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HOW THE GUN CONTROL ACT DISARMS BLACK FIREARM OWNERS

Maya Itah*

Abstract: Through 18 U.S.C. § 924(c), the Gun Control Act (GCA) outlaws the possession of a firearm “in furtherance of” a drug trafficking crime. The statute’s language is broad, and federal courts have interpreted it expansively. By giving prosecutors wide discretion in charging individuals with § 924(c) violations, the language enables the disproportionate incarceration of Black firearm owners.

This Comment addresses this issue in three parts. Part I discusses the ways early gun control laws overtly disarmed Black firearm owners. Additionally, Part I provides context for the passage of the Gun Control Act of 1968, which coincided with the backlash to the Civil Rights Movement. Next, Part II outlines the ways different circuits have interpreted § 924(c), demonstrating how those interpretations disadvantage Black defendants. Finally, Part III puts forth two proposals for reform: interpreting § 924(c) more narrowly, or simply removing the language at issue from the GCA. These reforms would reduce racial disparities in the enforcement of § 924(c). They would also reaffirm the right of Black Americans to keep and bear arms for self-defense.

INTRODUCTION

Two contrasting cases—the first involving a Black defendant, and the second involving a white defendant—illustrate the racially disparate application of the Gun Control Act (GCA).¹ In the first case, *United States v. Bell*,² officers in Pine Bluff, Arkansas, forced their way into Reecie Humphrey’s home, breaking down her door with a battering ram.³ The officers charged into a bedroom and found two people naked and asleep: Ms. Humphrey herself, and Pierre Bell, her partner.⁴ As soon as Ms. Humphrey and Mr. Bell put on clothes, the officers arrested them both.⁵

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1. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921–28).

2. 477 F.3d 607 (8th Cir. 2007).

3. *Id.* at 610; Brief for Appellant at 5, *Bell*, 477 F.3d 607 (No. 06-2802).

4. Brief for Appellant at 5, *Bell*, 477 F.3d 607 (No. 06-2802).

5. *Bell*, 477 F.3d at 610.

When the officers searched the bedroom, they identified two things that ultimately landed Mr. Bell in federal prison.⁶ First, they found a wallet containing Mr. Bell's identification card and roughly seven grams of crack cocaine.⁷ Second, they uncovered a handgun buried "between the mattresses on [Mr.] Bell's side of the bed."⁸

The prosecution charged Mr. Bell with possessing crack cocaine with intent to distribute, possessing a firearm as a person with a felony conviction, and possessing a firearm in furtherance of a drug trafficking crime.⁹ He went to trial in the United States District Court for the Eastern District of Arkansas.¹⁰ During the trial, Arkansas State Police Sergeant Don Sanders testified that the amount of crack cocaine in the wallet suggested that Mr. Bell was trafficking drugs, and that "drug dealers commonly possess firearms to protect themselves, their illegal goods, and their illegal proceeds."¹¹

A jury convicted Mr. Bell of all three counts.¹² For possessing a firearm in furtherance of a drug trafficking crime, the court sentenced Mr. Bell, a Black man in his thirties,¹³ to sixty months of incarceration¹⁴—the mandatory minimum.¹⁵ The court imposed this sentence on top of a 144-month sentence for dealing drugs and a 120-month sentence for possessing the firearm in the first place.¹⁶

On appeal, the Eight Circuit Court of Appeals held that "[t]he evidence

6. *Id.* at 610–11.

7. *Id.* at 610.

8. *Id.* At a suppression hearing, Mr. Bell testified that officers held a machine gun to his head while he was naked, assaulted him, threatened to tase him, and ignored his request to speak with his lawyer. Ms. Humphrey testified that the handgun was actually hers, and that a police officer said her children would be removed from her if she did not say that the drugs and gun belonged to Mr. Bell. The trial court did not credit their testimony. *See* Brief for Appellant, *supra* note 4, at 5–7.

9. *Bell*, 477 F.3d at 609–10.

10. *Id.* at 607.

11. *Id.* at 611.

12. *Id.*

13. *See Find an Inmate.*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/BQ9A-39GS>] (select the "Find by Name" tab; then type "Pierre Bell" into the search bar; then select "Search").

14. *Bell*, 477 F.3d at 610.

15. 18 U.S.C. § 924(c)(1)(A)(i). A mandatory minimum sentence is one the court must give a defendant who violates a specific statute, regardless of the defendant's personal circumstances or the specific facts of the crime. *See Sentencing 101*, FAMM, <https://famm.org/our-work/sentencing-reform/sentencing-101/> [<https://perma.cc/4UR4-YYZX>].

16. *Bell*, 477 F.3d at 610. For a discussion of how criminalizing the possession of firearms by people with felonies disparately impacts Black firearm owners, see generally Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143 (2018).

was sufficient to support [Mr.] Bell’s conviction for possessing a firearm in furtherance of a drug trafficking crime” under 18 U.S.C. § 924(c).¹⁷ The court noted that the officers who entered the bedroom “observed Bell apparently reaching for the revolver” and that the gun was “proximately located to” the crack cocaine.¹⁸ It reasoned that “[t]hese facts, while not overwhelming, support an inference that Bell possessed the revolver in furtherance of his possession with intent to distribute the crack cocaine.”¹⁹

The next case, *United States v. Rockey*,²⁰ involves a white defendant. It contrasts starkly with Mr. Bell’s case, illustrating the disparate impact of § 924(c) on Black firearm owners. Mr. Bell, who possessed a few grams of crack while keeping a gun in the home where he slept, received the same sentence for possessing a firearm in furtherance of a drug trafficking crime as William Eugene Rockey,²¹ a white man in his forties.²² Mr. Rockey was driving down a highway in Oklahoma when a police officer attempted to pull him over.²³ In response, Mr. Rockey led the officer on a high-speed chase.²⁴ At one point, he stuck a handgun out the window and fired two rounds.²⁵ Mr. Rockey ended the chase by abandoning the truck and fleeing into a nearby forest.²⁶ Two days later, police found him in the woods.²⁷ Along with “a loaded Ruger Super Blackhawk .44 Magnum affixed with a scope,” Mr. Rockey possessed a number of items useful for manufacturing methamphetamine: lithium batteries, a syringe, iodine, and ephedrine.²⁸ Possessing ephedrine is illegal under the Controlled Substances Act.²⁹

Mr. Bell and Mr. Rockey engaged in plainly different courses of conduct. Mr. Bell was asleep in his partner’s room, where a gun and a

17. *Bell*, 477 F.3d at 613; 18 U.S.C. § 924(c).

18. *Bell*, 477 F.3d at 614.

19. *Id.*

20. 449 F.3d 1099 (10th Cir. 2006).

21. *Id.* at 1102. Given that Mr. Rockey discharged the firearm, it is unclear why he didn’t receive a ten-year sentence instead. See 18 U.S.C. § 924(c)(1)(A)(iii) (“[A]ny person who . . . in furtherance of [a drug trafficking crime], possesses a firearm, shall . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.”).

22. See *Find an Inmate.*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/VNM4-U8VM>] (select the “Find by Name” tab; then type “William Eugene Rocky” into the search bar; then select “Search”).

23. *Rockey*, 449 F.3d at 1102.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1102–03.

29. *Id.* at 1103 (citing Controlled Substances Act, 21 U.S.C. § 841(c)(2)).

small quantity of drugs were present; Mr. Rockey shot at officers, ran from them, and had both a firearm and a controlled substance in his bag when he was arrested. Together, these cases demonstrate two things about § 924(c). First, the statute criminalizes a wide range of conduct. The range is so wide that it is hard to determine what generally ties § 924(c) convictions together, beyond the existence of a defendant who possessed drugs and a gun at the same point in time. Second, because of this range, prosecutors have significant discretion in deciding which defendants to charge with the crime. Why did Mr. Bell serve the same sentence as Mr. Rockey? Unlike Mr. Bell, Mr. Rockey actually fired a handgun.³⁰ Section 924(c)(1)(A)(iii) imposes a mandatory minimum sentence of ten years on defendants who discharge firearms,³¹ so the fact that both men were sentenced to five years is particularly strange. Although the record does not indicate what role race might have played in the prosecutors' charging decisions, Mr. Bell's Blackness likely accounts for the sentence he received.³²

This Comment explores how the federal courts' broad interpretation of § 924(c) makes room for the disparate criminalization of gun ownership by Black individuals. There are many cases like Mr. Bell's: police find drugs and a gun in the same room; at trial, an expert witness—typically a member of law enforcement—testifies that drug dealers often own guns; the jury convicts, and the defendant goes to prison. The defendant in question is disproportionately likely to be Black.³³ Along with a separate term of imprisonment for selling drugs, that defendant will serve a sentence of at least five years³⁴ and become ineligible for legal gun ownership.³⁵

In establishing 18 U.S.C. § 924(c)'s racially disparate impact, this Comment begins by looking at the history of gun control in the United States. Part I gives a brief overview of the ways gun control has disarmed Black Americans, both directly and indirectly. It also contextualizes the passage of the GCA, the first attempt at comprehensive federal gun control and the source of § 924(c). A general analysis of the benefits and drawbacks of gun control policies is beyond the scope of this Comment. Rather than carrying out that analysis, Part I simply addresses the fact that, historically, legislators have used gun control laws to prevent Black

30. *Id.*

31. 18 U.S.C. § 924(c)(1)(A)(iii).

32. *See infra* Part II.

33. *See infra* text accompanying notes 150–53.

34. 18 U.S.C. § 924(c)(1)(A)(i).

35. *Id.* § 922(g)(1) (forbidding people with felony convictions from possessing “in or affecting commerce, any firearm or ammunition”).

Americans from owning firearms. Part II discusses the ways federal courts have interpreted § 924(c) in the last two decades, focusing on the ways courts have dismissed Black defendants' assertion of the right to self-defense. Part III proposes two reforms that address the harm § 924(c) imposes on Black firearm owners. The first reform is a narrower interpretation of § 924(c) that focuses on whether the defendant had a culpable mental state. This interpretation would reduce the disparate impact of § 924(c) on Black individuals; along with curbing prosecutorial discretion, it would give defenses rooted in the right to self-defense the opportunity to succeed. The second reform is an outright repeal of the language in § 924(c) that criminalizes possession of a firearm in furtherance of a drug trafficking crime.

