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# CRIMINAL JUSTICE REFORM AND GUNS: THE IRRESISTIBLE MOVEMENT MEETS THE IMMOVABLE OBJECT

David E. Patton\*

## ABSTRACT

*The number of people incarcerated for federal firearm convictions has increased ten-fold in the past 30 years. One of the biggest sources of the increase is a Department of Justice initiative known as “Operation Triggerlock” in which people who are arrested by state and local police for gun possession are prosecuted in federal court for the express purpose of imposing more severe prison sentences. The people prosecuted are overwhelmingly people of color. Both Republican and Democratic politicians have supported the prosecutions: the former as part of an overall law and order agenda and as a way to forestall broader gun control legislation, and the latter as part of a larger effort to regulate guns and to protect against criticism from the right about lack of enforcement of the laws already on the books. This Article examines the history of the prosecutions, including the policy reasons for them and the research on their impact on crime which shows that the prosecutions have little to no impact. The Article then reviews the various criticisms of the prosecutions, including stark racial disparity, contribution to mass incarceration, harm to principles of federalism, diminished civil liberties, and lack of effectiveness. It argues that the uncertain benefits to public safety do not outweigh the known damage to fairness and equality in the criminal justice system. Lastly, the Article considers the prospects for reform in light of bipartisan support for criminal justice reform generally and concludes that while minor reforms may come from Congress and the Judiciary, any significant change is unlikely without a shift in charging policy from the Department of Justice.*

## INTRODUCTION

Three decades ago, federal prosecutors began to fundamentally change the nature of their work. They shifted focus from crimes with obvious interstate connections to crimes that were once thought of as purely local.<sup>1</sup> No single

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<sup>1</sup> Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1660–68 (2002); David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1440–41

initiative captures this change better than “Operation Triggerlock.”<sup>2</sup> Announced by Attorney General Richard Thornburgh in 1991, Triggerlock led to widespread federal prosecutions of so-called “felon-in-possession” cases.<sup>3</sup> Using the law passed in 1968 making it a federal crime for anyone previously convicted of a felony to possess a gun, federal prosecutors around the country began coordinating with local police to charge people in federal court with simple gun possession.<sup>4</sup> The people arrested need not have used the gun in a crime or traveled across state lines to be charged—the mere possession along with a criminal history was enough.<sup>5</sup> And if the person possessing the gun had the right number and kind of prior convictions, he (almost all were men) faced a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act.<sup>6</sup> Others who possessed the gun in connection with a drug crime or another specified offense were subject to steep mandatory, consecutive sentences on top of the sentences for the underlying crime, sometimes resulting in the equivalent of life sentences.<sup>7</sup>

These changes significantly contributed to steep increases in incarceration, particularly among men of color. In the first twenty years after Thornburgh’s announcement, the number of people serving time in federal prison for weapons possession jumped dramatically, a nearly tenfold increase from approximately 3,400 (5.8% of all federal prisoners) in 1990 to over 32,000 (15.1% of all federal prisoners) in 2011.<sup>8</sup> Although there have been fluctuations in the number of cases over the years, to this day the number of people incarcerated in federal prison for weapons offenses remains approximately 32,000.<sup>9</sup> And from the beginning of Triggerlock to the present, the vast majority of those prosecuted

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(2011); Daniel Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 374–75, 379 (2001) [hereinafter Richman, “*Project Exile*”]; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 395–98 (2006) [hereinafter Richman, *Violent Crime Federalism*]; see also JAMES A. STRAZELLA, *THE FEDERALIZATION OF CRIMINAL LAW* 17–18 (1998).

<sup>2</sup> Beale, *supra* note 1, at 1675; Patton, *supra* note 1; Richman, “*Project Exile*”, *supra* note 1, at 374–75; Richman, *Violent Crime Federalism*, *supra* note 1, at 396–97.

<sup>3</sup> Beale, *supra* note 1, at 1675; Patton, *supra* note 2; Richman, “*Project Exile*”, *supra* note 1, at 374–75; Richman, *Violent Crime Federalism*, *supra* note 1, at 396–97.

<sup>4</sup> Patton, *supra* note 1.

<sup>5</sup> See 18 U.S.C. § 922(g) (2012).

<sup>6</sup> § 924(e).

<sup>7</sup> § 924(c).

<sup>8</sup> *Table 6.0023.2013: Prisoners Under the Jurisdiction of the Federal Bureau of Prisons*, SOURCEBOOK CRIM. JUST. STAT.: U. ALB., <https://www.albany.edu/sourcebook/pdf/t600232013.pdf> (last visited Feb. 26, 2020).

<sup>9</sup> *Inmate Statistics: Offenses*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last updated Jan. 4, 2020).

have been people of color. In 2018, consistent with most years, approximately 72% of people sentenced for federal firearm offenses were Black or Hispanic.<sup>10</sup>

Although Democrats and Republicans agree on little when it comes to gun control, federal felon-in-possession prosecutions have bridged the gap. The prosecutions are consistent with Democrats' efforts to restrict gun ownership and useful to Republicans' resistance to broader gun control regulation. And, of course, there is the matter of who gets charged. The vast majority are poor people of color, not exactly the Republican base.<sup>11</sup> And in the 1990s when the initiatives began, Clinton Democrats, including many influential black politicians, were supporters of a host of "tough-on-crime" initiatives despite the impact on communities of color.<sup>12</sup>

But the politics of criminal justice have changed dramatically in the past several years. Conservative groups like Right on Crime, Americans for Tax Reform, and Prison Fellowship have pushed to reduce America's extraordinarily high rates of incarceration.<sup>13</sup> They have done so on libertarian, fiscal, and religious grounds.<sup>14</sup> And liberals, recovering from 1990s Clinton-era policies, are doing the same on humanitarian and racial justice grounds.<sup>15</sup> The confluence has led to a public dialogue unimaginable a decade ago about reducing sentences and reigning in prosecutions. Books like Michelle Alexander's *The New Jim Crow*, which argues that mass incarceration is a perpetuation of American's dark legacy of slavery and segregation, and Bryan Stevenson's *Just Mercy*, which

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<sup>10</sup> *Race of Federal Offenders by Type of Crime: Fiscal Year 2018*, U.S. SENTENCING COMMISSION, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table05.pdf> (showing 25.6% of people sentenced for federal firearm offenses were non-Hispanic White, 52.8% were Hispanic, and 18.7% were Black) (last visited Mar. 22, 2020).

<sup>11</sup> Alec Tyson, *The 2018 Midterm Vote: Divisions by Race, Gender, Education*, PEW RES. CTR. (Nov. 8, 2018), <https://www.pewresearch.org/fact-tank/2018/11/08/the-2018-midterm-vote-divisions-by-race-gender-education/>; *An Examination of the 2016 Electorate, Based on Validated Voters*, PEW RES. CTR. (Aug. 9, 2018), <https://www.people-press.org/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/>.

<sup>12</sup> See, e.g., JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 3–14 (2017).

<sup>13</sup> See, e.g., Bruce DuMont, *The Christian Case for Criminal Justice Reform*, REAL CLEAR POL. (Dec. 19, 2018), [http://realclearpolitics.com/articles/2018/12/19/the\\_christian\\_case\\_for\\_criminal\\_justice\\_reform\\_138959.html](http://realclearpolitics.com/articles/2018/12/19/the_christian_case_for_criminal_justice_reform_138959.html); Bill Keller, *Where Right Meets Left*, MARSHALL PROJECT (Feb. 20, 2015), <https://www.themarshallproject.org/2015/02/20/where-right-meets-left>; *The Conservative Case for Reform*, RIGHT ON CRIME, <http://rightoncrime.com/the-conservative-case-for-reform/> (last visited Feb. 26, 2020).

<sup>14</sup> *Supra* note 13 and accompanying text.

<sup>15</sup> See, e.g., Sheryl Gay Stolberg & Astead W. Herndon, 'Lock the S.O.B.s Up': Joe Biden and the Era of Mass Incarceration, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/joe-biden-crime-laws.html> (reviewing Joe Biden's and other Democrats' role in passing "tough-on-crime" legislation in the 1980s and 1990s which they are now apologizing for and backtracking from).

details the author's fight to reform the criminal justice system, have become bestsellers and have entered the mainstream discourse.<sup>16</sup>

Actual reforms have been slow to follow the discourse. They range from significant in some states, including legalization of recreational marijuana,<sup>17</sup> bail reform,<sup>18</sup> and the election of prosecutors running on reform platforms (though just how reformist they are is debatable),<sup>19</sup> to baby steps in the federal system, including a slight scaling back on certain mandatory minimum sentences, retroactive application of a reduction in penalties for crack cocaine, and the possibility of earlier release for some incarcerated people (though notably not nearly all).<sup>20</sup>

So what has this meant for federal felon-in-possession prosecutions? So far, nothing. Numbers dipped slightly from the Bush Administration to the Obama Administration, but in the last year of the Obama presidency, prosecutions were heading up and were more than 50% higher than in the last year of the Clinton Administration.<sup>21</sup> The Trump Administration has pushed them higher still and is on track to bring the highest number of firearm prosecutions ever, surpassing the previous high-water mark of 2004.<sup>22</sup> The same political dynamics surrounding gun control, and federal gun prosecutions, seem as firmly entrenched as ever.<sup>23</sup>

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<sup>16</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); BRYAN STEVENSON, *JUST MERCY* (2014).

