

GUNS AND DRUGS

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This Article argues that the increasingly prevalent critiques of the War on Drugs apply to other areas of criminal law. To highlight the broader relevance of these critiques, this Article uses as its test case the criminal regulation of gun possession. This Article identifies and distills three lines of drug war criticism and argues that they apply to possessory gun crimes in much the same way that they apply to drug crimes. Specifically, this Article focuses on: (1) race- and class-based critiques; (2) concerns about police and prosecutorial power; and (3) worries about the social and economic costs of mass incarceration. Scholars have identified structural flaws in policing, prosecuting, and sentencing in the drug context; in this Article, I highlight the ways that the same issues persist in an area—possessory gun crime—that receives much less criticism. Appreciating the broader applicability of the drug war’s critiques should lead to an examination of flaws in the criminal justice system that lessen its capacity for solving social problems.

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INTRODUCTION

On August 12, 2013, U.S. Attorney General Eric Holder, Jr. made an unexpected announcement: the Department of Justice would cease to pursue mandatory minimum sentences for certain low-level, nonviolent drug offenders.¹ Speaking at the American Bar Association’s annual meeting, Holder delivered a stinging critique of the nation’s carceral policies resulting from the War on Drugs.² All U.S. Attorneys would receive a policy memorandum setting forth a new, more lenient enforcement approach meant to remedy—or at least address—the fact that “too many Americans go to too many prisons for far too long and for no good law enforcement reason.”³

The message was hardly novel—attorneys, activists, academics, and even judges had produced a litany of critiques of the War on Drugs and mandatory minimum sentencing regimes for decades.⁴ During Holder’s

1. See Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?_r=0 [https://perma.cc/MYB7-XCKN].

2. *Id.*

3. *Id.* (quoting Eric Holder).

4. See, e.g., *United States v. Phinazee*, 515 F.3d 511, 521 (6th Cir. 2008) (Merritt, J., dissenting) (“This 25-year drug sentence is one more war-on-drugs case (among the thousands assigned to the federal courts each year by the Department of Justice) where a drug-addicted, young, black male goes to a federal prison for an unnecessary amount of time.”); *United States v. Kupa*, 976 F. Supp. 2d 417, 455 (E.D.N.Y. 2013) (“[T]he nation’s top law enforcement officer has said out loud what everyone has known for too long: [t]he drug trafficking sentences that we’ve been dishing out regularly for more than 20 years are unjust, counterproductive, fiscally irresponsible and racially discriminatory.”). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JUDGE JAMES P. GRAY, *WHY OUR DRUG LAWS FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* (2012); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006); Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT’L L.J. 167, 188–90 (2011).

tenure in office, these criticisms came from a wide range of political and ideological sources and grew more insistent, driven by concerns about criminal law's impact on the national debt and public polling suggesting greater tolerance for the use of drugs.⁵

That the nation's chief prosecutor would join this chorus was remarkable and signaled a potential watershed moment in U.S. drug policy and, perhaps more broadly, criminal justice policies. Indeed, within a year of the speech, Colorado and Washington legalized recreational marijuana use,⁶ and the Department of Justice expressed at least a tentative openness to allowing states to experiment with drug policies.⁷ In short, while concerns about drug use, addiction, and trafficking remain widespread,⁸ Holder's speech suggests an institutional willingness to reassess criminal law's role as a solution to these problems.

At the same time that politicians and legal scholars have begun to retreat from the criminal regulation of drugs, support for the criminal management of social problems has not necessarily dissipated, and the concerns articulated in the drug context have been identified sparingly in other corners of criminal law. But why is that? If we find compelling the critiques of criminal law as a blunt instrument for social change that has wrought undue collateral damage in the context of the War on Drugs, can we reconcile these concerns with a drive to criminalize other social problems? If we are uncomfortable with the amount of power that mandatory minimum sentencing schemes have concentrated in the hands of prosecutors, and we are skeptical about the ways in which prosecutors have harnessed this power, then why should we be any more comfortable with mandatory minimum sentences in other contexts? And, if widespread incarceration of particular demographic groups under criminal drug statutes

5. See, e.g., Emily Bazelon, *Rand Paul: Criminal Justice Hero*, SLATE (June 23, 2014, 6:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/rand_paul_wants_to_give_ex_felons_the_vote_they_sure_won_t_vote_republican.html [https://perma.cc/NSZ5-FSUJ]; Brian Bennett, *U.S. Can't Justify Drug War Spending, Report Says*, L.A. TIMES (June 9, 2011), <http://articles.latimes.com/2011/jun/09/world/la-fg-narco-contract-20110609> [https://perma.cc/JBN5-X9Z6].

6. See Maria L. La Ganga, *As Marijuana Attitudes Shift, This May Be a Year of Legalization*, L.A. TIMES (Jan. 19, 2014), <http://articles.latimes.com/2014/jan/19/nation/la-na-marijuana-laws-20140120> [https://perma.cc/RLE2-QS3V].

7. David Ingram, *U.S. Allows States to Legalize Recreational Marijuana Within Limits*, REUTERS (Aug. 29, 2013, 7:01 PM), <http://www.reuters.com/article/2013/08/29/us-usa-crime-marijuana-idUSBRE97S0YW20130829> (quoting Ethan Nadelmann, executive director of the Drug Policy Alliance, as saying, "I was expecting a yellow light from the White House . . . [b]ut this light looks a lot more green-ish than I had hoped. The White House is basically saying to Washington and Colorado: Proceed with caution") [https://perma.cc/8S9K-9MSD].

8. See, e.g., Tony Dokoupil, *Treatment or Jail: Patrick Kennedy Wages Fierce Anti-Pot Crusade*, NBC NEWS (Feb. 17, 2014, 1:48 PM), <http://www.nbcnews.com/storyline/legal-pot/treatment-or-jail-patrick-kennedy-wages-fierce-anti-pot-crusade-n22256> [https://perma.cc/Y8PQ-F9HF]; Katharine Q. Seelye, *Heroin in New England, More Abundant and Deadly*, N.Y. TIMES (July 18, 2013), http://www.nytimes.com/2013/07/19/us/heroin-in-new-england-more-abundant-and-deadly.html?pagewanted=all&_r=0 [https://perma.cc/ZX59-9YPL].

is a cause for public concern, why should widespread incarceration of the same groups under other criminal statutes be accepted without inquiry?