I. THE RACIST IMPACT OF GUN CONTROL IN THE UNITED STATES

The GCA is racially neutral on its face, but it wreaks a racially disproportionate impact.³⁶ The GCA's statement of purpose declares that the Act supports "law enforcement officials in their fight against crime and violence."³⁷ The Act also states that it does not punish "law-abiding citizens" who use firearms for "hunting, trapshooting, target shooting, personal protection, or any other lawful activity."³⁸ Nearly every type of firearm use Congress explicitly endorsed involves shooting for sport, a white-coded activity.³⁹ Congress could have listed other purposes that lack this strong association with white communities—for example, many

36. See *infra* text accompanying notes 150–53; see, e.g., *Holloway v. United States*, No. 01-CV-1017, 2014 WL 1942923, at *1 (E.D.N.Y. May 14, 2014) ("Black men like Holloway have long been disproportionately subjected to the 'stacking' of § 924(c) counts." (citing U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 363 (2011))); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1712 (2012) ("With political momentum for gun control heightened, in October 1968 the President . . . signed into law the Gun Control Act of 1968, which . . . 'represented a backlash against armed [Black individuals] who were seen to be undermining social order.'" (quoting ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 247 (2011))); David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1013 (2020) ("In 2018, consistent with most years, approximately 72% of people sentenced for federal firearm offenses were Black or [Latinx]."). See generally Shreefter, *supra* note 16.

37. Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213–14.

38. *Id.*

39. See Jay Mechling, *Boy Scouts, the National Rifle Association, and the Domestication of Rifle Shooting*, 53 AM. STUD. 5, 23 (2014) (discussing the image of the wholesome white youth who engages in target shooting); Louis Warren, *Book Review*, 89 J. AM. HIST. 621, 621 (2002) (reviewing DANIEL JUSTIN HERMAN, *HUNTING AND THE AMERICAN IMAGINATION* (2001)) ("By the end of the nineteenth century . . . white middle-class Americans turned to hunting to establish themselves as natives in a country of new immigrants.").

people own guns because their jobs require them to carry firearms, or because they inherited firearms from relatives⁴⁰—but it did not.

Shining a light on the GCA's historical context reveals why the Act disproportionately punishes Black people for owning firearms. As former professional basketball player Kareem Abdul-Jabbar recently wrote in the *Los Angeles Times*, "Racism in America is like dust in the air. It seems invisible—even if you're choking on it—until you let the sun in."⁴¹

This Part examines the GCA in view of the history of gun control. Laws restricting firearm access have long targeted Black people and members of other marginalized groups, first overtly and later covertly. Even if the GCA's drafters lacked the explicit intent to disarm Black people, the Act ultimately achieved that same result.

A. *Direct Prohibition: From the Colonial Period to Dred Scott*⁴²

The link between firearm ownership and political power has English roots. During the first half of the 1600s, the English monarchy frequently restricted the use of firearms, fearing "the dangers associated with having a large number of English commoners armed with handguns, muskets, and pikes."⁴³ The fear of armed commoners persisted in the latter half of the century. For example, a 1670 statute declared that "no person, other than heirs of the nobility, could have a gun unless he owned land" of a certain value.⁴⁴ England's population thus became "intimately familiar with the capricious ways in which arms, political power, and self-determination might link together."⁴⁵ Later, in 1765, English jurist William Blackstone "asserted that constitutional guarantees unsupported by citizens' private firearms are guarantees in name only."⁴⁶

Colonizers from England brought their beliefs about firearms to America. They saw gun ownership as a necessary means for securing their political freedoms as well as their homes.⁴⁷ Thus, it is significant that, in

40. *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> [<https://perma.cc/952Z-PBYL>].

41. Kareem Abdul-Jabbar, Opinion, *Don't Understand the Protests? What You're Seeing Is People Pushed to the Edge*, L.A. TIMES (May 30, 2020, 7:29 PM), <https://www.latimes.com/opinion/story/2020-05-30/dont-understand-the-protests-what-youre-seeing-is-people-pushed-to-the-edge> (last visited Sept. 19, 2021).

42. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

43. DONALD J. CAMPBELL, *AMERICA'S GUN WARS: A CULTURAL HISTORY OF GUN CONTROL IN THE UNITED STATES* 17 (2019).

44. Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 970 (1975).

45. CAMPBELL, *supra* note 43, at 18.

46. *Id.* at 19 (citation omitted).

47. *Id.* at 20.

1640, the Colony of Virginia passed a law excluding Black people from owning guns—the first restrictive law of any kind concerning the Colony’s Black population.⁴⁸ Throughout the Colonies, similar laws prevented Black people, free or enslaved, from possessing firearms.⁴⁹

The founding of the United States did not change matters. Many states made it illegal for Black people to possess firearms “in order to maintain [them] in their servile status,”⁵⁰ in spite of provisions in state constitutions analogous to the Second Amendment,⁵¹ which states that “the right of the people to keep and bear Arms[] shall not be infringed.”⁵² Representing the United States Supreme Court, Chief Justice Roger Taney rationalized the disarmament of Black people in *Dred Scott v. Sandford*.⁵³ He wrote that the slaveholding states would have never accepted a Constitution that gave Black people citizenship, because such a document “would give them the full liberty . . . to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁵⁴

B. Indirect Prohibition: Reconstruction and the Muzzling of the Fourteenth Amendment

After the Civil War, the United States government gave Black Americans citizenship by ratifying the Fourteenth Amendment.⁵⁵ In theory, Black citizens became white citizens’ political equals. In practice, states found ways to continue denying Black people fundamental rights, including the right to bear arms.

The Fourteenth Amendment’s framers intended it to secure a panoply of rights, among them “an individual right to own and keep guns in one’s home for self-protection.”⁵⁶ The Framers of the Constitution likely understood the Second Amendment as guaranteeing the rights of a militia—comprising “the people” rather than professional soldiers—to

48. Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R.L.J. 67, 69 (1991); see CAMPBELL, *supra* note 43, at 24.

49. See CAMPBELL, *supra* note 43, at 24.

50. Tahmassebi, *supra* note 48, at 67.

51. U.S. CONST. amend. II; Tahmassebi, *supra* note 48, at 67, 70. The Second Amendment did not apply to the states until the Supreme Court so held in *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

52. U.S. CONST. amend. II.

53. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

54. *Id.* at 417.

55. U.S. CONST. amend. XIV, § 1.

56. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 899.

use firearms for the protection of the republic, fulfilling a duty akin to jury service.⁵⁷ However, the Fourteenth Amendment's framers "significantly recast the right to weapons."⁵⁸ In a sense, they agreed with Justice Taney that citizenship implied the right to own a firearm for self-defense.⁵⁹ They saw the ability to keep a gun at home for self-defense as "a true 'privilege' or 'immunity' of citizens."⁶⁰ In particular, they felt that Black people living in the South "could not always count on the local police to keep white night-riders at bay," and thus needed to be able to count on themselves.⁶¹

However, the United States Supreme Court made no discernable effort to reaffirm the vision of the Fourteenth Amendment's framers. In *United States v. Cruikshank*,⁶² an 1875 case, the Court held that the Second Amendment "has no other effect than to restrict the powers of the national government."⁶³ The facts of *Cruikshank* make the case worth scrutinizing closely. In 1872, an election for the governor of Louisiana led to a "hotly contested" split between the Republican and Democratic candidates.⁶⁴ While both candidates claimed victory, a federal judge declared that the Republican candidate won.⁶⁵

Fearing that the Democrats—who were mostly former slave owners—would nonetheless try to take control of the regional government, an all-Black militia seized the local courthouse in 1873.⁶⁶ Thus began the Colfax Massacre: a group of white men forced the Black militiamen to surrender

57. See Amar, *supra* note 56, at 892–94; see also Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 646–47 (1989) ("There is strong evidence that 'militia' refers to all of the people, or at least of all of those treated as full citizens of the community.").

58. Amar, *supra* note 56, at 898.

59. See *id.* at 900; see also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 256 (1983) (explaining that "proscribing anti-gun laws was expressly contemplated by the authors of the . . . fourteenth amendment").

60. Amar, *supra* note 56, at 899 (quoting U.S. CONST. amend. XIV, § 1).

61. *Id.* at 899, 911.

62. 92 U.S. 542 (1875).

63. *Id.* at 553; see also Leslie Friedman Goldstein, *The Second Amendment, the Slaughter-House Cases (1873), and United States v. Cruikshank (1876)*, 1 ALB. GOV'T L. REV. 365, 369 (2008) ("In *Cruikshank* the Court made explicit . . . that neither the First nor Second Amendments are incorporated against the state governments as privileges or immunities of U.S. citizens.").

64. Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, SMITHSONIAN MAG.: SMART NEWS (Apr. 13, 2016), <https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/> [<https://perma.cc/922P-T8X9>].

65. William Briggs & Jon Krakauer, Opinion, *The Massacre that Emboldened White Supremacists*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/opinion/black-lives-civil-rights.html> [<https://perma.cc/4HML-TTFR>].

66. See Lewis, *supra* note 64.

and then murdered an estimated 150 of them.⁶⁷ Following the massacre, the federal government convicted three of the white perpetrators⁶⁸ under the Enforcement Act of 1870,⁶⁹ which made it illegal “to join in a conspiracy to deprive any citizen of ‘a right or privilege . . . secured to him by the Constitution.’”⁷⁰ The indictment alleged that the perpetrators, among other things, intended to prevent two Black citizens from exercising the “right to keep and bear arms for a lawful purpose.”⁷¹ The perpetrators challenged the indictment, and the United States Supreme Court ultimately set the convictions aside.⁷² In its opinion, the Court announced that the right to bear arms for a lawful purpose “is not a right granted by the Constitution.”⁷³ It reasoned that the Second Amendment merely “declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”⁷⁴

Cruikshank implicitly gave states permission to prevent Black people from possessing firearms. As a result, Black people “were routinely disarmed by Southern States after the Civil War.”⁷⁵ States’ methods included banning cheap handguns (“the only firearms the poverty-stricken freedmen could afford”),⁷⁶ imposing business or transaction taxes on handguns, giving the police discretion over the granting of firearms licenses, and simply continuing to enforce pre-emancipation statutes.⁷⁷ The Court did not reverse its position on the Second Amendment until 2010, holding in *McDonald v. City of Chicago*⁷⁸ that the Second Amendment right to keep and bear arms for self-defense is “among those fundamental rights necessary to our system of ordered liberty”⁷⁹ and “is fully applicable to the States.”⁸⁰ The United States Supreme Court’s refusal to give the federal government greater power in enforcing civil

67. *Id.*

68. *Cruikshank*, 92 U.S. at 546; see Justice John Paul Stevens, *Glittering Generalities and Historical Myths*, 51 U. LOUISVILLE L. REV. 419, 423 (2013).

