serve as “umbrella” sentencing-enhancer offenses for other criminal charges. We see from legislative developments and enforcement data discussed in Parts I and II that guns have been used this way for drugs offenses, violent offenses, and now increasingly for immigration enforcement.

There is a large and growing body of research on the causes of gun violence, as well as the efficacy of programmatic approaches towards reducing gun violence.⁴³³ In response to community-wide drivers of violence, a different approach emerged by the late 1990s. It sought to respond not to individual incidents, but rather to conduct a Group Violence Intervention (GVI). The GVI included (1) public education targeting youth responsible for the bulk of gun violence with focused deterrence, to ensure predictable consequences for gun violence, (2) mobilizing community and faith leaders, and (3) providing social services. Scholars such as Anthony Braga and David Kennedy have researched and developed such programs, which, again, seek to better detect and deter more broadly, as well as engage the community—and not primarily operating through sentencing enhancements.⁴³⁴ Following early success in Boston, under Operation Ceasefire, the model has been adopted in a wide range of jurisdictions.⁴³⁵

That collaborative, deterrence, prevention, and community-centered approach is very much unlike the principal approach of federal prosecutors—which involves collaboration—but is largely focused on severe sentencing. To be sure, community-based pilot programs to combat firearms violence have been funded by federal grants. A hospital-based risk prevention program, for

⁴³² Louis Beckett, *Americans Purchasing Record-Breaking Numbers of Guns Amid Coronavirus*, GUARDIAN (Apr. 1, 2020), <https://www.theguardian.com/world/2020/apr/01/us-gun-purchases-coronavirus-record> [<https://perma.cc/9BUS-ABGW>].

⁴³³ See, e.g., Drury D. Stevenson, *Gun Violence as an Obstacle to Educational Equality*, 50 U. MEMPHIS L. REV. 1091, 1132, 1135-36 (describing community-based programs like Cure Violence that seek to change the culture around firearms).

⁴³⁴ ANTHONY A. BRAGA, DAVID M. KENNEDY, ANNE M. PIEHL & ELIN J. WARING, THE BOSTON GUN PROJECT: IMPACT EVALUATION FINDINGS 4, 19 (2000); ANTHONY A. BRAGA, ANNE M. PIEHL & DAVID M. KENNEDY, REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE 1 (2001).

⁴³⁵ Anthony A. Braga & David L. Weisburd, *The Effects of 'Pulling Levers' Focused Deterrence Strategies on Crime*, 8 CAMPBELL SYSTEMATIC REVIEWS. 7 (2012); see also *Intervention Strategies*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies> (explaining that Group Violence Intervention strategy was first used in Operation Ceasefire and implemented in various other cities).

example, has been endorsed by the Department of Justice.⁴³⁶ The Office of Justice Programs, which conducts crime research for the Department of Justice, has evaluated Group Violence Initiative efforts to reduce gun violence.⁴³⁷ Congress has funded Group Violence Initiative programs, but it awarded a fraction of what the White House had requested, with the result that cities have had applications rejected by the DOJ.⁴³⁸ Other local strategies can focus on disrupting the illegal gun sales that are associated with gun violence.⁴³⁹ To date, federal law has not played a major role in such efforts, but the Biden Administration's new push may change that.⁴⁴⁰

We note that state lawmakers are not constrained by the same jurisdictional limits as the federal government and can more directly target violent crime.⁴⁴¹ That said, state lawmakers are not uninterested in regulating firearms use during crime. Use of a firearm is often an enhancement, including in sentencing; and it can, for example, mean the difference between first- and second-degree murder.⁴⁴² Increasingly, however, state lawmaking—at least in many states—is focused on a gun violence prevention approach that does not rely upon severe sentencing. As Joseph Blocher and Jacob Charles write, “Extreme risk protection order (“ERPO”) laws—often called ‘red flag’ laws—permit the denial of firearms to individuals who a judge has determined present an imminent risk of harm to themselves or others.”⁴⁴³ These laws, then, provide a more particularized approach regarding categories of individuals. Their focus is not primarily on criminal sentencing, and indeed, the focus is not criminal at all: it is a civil order removing the firearm from an individual who has been determined to be a threat to himself

⁴³⁶ U.S. DEP'T OF JUST., DEFENDING CHILDHOOD: REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 89 (2012), <https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf> [<https://perma.cc/MK8E-VDEL>].