In an effort to answer these questions, this Article considers whether the critiques of the War on Drugs apply to other debates about the structure of criminal law. In light of the trenchant criticisms of the War on Drugs and their tentative acceptance by the legal and political mainstream, this Article asks how broadly these criticisms cut and how widely these lessons from the War on Drugs should be applied to pressing debates about the criminal justice system. I argue that the problems with criminal regulation identified by drug war critics should serve as a taxonomy of collateral costs, a rubric against which to weigh the benefits of other criminal social reform projects. Put simply, the critiques of the War on Drugs are not—and should not be treated as—exceptional. Rather, I argue that they stand as powerful critiques of governing via criminal law.⁹

To this end, this Article distills the drug war criticisms into three general lines of attack: (1) the disparate impact of criminalization and criminal enforcement on low-income communities of color; (2) the expansion in police powers and prosecutorial discretion that drug statutes and judicial opinions have facilitated; and (3) the social and economic costs that have resulted from the mass incarceration of drug offenders. While certainly not exhaustive, this tripartite framing focuses the anti-drug war literature to help define three specific sets of costs that might be studied and weighed against the potential benefits of using criminal law to combat social problems.

As a means of testing this rubric and of applying the lessons from the War on Drugs, this Article focuses on another area in which criminal law has become a regulatory paradigm of choice and in which many of the same pathologies appear: gun possession. Concurrent with the growing criticism of the drug war, gun possession has remained a target at the forefront of the push to criminalize dangerous markets and dangerous behavior. My aim is not to suggest an apples-to-apples comparison between guns and drugs. Rather, it is to suggest that the legal treatment of gun possession is embedded in the same structure of criminal law and criminal law enforcement that has been critiqued in the drug context. I argue, therefore, that applying the drug war's critical rubric to gun possession highlights similar pathologies and speaks to broader flaws in the structure of the criminal justice system.

At first blush, the legal treatment of, and political attitudes toward, gun possession and drugs may appear wholly distinct and unrelated. However, this Article seeks to highlight the ways in which the criminal regulation of gun possession should be viewed in the context of the trenchant critiques leveled against the failed War on Drugs.¹⁰ Both criminalization projects

9. On "governing through crime," see generally SIMON, *supra* note 4.

10. Here and throughout, I highlight that this Article is concerned with *possessory gun offenses* rather than *crimes involving gun use*. That is, my focus is on *nonviolent, possessory* gun crimes where the law criminalizes possession of the hazardous item rather than the

have grown out of public concern about social scourges that have wreaked havoc in communities of color and lower-income urban communities, but both have also contributed to the mass incarceration of members of those same communities.¹¹ Additionally, the two legal areas are deeply intertwined—drug convictions often serve as predicates for a range of felon-in-possession gun crimes, and policing of guns and drugs are often closely tied. This Article therefore asks a question that is too often neglected both in the legal and political treatment of gun control: If further regulation is indeed desirable, should such regulation come in the form of criminal sanctions for possession and, if so, why?¹² Further, if criminal law is, or should be, the operative regulatory space through which to control gun possession, how might we avoid criminal statutes and enforcement mechanisms that mirror those deployed in the drug context?

My goal is not to stake out new ground in the rich and varied literature on the normative desirability or the social costs of gun ownership.¹³ Indeed, the tragic costs of gun violence are what make gun possession such a hard case. Nor does this Article seek to intrude on the fraught discourse surrounding the Second Amendment's proper interpretation. Rather, I hope to examine the social, economic, and political stakes of using criminal law as the regulatory paradigm through which to address public concerns about the ubiquity of guns and gun violence in U.S. society. Much has been said and written about whether gun ownership should be regulated and, if so, how heavily it should be regulated.¹⁴ However, commentators and legal scholars have devoted surprisingly little attention to the *criminal* nature of gun regulation.¹⁵ For example, despite Holder's public criticism of

conduct involving the hazardous item. While possession crimes as a specific type of offense have received sparse scholarly treatment, Markus Dubber has noted their role as a staple in contemporary U.S. policing and the troubling function they serve as a modern analog to vagrancy laws—vehicles to expand police power and to round up “undesirables.” Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 832 (2001).

11. See Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 845 (2014); see also *infra* notes 121–40 and accompanying text.

12. *But cf.* Jonathan Simon, *Guns, Crime, and Governance*, 39 HOUS. L. REV. 133, 145 (2002) (“In place of a debate about gun control versus rights, I want to substitute a different kind of debate about the effects of governing American society through crime.”).

13. See generally GUNS, CRIME, AND PUNISHMENT IN AMERICA (Bernard E. Harcourt ed., 2003); BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY (2006); JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed. 2010); MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011).

14. See generally *supra* note 13. See LOTT, *supra* note 13, at 10–11, 15–16, 37–100; TUSHNET, *supra* note 13, at 76–77, 85–95; WINKLER, *supra* note 13, at 9–10.

15. *But cf.* HARCOURT, *supra* note 13, at 233–35 (discussing the lack of a one-size-fits-all policy solution to prevent juvenile gun offenses); Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL'Y REV. ONLINE 1, 17 (2008); Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437 (2004); Bryce Covert, *Race, Gun Control and Unintended Consequences*, NATION (Jan. 15, 2013, 2:33 PM),

mandatory minimum sentences in the drug context, little has been said about similar sentences for pure possessory offenses in the gun context.¹⁶

This Article seeks to problematize the current and proposed criminal framework for managing gun possession. By looking at the growing literature on the damage that the War on Drugs has wrought,¹⁷ I argue for a critical reexamination of the way in which criminal law is used to regulate firearm possession. More broadly, by focusing on the “hard case” of gun possession, I argue that the costs that the drug war has revealed should be a central component of ongoing debates about the proper scope and structure of criminal law.

To be clear, my claim is not that these critiques should operate as a test for when to criminalize and when to decriminalize. That the critiques apply to gun possession (or, perhaps, to a much wider range of offenses) need not compel a decriminalization conclusion.¹⁸ Rather—as in the case of crack cocaine discussed in Part I.A—addressing these critiques may require a reshaping of both sentencing and enforcement regimes in order to confront and mitigate the distributional and collateral consequences of criminalization.