<sup>17</sup> *Marijuana Overview*, NAT'L CONF. ST. LEGISLATURES (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> (showing eleven states and the District of Columbia).

<sup>18</sup> See, e.g., NAT'L TASK FORCE ON FINES, FEES, & BAIL PRACTICES, *BAIL REFORM: A PRACTICAL GUIDE BASED ON RESEARCH AND EXPERIENCE* (2019).

<sup>19</sup> See, e.g., Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286>. For a critical look at how progressive these prosecutors are, see generally Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748 (2018).

<sup>20</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5198–203, 5210–11, 5220. For an explanation of the bill, see generally NATHAN JAMES, CONG. RESEARCH SERV., R45558, *THE FIRST STEP ACT OF 2018: AN OVERVIEW* (2019).

<sup>21</sup> *Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRAC REP. (Nov. 29, 2017), <https://trac.syr.edu/tracreports/crim/492/> (showing prosecutions under 18 U.S.C. § 922 were 4,461 in FY 2000 and 6,734 in FY 2016).

<sup>22</sup> *Federal Weapons Prosecutions Continue to Climb in 2019*, TRAC REP. (June 5, 2019), <https://trac.syr.edu/tracreports/crim/560/>.

<sup>23</sup> See, e.g., Vittoria Elliot, *Trump Quietly Backs Away from Stricter Gun Law Proposals After Mass Shootings*, INDEPENDENT (NOV. 1, 2019, 10:19 PM), <https://www.independent.co.uk/news/world/americas/us-politics/trump-gun-reform-laws-mass-shootings-nra-a9181831.html>; David Shortell et al., *Proposal to Expand Background Checks Floated on Hill but Trump Has Yet to Sign Off on It or Any Other Gun Plan*, CNN, <https://www.cnn.com/2019/09/18/politics/guns-background-checks-congress-trump/index.html> (last updated Sept. 18, 2019).

This Article examines the past three decades of federal gun possession prosecutions. How did they come about in such large numbers? What have scholars learned about the prosecutions' impact on violent crime? How have the prosecutions contributed to problems in the criminal justice system that are now widely acknowledged? Do trade-offs exist, and, if so, are they worth it? Three decades into this experiment, what have we learned, and where might we be headed in light of those lessons?

Part I briefly discusses the history of federal gun possession prosecutions, including a review of the research about the prosecutions' impact on crime rates. The research shows that we know relatively little about how the prosecutions impact crime (consistent with the little we know about what affects crime rates generally), but the few studies done suggest slight to no impact. Part II reviews the various criticisms of the prosecutions, including stark racial disparity, contribution to mass incarceration, harm to principles of federalism, diminished civil liberties, and lack of effectiveness. I argue that the uncertain benefits to public safety (as well as the real possibility that the prosecutions actually harm public safety) do not outweigh the known damage to fairness and equality in the criminal justice system. Lastly, in Part III, I examine the future of the prosecutions by reviewing recent events in Congress, the Judiciary, and the Executive. I conclude that while minor reforms have come from Congress and the Judiciary in the past few years, and more are possible, fundamental change will likely only come from a shift in charging policy from the Department of Justice.

## I. A SHORT HISTORY OF FEDERAL GUN POSSESSION PROSECUTIONS

### A. *The Origin Story*

The extraordinary increase in gun possession prosecutions did not begin with a new law. The federal law criminalizing gun possession for anyone with a prior felony conviction was passed in 1968, and for twenty years it remained lightly enforced.<sup>24</sup> Light enforcement was consistent with the notion of a limited role for the federal government in matters of local crimes. In the nearly 200 years of country's existence, federal involvement in criminal law had grown—but only to a point.<sup>25</sup> Initially reserved for crimes such as piracy and treason, federal law enforcement had grown in the twentieth century to include a broader array of offenses, but ones that still seemed to offer obvious advantages to federal rather

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<sup>24</sup> See Beale, *supra* note 1, at 1644; *supra* notes 2–5 and accompanying text.

<sup>25</sup> See Richman, *Violent Crime Federalism*, *supra* note 1, at 383–89.

than local intervention: interstate transportation of stolen property (particularly cars), interstate kidnapping, immigration offenses, large-scale criminal organizations, and perhaps more controversially, drug and Prohibition-era alcohol offenses. The result was that after Prohibition was repealed, the federal prison population remained incredibly constant. In 1940, there were 24,360 federal inmates.<sup>26</sup> In 1980, there were 24,252.<sup>27</sup>

But in the 1970s and 1980s, with rising crime rates and a shifting political dynamic that included the Republican “Southern Strategy” with its race-based appeals to tough-on-crime policies, the politics of crime took the national stage.<sup>28</sup> In 1984 Congress passed the Comprehensive Crime Control Act, which ushered in the federal sentencing guidelines and a host of tougher penalties for drug crimes,<sup>29</sup> as well as the Armed Career Criminal Act, which imposed a fifteen-year mandatory minimum for possessing a gun after having been convicted of three qualifying felonies.<sup>30</sup> Two years later, in the wake of the overdose death (from powder cocaine) of star basketball player Len Bias, Congress passed a wave of new mandatory minimum drug sentences, notably creating the infamous 100-to-1 ratio for crack to powder cocaine with its devastating racial disparities.<sup>31</sup> But even with the new laws on the books and the increase in drug prosecutions, gun possession prosecutions did not immediately follow.<sup>32</sup>

The turning point came with Thornburgh’s announcement in 1991 of Project Triggerlock. Although federal firearm prosecutions had increased steadily throughout the 1980s, those prosecutions were not the result of any formalized program and were likely incident to overall increases in federal prosecution,

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<sup>26</sup> *Id.* at 389.

<sup>27</sup> *Id.*

<sup>28</sup> Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html> (quoting President Nixon’s former domestic policy chief, John Ehrlichman, about the political strategy of using the criminal justice system to battle Nixon’s “two enemies: the antiwar left and black people”); *see also* 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/>; Rick Perlstein, *Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, NATION (Nov. 13, 2012), <https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/> (quoting the racist remarks of Lee Atwater in explaining the Republican’s “Southern Strategy” and noting that as George H.W. Bush’s campaign manager, Atwater ran the infamous Willie Horton ad with its race-baiting appeal to tough on crime policies).

<sup>29</sup> Richman, *Violent Crime Federalism*, *supra* note 1, at 394–95.

<sup>30</sup> *Id.* at 394.

<sup>31</sup> Adam Davidson, *Learning from History in Changing Times: Taking Account of Evolving Marijuana Laws in Federal Sentencing*, 83 U. CHI. L. REV. 2105, 2130–34 (2016).

<sup>32</sup> *See* Richman, “*Project Exile*”, *supra* note 1, at 395–96.

particularly the increase in drug and organized crime prosecutions where firearms were involved.<sup>33</sup> Project Triggerlock changed that. The stated goal was for federal prosecutors to “protect the public by putting the most dangerous offenders in prison for as long as the law allows” by using the “full force of federal sentences with a commitment to no plea bargaining.”<sup>34</sup>

Daniel Richman has written extensively about the history of Triggerlock and notes that it was announced at a time of heated debate about the Brady Bill, a package of gun control measures that Democrats generally favored and Republicans opposed.<sup>35</sup> At the time of the announcement, the Bush Administration strongly opposed the legislation, but momentum for it had been building, particularly with the endorsement of former President Reagan in a statement from George Washington University Medical Center where he had been treated after being shot eight years earlier.<sup>36</sup> A political dynamic developed that persists to this day: Republicans opposed broad gun control legislation, and as part of that opposition, supported stronger law enforcement efforts against illegal gun possession. As Professor Richman puts it:

Gun control minimalists support offender-specific criminal enforcement as an alternative to broader regulation of trafficking and access. And advocates of broader regulation embrace such enforcement programs as well, both as a shield against minimalist criticism and because their regulatory scheme naturally includes this sort of criminal enforcement.<sup>37</sup>

Triggerlock prosecutions waxed and waned in the several years following Thornburgh’s announcement.<sup>38</sup> The Clinton Administration did not disavow it; indeed, many of the Clinton-appointed United States Attorneys touted it.<sup>39</sup> But in 1997 both sides of the political debate cheered one highly visible Triggerlock program that would become a template for others around the country: Project Exile.

Project Exile was an initiative started by the United States Attorney’s Office for the Eastern District of Virginia in Richmond. It was led by the then-head of the Richmond office, James Comey. Comey (the now famous former FBI

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<sup>33</sup> *See id.* at 396.

<sup>34</sup> *Id.* at 374 (quoting Attorney General Richard Thornburgh).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 410.

<sup>38</sup> *See id.* at 375–76.

<sup>39</sup> *See id.* at 376, 382. But during the time before and after the Brady Bill’s passage in 1993, Republicans criticized the Administration for not bringing enough prosecutions. *See id.* at 390.