⁴³⁷ These programs can be found on the National Institute of Justice's site under Crime & Crime Prevention Programs by searching for “group violence” in the keyword filter. *Crime & Crime Prevention*, NAT'L INST. OF JUST., <https://crimesolutions.ojp.gov/topics/crime-crime-prevention#-1> [<https://perma.cc/Z94B-RS9C>] (search for “group violence” in the keyword filter).

⁴³⁸ *Intervention Strategies*, *supra* note 435.

⁴³⁹ See Philip J. Cook, *Gun Markets*, 1 ANN. REV. CRIM. 359, 373-74 (2018) (positing that certain regulation of transaction patterns, including expanding the categories of people disqualified from owning guns, can save lives).

⁴⁴⁰ See Juana Summers, *\$5 Billion For Violence Prevention Is Tucked into Biden Infrastructure Plan*, NPR (Apr. 1, 2021), <https://www.npr.org/2021/04/01/983103198/-5-billion-for-violence-prevention-is-tucked-into-biden-infrastructure-plan> [<https://perma.cc/JX4D-7UE9>] (reporting that President Biden's infrastructure plan includes \$5 billion to support community-based violence prevention programs).

⁴⁴¹ *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (noting that, unlike the federal government's limited powers, the Constitution reserves “a generalized police power to the States”).

⁴⁴² See, e.g., N.C. GEN. STAT., § 14-17(a) (defining first-degree murder as any murder that involves the use of a “deadly weapon”).

⁴⁴³ Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1285 (2020).

or others.⁴⁴⁴ However, these laws are often accompanied by criminal provisions regarding violation of a red flag order, often relying upon relatively minor fines and penalties.⁴⁴⁵

Many cities have also recently begun to establish and fund governmental offices of violence prevention to target the systematic and underlying concerns that lead to gun violence, often seeking solutions through non-carceral means.⁴⁴⁶ Similar types of community-based outreach efforts and public education campaigns about the harms of the current harsh sentencing regime may help make headway in the battle over norms and discourse.

As the American Psychological Association explains, “[r]educing the incidence of gun violence will require interventions through multiple systems, including legal, public health, public safety, community, and health.”⁴⁴⁷ It is not a problem that harsher sentences can be expected to solve.

CONCLUSION

In this Article, we explore the evolution of the surprising range of federal gun crimes, detailing the substance of and major amendments to each of the primary criminal statutes. They cover conduct ranging from gun distribution, possession of particular weapons such as machine guns, use by drug traffickers, and individual possession of guns by felons.

Second, we describe how, in practice, federal prosecutors adapted their approach to focus on certain core gun crimes over time. Enacting a universal federal crime of gun possession during commission of any crime was (barely)

⁴⁴⁴ *Id.* at 1317 (establishing that extreme risk laws are civil proceedings with no criminal sanctions).

⁴⁴⁵ *See, e.g.*, WIS. STAT. § 813.12(8)(a) (2020) (“Whoever knowingly violates a temporary restraining order or injunction issued under sub. (3) or (4) shall be fined not more than \$10,000 or imprisoned for not more than 9 months or both.”); *see also* FLA. STAT. § 741.30(9)(a) (2021) (permitting the use of civil or criminal contempt proceedings to address domestic violence injunction violations). Other such laws do not include criminal provisions. *E.g.*, COLO. REV. STAT. § 13-14.5-103(6)(g) (2021) (requiring subjects of temporary extreme risk protection orders to refrain from having a firearm in their possession while the order is in effect). For an overview, *see Extreme Risk Protection Orders*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders> [<https://perma.cc/V8KY-CNHW>].

⁴⁴⁶ *See Violence Prevention*, MILWAUKEE HEALTH DEPT., <https://city.milwaukee.gov/health/staysafe> [<https://perma.cc/64FV-PUZU>] (describing how the office “provides strategic direction and oversight for City efforts to reduce risk of violence through linked strategies in partnership with government, non-profit, neighborhood, and faith organizations”); Press Release, Mayor’s Office to Prevent Gun Violence Set to Expand, Launch Major Peacekeeping Programs (July 10, 2018), <https://www1.nyc.gov/site/peacenyc/index.page> [<https://perma.cc/65BV-U7T6>] (identifying the Office to Prevent Gun Violence’s goals as working “to coordinate the city’s various anti-gun violence initiatives, amplify community-based intervention and prevention services, and introduce technological solutions to prevent gun violence to create safe, empowered and interconnected communities in New York City”).