In addressing the criminal treatment of gun possession through the lens of the War on Drugs, this Article proceeds in three parts. The first part lays out three principal angles of criticism that have come to define the anti-drug war scholarship. Specifically, this part articulates: (1) race- and class-based concerns about selective enforcement and disparate impact; (2) the consolidation and accumulation of power and discretion in the hands of law enforcement officers and prosecutors; and (3) humanitarian, democratic, and fiscal issues raised by mass incarceration.

Next, the second part examines how the three critiques apply to the criminal regulation of gun possession. This is a hard case—guns bear with them a set of deeply ingrained ideological priors and are inextricable from a highly fraught range of political debates. Further, to some readers, gun possession may come too close to violent crime, such that any benefits of criminal regulation necessarily outweigh the high human costs.

<http://www.thenation.com/blog/172225/race-gun-control-and-unintended-consequences#>
[<https://perma.cc/Z2PF-VBCA>].

16. *But see* Maya Schenwar, Opinion, *Reduce Gun Penalties*, N.Y. TIMES (Mar. 14, 2014), <http://www.nytimes.com/2014/03/15/opinion/reduce-gun-penalties.html> (“Opposition to mandatory sentencing for drug-related offenses is steadily growing. Now we must widen our criticism to encompass mandatory minimums for firearms.”) [<https://perma.cc/ECM8-WZ5X>]. Douglas Berman’s work in this area has been a notable exception. *See, e.g., Sixth Circuit Panel Finds Mandatory 15-Year Imprisonment Term Not Grossly Disproportionate for Possession of Shotgun Shells*, SENT’G L. & POL’Y (Sept. 11, 2014), http://sentencing.typepad.com/sentencing_law_and_policy/2014/09/sixth-circuit-panel-finds-mandatory-15-year-imprisonment-term-not-grossly-disproportionate-for-posse.html [<https://perma.cc/DX3N-VWZ6>].

17. ALEXANDER, *supra* note 4; STUNTZ, *supra* note 4; Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1047 (2010).

18. Indeed, while marijuana decriminalization has gained substantial support, scholars and politicians have not necessarily voiced support for decriminalizing a wide range of nonmarijuana offenses.

Nevertheless, this part argues that criminal treatment of gun possession bears some important similarities to controversial components of the War on Drugs. Therefore, this part focuses on the ways that the three lines of the drug war critique apply to the criminal regulation of gun possession.

Finally, the third part addresses the potential limitations of the critiques and also the problem of speaking monolithically of “guns” and “drugs” as generic categories, but concludes that criminal gun possession statutes exacerbate the pathologies identified in the context of the War on Drugs. This part, therefore, asks what such a conclusion might mean as a policy matter and how it might lead us to rethink the way that criminal law is used in this area. By applying the lessons from the War on Drugs, we should think more carefully about the proper scope or function of using criminal law as the operative regulatory paradigm to address social problems. If criminal statutes are the best (or the least worst) available means of regulating gun possession, we must address their structure, lest we repeat or redirect the negative collateral effects that have come to define the failed War on Drugs.

I. THE WAR ON DRUGS

Many scholars have chronicled the War on Drugs and the searing imprint that it has left on the U.S. criminal justice system and on American society.¹⁹ Therefore, this part will not retread this well-worn ground to provide another overview of U.S. drug policy. Instead, this part sets up the common critiques of the War on Drugs as a frame through which to assess the costs, benefits, and normative desirability of criminal paradigms for regulating social problems by outlining three general avenues of critique leveled at the War on Drugs: the racial and socioeconomic discrimination, the metastasizing of police and prosecutorial power, and the cost (both in terms of human and economic capital) of mass incarceration.

A. Demographic Critiques

Critics have attacked the War on Drugs from numerous angles, but perhaps no critique has captured the public imagination and has prompted as much damning scholarship as the disproportionate impact of criminal drug policies on low-income communities of color. From articles,²⁰ to

19. See, e.g., ALEXANDER, *supra* note 4; EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* (1996); RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 20–60* (2004); DOUGLAS VALENTINE, *THE STRENGTH OF THE WOLF: THE SECRET HISTORY OF AMERICA’S WAR ON DRUGS* (2004); Melody M. Heaps & Dr. James A. Schwartz, *Toward a Rational Drug Policy: Setting New Priorities*, 1994 U. CHI. LEGAL F. 175, 179–91 (1994); Hon. Robert W. Sweet & Edward A. Harris, *Just and Unjust Wars: The War on the War on Drugs—Some Moral and Constitutional Dimensions of the War on Drugs*, 87 NW. U. L. REV. 1302 (1993) (reviewing THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992)).

20. See, e.g., Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 830 (2013); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257 (2009); John A. Powell &

books,²¹ to judicial opinions,²² the trope of the drug war as a racially disparate institution has become a staple of legal and social discourse. To these critics, the War on Drugs stands as an enterprise that has further segregated U.S. society and created a demographically distinct criminal underclass. Notably, the race-based critique of the War on Drugs has not been confined to academia or to the realm of progressive criminal law scholars. Concern for racial equality under the (criminal) law explicitly animated Holder's statements about the way that prosecutors were going about handling drug cases.²³ That is, a belief that the War on Drugs falls afoul of racial equality principles is increasingly a mainstream view.

Race-based criticisms have frequently focused on an area that provides an instructive frame to discuss gun criminalization's costs: the disparate enforcement of facially neutral drug laws against black defendants. This disparate enforcement has led to higher arrests of black defendants than white defendants.²⁴ Drug laws do not explicitly differentiate between defendants of different races or make any reference to race as a factor in culpability or sentencing. Nevertheless, the enforcement of drug laws has helped shape a criminal justice system in which people of color are overrepresented both in arrest pools and prison populations.²⁵

The disparate impact of drug war policies on communities of color, coupled with a broader legal system hostile to convicted criminals (and even arrestees) has led Michelle Alexander and other scholars to categorize the War on Drugs as a "New Jim Crow."²⁶ As of 2000, "African

Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U. CAL. DAVIS L. REV. 557 (1991).