Director) described it as “Triggerlock on steroids”<sup>40</sup> and explained that it involved a collaboration between federal and state law enforcement whereby, “When a police officer finds a gun during the officer’s duties, the officer pages an ATF agent (twenty-four hours a day). They review the circumstances and determine whether a federal statute applies. If so, federal criminal prosecution is initiated.”<sup>41</sup>

Far from the initial language of Triggerlock about targeting America’s “most dangerous offenders,”<sup>42</sup> Exile was sweeping in its approach. If a federal statute applied, anyone found with a gun would be charged in federal court.<sup>43</sup>

The U.S. Attorney for the Eastern District of Virginia, Helen Fahey, explained the advantages of federal prosecutions: lower likelihood of bail, harsher sentences, and a federal prison system that meant serving time in a distant location (hence the name “Exile”).<sup>44</sup> Media outreach in Richmond was extensive, including television ads, billboards, and even coordination with NRA-sponsored “Eddie Eagle Gun Safety” programs for elementary school children.<sup>45</sup> Within a year, Exile seemed to have a dramatic impact on homicides, with Richmond experiencing a 33% reduction between 1997 and 1998.<sup>46</sup>

Exile was soon publicized and politicized nationally. Although the program occurred in a Democratic administration, it was Republicans who capitalized on its apparent success.<sup>47</sup> The NRA made it a cornerstone of their message as gun control debates continued to rage, especially after the Columbine High School shooting in Colorado.<sup>48</sup> The familiar dynamic played out. Gun control opponents insisted that additional laws and broader regulatory requirements were unnecessary: The laws on the books were sufficient—they just needed to be enforced by programs like Exile.<sup>49</sup> And gun control proponents took what they could get, naturally supportive of anti-gun enforcement policies and tactically concerned about criticism from the right if they opposed such enforcement.

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<sup>40</sup> *Id.* at 379 n.63.

<sup>41</sup> *Id.* at 379.

<sup>42</sup> *Id.* at 374.

<sup>43</sup> *Id.* at 370.

<sup>44</sup> *Id.* at 379 n.66.

<sup>45</sup> *Id.* at 380.

<sup>46</sup> *Id.* at 381.

<sup>47</sup> *See id.*

<sup>48</sup> *Id.* at 384.

<sup>49</sup> *See id.* at 382–86.

With both sides of the aisle on board, the number of federal gun possession prosecutions soon skyrocketed.<sup>50</sup>

### *B. The Expansion*

Exile was widely replicated in districts throughout the country via an umbrella DOJ program called Project Safe Neighborhoods (PSN).<sup>51</sup> PSN was developed by the George W. Bush Administration and was designed to increase federal prosecutions and sentences as part of a broader strategy to reduce violent crime. In addition to the increased prosecutions, PSN strategies included: (1) “offender notification meetings,” adapted from a Boston program called Ceasefire, which involved small meetings with parolees and probationers to inform them of the new prosecution policies, and to offer job training and social services assistance; (2) media campaigns advertising the prosecution initiative; (3) increased home visits to parolees and probationers; and (4) research to identify increased criminal activity in order to increase police presence in those areas.<sup>52</sup>

The PSN “toolkit,” the package of materials sent to U.S. Attorneys’ Offices explaining the program and acting as a guide to developing PSN initiatives, explained the benefits of federal gun prosecutions: longer sentences and more restrictive bail laws. Those “benefits” accrued even when gun cases remained in the state courts because of the additional leverage the possibility of federal prosecutions provided to local prosecutors. “In some jurisdictions, state prosecutors offer violent gun criminals the option of receiving a higher-than-usual state sentence in lieu of federal prosecution, which may carry an even higher sentence.”<sup>53</sup> Attorney General John Ashcroft stated that the idea was “disarmingly simple: federal, state, and local law enforcement officers and prosecutors working together to investigate, arrest, and prosecute criminals with guns to get the maximum penalties available under state or federal law.”<sup>54</sup>

Since its inception in 2001, PSN has spent billions of dollars supporting state and federal law enforcement to carry out its programming and it has impacted federal prosecutions in every federal district in the country. According to

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<sup>50</sup> *See id.* at 380–81.

<sup>51</sup> *See* EDMUND F. MCGARRELL ET AL., PROJECT SAFE NEIGHBORHOODS - A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT iii (2009).

<sup>52</sup> *Id.* at 9–10.

<sup>53</sup> Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities*

*for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 317 (2007).

<sup>54</sup> *Id.* at 307 n.4.

subsequent studies, although many districts ramped up the prosecution component of PSN, the other non-prosecutorial components such as notification meetings and supportive services, were much less frequently and sporadically implemented.<sup>55</sup> One noteworthy example of the expansion was James Comey personally bringing a version of Exile from Richmond to the Southern District of New York when he became that district's U.S. Attorney during the George W. Bush Administration. It too focused almost entirely on the prosecutorial component of PSN.<sup>56</sup>

### C. *The Impact*

Researchers conducted several studies in the 2000s in an attempt to measure federal gun possession prosecutions' impact on crime rates. In 2003, Steven Raphael and Jens Ludwig conducted what is generally considered the most rigorous statistical analysis of Richmond's homicide rates and Project Exile and found that the prosecutions likely had no impact.<sup>57</sup> The highly-touted drop in homicides was almost certainly due to a regression to the mean. The year before Exile was implemented, Richmond saw a spike, and its drop was entirely consistent with other cities that also saw dramatic decreases without an Exile-type program. Even within Richmond, other populations unaffected by Exile, namely juveniles, also saw decreases in crime. Shortly after the study was released, one commentator, Peter Greenwood, the founder of the RAND Corporation's evidence-based criminal justice program stated: "Steven Raphael and Jens Ludwig have demonstrated fairly conclusively that one of the more popular strategies developed during the past decade to reduce firearm violence is a bust. It has no impact. It does not work."<sup>58</sup>

Other studies were slightly more qualified. Richard Rosenfeld and others studied Exile along with several other law enforcement initiatives and concluded that the results in Richmond "inspire somewhat greater confidence in the existence of a difference between Richmond's firearm homicide trend and the average trend for the sample [of the ninety-five largest U.S. cities], although the differences may have been quite small."<sup>59</sup>

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<sup>55</sup> See MCGARRELL ET AL., *supra* note 51, at 138, 142 (noting that of the 252 large cities in which PSN was implemented, 170 were considered "low dosage" with "dosage" referring to the various components of the programming).

<sup>56</sup> *See id.* at 7.

<sup>57</sup> See Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 254 (Jens Ludwig & Philip J. Cook eds., 2003).

<sup>58</sup> Peter Greenwood, *Comment*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 280 (Jens Ludwig & Philip J. Cook eds., 2003).

<sup>59</sup> Richard Rosenfeld et al., *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY &

In 2009 the Department of Justice commissioned its own broader study of PSN nationwide.<sup>60</sup> Perhaps not surprisingly, the study painted a rosier picture of the program's impact than did the earlier independent studies. But even accepting the report's conclusions of a 4.1% decrease in crime in PSN target cities as compared to a 0.9% drop in crime in non-PSN target cities, it is hard to say much about the impact of the gun prosecutions alone. Because of PSN's multi-pronged approach and the wide variation in implementation of the different prongs (from community outreach to law enforcement training to media campaigns) the study does not provide valid data about federal prosecutions and crime rates. A more detailed study of a PSN program in Chicago showed a significant impact on homicide rates, but attributed the majority of the impact to (1) the "forums" in which people recently placed on probation or parole attended meetings with community members to discuss increased gun prosecutions; (2) crime in the neighborhood; (3) why they were collaborating to reduce it, and various available social services such as substance abuse treatment; (4) mental health counseling; and (5) job training and placement.<sup>61</sup> According to the researchers, "the only variable not to have a significant effect was the person-month sentence received from PSN prosecution."<sup>62</sup>

The 2009 study appears to be the last effort to empirically assess the impact of PSN.

## II. CRITICISMS OF FEDERAL GUN POSSESSION PROSECUTIONS

There have been a host of criticisms of federal gun possession prosecutions. They span the political spectrum and have been leveled for many years.

### A. *Racial Disparity*

Racial disparity has been a part of felon-in-possession prosecutions from the start. In an equal protection challenge to Project Exile in Richmond, the parties stipulated that 90% of defendants were African-American, and the court

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PUB. POL'Y 419, 438 (2005) (emphasis omitted).

<sup>60</sup> See MCGARRELL ET AL., *supra* note 51, at iii–vi.

<sup>61</sup> See Andrew V. Papachristos et al., *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 231–32 (2007); see also DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION 4, 11 (2009) (referring to the Papachristos study as the "best evaluation to date" and summarizing other studies and concluding, "[i]n general, the certainty, and to a lesser extent, the swiftness of sanction mattered more than the severity of sanction, to the extent that many researchers concluded that severity was all but or in fact irrelevant").

<sup>62</sup> Papachristos et al., *supra* note 61, at 260.

lamented “the inability of prosecutors to explain the procedure” for diverting cases from state court for more serious punishment in federal court which cast “some doubt on the assertion that race plays no role in deciding whether a case is to be federally prosecuted.”<sup>63</sup> The challenge ultimately failed, and over the years, federal prosecutors in other districts have charged gun possession cases at similarly skewed rates, with the percentage of Black defendants (categories used by the Sentencing Commission) in many districts routinely over 80% and 90%.<sup>64</sup> In a 2007 article, Bonita Gardner detailed the cities and neighborhoods that PSN targeted and showed how the demographics of the targeted communities assured a stark racial imbalance.<sup>65</sup> That skewed targeting continues to this day. In 2017, nationwide, over 70% of all persons sentenced in federal court for unlawful possession of a firearm were Black or Hispanic.<sup>66</sup>

In addition to the location of the PSN target communities, the racial disparity also arises from the type of firearm offenses charged. In discussing the disparity in gun possession prosecutions, Gardner questioned the choice of the federal government to prosecute felon-in-possession cases but not the “other twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form.”<sup>67</sup> Indeed, the numbers paint a stark divide between simple possession prosecutions and offenses related to gun trafficking. In 2018, less than 5% of all federal firearm prosecutions involved trafficking or registration offenses.<sup>68</sup>

Benjamin Levin recently argued that many of the critiques of the war on drugs apply with equal force to firearm prosecutions, and in particular, the decision to target those with prior felony convictions which may well “reinscribe the inequalities of the drug war.”<sup>69</sup> Levin reminds us that “defining a crime is a political act, and the decision that an individual with a criminal record for drug

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<sup>63</sup> See *United States v. Jones*, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999); see also *United States v. Thorpe*, 471 F.3d 652, 658 (6th Cir. 2006). For a full discussion of the case, see Dominique Camm, *Reversing the Standard: The Difficulty in Proving Selective Prosecution*, 31 N.C. CENT. L. REV. 93, 94–95 (2008).