69. Enforcement Act of 1870, ch. 114, 16 Stat. 140.

70. Martha T. McCluskey, *Facing the Ghost of Cruikshank in Constitutional Law*, 65 J. LEGAL EDUC. 278, 281 (2015) (quoting Enforcement Act of 1870 § 6).

71. *Cruikshank*, 92 U.S. at 545 (quoting U.S. CONST. amend. II).

72. *Id.* at 559.

73. *Id.* at 553.

74. *Id.*

75. *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

76. Tahmassebi, *supra* note 48, at 73.

77. See *id.* at 73–75; Stephen P. Halbrook, *To Bear Arms for Self-Defense: A “Right of the People” or a Privilege of the Few?*, 21 FEDERALIST SOC’Y REV. 46, 47 (2020).

78. 561 U.S. 742 (2010).

79. *Id.* at 778.

80. *Id.* at 750.

rights paved the way for the Jim Crow era and its attendant violence.⁸¹

C. *Federal Prohibition: The Twentieth Century and the Beginnings of Federal Gun Control*

In the early twentieth century, the Jim Crow era's midpoint, widespread racism and xenophobia led the Ku Klux Klan to surge in popularity.⁸² Klan members often furthered the practice of restricting Black people's access to guns.⁸³ For example, in 1906, Mississippi passed a law "requiring retailers to maintain records of all pistol and pistol ammunition sales, and to make such available to authorities for inspection."⁸⁴ The authorities in question often belonged to the Ku Klux Klan.⁸⁵ Contrary to conventional narratives about racism in the United States, the Klan's popularity was not limited to the South.⁸⁶ The organization "was present in force in southern New Jersey, Illinois, Indiana, Michigan and Oregon."⁸⁷ Public support for white supremacy and nationalism may explain why "[a]ll of these states enacted either handgun permit laws or laws barring alien handgun possession between 1913 and 1934."⁸⁸

General calls for gun control rose in tandem with the number of people moving to cities and the number of people immigrating to the United States. By the start of the 1920s, more than half of Americans lived in cities, and many city residents had recently arrived in America.⁸⁹ Significantly, the newcomers came mostly from Eastern and Southern Europe and did not readily blend into America's dominant culture, defined by white, Protestant settlers from Western Europe.⁹⁰ United States citizens' "free-floating fears and suspicions, in concert with the rampant crime already prevalent, spurred significant numbers of city dwellers . . . to question the ready availability of firearms in such high-

81. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 348–49 (1991); McCluskey, *supra* note 70, at 281.

82. See generally Joshua D. Rothman, *When Bigotry Paraded Through the Streets*, ATLANTIC (Dec. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/12/second-klan/509468/> [<https://perma.cc/98KQ-7HRR>] (discussing the Klan's cultural and political prominence in the 1920s).

83. See Tahmassebi, *supra* note 48, at 71–76.

84. Shreefter, *supra* note 16, at 169 (quoting Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent at *18, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290)).

85. *Id.*

86. Tahmassebi, *supra* note 48, at 78.

87. *Id.*

88. *Id.*

89. CAMPBELL, *supra* note 43, at 34–35.

90. See *id.* at 35.

density environments proffering so much anonymity and easy mobility.”⁹¹ For example, the first person convicted under New York’s Sullivan Act of 1911,⁹² which “mandated police-issued licenses for handguns and made it a felony to carry an unlicensed concealed weapon,”⁹³ was an Italian worker who carried a firearm for self-defense.⁹⁴ The judge sentenced him to a year in prison.⁹⁵ In doing so, he said, “[i]t is unfortunate that this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country.”⁹⁶

The idea that gun control reduces violent crime became “a basic theme” among lawmakers who favored restrictions on the sale and ownership of firearms.⁹⁷ During the New Deal, when the federal government implemented wide-reaching programs to alleviate the effects of the Great Depression, people began “to think of crime control as a national problem meriting substantial federal regulation.”⁹⁸ Accordingly, lawmakers started having the first serious discussions about federal firearms regulation.⁹⁹ This period brought about the precursors to the GCA: the National Firearms Act of 1934¹⁰⁰ and the Federal Firearm Act of 1938.¹⁰¹ The former taxed the manufacturing, selling, and transportation of certain types of firearms; the latter went further, requiring firearm manufacturers, importers, and dealers to obtain a federal license and prohibiting people with felonies from purchasing guns.¹⁰² While the GCA repealed the Federal Firearms Act in 1968, it reenacted many of its provisions.¹⁰³

91. *Id.*

92. Sullivan Act of 1911, ch. 195, § 1, 1911 N.Y. Laws 442, 442.

93. Michael A. Walsh, *The Strange Birth of NY’s Gun Laws*, N.Y. POST (Jan. 16, 2012, 5:00 AM), <https://nypost.com/2012/01/16/the-strange-birth-of-nys-gun-laws/> [<https://perma.cc/5VUL-QMC6>].

94. CAMPBELL, *supra* note 43, at 32–33.

95. *Id.* at 33.

96. *Id.*

97. *See id.* at 41–42.

98. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 136 (1975).

99. *Id.* at 137.

100. Pub. L. No. 73-474, 48 Stat. 1236.

101. Pub. L. No. 75-785, 52 Stat. 1250; *see also* Zimring, *supra* note 98, at 138.

102. Sarah Gray, *Here’s a Timeline of the Major Gun Control Laws in America*, TIME (Apr. 30, 2019, 11:13 AM), <https://time.com/5169210/us-gun-control-laws-history-timeline/> [<https://perma.cc/8USP-66U4>].

103. *Id.*; *see also* MICHAEL A. FOSTER, CONG. RSCH. SERV., R45629, FEDERAL FIREARMS LAWS: OVERVIEW AND SELECTED LEGAL ISSUES FOR THE 116TH CONGRESS 2 (2019) (“In addition to expanding the [Federal Firearms Act’s] licensing scheme and categories of prohibited persons—which largely had been restricted to certain criminals—the GCA augmented the criminal penalties available for violations and established procedures for obtaining relief from firearm disabilities.”).

D. *Backlash to the Civil Rights Movement*

The Civil Rights Movement of the 1960s provided fuel for crime-fearing gun control advocates. The narrative of a nation “speeding toward anarchy” arose, gaining momentum when “major clashes between police and [B]lack Americans erupted” in the summer of 1964.¹⁰⁴ Another wave of protests washed over the country in the summer of 1967; many of those protests turned violent.¹⁰⁵

In response to widespread police brutality, Black activists began to advocate for self-defense through firearm possession. A New York protest spurred by the shooting and killing of James Powell, a Black fifteen-year-old, led a police commissioner to state that he would treat the protest as a crime problem rather than a social problem, to which Malcolm X responded, “[t]here are probably more armed Negroes in Harlem than in any other spot on earth. If the people who are armed get involved in this, you can bet they’ll really have something on their hands.”¹⁰⁶

The Black Panthers¹⁰⁷ “adopted [Malcolm X’s] perspective on guns as their own,”¹⁰⁸ taking action in ways that “led whites, including conservative Republicans, to support new gun control.”¹⁰⁹ The Black Panthers began a practice of following the police while armed and

104. CAMPBELL, *supra* note 43, at 59. It is worth noting that many commentators have expressed concern around the 2020 Black Lives Matter protests using similar language. *See, e.g.*, Charles Creitz, *Ex-Civil Rights Activist Says Black Lives Matter Using ‘Low-Income Black America . . . to Promote Insurrection’*, FOX NEWS (June 24, 2020), <https://www.foxnews.com/media/bob-woodson-black-lives-matter-insurrection-anarchy> [<https://perma.cc/9JA6-JJHJ>] (quoting an activist’s claim that “low-income black America are [sic] being used by the group to promote insurrection in the country, and anarchy”); Tom Cotton, Opinion, *Tom Cotton: Send in the Troops*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html> [<https://perma.cc/W9LF-VAC7>] (beginning a piece on the Black Lives Matter protests by announcing that “Midtown Manhattan descended into lawlessness”).

105. Adam Winkler, *The Secret History of Guns*, ATLANTIC, Sept. 2011, <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/8GMS-B88N>].