21. See, e.g., ALEXANDER, *supra* note 4; DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* (2007).

22. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) ("[T]he Commission stated that the crack/powder sentencing differential 'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race.' Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed 'primarily upon black offenders.'" (citations omitted)); *United States v. Brewer*, 624 F.3d 900, 912 n.14 (8th Cir. 2010) ("The disproportionate impact of the crack cocaine guidelines on minorities should concern every federal judge, and provide another reason why guideline sentences for crack cocaine offenders warrant special attention."); *United States v. Smith*, 73 F.3d 1414, 1422 n.3 (6th Cir. 1996) (Jones, J., concurring) (likening the racial disparity of crack cocaine sentencing to the internment of Japanese Americans during World War II).

23. See Dan Merica & Evan Perez, *Eric Holder Seeks to Cut Mandatory Minimum Drug Sentences*, CNN (Aug. 12, 2013, 7:03 PM), <http://www.cnn.com/2013/08/12/politics/holder-mandatory-minimums/> ("Holder embraced steps to address 'shameful' racial disparities in sentencing . . .") [<https://perma.cc/3JXK-H2U3>].

24. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 60 (2014).

25. See, e.g., ALEXANDER, *supra* note 4, at 96–97; NAT'L RESEARCH COUNCIL, *supra* note 24, at 60; Butler, *supra* note 17, at 1048.

26. See, e.g., ALEXANDER, *supra* note 4; Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 718 (2000); John Dewar Gleissner, *How to Create American Manufacturing Jobs*, 9 TENN. J.L. & POL'Y 166, 193–96 (2013); Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and*

Americans constituted 62.7% of all drug offenders admitted to state prison, which means that, relative to population, they were admitted at 13.4 times the rate of white Americans.”²⁷ As of 2004, three quarters of those imprisoned for drug offenses were black or Latino.²⁸ “In 2006, one in nine young black men was in prison, and black men were eight times more likely to be in jail or prison than white men.”²⁹ Disturbingly, these disparities in enforcement are not necessarily reflective of similar disparities in rates of drug use or even drug dealing.³⁰ Indeed, studies suggest that rates of drug use—particularly among school-age users—were substantially higher among whites than in black or Latino populations.³¹ That is, evidence suggests that illicit drug use or possession is not an epidemic confined to communities of color; rather, *arrests for illicit drug use* is an epidemic largely focused in communities of color.³²

Even if disparities in enforcement do not demonstrate racial animus, at least certain substantive components of the drug war’s legal architecture are based in racialized fears.³³ Perhaps no component of the War on Drugs has served as a greater target for these race-based arguments than the longtime, statutory use of a 100:1 crack-to-powder cocaine sentencing scheme.³⁴ Passed in 1986, the Anti-Drug Abuse Act³⁵ imposed mandatory minimum sentences based on calculations that equated one gram of crack cocaine

Destined to Reinforce Targeted Mass Incarceration and Social Control, 11 HASTINGS RACE & POVERTY L.J. 1, 6 (2014).

27. Kane v. Winn, 319 F. Supp. 2d 162, 179 n.27 (D. Mass. 2004).

28. See ALEXANDER, *supra* note 4, at 96–97 (citing MARC MAUER AND RYAN S. KING, SCHOOLS AND PRISONS: FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION* 3 (2004)); see also Butler, *supra* note 17, at 1048.

29. Butler, *supra* note 17, at 1047 (footnotes omitted).

30. See ALEXANDER, *supra* note 4, at 96–97.

31. *Id.* at 97.

32. See NAT’L RESEARCH COUNCIL, *supra* note 24, at 3; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1046 (2010) (“A critical fact often lost in the public debate over the propriety of the nation’s ‘war on drugs’ is that the available statistical data suggests that Whites, Latina/os, Blacks, and Asian-Americans have roughly similar rates of illicit drug use. Nonetheless, the ‘war on drugs’ as it has been enforced has had devastating impacts on minority communities across the United States.” (footnotes omitted)).

33. *But cf.* Dorsey v. United States, 132 S. Ct. 2321, 2344 (2012) (“Although many observers viewed the 100-to-1 crack-to-powder ratio under the prior law as having a racially disparate impact . . . only intentional discrimination may violate the equal protection component of the Fifth Amendment’s Due Process Clause.” (citations omitted)). See generally Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws*, 50 HOW. L.J. 345, 346 (2007).

34. See, e.g., John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 381 (2013); Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613 (2000); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1254–56 (1996); cf. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998) (arguing that the disparate treatment of crack and powder cocaine owes more to class bias than to racism).

35. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

with one hundred grams of powder cocaine.³⁶ The resultant sentencing scheme punished crack cocaine possession (a crime more often associated with lower-income black defendants) vastly more harshly than possession of its powder form (a crime less associated with low-income black defendants).³⁷ Congress appeared to have distinguished between a “black crime” and a “white crime” and chosen to punish the former with much greater severity. While still serving as a district court judge in the District of Columbia, Judge Louis F. Oberdorfer went so far as to describe “[t]he discrepancy in the treatment of those who traffic in crack cocaine versus powder cocaine traffickers [as] the most serious vice in the [Sentencing] Guidelines today.”³⁸

After decades of criticism, Congress passed the Fair Sentencing Act of 2010³⁹ (FSA), which finally addressed the disparity. In passing the FSA, Congress explicitly acted “to ‘restore fairness to Federal cocaine sentencing’ laws that had unfairly impacted blacks for almost 25 years.”⁴⁰ Subsequent judicial applications and interpretations of the FSA have highlighted this troubled racial history.⁴¹ For example, citing William Stuntz’s categorical critique of U.S. drug policy, a divided panel of the Sixth Circuit in *United States v. Blewett*⁴² went so far as to hold that “the

36. See, e.g., 21 U.S.C. § 841(b)(1)(A)(ii)–(iii) (2012); *id.* § 841(b)(1)(B)(ii)–(iii). See generally Conyers, Jr., *supra* note 34, at 381–82.

37. See Judge Louis F. Oberdorfer, Lecture, *Mandatory Sentencing: One Judge’s Perspective—2002*, 40 AM. CRIM. L. REV. 11, 16–17 (2003).