<sup>64</sup> See Gardner, *supra* note 53, at 316; Patton, *supra* note 2, at 1443.

<sup>65</sup> See Gardner, *supra* note 53, at 316–17.

<sup>66</sup> *Race of Offenders in Each Primary Offense Category, Fiscal Year: 2017*, U.S. SENTENCING COMMISSION, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-source-books/2017/Table04.pdf> (last visited Mar. 6, 2020).

<sup>67</sup> Gardner, *supra* note 53, at 312.

<sup>68</sup> U.S. SENTENCING COMM’N, *USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2018*, at 55 (2018).

<sup>69</sup> Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2197 (2016).

offenses cannot possess a gun lawfully rests on a political definition not only about guns, but about drugs as well.”<sup>70</sup>

What makes these racial disparities particularly troubling is how intentional the prosecutorial decisions are. Federal felon-in-possession prosecutions overwhelmingly come from local police arrests in which the person arrested would otherwise face state charges.<sup>71</sup> The decision whether to prosecute someone federally is not a decision between prosecution or no prosecution—it’s a decision between state or federal prosecution. That is, even compared to the enormous discretion prosecutors normally exercise, these decisions are highly discretionary. PSN specifically targets communities of color for punishment above and beyond what would already be significant punishment in state court.

When it comes to racial disparity, some of the direct federal law enforcement arrests are even more troubling than the transferred state cases. They often involve stings by the DEA and ATF which overwhelmingly target people of color. A common operation that has been heavily criticized, but still persists, is the so-called fake “stash-house” sting.<sup>72</sup> In the operations, federal agents use cooperating informants to convince people that an apartment or house contains hundreds of thousands of dollars’ worth of drugs or drug proceeds that can be easily burgled or robbed.<sup>73</sup> The informant tells the target to find and bring other people and guns to a meet-up location.<sup>74</sup> At the appointed location, the agents arrest everyone who shows up and charge them with assorted federal robbery, drug, and firearms charges that often carry decades of mandatory prison time.<sup>75</sup>

Two recent selective enforcement challenges to this practice in the Southern District of New York show overwhelming racial disparities. In one, a survey of fake stash-house sting cases revealed that in the five-year period between 2013 and 2018, the operations targeted 144 individuals, 141 of whom (97.9%) were Black or Latino, two of whom were Asian, and one of whom was White.<sup>76</sup> The other, using slightly different data, showed that over a ten-year period, of 179 reverse-sting defendants, none were White and all but two were Black or

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<sup>70</sup> *Id.*

<sup>71</sup> Patton, *supra* note 1, at 1464.

<sup>72</sup> See, e.g., Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY (June 28, 2013, 11:26 AM), <https://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109/> (noting that more than 1,000 individuals have been prosecuted following similar “stash-house” stings).

<sup>73</sup> See, e.g., *United States v. Flowers*, 712 F. App’x. 492, 510 (6th Cir. 2017) (Stranch, J., concurring) (quoting *United States v. Black*, 733 F.3d 294, 302–03 (9th Cir. 2013)).

<sup>74</sup> See *id.* (quoting *Black*, 733 F.3d at 302–03).

<sup>75</sup> See *id.* (quoting *Black*, 733 F.3d at 302–03).

<sup>76</sup> *United States v. Garcia-Pena*, 17 Cr. 363, 2018 WL 6985220, at \*4 (S.D.N.Y. 2018).

Hispanic.<sup>77</sup> These astonishingly skewed figures occurred in a federal district that is 43.1% White (non-Latino), 31.4% Latino, and 16.7% Black (non-Latino). In the Northern District of Illinois, only six out of ninety-four defendants charged in fake stash-house sting cases were White and non-Hispanic, figures the Seventh Circuit referred to as “troubling” in ordering limited discovery into the reasons and criteria for the prosecutions.<sup>78</sup>

The constitutional challenges to the arrests and prosecutions have had mixed success,<sup>79</sup> but regardless of the merits of the equal protection claims, the policy criticisms on racial disparity grounds are compelling. Sixth Circuit Judge Jane Stranch, in a concurring opinion denying a motion to dismiss on due process grounds, wrote:

I write separately to express my discomfort with the governmental operation known as a “stash house sting.” Because these stings are wholly inventions of law enforcement agents, they can and do include powerful inducements to participate in one big “hit,” a hit that is conveniently large enough to qualify for mandatory minimum sentences. Obtaining the outsized reward is also made to look easy—the agent is a disgruntled insider who knows when and how to stage these “rip-and-runs” and offers to provide all needed assistance, from manpower to transportation. The unseemly nature of the Government’s activity is emphasized by its failure to achieve its declared goals of jailing dangerous criminals and making our streets safer. Evidence showing that these hurry-up set-ups achieve the stated goals was not proffered and the facts here demonstrate why: no known dangerous individuals or criminal enterprises were researched or targeted and no pre-existing drug rings or conspiracies were broken up. In fact, this sting trapped Flowers, a gainfully employed young man with no criminal record. We have this result because informants were simply sent out into the community to gather information and find someone who would bite at the opportunity to make loads of money quickly. And, in line with sting statistics, the men recruited here were all African American and all from impoverished areas—as are

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<sup>77</sup> Shayna Jacobs, *10 Years. 179 Arrests. No White Defendants. DEA Tactics Face Scrutiny in New York*, WASH. POST (Dec. 14, 2019), [https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12ce-11ea-bf62-eadd5d11f559\\_story.html](https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12ce-11ea-bf62-eadd5d11f559_story.html).

<sup>78</sup> *United States v. Davis*, 793 F.3d 712, 722 (7th Cir. 2015).

<sup>79</sup> Courts have required defendants to show that similarly situated Whites could have been but were not targeted, a standard that is nearly impossible to meet and is a highly questionable method for detecting discrimination. For a thorough explanation of why this “counterfactual causal” model is so flawed, see generally Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163 (2019).

the overwhelming number of stash-house-sting targets across the nation.<sup>80</sup>

Just as Levin reminds us that defining a crime is a political act, so too is the decision about whether, how, and against whom to charge a crime, and as a practical matter, it is likely a more significant one. And the racially disparate federal charging decisions in gun cases are not just a product of conservative political acts. . The reverse-sting and felon-in-possession prosecutions have been pursued by Attorneys General and U.S. Attorneys from both ends of the political spectrum. Legal historian Anders Walker has written about the liberal contribution to racial inequality in the criminal legal system and cites liberal support for tough on crime policies for firearms offenses as a prime example.<sup>81</sup> He argues that Michelle Alexander’s thesis in *The New Jim Crow*, comparing conservative wedge politics and the war on drugs to formalized racial segregation, misses the “current liberal enthusiasm for federal gun regulation” as a significant “contributor to black incarceration.”<sup>82</sup>

### *B. Over-Incarceration*

Federal gun possession cases are no small part of overall federal prosecutions. Firearm offenses are the third highest category of federal prosecutions, behind only drugs and immigration.<sup>83</sup> And they represent the second highest offense type of people serving time in federal prison behind only drugs.<sup>84</sup> Nearly 20% of all federal prisons are incarcerated for a weapons offense.<sup>85</sup>

The point of the prosecutions as stated by the originators of the programs is to impose harsher sentences than would otherwise be imposed in state court, and to drive up state court sentences by using the threat of federal prosecution as leverage. This last point is significant. Although the vast majority of criminal cases, and therefore the vast source of mass incarceration, come from state systems, the federal prosecutions impact those systems tremendously by providing state prosecutors greater power to negotiate tougher pleas.

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<sup>80</sup> *Flowers*, 712 F. App’x. at 508–09 (Stranch, J., concurring).

<sup>81</sup> Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 871 (2014).

<sup>82</sup> *Id.* at 873.

<sup>83</sup> U.S. SENTENCING COMM’N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 4 (2019) (demonstrating that firearm offenses make up approximately 11% of federal offenses).

<sup>84</sup> *Inmate Statistics: Offenses*, *supra* note 10.