106. CAMPBELL, *supra* note 43, at 59 (quoting FRED SHAPIRO & JAMES SULLIVAN, RACE RIOTS: NEW YORK 1964, at 67 (1964)).

107. The Black Panther Party, founded by Huey P. Newton and Bobby Seale in 1966, is a “black revolutionary party” that began by “[establishing] neighborhood patrols and [protecting] residents from police brutality.” *The Black Panther Party*, HOW. UNIV. L. LIBR., <https://library.law.howard.edu/civilrightshistory/bpp> [<https://perma.cc/Q73B-XKQK>]. It “ultimately evolved into a Marxist revolutionary group that fought for African American weapon rights, exemption from ‘white American’ sanctions, and financial compensation for years of racial exploitation.” *Id.* The organization also delivered social services, “providing access to medical clinics and free breakfasts for children.” *Id.* The Federal Bureau of Investigation “considered the Black Panthers an enemy of the U.S. government” and “used a combination of sabotage and misinformation” in its efforts to dismantle it. *Id.*

108. CAMPBELL, *supra* note 43, at 65.

109. Winkler, *supra* note 105.

shouting out legal advice to Black arrestees as officers were arresting them.¹¹⁰ Most famously, in 1967, thirty armed Black Panthers climbed the steps of the California State Capitol building and “announced . . . that racist legislatures would no longer keep black people disarmed and powerless” and that “the time had come for [B]lack to arm themselves.”¹¹¹ They then entered the building with their firearms.¹¹²

The 1968 report from the National Advisory Commission on Civil Disorders, commissioned by President Lyndon B. Johnson,¹¹³ sheds light on the federal government’s conflicting reactions to the Civil Rights Movement. On one hand, the Johnson Administration wanted to address the protestors’ grievances. The report has been lauded for recognizing institutional racism,¹¹⁴ as it spent significant time discussing social programs and other ways of addressing racial inequity. On the other hand, the report demonstrates a certain anxiety around the protestors’ desire to disrupt the status quo. The report states that “[the typical rioter] takes great pride in his race and believes that in some respects Negroes are superior to whites. . . . He is more likely to be actively engaged in civil rights efforts, but is extremely distrustful of the political system.”¹¹⁵ Moreover, the report discussed so-called “legal tools,” a euphemism for criminal statutes: “A Commission survey of selected police departments revealed no basic lack of legal tools available to control disorders, but the survey and other evidence have, however, indicated five other areas where further legislation may be necessary.”¹¹⁶ According to the report, law enforcement needed more “legal tools” for controlling firearm use: “The fact that firearms can readily be acquired is an obviously dangerous factor in dealing with civil disorders. . . . We therefore support the President’s call for gun control legislation and urge its prompt enactment.”¹¹⁷

Calls for criminal sanctions may seem out-of-place in a report that, at least to some extent, meaningfully engaged with the protestors’ demands. However, white liberals who sympathized with the Civil Rights Movement often called for gun control in order to reconcile that sympathy

110. *Id.*

111. CAMPBELL, *supra* note 43, at 67–68.

112. *Id.*

113. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, at v (1968).

114. See generally Alice George, *The 1968 Kerner Commission Got It Right, but Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kenner-commission-got-it-right-nobody-listened-180968318/> [<https://perma.cc/77RG-3LGW>].

115. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, *supra* note 113, at 73–74.

116. *Id.* at 289.

117. *Id.*

with beliefs about the inherent criminality of young Black men: “The fear of ‘the criminal’ . . . a white person on the political left may feel is intolerable. It cannot fit within the core self-concept of ‘I am a good person; I am not a racist.’”¹¹⁸ By projecting that fear onto a criminal object—the firearm—white liberals were able to channel it in a seemingly neutral way.¹¹⁹

E. The Birth of the Gun Control Act of 1968

In 1965, President Lyndon B. Johnson sent Congress a message calling for “active combat against crime.”¹²⁰ Noting that the national crime rate had doubled since 1940,¹²¹ President Johnson proposed that Congress respond by regulating firearms more tightly.¹²² Two national tragedies also increased Congress’s willingness to take on gun control: the assassinations of President John F. Kennedy in 1963 and Senator Robert F. Kennedy in 1968.¹²³ Finally, in late 1968, the GCA became law.¹²⁴ Upon signing the GCA, President Johnson announced, “Today we begin to disarm the criminal and the careless and the insane. All of our people who are deeply concerned in this country about law and order should hail this day.”¹²⁵

As President Johnson’s remarks indicate, one of the GCA’s major objectives was “[d]enying access to firearms to certain congressionally defined groups,”¹²⁶ such as people with felony convictions—who were (and still are)¹²⁷ disproportionately Black.¹²⁸ Mass incarceration, a term recognizing the United States’ role as “the world’s leading jailer,”¹²⁹ has

118. Eric Primm, Robert M. Regoli & John D. Hewitt, *Race, Fear, and Firearms: The Roles of Demographics and Guilt Assuagement in the Creation of a Political Partition*, 13 J. AFR. AM. STUD. 63, 69–70 (2008).

119. *Id.* at 70.

120. 1 HARRY L. WILSON, GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT 182 (2016).

121. *Id.*

122. *Id.* at 187.

123. See Zimring, *supra* note 98, at 146–47.

124. *Id.* at 147.

125. WILSON, *supra* note 120, at 215.

126. Zimring, *supra* note 98, at 149.

127. *Race & Justice News: One-Third of Black Men Have Felony Convictions*, SENT’G PROJECT: RACE & JUST. NEWS (Oct. 10, 2017), <https://www.sentencingproject.org/news/5593/> [<https://perma.cc/BG85-TBN9>] (reporting that in 2010, 33% of Black men had a felony conviction, compared with 13% of all adult men).

128. See Zimring, *supra* note 98, at 149; Shreefter, *supra* note 16, at 157.

129. Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial*

a disparate effect on Black people, who are “5.9 times as likely to be incarcerated”¹³⁰ as white people. The beginnings of mass incarceration emerged during the Civil Rights Movement, and political leaders who opposed the movement “systematically and strategically linked opposition to civil rights legislation to calls for law and order.”¹³¹ Those calls for law and order bore fruit with the launch of the War on Drugs, a collection of policy decisions “that framed drug users . . . as criminals . . . who deserved only incarceration and punishment.”¹³² As the War on Drugs commenced, the United States Supreme Court’s Fourth Amendment jurisprudence took a “sharp turn,” making it easier for police officers to stop and search people with minimal justification.¹³³ For example, in *Terry v. Ohio*,¹³⁴ the Court held that a police officer may conduct “a reasonable search for weapons . . . where he has reason to believe that he is dealing with an armed and dangerous individual, *regardless of whether he has probable cause* to arrest the individual for a crime.”¹³⁵ The lack of constraints on officers’ investigatory tactics, combined with prosecutors’ enormous discretion and the intense surveillance of people released on probation or parole, contributes to the disproportionate incarceration of Black people.¹³⁶ In the mid-1980s, the number of Black people sent to prison on drug charges almost quadrupled; by 2000, that number was more than twenty-six times higher than it had been in 1983.¹³⁷ During that time, the number of white people sent to prison rose, too—but only by a factor of eight.¹³⁸ While the incarceration

Politics of Crime and Punishment in the Post-Civil Rights Era, 16 ANN. REV. L. & SOC. SCI. 433, 434 (2020).

130. THE SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018) (citing E. ANN CARSON, U.S. BUREAU OF JUST. STAT., NCJ 251149, PRISONERS IN 2016 (2018)), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/9KRZ-SK5P>].

131. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 40 (2d ed. 2020).

132. Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/> [<https://perma.cc/6KXP-HJFA>].

133. ALEXANDER, *supra* note 131, at 78–83, 85–87.

134. 392 U.S. 1 (1968).

135. *Id.* at 27 (emphasis added). The Court further held that “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Id.* (citing *Brinegar v. United States*, 338 U.S. 160, 174–176 (1949)).

136. ALEXANDER, *supra* note 131, at 109, 119, 122.

137. *Id.* at 96.

138. *Id.*

rates suggest otherwise, most people who illegally use or sell drugs are white.¹³⁹

Relatedly, the importation of cheap handguns—dubbed “Saturday Night Specials”—was a concern for Congress.¹⁴⁰ In congressional testimony, “[t]he image projected was not just that of a gun but of a gun and a user class. And the goal implicit in the legislation apparently was to reduce access to guns for high-risk groups by restricting the supply of cheap guns, particularly cheap handguns.”¹⁴¹ When the GCA passed, many Black households were suffering economically: during the 1960s, the disappearance of high-paying manufacturing jobs combined with white flight to create “whole urban pockets with high unemployment for Black men.”¹⁴² As a result, restrictions on the importation of cheap handguns likely had a disparate impact on Black individuals. Additionally, although the origin of the term “Saturday Night Special” is not entirely clear, some scholars have contended that it comes from the phrase “[n****r-town Saturday night,”¹⁴³ which police used to express indifference toward violence in Black neighborhoods.¹⁴⁴ It is hard to escape the conclusion that legislators—intentionally or not—saw the user class they wanted to restrict as predominantly Black.

Moreover, the GCA had less of an impact on firearm supply and more of an impact on firearm convictions.¹⁴⁵ The Act caused a shift in the manpower priorities of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF): the agency quickly devoted more time to firearms enforcement—with criminal rather than regulatory enforcement taking up a larger share of that time.¹⁴⁶ Likely as a result of this shift, cases recommended for prosecution by the ATF rose from 375 in 1968 to 3,283

139. *Id.*

140. Zimring, *supra* note 98, at 156.

141. *Id.*

142. Alicia L. Granse, Comment, *Gun Control and the Color of the Law*, 37 MINN. J.L. & INEQ. 387, 397 (2019); *see also* Leah Boustan, Opinion, *The Culprits Behind White Flight*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/opinion/white-flight.html> [<https://perma.cc/W5LW-HG8U>]; T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 800 (1995) (“[T]he name of this gun type derived from the racist phrase ‘[n****r-town] Saturday night,’ and the reference is to ‘ghetto control’ rather than gun control.”).

143. Granse, *supra* note 142, at 409.

144. *Saturday Night Specials*, in VIOLENCE IN AMERICA (Ronald Gottesman & Richard Maxwell Brown eds., 1999) (“A typical and traditional expression of official indifference to shootings and killings was ‘Oh well, that’s just [n****rtown] Saturday night,’ the implicit message being that those people’s lives are not worth anything . . .”).

145. *See* Zimring, *supra* note 98, at 154.

146. *Id.* at 158–59.

in 1973.¹⁴⁷ Indictments rose from 175 to 2,257, and convictions rose from 89 to 1,719.¹⁴⁸

II. GUN CONTROL TODAY: THE RACIST IMPACT OF 18 U.S.C. § 924(C)

Recent data on federal firearm offense convictions shows that Black people are disproportionately penalized for firearm use and ownership. As of July 1, 2019, Black people made up 13.4% of the United States population, and white people made up 60.1%.¹⁴⁹ However, in 2019, 53.2% of people convicted of a federal firearm offense were Black, whereas 25.5% were white.¹⁵⁰

Passed as part of the GCA,¹⁵¹ § 924(c) helps maintain this disparity.¹⁵² In its modern form, this section states the following:

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 . . . be sentenced to a term of imprisonment of not less than 5 years¹⁵³

Black people accused of violating § 924(c) “are much more likely to be convicted . . . than other groups, are more likely to be convicted of multiple counts, and are more likely to remain subject to the mandatory penalties at sentencing.”¹⁵⁴ In 2020, 51% of people convicted under

147. *Id.* at 159.

148. *Id.*

149. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/HLZ9-FL97>].