38. *Id.* at 16. Introducing an analogy even more pointed than Alexander’s “The New Jim Crow,” Judge Oberdorfer begins his lecture on the flawed drug sentencing regime with a comparison to the Fugitive Slave Law. See Oberdorfer, *supra* note 37, at 12–13.

39. Pub. L. No. 111-220, 124 Stat. 2372 (2010).

40. *United States v. Blewett*, 719 F.3d 482, 484 (6th Cir. 2013), *vacated*, 746 F.3d 647 (6th Cir. 2013).

41. See, e.g., *id.*; *United States v. Black*, 737 F.3d 280, 287–88 (4th Cir. 2013) (King, J., concurring) (“Prior to the FSA, Congress’s insistence on unduly harsh mandatory minimum sentences for nonviolent crack-cocaine offenders—even after such sentences were widely acknowledged to be racially discriminatory—was a grim misfire in the war on drugs. . . . There is nothing fair about the ongoing plight of thousands of crack-cocaine offenders who yet languish in our prison system, serving sentences based largely on race-based misperceptions, rather than on the gravity of their criminal conduct.”); *United States v. Smith*, 501 F. App’x 920, 923–24 (11th Cir. 2012) (“The FSA unambiguously reflects Congress’s judgment that the crack-to-powder ratios . . . continued to overstate the seriousness of crack cocaine offenses; continued to detract from the sentencing goal of punishing major drug traffickers more seriously than low-level dealers; and continued to undermine public confidence in the criminal justice system in light of racial disparities.”); *United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (“[W]e believe that the result that we reach in this case—affirming a sentence of sixty months’ imprisonment for a minor drug offense under a law that Congress appears to have concluded was groundless and racially discriminatory—subverts justice and erodes the legitimacy of the criminal justice system. . . . [T]he district judge understandably declared [that the result] made his ‘stomach hurt[]’ because it was ‘disproportionate [with respect to] African Americans’ and ‘wrong from a moral sense.’” (alteration in original) (footnotes omitted)). *But see* *United States v. Rawlinson*, 433 F. App’x 99, 104 (3d Cir. 2011) (“[T]here is no evidence whatsoever that suggests that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission.” (quoting *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992))).

42. 719 F.3d 482 (6th Cir. 2013).

federal judicial perpetuation of the racially discriminatory mandatory minimum crack sentences for those defendants sentenced under the old crack sentencing law . . . would violate the Equal Protection Clause.”⁴³

While I will focus more extensively on concerns about police tactics in the next section,⁴⁴ it is also worth noting the significant role that racialized policing plays in this line of critique. As in the context of the crack/powder sentencing disparity, allegations of racial profiling largely rest on the view that law enforcement has internalized racialized assumptions about minority criminality and then allowed these fears to guide policy and practice.⁴⁵ This criticism of racialized policing in the context of the War on Drugs has focused both on traffic stops (the phenomenon of stops for “driving while black”)⁴⁶ and the street level practice of police “stops-and-frisks.”⁴⁷ Drawing from empirical studies, a range of scholars have highlighted the racially disparate impact of traffic stops and police interactions on nonwhite individuals.⁴⁸

Importantly, the critiques rooted in a theory of disparate impact generally do not rest on the innocence of the criminal defendants or arrestees.⁴⁹ Men and women of color use drugs and take part in all aspects of the illegal drug trade.⁵⁰ But so do white men and women.⁵¹ To proponents of race-based critiques, the enforcement mechanisms of the War on Drugs have grown dangerously preoccupied with the minority offenders.⁵² Instead of a system designed and implemented to control (or even eradicate) drugs and drug use, the criminal regulation of drugs targets one subset of potential

43. *Id.* at 484.

44. *See infra* Part I.B.

45. *See, e.g.*, Glasser, *supra* note 26, at 712; Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 154–55 (2014); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 306–07 (2001).

46. *See, e.g.*, *Smith v. City of Gretna Police Dep’t*, 175 F. Supp. 2d 870, 874 (E.D. La. 2001) (“The Court finds it plausible that the reason why Defendant was *actually* pulled over was that he was a black man driving an expensive new car—the phenomenon known as ‘driving while black.’”); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431–32 (1997); David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545, 558–59 (1997).

47. *See, e.g.*, Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1557 (2014).

48. *See, e.g.*, Glasser, *supra* note 26, at 711–12; Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 660 (2002).

49. *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 572 (2003) (“[P]olicy analyses should consider the race-related consequences of the drug war, without regard to whether officers engage in racial profiling. Given the high level of incarceration of disadvantaged racial minorities, those consequences would remain especially significant even if not one innocent person were investigated.”).

50. *See supra* notes 30–31 and accompanying text.

51. *See supra* notes 30–31 and accompanying text.

52. *See generally* Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 914 (1997).

offenders. The resultant legal regime has therefore become less a mechanism for social reform than a means of criminal social control.⁵³

B. Civil Libertarian Concerns

Police practices in the War on Drugs raise questions about the racial politics of criminal enforcement. But they also have spawned a broader line of critique rooted in a set of concerns about an expansive police or prosecutorial apparatus.⁵⁴ For want of a better way to categorize these criticisms, I term them “civil libertarian concerns.” This set of critiques focuses on two interrelated elements of the criminal justice system as it has evolved over the course of the War on Drugs: (1) the growth of power granted to law enforcement officers to combat the specter of a violent and omnipresent criminal drug underworld; and (2) the concentration of power and discretion in the hands of prosecutors via the rise of mandatory minimum prison sentencing schemes and plea bargaining.

1. Police Power

First, scholars and commentators have identified the War on Drugs as a catalyst for the rapid expansion of police power over the last few decades.⁵⁵ Ultimately complemented by the strong statist policies of the War on Terror,⁵⁶ the War on Drugs has cemented the public conception and legal status of a strong police force as an essential component of a functional modern state.⁵⁷

53. See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 191–92 (2001); SIMON, *supra* note 4, at 6.

54. See, e.g., ALEXANDER, *supra* note 4, at 73–79 (describing police militarization and the rise of asset forfeiture); RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 242–308 (2013) (tying the rise in police militarization to the War on Drugs); David Boaz, *A Drug-Free America—or a Free America?*, 24 U.C. DAVIS L. REV. 617, 626 (1991) (emphasizing the “war” framing of U.S. drug policy); Peter J. Boettke et al., *Keep Off the Grass: The Economics of Prohibition and U.S. Drug Policy*, 91 OR. L. REV. 1069, 1084–90 (2013) (describing the rise of police militarization within the context of the drug war); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 893–94 (2002) (discussing police power as a component of the drug war); Finkelman, *supra* note 4, at 1390 (same); Powell & Hershenov, *supra* note 20, at 572–75; Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 473–75 (2010).