<sup>85</sup> *Id.*

Levin argues convincingly that “like criminal drug statutes, existing and proposed criminal gun possession statutes should also trigger skepticism from critics of mass incarceration.”<sup>86</sup> He details the ways in which gun possession prosecutions and the war on drugs share the same misguided pathology of using the criminal law and extremely severe sentences as the regulatory tool of choice.<sup>87</sup>

In the drug context, the use of criminal law to handle a public health crisis ultimately merged with a strong punitive streak, yielding a regulatory regime undergirded with violent moralism. Shaped by this preference for incarceration, the criminal gun statutes in the federal system and in many states advance a web of exponentially advancing sentences. Like drug crime offenses, possessory drug offenses quickly multiply, allowing prosecutors to stack charges and to extend significantly the prison term that a defendant faces. The end result is a legal regime that—much like drug prohibition—feeds into a growing carceral population.<sup>88</sup>

Nowhere have the sentences been more troubling than in the extreme cases of prosecutions under 18 U.S.C. § 924(c). Section 924(c) requires a mandatory five-year sentence for anyone possessing a gun “during and in relation to any crime of violence or drug trafficking crime.”<sup>89</sup> The penalty increases to seven years if the gun was brandished, and ten years if it was discharged. A sentence under 924(c) must run consecutively to any other sentence.<sup>90</sup> And each “second or subsequent conviction” for Section 924(c) requires an additional mandatory, consecutive twenty-five years.<sup>91</sup> This has meant the equivalent of life sentences for many people who engaged in serious criminal conduct but who were sentenced far more severely than the average person convicted of murder.<sup>92</sup> As discussed further below, the recently passed First Step Act has ameliorated some of the harshest aspects of this so-called “stacking” of charges, but the law did not provide any retroactive relief. One well-publicized example of the harshness of the prosecutions was Weldon Angelos, who was sentenced in federal court in Salt Lake City, Utah to fifty-five years in prison at the age of twenty-five for

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<sup>86</sup> Levin, *supra* note 69, at 2213.

<sup>87</sup> *Id.* at 2214–15.

<sup>88</sup> Levin, *supra* note 69, at 2215.

<sup>89</sup> 18 U.S.C. § 924(c) (2012).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Danielle Kaeble, *Time Served in State Prisons, 2016*, BUREAU JUST. STAT. (Nov. 2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> (showing the median time served for all degrees of murder nationwide is 13.4 years).

selling marijuana three times while possessing a gun.<sup>93</sup> Just a few other cases include:

- Eric Andrews, who was 19 when he engaged in several robberies over a one-month period of time and was sentenced in federal court in Philadelphia in 2006 to 311 years in prison;<sup>94</sup>
- Kittrell Decator, who was sentenced in 1995 to 53 years in prison in federal court in Baltimore for three bank robberies in which nobody was physically injured;<sup>95</sup>
- Ronnie Lynn Fowler, who was sentenced in 1992 to 45 years in prison in federal court in Dallas for five night-deposit robberies in which nobody was physically injured;<sup>96</sup>
- Kevin Haynes, who was sentenced to 46 years in federal court in Brooklyn in 1993 for four bank robberies in which nobody was physically injured;<sup>97</sup>
- Kepa Maumau, who was sentenced to 57 years in 2011 in federal court in Salt Lake City for a series of robberies in which nobody was physically injured;<sup>98</sup>
- Ian Owens, who was sentenced to 117 years in 2005 in federal court in the Eastern District of Michigan for committing a series of bank robberies in which nobody was seriously injured;<sup>99</sup>
- Derrick Redd, who was sentenced to 50 years in 1997 in federal court in Alexandria, Virginia for four bank robberies in which nobody was physically injured;<sup>100</sup>
- Robert Rollings, who was sentenced to 106 years in 2001 in federal court in Chicago for participating in four bank robberies in which nobody was physically injured;<sup>101</sup>

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<sup>93</sup> Adam Liptak, *Long Term in Drug Case Fuels Debate on Sentencing*, N.Y. TIMES (Sept. 12, 2004), <https://www.nytimes.com/2004/09/12/us/long-term-in-drug-case-fuels-debate-on-sentencing.html>; Eileen Sullivan, *Shorter Sentences, More Judicial Leeway: What the Criminal Justice Bill Would Do*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/sentencing-prison-bill.html>. In 2016, Angelos was resentenced and released after thirteen years of intense media coverage of his case. Jason Kitchen, *After 13 Years in Prison, Weldon Angelos Is a Free Man*, HUFFPOST (June 8, 2016, 8:14 AM), [https://www.huffpost.com/entry/after-13-years-in-prison\\_b\\_10322000](https://www.huffpost.com/entry/after-13-years-in-prison_b_10322000). Prosecutors agreed to vacate one of the 924(c) convictions, but the details are sealed. *Id.*

<sup>94</sup> *United States v. Andrews*, 2:05 Cr. 280 (ER) (E.D. Pa.).

<sup>95</sup> *Decator v. United States*, No. 1:95-cr-202, 2013 WL 12344772 (D. Md. Nov. 27, 2013).

<sup>96</sup> *United States v. Fowler*, No. 4:92-cr-177, 2012 WL 12871653 (E.D. Tex. Oct. 9, 2012).

<sup>97</sup> *United States v. Haynes*, 93 Cr. 1043 (RJD) (E.D.N.Y.).

<sup>98</sup> *United States v. Maumau*, No. 2:08-cr-758, 2020 WL 806121 (D. Utah Feb. 18, 2020).

<sup>99</sup> *United States v. Owens*, 02 Cr. 226 (E.D. Mi.).

<sup>100</sup> *United States v. Redd*, 97 Cr 06 (E.D. Va.).

<sup>101</sup> *United States v. Rollings*, 99 Cr. 771 (N.D. Ill.).

- Gregory Rose, who was sentenced to 90 years in 2005 in federal court in Albany, New York for participating in a series of bank robberies in which nobody was physically injured.<sup>102</sup>

These are only some of the dozens of cases in which “stacked” 924(c) convictions have mandated sentences that are wholly disproportionate to the conduct and far lengthier than punishment for more serious crimes.<sup>103</sup> While the 924(c) prosecutions are not necessarily part of a district’s Triggerlock program (e.g., bank robberies are usually investigated by federal law enforcement from the outset), they represent the more extreme end of the spectrum of federal firearm prosecutions’ harsh contribution to mass incarceration.

### C. *Privacy and Libertarian Criticisms*

There have also been criticisms of federal gun possession prosecutions on libertarian grounds—beyond the mere “keep your hands off my guns” variety. Possessory offenses rely heavily on searches for detection. A gun kept in a nightstand or closet or car trunk won’t be found unless police make an effort to look in those places. And so they find ways to look there. In this way, the prosecutions contribute to an unhealthy amount of police and prosecutorial power. Referring to New York City’s now much-maligned “stop and frisk” practices, Levin notes that “it was guns as much, if not more so, than drugs that justified the aggressive and intrusive practice.”<sup>104</sup> He also notes that it was guns more so than drugs that provided the basis for some of the broader exceptions to the Fourth Amendment’s restrictions on searches and seizures.<sup>105</sup> “Even as the Warren Court was expanding the protections afforded to criminal defendants and curbing police abuses, it relied on concern for officer safety in the gun possession context to carve out what would become the critical exception to the Fourth Amendment’s prohibition on unreasonable searches and seizures.”<sup>106</sup>

Federal prosecutors in the Southern District of New York have repeatedly fought to shield police officers who violate the Fourth Amendment in felon-in-possession cases and were found untruthful by federal judges in suppression hearings.<sup>107</sup> A *New York Times* investigation revealed at least twenty cases

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<sup>102</sup> United States v. Rose, 3:04 Cr. 067 (N.D.N.Y.).

<sup>103</sup> For analysis and criticism of the Section 924(c) mandatory sentencing regime by the United States Sentencing Commission, see generally U.S. SENTENCING COMM’N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011).

<sup>104</sup> Levin, *supra* note 69, at 2202.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (footnote omitted).

<sup>107</sup> David E. Patton, *Policing the Poor and the Two Faces of the Justice Department*, 44 FORDHAM URB.

where NYPD officers' testimony was found to be "unreliable, inconsistent, twisting the truth, or just plain false" and where federal prosecutors had defended the conduct and no adverse personnel action was ever taken against the officers.<sup>108</sup>

Many of the constitutional violations never come to light because of the nature of federal criminal practice in which less than 3% of cases go to trial and prosecutors leverage the threat of severe mandatory sentences to obtain pleas without a challenge to police conduct.<sup>109</sup>

#### D. Federalism

Lastly, there have also been criticisms of Triggerlock nearly from the start on federalism grounds. Traditional conservatives ask: Why is the federal government involving itself in what should rightfully be local policing? What happened to our aversion to a national domestic police force? One commentator cited Triggerlock as part of an "impending crisis in the federal justice system" that is "the product of a pervasive failure to recognize that federal courts are an exhaustible resource designed to play a specialized role in the justice system."<sup>110</sup> In 1991, Chief Justice William Rehnquist lamented a proposal in Congress to expand federal jurisdiction even further over offenses committed with guns, writing that the law would be "inconsistent with long-accepted concepts of federalism" and "would swamp federal prosecutors" at the expense of other priorities.<sup>111</sup>

Sara Sun Beale argued convincingly that two of the blockbuster Supreme Court opinions of the 1990s, *United States v. Lopez* and *United States v. Morrison*, which were widely viewed as part of a natural conservative effort to restrict the scope of the Commerce Clause and federal authority generally, are more properly seen as a tailored response to the Court's concern about turning federal courts into "police courts," reducing their exclusivity and diminishing

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L.J. 1431, 1441 (2017).

<sup>108</sup> See Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES (May 12, 2008), <http://www.nytimes.com/2008/05/12/nyregion/12guns.html>.