150. CHARLES R. BREYER & DANNY C. REEVES, U.S. SENT’G COMM’N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 48 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/Y44C-AM4Q>].

151. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (codified as amended in scattered sections of 18 U.S.C.).

152. *See* 18 U.S.C. § 924(c).

153. *Id.* § 924(c)(1)(A)(i) (emphasis added).

154. Paul J. Hofer, *Review of the U.S. Sentencing Commission’s Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 FED. SENT’G REP. 193, 205 (2012).

§ 924(c) were Black.¹⁵⁵

The First Circuit commented on the malleability of the language criminalizing possession of a firearm “in furtherance of” a drug trafficking crime: “In most situations, a judge who [instructs the jury] in the terms of the statute—the ‘in furtherance of’ language—has substantial latitude as to whether and how to elaborate.”¹⁵⁶ Because this language captures a wide range of activities,¹⁵⁷ the statute gives prosecutors significant latitude in charging individuals with committing the crime.

Prosecutorial discretion contributes to the disproportionate incarceration of Black people. Professor Angela J. Davis wrote that prosecutorial discretion “gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve.”¹⁵⁸ Prosecutors’ broad and frequently unreviewable powers are “a major cause of racial inequality in the criminal justice system.”¹⁵⁹ To a great extent, those powers reside in prosecutors’ “charging and bargaining decisions,” which “are huge determinants of sanctions”¹⁶⁰—especially if a crime carries a mandatory minimum sentence.¹⁶¹ When a prosecutor charges a defendant with such a crime, “the defense attorney’s input is virtually irrelevant, and the judge’s ultimate power to determine the offender’s sentence is greatly, if not entirely, constrained.”¹⁶² Ninety-seven percent of people facing federal charges plead guilty or *nolo contendere* (no contest),¹⁶³ as prosecutors frequently charge defendants with crimes that carry harsh sentences for the purpose of getting defendants to plead guilty to lesser charges.¹⁶⁴ “Mandatory minimums . . . provide prosecutors the most

155. *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses*, U.S. SENT’G COMM’N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf [https://perma.cc/48WF-EF7H].

156. *United States v. Felton*, 417 F.3d 97, 106 (1st Cir. 2005).

157. *See infra* section II.B.

158. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998).

159. *Id.* at 17.

160. Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1496–97 (2016).

161. Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT’G REP. 309, 309 (2019) (“In mandatory minimum cases, discretion to fashion a sentence is removed from the judge and given to the prosecutor.”).

162. Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2305 (2020).

163. ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 9 (3d ed. 2018).

164. *See* Price, *supra* note 161, at 312.

powerful tool they have to leverage” those pleas.¹⁶⁵ When defendants go to trial and lose, prosecutors then pin the responsibility on them, contending that they “exercised poor judgment in rejecting the [offers].”¹⁶⁶

In the aggregate, prosecutors do not exercise their charging powers equitably. Federal prosecutors are twice as likely to charge Black people with crimes that carry mandatory minimum sentences, compared with similarly situated white people.¹⁶⁷ In particular, a 2009 study found that Black and Latinx defendants were “disadvantaged in charging decisions” for federal weapons offenses, suggesting “that prosecutorial reliance on stereotypical patterned responses is particularly likely when both offender and offense categorizations feed into common attributions of dangerousness and culpability.”¹⁶⁸

A. *Getting Tougher on Crime: The 1998 Amendment to the GCA*

In 1998, in response to the United States Supreme Court’s decision in *Bailey v. United States*,¹⁶⁹ Congress added language criminalizing firearm possession “in furtherance of” specific crimes.¹⁷⁰ In *Bailey*, officers who searched the defendant’s car found thirty grams of cocaine and a round of ammunition in the passenger compartment.¹⁷¹ They also found a pistol and “a large amount of cash” in the trunk.¹⁷² At trial, the prosecution introduced expert testimony that “drug dealers frequently carry a firearm to protect their drugs and money as well as themselves.”¹⁷³ The jury convicted the defendant of “‘using’ a firearm during and in relation to a drug trafficking crime” in violation of 18 U.S.C. § 924(c)(1).¹⁷⁴ However, the United States Supreme Court held that “evidence of the proximity and accessibility of a firearm to drugs or drug proceeds” was not enough for a

165. *Id.* at 310.

166. *Id.* at 312.

167. NAZGOL GHANDNOOSH, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 16 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> [<https://perma.cc/4S28-WKHH>].

168. Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 421 (2010).

169. 516 U.S. 137 (1995), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469.

170. *United States v. Mackey*, 265 F.3d 457, 461 (6th Cir. 2001).

171. *Bailey*, 516 U.S. at 139.

172. *Id.*

173. *Id.*

174. *Id.* (quoting *United States v. Bailey*, 995 F.2d 1113, 1119 (D.C. Cir. 1993)).

conviction.¹⁷⁵ Rather, the statute required “evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.”¹⁷⁶

To arrive at this holding, the Court reversed the District of Columbia Circuit.¹⁷⁷ In doing so, it examined the lower court’s interpretation of the word “use.”¹⁷⁸ The D.C. Circuit had employed an “accessibility and proximity test,” holding that “one uses a gun” in violation of the statute “whenever one puts or keeps the gun in a particular place from which one (or one’s agent) can gain access to it if and when needed to facilitate a drug crime.”¹⁷⁹ The Court criticized that standard, pointing out that it “provides almost no limitation on the kind of possession that would be criminalized.”¹⁸⁰ By demanding a more rigorous factual basis for the conviction, *Bailey* restricted prosecutorial power to charge individuals with § 924(c) violations.

In response, Congress expanded that power, adding the “in furtherance of” language to make the statute encompass possession that advanced or promoted the underlying drug trafficking offense.¹⁸¹ The amendment also imposed harsher penalties on people convicted under § 924(c), demonstrating that Congress was motivated by “[getting] tough on crime.”¹⁸²

Section 924(c)’s new language gave prosecutors more discretion to charge defendants and exact more severe sentences. Over the past two decades, judges have interpreted that language broadly.¹⁸³ Both prosecutorial discretion and judicial interpretations of § 924(c) have aggravated disproportionality in who receives more severe charges and longer sentences.¹⁸⁴

175. *Id.* at 138, 150.

176. *Id.* at 143.

177. *Id.* at 151.

178. *Id.* at 141.

179. *Id.* (quoting *United States v. Bailey*, 36 F.3d 106, 115 (D.C. Cir. 1994), *rev’d*, 516 U.S. 137 (1995)).

180. *Id.* at 144.

181. *United States v. Mackey*, 265 F.3d 457, 461 (6th Cir. 2001) (quoting H.R. REP. NO. 105-344, at 11–12 (1997)).

182. Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court’s Interpretation of the Statute*, 48 CATH. UNIV. L. REV. 1319, 1325 (1999).

183. See *infra* text accompanying notes 184–200.

184. See *supra* text accompanying notes 155–64.

B. The Ambiguous Meaning of “in furtherance of”

What does it mean to possess a firearm “in furtherance of” a drug trafficking crime? That short phrase has “spawned considerable case law,”¹⁸⁵ but it remains ambiguous. For example, it is unclear “whether the ‘in furtherance’ requirement refers to subjective purpose or objective potential (or whether either would do).”¹⁸⁶ In fact, the congressional committee that first considered the language was unsure if the facts in *Bailey* would have been “sufficient to sustain a conviction for possession of a firearm ‘in furtherance of’ the commission of a drug trafficking offense.”¹⁸⁷

In theory, the language exists to “protect[] public safety” and “punish[] . . . drug trafficking crimes involving firearms.”¹⁸⁸ In practice, when determining whether a defendant’s conduct meets the elements of the statute, appellate courts conduct loosely cabined fact-based inquiries that capture a surprisingly wide range of behavior, much of which has little to do with dealing drugs.¹⁸⁹

When the Supreme Court decided *Bailey* in 1995, it was wary of the potential breadth of an accessibility and proximity test as applied to the element of “use.”¹⁹⁰ Nevertheless, since Congress amended § 924(c), the Ninth Circuit has employed a similar test when interpreting possession “in furtherance of,” finding that a prosecutor can prove it by showing a nexus between the firearm and the crime, “determined by examining, inter alia, the *proximity, accessibility,* and strategic location of the firearms in relation to the locus of drug activities.”¹⁹¹

Other circuits’ interpretations also criminalize a broad range of firearm-related conduct. The plain meaning of “furtherance” is “the act of

185. *United States v. Hector*, 474 F.3d 1150, 1156 (9th Cir. 2007).

186. *United States v. Felton*, 417 F.3d 97, 104 (1st Cir. 2005).

187. H.R. REP. NO. 105-344, at 12 (1997).

188. *See id.* at 14 (describing the U.S. Department of Justice’s reasons for opposing the bill).

189. *See, e.g., United States v. Bell*, 477 F.3d 607, 613 (8th Cir. 2007) (explaining that if a defendant asserts on appeal that there is insufficient evidence to support their § 924(c) conviction, the appellate court reviews the evidence in the light most favorable to the prosecution); *infra* notes 200–200.

190. *Bailey v. United States*, 516 U.S. 137, 144 (1995), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469.

191. *United States v. Rios*, 449 F.3d 1009, 1012 (9th Cir. 2006) (emphasis added); *see also United States v. Mosley*, 465 F.3d 412, 417 (9th Cir. 2006) (citing *Rios* for the same proposition); *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007) (same); *United States v. Thongsy*, 577 F.3d 1036, 1041 (9th Cir. 2009) (citing *Hector* for the same proposition); *United States v. Norwood*, 603 F.3d 1063, 1072 (9th Cir. 2010) (noting that “the government has provided adequate evidence of a nexus” if it shows that the gun is in the same room and within easy reach of a sizeable amount of drugs and trafficking paraphernalia).

furthering; advancement,”¹⁹² and most circuits use some variation of that definition.¹⁹³ Additionally, in *United States v. Ceballos-Torres*,¹⁹⁴ the Fifth Circuit introduced eight non-exclusive factors to “help determine whether a particular defendant’s possession furthers, advances, or helps forward a drug trafficking offense.”¹⁹⁵ These factors are: (1) the type of drug activity the defendant is conducting; (2) the firearm’s accessibility; (3) the type of firearm; (4) whether the firearm is stolen; (5) whether the possession is legitimate or illegal; (6) whether the firearm is loaded; (7) proximity to drugs or profits from the sale of drugs; and (8) “the time and circumstances under which the gun is found.”¹⁹⁶ The majority of circuits now apply these factors.¹⁹⁷ The Ninth Circuit has explicitly rejected them, asserting that it “will not resort to a checklist that has little relation to the crime charged.”¹⁹⁸ The Eighth Circuit has held that just two factors can be enough: a conviction for possession with intent to distribute a controlled substance, combined with a conviction for unlawfully possessing a firearm as a felon.¹⁹⁹

To appreciate the practical implications of the circuit courts’ broad

192. *United States v. Lopez*, 477 F.3d 1110, 1116 n.22 (9th Cir. 2007) (internal quotation marks omitted) (quoting *Furtherance*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 509 (11th ed. 2003)).