55. See, e.g., ALEXANDER, *supra* note 4, at 73–79; BALKO, *supra* note 54, at 243–48; Finkelman, *supra* note 4, at 1390.

56. See Aziz Z. Huq & Christopher Muller, *The War on Crime As Precursor to the War on Terror*, 36 INT’L J. L. CRIME & JUST. 215, 215–16 (2008); cf. Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1670–73 (2010) (describing the role of “wartime” as a concept in legal thought and lawmaking).

57. See James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 374 (2009); cf. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44, 147–49 (2011) (arguing that “neoliberal penalty”—an interdependence between laissez-faire economic policies and harsh punitive measures—has become a hallmark of post-industrial capitalist states).

Through a range of statutory mechanisms beginning in the 1980s, the federal government armed and militarized state law enforcement to fight drug use and distribution.⁵⁸ The Military Cooperation with Civilian Law Enforcement Officials Act⁵⁹ allowed the Department of Defense (DOD) to provide material support (both intelligence and equipment) to state antidrug initiatives.⁶⁰ Similarly, in 1986, Congress revamped a federal aid program that provided large financial grants to state law enforcement agencies to aid in their antidrug efforts.⁶¹ The Edward Byrne Memorial State and Local Law Enforcement Assistance Program (or, commonly, “Byrne grants”) “encourage[d] multi-jurisdictional and multi-State efforts to support national drug control policies.”⁶² On top of these measures, in 1997, Congress enacted Program 1033, which authorized the DOD to transfer surplus military equipment to state and local law enforcement.⁶³ As critics have noted, grants from the Department of Homeland Security have allowed local police officers to wage the War on Drugs with weapons purchased and manufactured for international combat and national defense.⁶⁴ That is, the militarization of police during the War on Drugs has created a domestic space of conflict. Viewed through this frame, some aspects of law enforcement look less like a preservation of public safety and more like an all-out battle between police and civilians.

Not only have drug war critics focused on the empowerment of police via legislative and executive militarization, but they also have devoted a great deal of attention to the courts’ solicitude for police officers in their antidrug efforts, often at the expense of constitutional rights and individual liberties.⁶⁵ As one set of critics puts it:

Perhaps the judiciary’s single most destructive contribution to the drug war has been its creation of the “drug exception to the Constitution.” In their eagerness to combat drugs, the courts have departed from longstanding fourth, fifth, and fourteenth amendment protections. As a result, they have upheld (1) vague and over-inclusive search warrants; (2) searches conducted in the absence of warrants and without either probable cause or individualized suspicion; (3) invasive hi-tech surveillance . . . ; and (4) drug courier profiles, often including racial and ethnic

58. See Boettke et al., *supra* note 54, at 1086–87.

59. 10 U.S.C. §§ 371–382 (2012).

60. See *id.*; Boettke et al., *supra* note 54, at 1086–87.

61. 42 U.S.C. §§ 3750–3755 (2012); see also Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42 (1998); Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 813 (2004).

62. TERENCE DUNWORTH, PETER HAYNES & AARON J. SAIGER, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, NATIONAL ASSESSMENT OF THE BYRNE FORMULA GRANT PROGRAM (1997), <http://abtassociates.com/reports/byrne-formula.pdf> [https://perma.cc/W6XB-6GSE].

63. See Boettke et al., *supra* note 54, at 1087.

64. See *id.*

65. See, e.g., Boaz, *supra* note 54, at 619; Finkelman, *supra* note 4, at 1390; Erik Luna, Commentary, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 757–68 (2002); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 240; Wisotsky, *supra* note 54, at 890.

characteristics, leading to departures from the requirements of individualized suspicion, to name but a few.⁶⁶

According to this view, not only have legislators and the executive armed police for a war against the citizenry, but the courts also have stripped civilians of many protections against police intrusions in the drug context.

Although the Supreme Court has mostly allowed the expansion of police powers,⁶⁷ individual justices and judges also have leveled critiques of drug jurisprudence from the bench.⁶⁸ In his dissent in *California v. Acevedo*,⁶⁹ Justice Stevens expressed his displeasure with the Court's complicity in overaggressive police enforcement of drug policies.⁷⁰ Noting that "the flow of narcotics cases through the courts has steadily and dramatically increased," Justice Stevens concluded that "[n]o impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."⁷¹ Similarly, in dissenting from the majority's narrow reading of the Fourth Amendment in *Skinner v. Railway Labor Executives' Association*,⁷² Justice Thurgood Marshall declared that "[t]here is no drug exception to the Constitution."⁷³

Indeed, this sense that the policy concerns of the War on Drugs have trumped other sources of legal and constitutional authority has retained a degree of clout in certain Fourth Amendment contexts and has recurred in prodefendant rulings and dissents. As the Sixth Circuit stated in *United States v. Radka*⁷⁴:

Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time, our Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society The drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the "War on Drugs."⁷⁵

66. Powell & Hershenov, *supra* note 20, at 578–79 (footnotes omitted).

67. *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 580 (1991); *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

68. *See, e.g.*, *United States v. One Lot of U.S. Currency Totaling \$14,665*, 33 F. Supp. 2d 47, 49 (D. Mass. 1998) ("Neither the courts nor Congress are empowered to suspend the Constitution so that the government may more effectively wage the war on drugs.").

69. 500 U.S. 565 (1991).

70. *Id.* at 601 (Stevens, J., dissenting).

71. *Id.*

72. 489 U.S. 602 (1989).

73. *Id.* at 641 (Marshall, J., dissenting).

74. 904 F.2d 357 (6th Cir. 1990).

75. *Id.* at 361; *see also* *United States v. Taylor*, 956 F.2d 572, 584 (6th Cir. 1992) ("We recognize that our government is in the midst of waging a 'war on drugs.' Yet, the valiant effort of our law enforcement officers to rid society of the drug scourge cannot be done in total disregard of an individual's constitutional rights."); *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991).