<sup>109</sup> David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578 (2013)

<sup>110</sup> John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 699 (1999); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1165 (2005); see also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1006 (1995).

<sup>111</sup> WILLIAM H. REHNQUIST, 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (1992).

their prestige.<sup>112</sup> The failure of an anticipated post-*Lopez* Commerce Clause revolution to materialize suggests she was right.

### *E. High Costs and Few Benefits*

In assessing the costs and benefits of the prosecutions, a natural starting point is the stated rationale for them: violent crime reduction. There is no question that the stated goals of the prosecutions are grounded in utilitarian justifications. All of the statements by the law enforcement founders and proponents of the prosecutions tout their role in reducing violent crime.<sup>113</sup> This is not surprising: Retributive rationales for federal prosecutions and harsh sentences are weak. There is nothing inherently wrong with possessing a gun in America. In fact, it is lauded by many as exercising a cherished constitutional right.<sup>114</sup> It is only wrong to own a gun if you are a certain type of person, namely someone with a felony conviction. It is a regulatory rationale, a *malum prohibitum* offense, that depends on a determination that the people identified pose a risk worthy of criminal sanction (as opposed to, or in addition to, other forms of possible regulation).

Given the stated utilitarian concerns, it ought to be of particular concern whether the prosecutions are in fact useful. That is, do they in fact improve public safety and drive down crime rates? As noted, the empirical research on the relationship between federal gun possession prosecutions and crime rates strongly suggests that the prosecutions have little to no impact. The research comports with more general scholarship about what works to reduce crime.

There is near unanimity among scholars that of the potential means of deterring crime, certainty of detection is the most important and severity of punishment is the least important. People who engage in unlawful activity rarely engage in the sort of long-term cost/benefit calculation that would be necessary for increased amounts of punishment to impact decision-making. As I have written about previously, federal gun possession prosecutions are particularly vulnerable to deterrence critiques because they do nothing to increase the perceived odds of detection (which remains almost entirely dependent on local police activity).<sup>115</sup> In addition, whatever small amount of deterrence might come from increased length of punishment is dependent on the person who might

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<sup>112</sup> Beale, *supra* note 1, at 1655–57.

<sup>113</sup> MCGARRELL ET AL., *supra* note 51.

<sup>114</sup> See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>115</sup> Patton, *supra* note 1, at 1460.

potentially possess a gun to be aware of the punishment.<sup>116</sup> Hurdles to the PSN-targeted population's knowledge of federal sentences and the possibility of federal prosecution are high. The vast majority of weapons and violent crime offenses are still prosecuted in state court.<sup>117</sup> Anyone with a felony who is familiar with the court system is far more likely to be familiar with the state courts as opposed to federal courts.<sup>118</sup> Plucking out a comparatively small number of cases to prosecute in federal court leads to what Sara Sun Beale long ago termed the "cruel lottery."<sup>119</sup> Not only is it cruel but it is likely ineffective.<sup>120</sup>

A federal judge recently agreed with these principles. In 2017 in the Eastern District of New York, District Judge Jack Weinstein held an evidentiary hearing in a gun possession sentencing proceeding to determine whether the government's claims about the deterrent effects of a lengthy prison sentence were justified.<sup>121</sup> In concluding they were not, he relied heavily on the testimony of law professor and criminologist, Jeffrey Fagan, who explained the consensus view of empirical researchers that the "deterrent effect of criminal sanctions are specific to the risks of detection, not to the severity of punishments."<sup>122</sup> In other words, people are typically deterred by their perceived odds of getting caught, not how long their sentence might be. Judge Weinstein quoted at length from Dr. Fagan's testimony in finding that a long sentence would serve neither a general nor a specific deterrent purpose:

[Potential offenders] have no idea whether a case is going to be [prosecuted] if they're caught . . . [T]hey have no way of estimating whether that case is going to be tried in federal court with a longer [sentence under a federal statute], or in a state court with a somewhat shorter sentence.

. . . .

I think it's unlikely [for] Mr. Lawrence . . . under the theory of specific deterrence[] or in general for people in the . . . community in which Mr. Lawrence lives, that being given . . . an enhanced sentence, under the federal guidelines, under a federal statute, would have much of a deterrent effect either for him or in general in the community. Only were there to be extraordinary measures to disseminate that information would there be the possibility of deterrence. But all of the

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<sup>116</sup> *Id.* at 1432.

<sup>117</sup> *Id.* at 1464.

<sup>118</sup> *Id.* at 1442.

<sup>119</sup> Beale, *supra* note 110, at 997.

<sup>120</sup> Patton, *supra* note 1, at 1444.

<sup>121</sup> *United States v. Lawrence*, 254 F. Supp. 3d 441 (E.D.N.Y. 2017).

<sup>122</sup> Affidavit of Jeffrey Fagan at 3, *United States v. Lawrence*, 254 F. Supp. 3d 441 (E.D.N.Y. 2017) (No. 16-cr-243).

research that we've done including on gun crimes suggest that even where there's knowledge of lengthy sentences that's not the key to deterrence. The key to deterrence is the risk of punishment.<sup>123</sup>

Judge Weinstein's findings comport with the overwhelming consensus of criminologists that severity of sentence (the primary justification for Triggerlock) does little, if anything, to deter crime.<sup>124</sup>

Perhaps more surprising is that even some large-scale efforts to increase detection of firearms have shown weak results. The widespread practice of "stop and frisk" by police in New York City, in which police aggressively looked for excuses to stop and search enormous numbers of minority residents in mostly poor neighborhoods for the express purpose of finding guns, likely had no impact on crime rates.<sup>125</sup> When the practice was discontinued after a federal judge found the practice unconstitutional, crime rates continued to fall—to levels not seen in at least sixty years.<sup>126</sup> This is despite the fact that stops went from 685,724 at their height in 2011 to 11,627 in 2017.<sup>127</sup> Mayor Michael Bloomberg has since apologized for the policy after years of defending it, saying now that he got it "really wrong."<sup>128</sup>

When stacked against the criticisms leveled above (racial disparity, contribution to mass incarceration, damage to traditional preference for state courts as a venue for local crime, and the erosion of personal liberty that comes from unconstitutional police searches), the lack of any clear benefit in crime reduction is particularly troubling.<sup>129</sup>

### III. THE FUTURE OF FEDERAL GUN POSSESSION PROSECUTIONS

Federal gun possession prosecutions have proved remarkably durable despite the criticism from both the left and right.<sup>130</sup> Of course, part of the

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<sup>123</sup> *Lawrence*, 254 F. Supp. 3d at 445–46.

<sup>124</sup> See generally Patton, *supra* note 1.

<sup>125</sup> Ashley Southall & Michael Gold, *Why 'Stop and Frisk' Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html>; see also Ames Grawert & James Cullen, *Fact Sheet: Stop and Frisk's Effect on Crime in New York City*, BRENNAN CTR. FOR JUST. (Oct. 7, 2016), <https://www.brennancenter.org/our-work/research-reports/fact-sheet-stop-and-frisks-effect-crime-new-york-city>; German Lopez, *A Conservative Columnist Admits It: "We Were Wrong About Stop-and-Frisk"*, VOX (Jan. 8, 2018), <https://www.vox.com/policy-and-politics/2018/1/8/16865730/national-review-stop-and-frisk-police>.

<sup>126</sup> Southall & Gold, *supra* note 125.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *supra* Part II.A–D.

<sup>130</sup> See *Federal Weapons Prosecutions*, *supra* note 22.

durability has been the praise from both the left and right. So, after thirty years, what have we learned that might provide lessons for the current moment? With talk of criminal justice reform from both sides of the political aisle, is there real potential to rethink federal prosecution of gun possession?

Below, I discuss recent developments from each of the three branches and what they might mean for the future.

#### A. *Congress*

Congress is unlikely to revisit anytime soon the wisdom of the statutory basis for most federal gun prosecutions, 18 U.S.C. § 922(g). There have not been any such proposals, and measures well short of repealing Section 922(g) have been met with heavy resistance.<sup>131</sup> But there are realistic prospects for reforming some of the most draconian sentencing provisions relating to gun possession.

Last year, Congress passed the First Step Act (FSA).<sup>132</sup> Unlike the previous generation of criminal legal legislation, the FSA mostly reduced severity (albeit only slightly) through provisions that impact sentencing and corrections. Examples of the sentencing reform included the retroactive application of the Fair Sentencing Act of 2010, which somewhat (though not entirely) ameliorated the 100-to-1 crack to powder cocaine sentencing disparity (making it 18-to-1),<sup>133</sup> and a broadening of the so-called Safety Valve, allowing a slight expansion for a way out of mandatory minimum sentences for people charged with drug crimes.<sup>134</sup>

With respect to firearms, there was one major reform: an amendment to part of the “stacking” provisions of 18 U.S.C. § 924(c).<sup>135</sup> Recall from the discussion above that each “second or subsequent conviction” for Section 924(c) required an additional mandatory, consecutive twenty-five years.<sup>136</sup> The Supreme Court interpreted that provision such that it did not require a previous final conviction

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<sup>131</sup> See, e.g., Tim Mack & Betsy Swan, *Why Did Ted Cruz Suddenly Get Tough on Gun Possession?*, DAILY BEAST (Oct. 26, 2015, 1:00 AM), <https://www.thedailybeast.com/why-did-ted-cruz-suddenly-get-tough-on-gun-possession>; Michelle Ye Hee Lee, *Sen. Tom Cotton’s Claim That Sentencing Reform Bill Would Release ‘Thousands of Violent Felons’*, WASH. POST (Feb. 8, 2016, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/02/08/sen-tom-cottons-claim-that-sentencing-reform-bill-would-release-thousands-of-violent-felons/>.