193. See *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004) (“[T]he evidence must demonstrate that possession of the firearm advanced or helped forward a drug trafficking crime.”); *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002) (“We agree with our sister circuits that adopting this interpretation of ‘furtherance’ is consistent with Congress’ intent in amending § 924(c).”); *United States v. Suarez*, 879 F.3d 626, 632 (5th Cir. 2018) (stating that the government had to prove that the defendant’s possession of a firearm furthered, advanced, or helped forward the drug trafficking offense); *United States v. Mackey*, 265 F.3d 457, 460–61 (6th Cir. 2001) (“The term ‘furtherance’ should be understood in its ordinary or natural meaning, which, according to the dictionary, is ‘a helping forward: advancement, promotion.’” (quoting *Furtherance*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1981))); *United States v. Castillo*, 406 F.3d 806, 814 (7th Cir. 2005) (“[T]he natural meaning of ‘in furtherance of’ is ‘furthering, advancing or helping forward.’” (citing *United States v. Hamilton*, 332 F.3d 1144, 1149 (7th Cir. 2005))); *United States v. Iiland*, 254 F.3d 1264, 1274 (10th Cir. 2001) (“No evidence demonstrates that [the defendant’s] possession furthered, promoted or advanced his illegal drug activity.”); *United States v. Timmons*, 283 F.3d 1246, 1252 (11th Cir. 2002) (“[A] conviction under § 924(c) requires that the prosecution establish that the firearm helped, furthered, promoted, or advanced the drug trafficking.”); *United States v. Wahl*, 290 F.3d 370, 376 (D.C. Cir. 2002) (listing factors for determining whether possession furthers, advances, or helps forward a drug trafficking crime).

194. 218 F.3d 409 (5th Cir. 2000).

195. *Id.* at 414.

196. *Id.* at 414–15.

197. See *Sparrow*, 371 F.3d at 853; *Lomax*, 293 F.3d at 705; *Mackey*, 265 F.3d at 462; *United States v. Duran*, 407 F.3d 828, 840 (7th Cir. 2005); *United States v. Basham*, 268 F.3d 1199, 1206–08 (10th Cir. 2001); *Timmons*, 283 F.3d at 1253.

198. *United States v. Krouse*, 370 F.3d 965, 968 (9th Cir. 2004).

199. *United States v. Johnson*, 474 F.3d 1044, 1050 (8th Cir. 2007); *United States v. Bell*, 477 F.3d 607, 614 (8th Cir. 2007).

tests, it is helpful to look at examples of the activities they criminalize. For instance, according to the Ninth Circuit, a person possesses a firearm in furtherance of a drug trafficking crime by keeping a handgun under a futon couch in an apartment from which they sell drugs.²⁰⁰ The court explained that the “apartment was small—less than 700 square feet,” and “the loaded firearm was located directly on the path [the defendant] traveled in conducting the drug transactions.”²⁰¹ According to the Seventh Circuit, a person possesses a firearm in furtherance of a drug trafficking crime by attempting to buy ten kilograms of cocaine while sitting in an SUV, which has a loaded gun in a compartment that “could be opened only by following a sequence of steps that would take about half a minute to complete: start the car, press the defrost button, push down the button to open a rear window, and place a magnet close to the ignition.”²⁰² According to the First Circuit, a person possesses a firearm in furtherance of a drug trafficking crime by having an unloaded handgun “in a plastic bag in a drawer under [a] bed” with the drawer “blocked by a duffel bag, a trash can, and a box of books,” even if the house contains no ammunition.²⁰³ In each example, the gun was far from readily available, but the court found that the defendant possessed the firearm in furtherance of drug trafficking.

C. *Why Defenses Rooted in the Right to Self-Defense Fail*

If someone happens to keep a gun in proximity to drug sales, have they violated § 924(c)? In their published opinions, judges claim that the answer is no.²⁰⁴ Nevertheless, appellate opinions demonstrate that the answer is often yes, even where the defendant puts forth a plausible, legal reason for possessing a firearm.²⁰⁵

200. *United States v. Hector*, 474 F.3d 1150, 1153, 1157–58 (9th Cir. 2007).

201. *Id.*

202. *United States v. Brown*, 724 F.3d 801, 802, 805 (7th Cir. 2013).

203. *United States v. Grace*, 367 F.3d 29, 31, 36 (1st Cir. 2004).

204. *See, e.g., United States v. Krouse*, 370 F.3d 965, 967 (9th Cir. 2004) (“Evidence that a defendant merely possessed a firearm at a drug trafficking crime scene, without proof that the weapon furthered an independent drug trafficking offense, is insufficient to support a conviction under § 924(c).”); *United States v. Ceballos-Torres*, 218 F.3d 409, 414 (5th Cir. 2000) (“The ‘mere presence’ test is one based on generality—anytime a drug dealer possesses a gun, that possession is in furtherance, because drug dealers generally use guns to protect themselves and their drugs. What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense.”); *United States v. Wahl*, 290 F.3d 370, 375 (D.C. Cir. 2002) (“Wahl argues correctly that even under the amended statute, the mere presence of a firearm at the scene of drug trafficking is insufficient to support a conviction under section 924(c)(1).”).

205. *See infra* text accompanying notes 224–42.

The lack of attention to whether defendants have criminal intent is troubling. There is “a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’”²⁰⁶ The Supreme Court has applied this presumption “even when Congress does not specify any [intent] in the statutory text,”²⁰⁷ and “even where ‘the most grammatical reading of the statute’” does not support it.²⁰⁸ Some cases interpreting § 924(c) display a self-conscious recognition of this principle. In *United States v. Mann*,²⁰⁹ a rare case where the court vacated the defendants’ § 924(c) convictions, the Ninth Circuit pointed out that “Congress has not made mere possession, when it occurs contemporaneously with drug manufacture, a strict liability crime.”²¹⁰ Nevertheless, examining the “in furtherance of” language as applied to the possession element shows that courts do not meaningfully inquire into defendants’ mental states. While people accused of possessing firearms in furtherance of drug trafficking crimes frequently invoke self-defense to explain the guns in their homes, courts often reject their explanations, even when the main link between the guns and the drugs is simply proximity.²¹¹

This persistent rejection of defenses based on personal protection has serious implications for Black firearm owners. Personal protection is the most common justification for owning guns.²¹² The Supreme Court found that justification lawful in *District of Columbia v. Heller*,²¹³ where it held that people have a constitutional right to possess and use handguns for self-defense in their homes.²¹⁴ That right is of special consequence for Black Americans, who have historically lacked the privilege of relying on

206. *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191, 2195 (2019) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

207. *Id.*

208. *Id.* at 2197 (quoting *X-Citement Video*, 513 U.S. at 70).

209. 389 F.3d 869 (9th Cir. 2004).

210. *Id.* at 880. It is worth noting that the defendants were white. *Find an Inmate*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/BQ9A-39GS>] (select the “Find by Name” tab; then type “Tomi Mann” or “James Pollender” into the search bar; then select “Search”). While the court rejected the prosecution’s argument that the type of gun at issue was “generally lacking in usefulness except for violent and criminal purposes,” it did not explicitly address the subjects of hunting, shooting for sport, or self-defense. *Mann*, 389 F.3d at 880.

211. *See infra* text accompanying notes 225–44.

212. Ruth Igielnik & Anna Brown, *Key Takeaways on Americans’ Views of Guns and Gun Ownership*, PEW RSCH. CTR. (June 22, 2017), <https://www.pewresearch.org/fact-tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/> [<https://perma.cc/GP2G-9EDR>].

213. 554 U.S. 570 (2008).

214. *Id.* at 636.

the government for help in the face of danger.²¹⁵

While the Ku Klux Klan no longer terrorizes Black communities on a massive scale, today, Black individuals are disproportionately likely to be victims of violent crime,²¹⁶ a state of affairs rooted in institutional racism. Between 1890 and 1970, millions of Black households moved from rural to urban areas.²¹⁷ A combination of targeted violence and housing discrimination led to the concentration of Black families in segregated, economically under-resourced neighborhoods.²¹⁸ While much of that housing discrimination has been outlawed, residential segregation persists: in 2010, a third of Black metropolitan residents lived under conditions of hypersegregation, and less than 1% of Black metropolitan residents lived under conditions of low or no segregation.²¹⁹ Segregation and concentrated disadvantage account for high levels of violent crime in many Black communities.²²⁰ A 2010 study found that the average rates of violent crime in predominantly Black neighborhoods were 327% higher than in predominantly white neighborhoods.²²¹ A lack of confidence in law enforcement, the institution that is supposed to provide protection from violent crime, compounds the problem: 48% of Black people have very little or no confidence that local police will treat Black and white people equally, compared with 12% of white people.²²² While one could contend that violence in Black neighborhoods lends support for greater firearms restrictions, “another, perhaps stronger case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them.”²²³

To understand how courts brush aside claims of self-defense, it is helpful to look at specific cases. For example, in *United States v.*

215. Cottrol et al., *supra* note 81, at 359.

216. RUTH D. PETERSON, LAUREN J. KRIVO & JOHN HAGAN, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 14 (2010).

217. Stephen L. Ross, *Understanding Racial Segregation: What Is Known About the Effect of Housing Discrimination?*, in NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA 288, 289 (Harriet B. Newburger et al. eds., 2011).

218. *See id.* at 289–90; Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROBS. 1, 1 (2020).