⁴⁴⁷ AM. PSYCH. ASS’N, GUN VIOLENCE: PREDICTION, PREVENTION, AND POLICY (2013), <https://www.apa.org/pubs/info/reports/gun-violence-prevention> [<https://perma.cc/R767-PCNL>].

rejected by Congress after the judiciary raised alarm bells concerning federalism and docket congestion. Nor has a more cooperative federalism approach worked in the background-check setting, where financial incentives and penalties provide more indirect means to carry out federal priorities. Instead, the middle course—relying on a powerful felon-in-possession statute in close collaboration with state and local prosecutors—has promoted the federal interest in imposing severe penalties in firearms cases. Most recently, such efforts have also become prominent in immigration prosecutions.

Third, this expanded statutory and enforcement regime has provided vehicles for constitutional litigation testing the reach of federal criminal jurisdiction, use of federal crimes as sentencing enhancements, and boundaries between federal, state, and local enforcement. And yet that litigation has not meaningfully hampered enforcement. At best, constitutional rulings have channeled enforcement, including in ways that may have magnified inequities.

We argue that federal gun crimes are not just a microcosm of larger federal priorities regarding gun regulation or criminal prosecution priorities. Rather, they have their own logic. We have described how three factors dominate: (1) aggressive interest-group lobbying that ends in legislative compromise on harsh punishment; (2) judges and lawmakers dichotomize guns, contrasting their possession by “law-abiding citizens” with that of “thugs” and “gangsters”; and (3) prosecutorial power that is magnified in this area due to the ubiquity of firearms in communities and in criminal activity in the United States, together with federal prosecutors’ ability to leverage sentencing to obtain favorable plea bargains.

In few other areas is there such intensive lobbying on both sides when criminal statutes are enacted. Federal gun crimes reflect a unique dynamic in which legislation is shaped by aggressive lobbying by interest groups, the special resources and discretion of federal prosecutors, and the ubiquity of firearms in communities and in criminal activity in the United States. Federal firearms crimes should be understood as central to federal prosecution, just as the fraud and drug statutes have long been. With powerful forces arrayed on both sides, by the 1980s, statutes reflected a settlement: regulation of the manufacture and distribution of firearms was limited, while increasingly severe criminal penalties for individuals continued to expand in their reach. Those penalties in turn empowered prosecutors seeking leverage in plea bargaining.

As a result, gun crimes represent a special story in federal criminal law, in which prosecutors, Congress, and interest groups have remained very much aligned. From a criminal law perspective, then, federal gun law looks quite unified and consistent, with an extensive focus on punishing individuals in order to target a wide range of criminal conduct—ranging from primarily to

only tangentially gun-related. The result magnifies inequality in sentencing outcomes, often in cases having little connection to gun violence, while ignoring underlying causes of gun violence. The federal government has supported non-carceral gun violence prevention programs, but to a limited extent. The powerful political and institutional forces that fixed felon-in-possession prosecution as a cornerstone of federal law and prosecution strategy continue to occupy the field.

The trajectory of federal gun crimes has been clear. Whether the federal approach will arc towards a more grounded approach remains to be seen. A new direction is apparent in the states, where the recent focus has been on non-criminal red flag laws, other restrictions on gun possession and purchasing, as well as community programs focused on deterrence and prevention.⁴⁴⁸ Thus, while coherent from a political economy perspective, from a policy perspective, federal gun crime does not achieve a federal, systematic, non-discriminatory, and collaborative effort to address the deep American problem of gun violence.

⁴⁴⁸ For a further summary of these gun violence intervention strategies, see *Intervention Strategies*, *supra* note 435.

APPENDIX: STATUTORY CHANGES TO 18 U.S.C. § 924(C)

Underlined text = additions~~Strikethrough text~~ = deletions

Act	Modifications to Text
1968—Pub. L. 90-618 § 102 Gun Control Act of 1968	(c) Whoever— (1) <u>uses a firearm to commit any felony which may be prosecuted in a court of the United States, or</u> (2) <u>carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.</u>
1971—Pub. L. 91-644 Omnibus Crime Control Act of 1970	(c) Whoever— (1) uses a firearm to commit any felony <u>for</u> which <u>he</u> may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony <u>for</u> which <u>he</u> may be prosecuted in a court of the United States, shall, <u>in addition to the punishment provided for the commission of such felony,</u> be sentenced to a term of imprisonment for not less than one year nor more than 10-ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five-two years nor more than 25 <u>twenty-five</u> years, and, notwithstanding any other provision of law, the court shall not suspend the sentence <u>in the case of a second or subsequent conviction</u> of such person or give him a probationary sentence, <u>nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.</u>
1984—Pub. L. 98-473, § 1005(a)	(c) Whoever, <u>during and in relation to any crime of violence, including a crime of violence which provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm,</u> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States; shall, in addition to the punishment provided for <u>such crime of violence</u> the commission of such felony, be sentenced to a term