<sup>132</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

<sup>133</sup> See Fair Sentencing Act of 2010, Pub. L. No. 110-220, § 2, 124 Stat. 2372, 2372; U.S. SENTENCING COMM’N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT 1–2 (2019).

<sup>134</sup> First Step Act § 402.

<sup>135</sup> 18 U.S.C. § 924(c) (2012).

<sup>136</sup> *Id.*

and could include multiple counts in the same indictment.<sup>137</sup> In other words, a person charged with three counts of robbery or distributing drugs while possessing a firearm, would be sentenced to a mandatory term of fifty-five years in prison to be served consecutively to the sentence for the robbery or drug offense (and any other crime of conviction). This was so even if the person had committed all of the conduct on the same day (e.g., engaging in three separate drug transactions while possessing a gun). The First Step Act changed the “stacking” language to require that before the enhanced twenty-five-year sentence could be imposed, a prior conviction had to have “become final.”<sup>138</sup> In other words, after the amendment the person in the example above would now face a fifteen-year mandatory, consecutive sentence (five plus five plus five) rather than the fifty-five years because none of the three separate drug transactions had resulted in a previously final conviction.

The centerpiece of the corrections reform in the FSA is the establishment of an early release credit system that depends largely on two factors: a person’s risk assessment score (using an algorithmic tool that is currently being developed) and whether the offense of conviction excludes them from using the credits for early release. With respect to firearm offenses, people convicted under Section 922(g) are not excluded from using the credits for early release, but those convicted under Section 924(c) are (as are roughly half of all federally incarcerated people based on their offense of conviction). It remains to be seen how a person’s past firearm possession may impact the algorithm in a way that could deny them release credits.

The FSA is notable both for what it does and does not do in the area of firearms offenses. Earlier versions of the FSA took greater steps to ameliorate some of the harshest gun-related sentences. For instance, an earlier version of the bill which passed the Senate Judiciary Committee with bipartisan support would have made the FSA’s change to Section 924(c) retroactively applicable and would have reduced the enhanced twenty-five-year sentence to fifteen years.<sup>139</sup> That bill would have also reduced the Armed Career Criminal Act (ACCA) mandatory minimum sentence of fifteen years to ten years and made the provision retroactively applicable.<sup>140</sup> The failure of Congress to do more than alleviate one of several extreme penalty provisions for firearms offenses

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<sup>137</sup> *Deal v. United States*, 508 U.S. 129 (1993).

<sup>138</sup> First Step Act § 403.

<sup>139</sup> S. 2123, 114th Cong. § 104 (2015).

<sup>140</sup> *Id.*

suggests that meaningful legislation to reduce the scope of more typical gun possession cases is not likely anytime soon.

Perhaps the most optimistic thing that can be said about the possibility of reducing high sentences for gun possession is that some lawmakers have proposed vehicles for sentence reduction that do not exclude firearm cases. For example, several 2020 Democratic presidential candidates have called for the elimination of mandatory minimums (without excluding gun possession penalties), and Senator Corey Booker has introduced the Second Look Act that would allow judges to revisit any sentence for people who have served over ten years.<sup>141</sup> Those proposals would help ameliorate the harshest sentences for Section 924(c) and ACCA convictions, but they would likely have little impact on the vast majority of Triggerlock prosecutions, most of which do not involve mandatory minimum sentences.

### *B. The Judiciary*

As with Congress, the prospects for a fundamental reshaping of federal gun prosecutions coming from the Judiciary are dim. Early on, the Supreme Court took a pass on the most obvious avenue to restricting the prosecutions by requiring little in the way of a real connection to interstate commerce.<sup>142</sup> But like Congress, there have been incremental incursions by the Court with respect to the most draconian sentencing provisions and beyond that, a slight narrowing of the scope of Section 922(g).

Three significant Supreme Court criminal cases in the past five years deal with firearms offenses. The first, *Johnson v. United States*,<sup>143</sup> held that the so-called “residual clause” of the ACCA was void for vagueness under the Due Process Clause of the Fifth Amendment. Recall that ACCA creates a mandatory minimum sentence of fifteen years for anyone illegally possessing a firearm after having been previously convicted of three “violent” felonies.<sup>144</sup> The definition of a violent felony includes a list of enumerated offenses, an “elements clause,” and a residual clause that includes any felony that “involves conduct that presents a serious potential risk of physical injury to another.”<sup>145</sup> The initial

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<sup>141</sup> 2020: *The Democrats on Gun Control*, MARSHALL PROJECT, <https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice> (last updated Feb. 18, 2020) (listing each of the major candidates’ positions and noting Senator Booker’s Second Look proposal).

<sup>142</sup> See, e.g., *Scarborough v. United States*, 431 U.S. 563 (1977) (holding that proof that a firearm had traveled at some point in interstate commerce was sufficient connection).

<sup>143</sup> 135 S. Ct. 2551, 2562–63 (2015).

<sup>144</sup> 18 U.S.C. § 924(e) (2012).

<sup>145</sup> § 924(e)(2)(B)(i)–(ii).

question presented was whether Johnson's prior conviction for possessing a short-barreled shotgun qualified under the residual clause as a violent felony.<sup>146</sup> After granting certiorari, the Court *sua sponte* requested briefing on whether the residual clause was void for vagueness, even though the Court had quite recently (twice in the preceding eight years) considered and rejected that claim.<sup>147</sup> The Court then answered the question in the affirmative, with Justice Scalia writing for the 6-3 majority.<sup>148</sup>

And in the second case, *United States v. Davis*, the Supreme Court just last year in a 5-4 ruling extended *Johnson*'s vagueness analysis to Section 924(c)'s similarly worded residual clause, thus slightly narrowing one of the more draconian firearm penalty provisions.<sup>149</sup>

The third case, *Rehaif v. United States*, applies directly to the bulk of Triggerlock cases because it addresses the mens rea requirement of Section 922(g).<sup>150</sup> The question presented was whether the government must show that the person charged knew "both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)." The Court answered yes, overruling lower courts' near-unanimous views that the person need not know of their offending status. Although the decision adds to the government's burden and will help some defendants, it is not likely to impact the vast majority of cases in which prosecutors will have a relatively easy time proving a person's knowledge of their own prior felony conviction.

In trying to discern the Court's jurisprudence surrounding federal gun possession prosecutions, a key question is whether the Court's analysis should be taken at face value or whether, similar to some interpretations of *Lopez* from twenty-five years ago, the analysis should be seen as a reflection of the Court's view of other policy aspects of the prosecutions and sentences.<sup>151</sup> There are grounds for both views.

The face-value interpretation has plenty of support. The *Rehaif* majority opinion was grounded in straightforward statutory interpretation without broader discussion of the scope or wisdom of Triggerlock prosecutions. And several decisions following *Johnson* indicate that it was not necessarily driven

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<sup>146</sup> *Johnson*, 135 S. Ct. at 2556.

<sup>147</sup> *Id.* at 2580.

<sup>148</sup> *Id.* at 2563.

<sup>149</sup> 139 S. Ct. 2319 (2019).

<sup>150</sup> 139 S. Ct. 2191 (2019).

<sup>151</sup> *United States v. Lopez*, 514 U.S. 549 (1995); Beale, *supra* note 2.

by gun-related policy concerns. For instance, the Court applied the *Johnson* reasoning to a non-gun-related issue, the definition of crimes of violence in the immigration context in *Sessions v. Dimaya*, and it failed to extend *Johnson* to federal sentencing guidelines and the guidelines' career offender provision in *Beckles v. United States*.<sup>152</sup> To the extent *Johnson* was influenced by the Court's displeasure with federal involvement in prosecuting gun possession cases or the extreme severity of the sentences, the decisions in *Dimaya* and *Beckles* need not have been decided as they were. There were ways for the Court to distinguish *Johnson*'s analysis in the immigration context (by holding that a more relaxed civil vagueness standard applied to immigration statutes) and for it to apply the analysis in the guidelines context (by finding, as Justice Sotomayor argued in concurrence, that because sentences are "anchored" by the guidelines, they too are susceptible to vagueness challenge despite their non-binding nature).<sup>153</sup>

But the policy-influence interpretation has support as well. To begin, Justice Kavanaugh starts his dissent in *Davis* with the following:

Crime and firearms form a dangerous mix. From the 1960s through the 1980s, violent gun crime was rampant in America. The wave of violence destroyed lives and devastated communities, particularly in America's cities. Between 1963 and 1968, annual murders with firearms rose by a staggering 87 percent, and annual aggravated assaults with firearms increased by more than 230 percent.<sup>154</sup>

The opening continues with five more paragraphs detailing gun violence statistics and the rising and falling of crime rates.<sup>155</sup> "[A]fter 33 years and tens of thousands of federal prosecutions, the Court suddenly finds a key provision of § 924(c) to be unconstitutional because it is supposedly too vague."<sup>156</sup> Justice Alito is similarly animated in his dissent in *Rehaif*, stating his displeasure with narrowing Section 922(g)'s scope because "it probably does more to combat gun violence than any other federal law."<sup>157</sup> To say that the dissents in both cases were influenced by policy considerations would be a vast understatement.