In short, much as commentators have focused on the deterioration of civil liberties in the context of the War on Terror, scholars and courts have identified the War on Drugs as a dangerous “state of exception” in which state authority and official force operate largely unchecked.⁷⁶

2. Prosecutorial Discretion

Moving beyond the massive increase in police power that has accompanied the War on Drugs, critics have also focused on the war’s role in expanding the discretion granted to prosecutors.⁷⁷ Combined with the rise of mandatory minimum prison sentences, the proliferation of plea bargaining has helped shape a criminal justice system in which prosecutors are able to control case outcomes with limited judicial intervention.⁷⁸

Former federal prosecutors Robert Morvillo and Barry Bohrer claim that the rise of mandatory minimum sentences in the drug context has “change[d] . . . the balance of power between the prosecution and the defense” and “given prosecutors greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences.”⁷⁹ Similarly, federal defender turned law professor Ian Weinstein asserts that “the vast increase in prosecutorial power to control narcotics sentences is at the core of the problems with federal narcotics sentencing.”⁸⁰ Notably, these critiques have gained steam among judges who have grown more active in criticizing the power of prosecutors and the role of mandatory minimum sentences and plea bargaining in the drug context.⁸¹ Judge Jed Rakoff, for example, has decried the use of mandatory minimum statutes passed during the War on Drugs as “weapons [used by prosecutors] to bludgeon defendants into effectively coerced plea

76. See, e.g., Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 722 (2006). Cf. generally GEORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005) (describing the “state of exception” as an exception from restrictions on state violence or sovereignty justified by a state of crisis).

77. See, e.g., Davis, *supra* note 20, at 821 (“Disproportionate offending in certain categories of crimes . . . , racial profiling, the War on Drugs, and certain sentencing laws and policies all contribute to racial disparity in the criminal justice system. The role that prosecutors play in the equation is unique because of their extraordinary power and discretion. The impact of their discretion, power, and decision-making cannot be overstated.”); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 745 (1991).

78. See, e.g., Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003).

79. Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137–38 (1995).

80. Weinstein, *supra* note 78, at 88.

81. See, e.g., *United States v. Phinazee*, 515 F.3d 511, 527 (6th Cir. 2008) (Merritt J., dissenting); *United States v. Spencer*, 817 F. Supp. 176, 183 (D.D.C. 1993), *aff’d and remanded*, 25 F.3d 1105 (D.C. Cir. 1994); *State v. Rummer*, 432 S.E.2d 39, 67 (W. Va. 1993) (Neely, J., dissenting); Eli Saslow, *Against His Better Judgment*, WASH. POST (June 6, 2015), <http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/> (noting U.S. District Court Judge Mark Bennett’s lamentation of the mandatory minimum of ten years he was forced to hand down for a drug crime) [<https://perma.cc/FW4W-M7UQ>].

bargains.”⁸² Put simply, those tasked with managing the daily functioning of criminal courts have come to recognize that the War on Drugs has helped cement prosecutors as the most powerful actors in the criminal justice system.

C. *Opposition to Mass Incarceration*

The final critical intervention against the War on Drugs that I identify finds roots in a general hostility to U.S. carceral policy. For those skeptical about the benefits of incarceration as a normatively desirable means of punishing offenders or who simply are concerned about the costs of incarceration, a criminal regulatory project predicated on wide-scale imprisonment cannot be appealing. While some scholars have questioned the significance of drug criminalization to rising prison populations,⁸³ criminal law scholars and criminologists generally have drawn a strong link between the War on Drugs and mass incarceration.⁸⁴ The 2014 National Academy of Sciences report on mass incarceration identified the War on Drugs as “an important contributor to higher U.S. rates of incarceration.”⁸⁵ As Stuntz puts it, while drugs were not the “primary cause” of ballooning incarceration rates, they were a “significant factor in exploding prison populations”⁸⁶ Critiques of the War on Drugs, based on its role in creating our current system of mass incarceration, tend to sound in one of two registers: (1) purely economic, focusing on the costs to taxpayers of maintaining such an expansive criminal justice system and such a massive prison system; and (2) social welfarist, focusing on the social harms faced by individuals and communities affected by the prison system.

As to the purely economic perspective, critics have argued that the expansive carceral state simply is too expensive.⁸⁷ In the wake of the

82. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/29GW-2E4U>].

83. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 49–53 (2012) (arguing that violent crime, rather than drug crime, is responsible for a large portion of the U.S. carceral population); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1090–06 (2013) (critiquing the conventional wisdom as placing too much weight on the War on Drugs as the primary driver of mass incarceration).

84. See, e.g., Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 1 (2015) (“Drug offenders make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the federal Bureau of Prisons, so they are in many ways the key to the size and nature of the federal prison population.” (footnote omitted)).

85. NAT’L RESEARCH COUNCIL, *supra* note 24, at 118.

86. STUNTZ, *supra* note 4, at 47.

87. See, e.g., Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1, 2 (2010); Gottschalk, *supra* note 4, at 1701; Michelle Alexander, *Obama’s Drug War*, NATION (Dec. 9, 2010), <http://www.thenation.com/article/156997/obamas-drug-war#> [<https://perma.cc/6GNP-LVLE>]; Andrew Cohen, *The Next Phase of the War on Drugs*, BRENNAN CTR. (Aug. 14, 2013), <http://www.brennancenter.org/analysis/next-phase-war-drugs> [<https://perma.cc/E5M5-ACDF>].

global economic crisis that finds localities, states, and the federal government struggling financially, a focus on the enormous expense of maintaining prisons and prisoners has rallied a new group of critics of the carceral project from the right and energized more traditional critics from the left.⁸⁸ The rhetoric of debt consciousness and a rising preference for austerity rather than broader social spending has begun to dull the appeal of punitive policies to many of their longtime supporters.⁸⁹ While there may be great debate as to whether prisons *work*, as a matter of criminological theory or as a matter of public policy,⁹⁰ there is no question that they are very expensive.⁹¹

For fiscally conscious critics of the mass incarceration project, then, the War on Drugs is doubly problematic. First, it has led to many new inmates, often serving multiple, lengthy sentences.⁹² Second, given the widespread questions about the war's effectiveness as a means of controlling drug abuse or violence,⁹³ the War on Drugs raises the specter of an incredibly expensive, *failed* government program, the sort of program that increasingly finds itself a target of cost-cutting budget proposals.⁹⁴

As to the social welfarist or humanitarian critiques of mass incarceration, concerns stem from both the quality of prison life itself and from the

88. See, e.g., Cohen, *supra* note 87.

89. See, e.g., HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 78–79 (2015); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 78 (2011) (“The Great Recession of 2008 has certainly put severe pressure on the ‘prison bubble’ . . . as many states find themselves unable to service the debt associated with prison building or carry the expenses associated with massive prison populations.”); Vikrant P. Reddy & Marc A. Levin, *Right on Crime: A Return to First Principles for American Conservatives*, 18 TEX. REV. L. & POL. 231, 244 (2014); Jonathan Simon, *Law’s Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 661 (2014).