	<p>of imprisonment for not less than one five years nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two ten years, nor more than twenty five years, and, n Notwithstanding any other provision of law, the court shall not <u>place on probation or suspend the sentence in the case of a second or subsequent conviction of such any person convicted of a violation of this subsection or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment imposed including that imposed for the commission of such felony crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.</u></p>
<p>1986—Pub. L. 99—308, § 104(a)(2)</p> <p>Firearm Owners Protection Act</p>	<p>(c)(1) Whoever, during and in relation to any crime of violence <u>or drug trafficking crime</u>, including a crime of violence <u>or drug trafficking crime</u>, which provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence <u>or drug trafficking crime</u>, be sentenced to imprisonment for five years, <u>and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years.</u> In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years, <u>and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for twenty years.</u> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment imposed including that imposed for the crime of violence <u>or drug trafficking crime, or drug trafficking crime</u> in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.</p> <p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony violation of Federal law involving the <u>distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).</u></p>

	<p>(3) For purposes of this subsection the term 'crime of violence' means an offense that is a felony and—</p> <p><u>(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another,</u></p> <p><u>or</u></p> <p><u>(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</u></p>
<p>1988—Pub. L. 100-690, §§ 6212, 6460, 7060</p> <p>Anti-Drug Abuse Act of 1988</p>	<p>(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime; (including a crime of violence or drug trafficking crime; which provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device); for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten-thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten-twenty years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for twenty years <u>life imprisonment without release</u>. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment imposed including that imposed for the crime of violence or drug trafficking crime, or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.</p> <p>(2) For purposes of this subsection, the term 'drug trafficking crime' means any felony <u>punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).</u></p> <p>(3) For purposes of this subsection the term 'crime of violence' means an offense that is a felony and—</p>

	<p>(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or</p> <p>(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</p>
<p>1990—<u>Pub. L. 101-647, §§ 1101, 3527</u></p> <p>Crime Control Act of 1990</p>	<p>(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, <u>and if the firearm is a short-barreled rifle, short-barreled shotgun, to imprisonment for ten years</u>, and if the firearm is a machinegun, <u>or destructive device</u>, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, <u>or destructive device</u>, or is equipped with a firearm silencer or firearm muffler, to imprisonment for life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment imposed including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.</p> <p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).</p> <p>(3) For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and—</p> <p>(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or</p>

	(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
<p>1994—Pub. L. 103—322, §§ 110102, 110105, 110510, 330011</p> <p>Violent Crime Control and Law Enforcement Act of 1994</p>	<p>(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment imposed including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.</p> <p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).</p> <p>(3) For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and—</p> <p>(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or</p> <p>(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</p>