But how much were the justices in the majority influenced in the same way? Was their analysis colored by the extraordinary sentences that come with ACCA and Section 924(c) and the public discourse from all sides of the political spectrum about mass incarceration? Or was it affected by studies refuting the

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<sup>152</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Beckles v. United States*, 137 S. Ct. 886 (2017).

<sup>153</sup> *Beckles*, 137 S. Ct. at 903 (2017) (Sotomayor, J., concurring).

<sup>154</sup> *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (Kavanaugh, J., dissenting).

<sup>155</sup> *Id.* at 2337 (Kavanaugh, J., dissenting).

<sup>156</sup> *Id.* (Kavanaugh, J., dissenting).

<sup>157</sup> *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019).

impact of federal firearm prosecutions on reducing crime as argued by Justices Kavanaugh and Alito? If so, the indications are less obvious than the dissents' explicitly policy-driven view.

Although the cases are significant for the reasons discussed, *Johnson*, *Davis*, and *Rehaif* are not likely to have much of an impact on the vast majority of gun possession prosecutions. They will trim back some of the worst excesses of the ACCA and Section 924(c), but they will not slow typical felon-in-possession cases. Absent an unlikely about-face on the low interstate commerce bar, the only realistic hope for the Judiciary to impact gun possession prosecutions is to address the central reason for the existence of the PSN programs: severe sentences. And that will likely need to come from the district courts employing the reasoning of Judge Weinstein in *Lawrence* discussed above.<sup>158</sup> If accepted more broadly, Judge Weinstein's conclusions would remove the primary reason for federal gun prosecutions: improved public safety from the deterrent effects of lengthy sentences.

Time will tell if federal judges begin to seriously examine the utilitarian justifications for gun possession prosecutions. If they do, the impact could be far more significant than the better known Supreme Court cases.

### C. *The Executive*

Absent dramatic and surprising action from Congress or the Judiciary, a real scaling back on federal gun prosecutions can only come from the place where they began: the Department of Justice. As noted, the prosecutions did not begin with a new law.<sup>159</sup> The ramping up in the 1990s and steady increases in the 2000s were almost entirely prosecutor-driven.<sup>160</sup> The prosecutorial initiatives were spurred by the small area of overlap in the Venn diagram of gun control politics: conservative tough-on-crime policies and efforts to stave off broader regulation crossing paths with the liberal desire to take action where possible and ward off criticism from the right about enforcing the laws already on the books.<sup>161</sup> That bipartisan agreement led to a dramatic, and largely unquestioned, increase in prison sentences for poor people of color.<sup>162</sup>

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<sup>158</sup> *Supra* notes 121–22 and accompanying text.

<sup>159</sup> *See supra* notes 2–9 and accompanying text.

<sup>160</sup> *See supra* Part I.A–B.

<sup>161</sup> *See supra* note 37 and accompanying text.

<sup>162</sup> *Supra* notes 8–10 and accompanying text.

The question now is whether the “progressive prosecutor” movement in some cities and “smart on crime” policies embraced by some conservatives will extend to federal gun possession prosecutions. Thus far, there is little to suggest they will. Even during the Obama Administration, when the number of firearm prosecutions dipped from the Bush Administration highs, they were still 51% higher than the last year of the Clinton Administration and were on an upward trajectory from 2015 to 2016.<sup>163</sup> The slight movement toward more progressive policies under the Holder- and Lynch-led Justice Departments (most notably, somewhat less frequent use of mandatory minimum sentences in drug cases and a reduction in authorized death penalty cases)<sup>164</sup> did not include a revision to Triggerlock prosecutions—or even to the “disreputable” stash-house sting cases.<sup>165</sup> Indeed, gun possession remained an exclusionary factor for the criteria announced by Attorney General Holder allowing prosecutors to charge below a mandatory minimum in certain drug cases.<sup>166</sup>

Under the Trump Administration, gun possession prosecutions have continued their rise from the end of the Obama Administration. In his first year as Attorney General, Jeff Sessions announced that he was “taking steps to strengthen the PSN program and making clear that it is a Department priority.”<sup>167</sup> In response, federal prosecutors around the country have ratcheted up gun possession prosecutions, with Fiscal Year 2019 on track to be the highest total ever, surpassing the previous high in 2004.<sup>168</sup> A recent press release from the U.S. Attorney’s Office in Chicago quoted Attorney General William Barr touting the “revitalized Project Safe Neighborhoods program” and citing an extraordinary increase in “federal firearm defendants” in the Northern District of Illinois:

According to preliminary data for the 2019 Fiscal Year, which ended September 30, 2019, the U.S. Attorney’s Office charged more federal firearm defendants than were charged in each of the prior 15 years.

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<sup>163</sup> *Federal Weapons Prosecutions*, *supra* note 22 (showing prosecutions under 18 U.S.C. § 922 were 4,461 in FY 2000 and 6,734 in FY 2016).

<sup>164</sup> See Memorandum from Eric Holder, U.S. Att’y Gen., to U.S. Att’ys and Assistant Att’y Gen. for the Criminal Div., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

<sup>165</sup> *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring) (describing stash-house stings as a “disreputable tactic”).

<sup>166</sup> Memorandum, *supra* note 164 (listing criteria to “decline to charge the quantity necessary to trigger a mandatory minimum” in drug cases and including “the defendant’s relevant conduct does not involve . . . possession of a weapon”).

<sup>167</sup> Memorandum from Jefferson Sessions, U.S. Att’y Gen., to all U.S. Att’ys, Project Safe Neighborhoods (Oct. 4, 2017).

<sup>168</sup> *Federal Weapons Prosecutions*, *supra* note 22.

The number of charged firearm defendants in Fiscal Year 2019 was 44% higher than 2018, and 60% higher than 2017, according to preliminary data.<sup>169</sup>

Looking to the future, if Trump is reelected, there is every reason to think the high numbers of prosecutions will continue. If a Democrat is elected, the picture is cloudier as none of the nominees have spoken to the issue even as they propose broad “criminal justice reform” policies generally.<sup>170</sup>

Regardless of who controls the White House, one possible source of pushback on the prosecutions are the state and local partners upon whom the PSN programs depend. As noted, the majority of federal gun possession prosecutions arise from arrests by local police.<sup>171</sup> The U.S. Attorneys’ Offices are often only aware of the cases because of their coordination with local police and prosecutors. Absent that coordination, many cases could not be charged federally. There are some signs already that local authorities are rethinking their cooperation with federal joint task forces because of federal rules that conflict with reform-minded police departments’ and district attorneys’ offices rules.<sup>172</sup> At least five cities—Atlanta, Houston, San Francisco, Portland, and St. Paul—have pulled out of joint task forces because of concerns about improper use of force, prohibitions on the use of body cameras, and a general lack of transparency in investigating troubling law enforcement incidents.<sup>173</sup> Might cooperation on gun possession cases be next?

In order for either local or federal prosecutors to scale back on gun possession prosecutions, they will need to view them (or their political base will need to insist that they view them) as needing reform in the same way that so many other areas need reform. Can criminal justice advocates on either side of the political aisle be convinced to push on this topic as strongly as they have pushed on mandatory minimums, bail, marijuana, or police violence? And if so, will those being pushed feel the need to listen? Thus far, we have not seen it.

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<sup>169</sup> Press Release, U.S. Att’y’s Office N. Dist. Ill., U.S. Attorney’s Office Announces Progress and Ongoing Strategies in Combating Violent Crime in Chicago (Oct. 24, 2019).

<sup>170</sup> See German Lopez, *Here’s Where Every 2020 Candidate Stands on Guns*, VOX, <https://www.vox.com/2019/8/7/20756698/democratic-presidential-candidates-gun-violence-mass-shootings> (last updated Dec. 5, 2019); Katie Park & Jamiles Lartey, *2020: The Democrats on Criminal Justice*, MARSHALL PROJECT, <https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice> (last updated Jan. 24, 2020).

<sup>171</sup> See *supra* note 71 and accompanying text.

<sup>172</sup> Simone Weichselbaum, *Why Some Police Departments are Leaving Federal Task Forces*, MARSHALL PROJECT (Oct. 31, 2019), <https://www.themarshallproject.org/2019/10/31/why-some-police-departments-are-leaving-federal-task-forces>.

<sup>173</sup> *Id.*

Neither Holder nor Lynch (nor any of the Obama-era U.S. Attorneys) could remotely be compared to reformist district attorneys like Larry Krasner in Philadelphia, Pennsylvania or Wesley Bell in Ferguson, Missouri.<sup>174</sup> And the criminal justice advocacy groups have not highlighted gun prosecutions as an issue.

### CONCLUSION

Guns will test the resolve of criminal justice reformers on the left and right. Those on the left will need to stop supporting severe criminal sanctions as an acceptable policy response to social ills like gun violence. It will require a recognition that mass incarceration cannot be solved by only decrying prosecutions for offenses out of favor on the left, like non-violent drug offenses. And the right will need to apply the same big government skepticism and empirical scrutiny of taxpayer expenditures even when that scrutiny is at odds with tough on crime rhetoric or the NRA's strategy of forestalling broader gun control measures. Those are steep hills for both sides to climb. Perhaps the small steps that have been taken in other areas will provide a path.

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<sup>174</sup> Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, GUARDIAN (July 23, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty>.