219. Massey, *supra* note 218, at 3, 8. In 1989, researchers “coined the term ‘hypersegregation’ to describe metropolitan areas in which [Black people] were highly segregated” on multiple geographic dimensions. *Id.* at 4.

220. PETERSON ET AL., *supra* note 216, at 79.

221. *Id.*

222. Laura Santhanam, *Two-Thirds of Black Americans Don’t Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWSHOUR (June 5, 2020, 12:00 PM), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do> [<https://perma.cc/2NHT-JQ8L>].

223. Cottrol et al., *supra* note 81, at 361.

Bryant,²²⁴ the Second Circuit upheld a § 924(c) conviction where a Black defendant²²⁵ admitted to selling narcotics and owning a shotgun, but explained that he had bought the shotgun for protection after a robbery at his residence.²²⁶ In that case, officers searched the defendant's master bedroom and recovered a loaded shotgun from underneath the bed, as well as cash, drugs, and drug paraphernalia from various parts of the room.²²⁷ After the search, the defendant gave a statement to the police. He said he had lived at his residence for about three years, and that he had recently started selling cocaine for his roommate: "[a]bout a month ago VJ started selling cocaine out of my house. If VJ is not home and someone wants some cocaine I will sell that cocaine. Two months after I moved in I was robbed. That is why I have a shotgun."²²⁸ The defendant's ownership of the shotgun was legal, and there was no evidence of him brandishing or discharging the firearm in public.²²⁹ Moreover, as his statement makes clear, he bought it several years before he began selling narcotics from his residence.²³⁰

The defendant challenged § 924(c) as unconstitutional because it "burdened his . . . right to keep and bear arms in defense of his own home."²³¹ The court, while acknowledging the "'core lawful purpose' of self-defense," rejected this challenge.²³² It held that "once Bryant engaged in 'an illegal home business,' he was no longer a law-abiding citizen using the firearm for a lawful purpose, and his conviction for possession of a firearm under these circumstances does not burden his Second Amendment right to bear arms."²³³

Another Second Circuit case illustrates the ways courts treat § 924(c) defendants who invoke the right to self-defense. In *United States v. Lewter*,²³⁴ the court upheld a § 924(c) conviction where officers found drugs and cash in the defendant's dresser and a pistol under his bed.²³⁵ As

224. 711 F.3d 364 (2d Cir. 2013).

225. See *Find an Inmate.*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/BQ9A-39GS>] (select the "Find by Name" tab; then type "Ron Bryant" into the search bar; then select "Search").

226. *Bryant*, 711 F.3d at 367.

227. *Id.* at 366.

228. *Id.*

229. *Id.* at 367.

230. *Id.* at 367–68.

231. *Id.* at 365.

232. *Id.* at 370 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008)).

233. *Id.* (internal citation omitted) (quoting *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009)).

234. 402 F.3d 319 (2d Cir. 2005).

235. *Id.* at 321.

in *Bryant*, the defendant was Black.²³⁶ He argued that there was insufficient evidence that he possessed a firearm in furtherance of drug trafficking.²³⁷ He asserted that he did not sell drugs inside his residence, he lived in a tough neighborhood, and the jury had no basis for choosing between the possibility that his possession furthered his illegal activities and the possibility that his possession was for personal safety.²³⁸ Testimony at trial established that the area immediately around the apartment was “particularly dangerous,” and that “the problems were so severe that there had been a video surveillance system set up to monitor it.”²³⁹

However, the court held “[t]he evidence was sufficient to support the jury’s verdict that [the defendant] possessed the gun to defend his drug stash.”²⁴⁰ First, the court defined “in furtherance of” broadly: “[I]n furtherance’ means that the gun afforded some advantage (actual or potential, real or contingent) relevant to the vicissitudes of drug trafficking.”²⁴¹ Next, the court pointed to the following facts: the defendant stored the pistol within feet of his stash and within his reach; the firearm appeared to have an obliterated serial number, which is illegal; and the pistol “was loaded with hollow-point bullets.”²⁴² The court then reasoned that the latter two factors “militate against an inference of innocent use, such as target practice or hunting.”²⁴³ Moreover, it added that “possession for personal protection does not preclude possession in furtherance of a drug trafficking offense,” and that here, “the person to be protected was a drug dealer, and among the things being protected were a saleable quantity of drugs.”²⁴⁴

By contrast, courts faced with § 924(c) cases readily accept hunting, target shooting, and collecting guns as examples of lawful reasons for owning firearms.²⁴⁵ Unlike self-defense, these activities are largely associated with white communities. The United States Fish and Wildlife Service conducted a national survey in 2016 and found that 97% of

236. See *Find an Inmate.*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/BQ9A-39GS>] (select the “Find by Name” tab; then type “Coleridge Lewter” into the search bar; then select “Search”).

237. *Lewter*, 402 F.3d at 321–22.

238. *Id.*

239. Brief and Special Appendix for Defendant-Appellant at 9–10, *Lewter*, 402 F.3d 319 (No. 04-2546-CR).

240. *Lewter*, 402 F.3d at 322.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 323.

245. See *infra* text accompanying notes 249–52.

hunters were white.²⁴⁶ A 2008 study found that 87% of active sport shooters were white.²⁴⁷ According to one 2006 study, the typical gun collector is a white, married man over the age of forty.²⁴⁸ And a 2009 ethnographic study found that “Guns Don’t Kill People It’s Those Dang Angry Minorities” was a popular t-shirt slogan in the gun-collecting community.²⁴⁹

Courts have explicitly stated that these activities—hunting, target shooting, and gun collection—make firearm possession by people engaged in drug trafficking justifiable. In *United States v. Mackey*,²⁵⁰ the Sixth Circuit listed factors that would help “distinguish possession in furtherance of a crime from innocent possession of a wall-mounted antique or an unloaded hunting rifle locked in a cupboard.”²⁵¹ Several other circuit courts have quoted that language.²⁵² In *Ceballos-Torres*, the Fifth Circuit noted that “a drug trafficker who engages in target shooting or in hunting game” will be unlikely to violate § 924(c) “by keeping a pistol for that purpose that is otherwise locked and inaccessible.”²⁵³ In *United States v. Thongsy*,²⁵⁴ the Ninth Circuit held that an instructional error in a § 924(c) case was harmless, noting that a Drug Enforcement Administration Agent testified that the defendant’s firearm “would not be used for hunting.”²⁵⁵ Even Congress seemed to consider white-coded activities when it amended the statute in 1998. For example, one representative expressed concern that under the statute, a hunter who possessed a hunting rifle and a small amount of drugs could face

246. U.S. FISH & WILDLIFE SERV., 2016 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 33 (2018), https://www.fws.gov/wsfrprograms/subpages/nationalsurvey/nat_survey2016.pdf [<https://perma.cc/3X73-AGKZ>].

247. RESPONSIVE MGMT. & NAT’L SHOOTING SPORTS FOUND., THE FUTURE OF HUNTING AND THE SHOOTING SPORTS: RESEARCH-BASED RECRUITMENT AND RETENTION STRATEGIES 32 (2008), https://responsivemanagement.com/wp-content/uploads/2018/11/Future_Hunting_Shooting_Report.pdf [<https://perma.cc/6JRF-E3SJ>].

248. Leon Anderson & Jimmy D. Taylor, *Standing Out While Fitting in: Serious Leisure Identities and Aligning Actions Among Skydivers and Gun Collectors*, 39 J. CONTEMP. ETHNOGRAPHY 34, 39 (2010).

249. JIMMY D. TAYLOR, AMERICAN GUN CULTURE: COLLECTORS, SHOWS, AND THE STORY OF THE GUN 122 (2009).

250. 265 F.3d 457 (6th Cir. 2001).

251. *Id.* at 462.

252. *See* *United States v. Castillo*, 406 F.3d 806, 815 (7th Cir. 2005); *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004).

253. *United States v. Ceballos-Torres*, 218 F.3d 409, 415 (5th Cir. 2000).

254. 577 F.3d 1036 (9th Cir. 2009).

255. *Id.* at 1043.

punishment.²⁵⁶

In sum, federal courts interpret § 924(c) in ways that increase Black defendants' vulnerability to incarceration and disarmament. First, the interpretations encourage prosecutorial discretion, a major contributor to racially disparate outcomes in the criminal legal system. Second, the interpretations penalize defendants who invoke the right to self-defense while shielding defendants who own guns for recreation. Because structural racism renders Black people more vulnerable to violence, and because recreational gun users are overwhelmingly white, these interpretations disadvantage Black defendants who choose to go to trial rather than simply pleading guilty. As a source of harm for Black firearm owners, § 924(c) requires a closer look.

III. INCREMENTALIST AND ABOLITIONIST APPROACHES TO CHANGE

The New York Times, *The Washington Post*, and *The Wall Street Journal* all wrote about 2020 as a period of racial reckoning.²⁵⁷ As we grapple with institutional racism, we must take care not to leave anyone behind—including people accused of dealing drugs.

This Comment proposes two different ways to address § 924(c)'s disparate impact on Black people, one incrementalist and one abolitionist. First, to reduce the unstructured discretion that penalizes Black defendants, courts should require a criminal scienter²⁵⁸ connection between firearm possession and drug trafficking. Alternatively, to eliminate that unstructured discretion entirely, Congress should repeal the language in § 924(c) that criminalizes possession of a firearm in furtherance of a drug trafficking crime.

256. Collins, *supra* note 182, at 1353 n.217 (citing 144 CONG. REC. H533 (daily ed. Feb. 24, 1998) (statement of Rep. Maxine Waters)).

257. See John Eligon & Audra D. S. Burch, *After a Summer of Racial Reckoning, Race Is on the Ballot*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html> [<https://perma.cc/L3RP-2SD4>]; Paul Farhi & Sarah Ellison, *Ignited by Public Protests, American Newsrooms Are Having Their Own Racial Reckoning*, WASH. POST (June 13, 2020), https://www.washingtonpost.com/lifestyle/media/ignited-by-public-protests-american-newsrooms-are-having-their-own-racial-reckoning/2020/06/12/be622bce-a995-11ea-94d2-d7bc43b26bf9_story.html [<https://perma.cc/SV8E-FJVJ>]; Pamela Newkirk, *After 2020, How Do We Move Forward on Race?*, WALL ST. J. (Dec. 14, 2020, 11:00 AM), <https://www.wsj.com/articles/after-2020-how-do-we-move-forward-on-race-11607961601> [<https://perma.cc/U9J9-TN9E>].