<p>1998—Pub. L. 105—386, § 1</p> <p>An Act To Throttle Criminal Use of Guns</p>	<p>(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, Whoever<u>any person who</u>, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which<u>that</u> provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he<u>the person</u> may be prosecuted in a court of the United States, uses or carries a firearm, <u>or who, in furtherance of any such crime, possesses a firearm</u>, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—</p> <p>(i) be sentenced to <u>a term of imprisonment of not less than 5</u> for five years;</p> <p>(ii) <u>if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and</u></p> <p>(iii) <u>if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.</u></p> <p>(B) and if <u>If the firearm possessed by a person convicted of a violation of this subsection—</u></p> <p>(i) <u>is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment for of not less than 10</u> ten years; <u>or</u></p> <p>(ii) and if the firearm <u>is a machinegun; or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment for of not less than 30</u> thirty years.</p> <p>(C) In the case of his <u>a</u> second or subsequent conviction under this subsection, such<u>the</u> person shall—</p> <p>(i) be sentenced to <u>a term of imprisonment for of not less than 25</u> twenty years; <u>and</u></p> <p>(ii) <u>if the firearm involved is a machinegun; or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to life imprisonment for life</u> without release.</p> <p>(D) Notwithstanding any other provision of law—</p> <p>(i) the<u>a</u> court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection; <u>and</u></p> <p>(ii) nor shall the<u>no</u> term of imprisonment imposed <u>on a person</u> under this subsection run concurrently with any other term of imprisonment imposed <u>on the person</u>, including that any term of imprisonment imposed for the crime of violence or drug trafficking crime in<u>during</u> which the firearm was used, or carried, or possessed.</p>
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	<p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).</p> <p>(3) For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and— (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</p> <p><u>(4) For purposes of this subsection, the term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.</u></p>
<p>2005—Pub. L. 109-92, § 6</p> <p>Protection of Lawful Commerce in Arms Act</p>	<p>(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—</p> <p>(i) be sentenced to a term of imprisonment of not less than 5 years;</p> <p>(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and</p> <p>(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.</p> <p>(B) If the firearm possessed by a person convicted of a violation of this subsection—</p> <p>(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or</p> <p>(ii) is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.</p>

	<p>(C) In the case of a second or subsequent conviction under this subsection, the person shall—</p> <p>(i) be sentenced to a term of imprisonment of not less than 25 years; and</p> <p>(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.</p> <p>(D) Notwithstanding any other provision of law—</p> <p>(i) a court shall not place on probation any person convicted of a violation of this subsection; and</p> <p>(ii) no term of imprisonment imposed on a person under this subsection run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.</p> <p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).</p> <p>(3) For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and—</p> <p>(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or</p> <p>(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</p> <p>(4) For purposes of this subsection, the term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.</p> <p><u>(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a</u></p>
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	<p><u>court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—</u></p> <p><u>(A) be sentenced to a term of imprisonment of not less than 15 years; and</u></p> <p><u>(B) if death results from the use of such ammunition—</u></p> <p><u>(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and</u></p> <p><u>(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.</u></p>
<p>2006—Pub. L. 109—304, § 17</p>	<p>(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—</p> <p>(i) be sentenced to a term of imprisonment of not less than 5 years;</p> <p>(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and</p> <p>(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.</p> <p>(B) If the firearm possessed by a person convicted of a violation of this subsection—</p> <p>(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or</p> <p>(ii) is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.</p> <p>(C) In the case of a second or subsequent conviction under this subsection, the person shall—</p> <p>(i) be sentenced to a term of imprisonment of not less than 25 years; and</p> <p>(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.</p> <p>(D) Notwithstanding any other provision of law—</p>

	<p>(i) a court shall not place on probation any person convicted of a violation of this subsection; and</p> <p>(ii) no term of imprisonment imposed on a person under this subsection run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.</p> <p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).</p> <p>(3) For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and—</p> <p>(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another,</p> <p>or</p> <p>(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</p> <p>(4) For purposes of this subsection, the term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.</p> <p>(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—</p> <p>(A) be sentenced to a term of imprisonment of not less than 15 years; and</p> <p>(B) if death results from the use of such ammunition—</p>
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	<p>(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and</p> <p>(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.</p>
<p>2018—<u>Pub. L. 115—391</u>, § 403</p> <p>First Step Act of 2018</p>	<p>(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—</p> <p>(i) be sentenced to a term of imprisonment of not less than 5 years;</p> <p>(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and</p> <p>(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.</p> <p>(B) If the firearm possessed by a person convicted of a violation of this subsection—</p> <p>(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or</p> <p>(ii) is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.</p> <p>(C) In the case of a second or subsequent conviction under this subsection <u>violation of this subsection that occurs after a prior conviction under this subsection has become final</u>, the person shall—</p> <p>(i) be sentenced to a term of imprisonment of not less than 25 years; and</p> <p>(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.</p> <p>(D) Notwithstanding any other provision of law—</p> <p>(i) a court shall not place on probation any person convicted of a violation of this subsection; and</p> <p>(ii) no term of imprisonment imposed on a person under this subsection run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.</p>

	<p>(2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.</p> <p>(3) For purposes of this subsection the term ‘crime of violence’ means an offense that is a felony and— (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.</p> <p>(4) For purposes of this subsection, the term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.</p> <p>(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section— (A) be sentenced to a term of imprisonment of not less than 15 years; and (B) if death results from the use of such ammunition— (i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and (ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.</p>
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