258. Black's Law Dictionary defines scienter as a "degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." *Scienter*, BLACK'S LAW DICTIONARY (11th ed. 2019).

A. *The Incrementalist Approach: Applying the Presumption of Scienter to § 924(c)*

Applied to the element of possession, the phrase “in furtherance of” allows for a broad interpretation of the statute, one that encourages the disproportionate criminalization of firearm ownership by Black people and members of other marginalized groups. Firearm possession is a passive act, and “in furtherance of” does little to limit the context in which such possession breaks the law.

At the very least, courts should prevent possession of a firearm in furtherance of drug trafficking from becoming a de facto strict-liability crime²⁵⁹ by interpreting § 924(c)(1)(A) more narrowly. Courts should require prosecutors to prove a genuine connection between the firearm and the drug-trafficking activity. Doing so would limit prosecutors’ discretion to charge defendants under § 924(c) and thus reduce the potential for racially disparate outcomes.

When determining whether a defendant possessed a firearm in furtherance of a drug trafficking crime, a court should not ask whether, objectively, the firearm had the potential to further drug trafficking. Rather, the court should put itself in the defendant’s shoes and ask whether, subjectively, the defendant possessed the firearm for the purpose of furthering the specific drug trafficking crime the prosecution claims took place. Because this inquiry would require the court to delve into the defendant’s subjective reasons for possessing the gun, it would make it likelier that a defendant convicted of violating § 924(c) truly intended to use the gun to advance or promote the drug trafficking crime at issue in the case. It would also make it harder for courts to brush aside defendants’ assertion of the right, reaffirmed by *Heller*, to possess a firearm in one’s home for protection—a right the United States has a history of denying Black Americans.

Under a subjective standard, the defendant in *Bryant* would have likely faced a different outcome. The court would not have been able to announce that the defendant “was no longer a law-abiding citizen using the firearm for a lawful purpose” simply because he dealt drugs.²⁶⁰ Rather, the prosecution would have had to affirmatively prove that the defendant possessed the shotgun with the intention of using it to promote his drug trafficking activities. The record does not show that the defendant’s roommate talked with him about using the shotgun to protect the drugs. It

259. Black’s Law Dictionary defines a strict-liability crime as an “offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state.” *Crime*, BLACK’S LAW DICTIONARY (11th ed. 2019).

260. *United States v. Bryant*, 711 F.3d 364, 370 (2d Cir. 2013).

does not show that any of the defendant's buyers saw the shotgun or even knew of its existence. It merely shows that the shotgun was in the same room as the drugs, paraphernalia, and cash. Given that the defendant told officers that he bought the shotgun for self-defense well before he began selling cocaine, the prosecution would have had to tie ownership of the firearm to drug trafficking much more rigorously to secure a conviction.

While *Lewter* presents a closer case, the outcome might have been different under a subjective standard. In *Lewter*, officers found drugs, cash, and a pistol in the defendant's apartment. Mr. Lewter argued that there was insufficient evidence for the jury to find that he possessed a gun to further drug trafficking rather than to protect himself from the dangers of his neighborhood. Using the test proposed here, the court would not have been able to hold that a person possesses a firearm in furtherance of drug trafficking if the gun only affords "some advantage (actual or potential, real or contingent) relevant to the vicissitudes" of selling drugs.²⁶¹ Under this definition, a person violates § 924(c) whenever their gun *could* have helped them sell drugs, regardless of whether they intended to use the gun for that purpose.

Moreover, the *Lewter* court's point that "the person to be protected was a drug dealer"²⁶² would be irrelevant. The fact that a person both owns a gun and sells drugs does not, standing alone, show intent to use the gun to further the sale of drugs. Courts have repeatedly recognized this fact by noting that a drug dealer can own a hunting rifle or an antique firearm without violating § 924(c).²⁶³ They should explicitly extend that reasoning to drug dealers' ownership of firearms for self-defense. Trafficking controlled substances may not be a lawful occupation, but it is ultimately something a person does for money. It is not an identity or an immutable characteristic. A person who meets their financial obligations in this way is no less deserving of protection from neighborhood violence than a person who has never so much as jaywalked.

Unfortunately, a subjective standard likely would not have helped Mr. Bell, whose story appears in the Introduction. Officers said they saw Mr. Bell reach for a gun while crack cocaine belonging to him sat nearby. The record lacks information about why Mr. Bell purchased the gun, or why he kept it at his partner's home. While there is room to argue that trying to grab a gun when strangers barge into one's bedroom is consistent with self-defense, a jury would be entitled to find that Mr. Bell was attempting to use the gun to defend the drugs. Mr. Bell's case demonstrates the limits

261. *United States v. Lewter*, 402 F.3d 319, 321–22 (2d Cir. 2005).

262. *Id.* at 323.

263. *See supra* section II.C.

of reinterpreting statutory language that Congress designed to put more people in prison.

B. The Abolitionist Approach: Amending § 924(c)

When Congress amended § 924(c) in 1998, the tough-on-crime approach to reducing violence was in full swing.²⁶⁴ Today, political leaders question the wisdom of that approach. President Joe Biden, who once “spearheaded many of the laws” that “fueled a population explosion in federal prisons,”²⁶⁵ campaigned on a platform of reducing incarceration.²⁶⁶ Two House Representatives have backed the BREATHE Act²⁶⁷: written by Black Lives Matter activists, the bill proposes to defund “large swaths of the federal law enforcement apparatus,” eliminate mandatory minimum sentences, and begin working toward the abolishment of prisons.²⁶⁸ A bill that drastically shrinks the scope of the criminal legal system would have been unthinkable just a few years ago, but a June 2021 poll showed that the BREATHE Act is popular among likely voters.²⁶⁹ Given this shift in thinking around what it means to keep communities safe, the time is ripe to revisit the GCA. Congress should remove the language in § 924(c) that punishes possession of a firearm in furtherance of drug trafficking.

Eliminating this language is not a particularly radical step. Even if Congress were to decriminalize possessing a firearm in furtherance of drug trafficking, federal prosecutors would still have the power to charge individuals for using or carrying firearms “during and in relation to any . . . drug trafficking crime.”²⁷⁰ For example, a person would still break

264. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 831 (2000) (“The percentage of the population incarcerated, the length of sentences imposed, and the number of offenses which carried automatic prison sentences regardless of mitigating circumstances all increased drastically during a relatively short period of time.”).

265. German Lopez, *Biden’s Secret Weapon for Criminal Justice Reform*, VOX (Feb. 26, 2021, 12:00 PM), <https://www.vox.com/2021/2/26/22303071/biden-clemency-pardon-criminal-justice-reform-mass-incarceration> [https://perma.cc/5UNK-NMCT].

266. *The Biden Plan for Strengthening America’s Commitment to Justice*, BIDEN HARRIS, <https://joebiden.com/Justice/> [https://perma.cc/3C2R-QLPM].

267. H.R. 585, 116th Cong. (2019).

268. Sean Collins, *Now Is the Time to Revolutionize Policing*, VOX (Feb. 22, 2021, 8:00 AM), <https://www.vox.com/22263084/breathe-act-revolutionize-policing-pressley-tlaib> [https://perma.cc/T7TM-EBLR].

269. Li Zhou, *This Progressive Police Reform Bill Is Pretty Popular*, VOX (June 21, 2021, 8:30 AM), <https://www.vox.com/2021/6/21/22535672/breathe-act-progressive-police-reform-bill> [https://perma.cc/KTQ3-YUJP].

270. 18 U.S.C. § 924(c)(1)(A).

the law by putting a gun on display during a drug transaction.²⁷¹ Moreover, trafficking drugs would continue to be a standalone crime—one that carries its own mandatory minimums, depending on factors like the types and quantities of drugs involved.²⁷² Far from wiping all gun crimes off the books, this reform would simply erase a provision of § 924(c) that carries great potential for abuse. Without the provision, prosecutors would have far less power to coerce firearm owners during plea bargaining, and appellate judges would have a harder time upholding convictions where defendants legitimately asserted the right to self-defense.

By getting rid of a powerful charging tool, this reform would constitute a small but meaningful step toward addressing racial disparities in the enforcement of federal firearm laws. It would also give the government one less way to punish Black Americans for exercising their Second Amendment rights.

CONCLUSION

The firearm is a potent symbol of political power. To the English colonizers, the Fourteenth Amendment's drafters, and the Black Panthers alike, guns represented self-determination. Having a gun meant having the ability to protect oneself, be it from a tyrannical government bent on maintaining the status quo, a Klansman bent on terrorizing people of color, or a police officer bent on carrying out an arrest by any means necessary. Given the firearm's symbolic significance, it is important to notice who gets to own guns and who does not, regardless of one's opinions about the proper role of weapons in an industrialized society.

While the GCA appears racially neutral, its origins and impact demonstrate that, under the guise of disarming criminals, it unjustly disarms Black Americans. Greater prosecutorial discretion leads to greater disparities in the charging and incarceration of Black people. By giving prosecutors the power to charge an individual with a crime whenever they keep a gun near their drugs—even if they possess as few as seven grams, a quantity arguably consistent with personal use—§ 924(c) leads to the excessive criminalization of Black firearm owners.

In amending § 924(c) after *Bailey*, Congress expressed its intention to fight crime, but that intention must be balanced with the need to refrain from punishing people who lack culpable mental states. It must also be balanced with the need to question laws that disparately impact

271. See *Bailey v. United States*, 516 U.S. 137, 146 (1995), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (amending § 924(c) to criminalize possession of a firearm “in furtherance of” drug trafficking).

272. 21 U.S.C. § 841.

marginalized groups.

Courts can bring a small measure of balance to the GCA by requiring prosecutors to establish a criminal scienter connection between the possession of a firearm and the trafficking of drugs. Congress can go further by amending § 924(c) to eliminate the vaguely defined crime of possessing a firearm “in furtherance of” drug trafficking. In comparison with the scope of the criminal legal system, these reforms are narrow. Nevertheless, either would have a meaningful impact on the lives of individuals—particularly Black individuals—accused of violating § 924(c).