90. See, e.g., MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 18–33 (2009); David S. Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 907 (2013); David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, 4 AM. ECON. J. APPLIED ECON. 32, 33 (2012); Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 276 (2012).

91. See, e.g., Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 269 n.25 (2011) (collecting statistics); Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 353 (2011) (“The mass incarceration that has resulted from these policies has been exorbitantly expensive; in 2008, for example, the costs of corrections in the country totaled an estimated \$68 billion.”).

92. See, e.g., Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1330 n.72 (2005) (collecting sources); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275 (2004). This is not to mention many individuals in other aspects of the criminal justice system (e.g., those on probation, post-trial supervision, etc.) who similarly drive up the general operating costs for state, local, and federal law enforcement and corrections agencies.

93. See, e.g., GRAY, *supra* note 4; Juan R. Torruella, *The “War on Drugs”: One Judge’s Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235, 235–36 (1997); Comment, *Changes in Prison and Crime Demographics*, 111 HARV. L. REV. 1875, 1886 (1998).

94. See, e.g., Alexander, *supra* note 87.

problems associated with reentry into society. In terms of conditions of confinement, U.S. prisons are generally considered to be less inmate friendly than many of their northern European counterparts;⁹⁵ sexual abuse is common;⁹⁶ and federal courts' dockets are routinely crowded with claims about mistreatment at the hands of correctional officers.⁹⁷ Put more bluntly, for many inmates, "[p]rison is hell."⁹⁸

But perhaps even more important to this line of critiques is an emphasis on the collateral consequences of the criminal justice system.⁹⁹ That is, difficulties for those who have been incarcerated do not necessarily end upon their release.¹⁰⁰ Critics of mass incarceration have shown that formerly incarcerated individuals often struggle with the psychological aftereffects, such as posttraumatic stress disorder,¹⁰¹ and suffer from a range of social and economic consequences of their incarceration, such as a loss of voting rights, public welfare benefits, and employment opportunities.¹⁰² Additionally, these collateral consequences may affect not only criminal defendants but also their families and communities.¹⁰³

95. See, e.g., Daniel J. Sharfstein, *Human Rights Beyond the War on Terrorism: Extradition Defenses Based on Prison Conditions in the United States*, 42 SANTA CLARA L. REV. 1137, 1142 (2002).

96. See, e.g., Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 11 (2011); Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111, 117–19 (2011).

97. See, e.g., *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (requiring administrative exhaustion in suits brought by prisoners); *Porter v. Nussle*, 534 U.S. 516 (2002) (discussing inmate complaint of prolonged and sustained pattern of harassment and intimidation at hands of officers).

98. Suk, *supra* note 96, at 111.

99. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1825–32 (2012); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 686–90 (2006); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010) [hereinafter Pinard, *Collateral Consequences*].

100. See, e.g., JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015) (cataloging the broader social effects of a criminal record); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007) (describing the employment consequences for individuals with criminal records); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 151–85 (2005) (identifying a range of social, political, and economic obstacles faced by ex-offenders).

101. See, e.g., Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 111–12 (2008); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 259 (2004).

102. See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 24, at 233–80; MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 96 (2014); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1147–48, 1164–69 (2004); Pinard, *Collateral Consequences*, *supra* note 99, at 467 (describing "several different types of collateral consequences, including not only felon disenfranchisement but also loss of eligibility for welfare benefits, public housing, and certain types of employment").

103. See generally IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Pattillo et al. eds., 2004). Indeed, it is this concern about the broader social impact of incarceration that drives much of the "New Jim Crow" analysis. See *supra* notes 26–32 and accompanying text.

As with the economic critique, therefore, the link between the War on Drugs and mass incarceration is damning. If imprisonment produces such undesirable collateral consequences, and if the War on Drugs has led to greater imprisonment, then, syllogistically, the War on Drugs has produced many unwanted collateral consequences. Accordingly, for critics of mass incarceration, the War on Drugs and the project of regulating drug use and drug markets criminally has wrought many ills and should be abolished.¹⁰⁴

Having established these three lines of criticism, the next part uses these critiques as a frame through which to focus on the criminal regulation of firearms.

II. GUN POSSESSION

Despite longstanding public concern about gun violence, guns occupy a very different place in U.S. cultural, political, and legal discourse than drugs. Unlike drug possession, gun possession remains deeply embedded in longstanding cultural narratives about American independence, personal autonomy, and national identity.¹⁰⁵ With *District of Columbia v. Heller*¹⁰⁶ and *McDonald v. City of Chicago*,¹⁰⁷ the Supreme Court went so far as to conclude that individual gun ownership was not only an important component of the nation's history, but also a constitutional right guaranteed by the Second Amendment.¹⁰⁸ Put simply, then, gun ownership is frequently not only lawful, it is also constitutionally protected. By contrast, whatever consensus in favor of decriminalizing marijuana may be emerging, there certainly is no right to possess marijuana (or any other drug) enshrined in the Constitution.

If the last decade has seen the Supreme Court take unprecedented steps to protect the rights of gun owners, how can I suggest that the legal treatment of gun possession resembles the criminal architecture of the drug war? If the Republican Party lists gun rights as one of its key platform plans and the National Rifle Association (NRA) continues to exercise tremendous

104. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 2203 (2013).

105. See, e.g., RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* (1992) (chronicling the importance of the rugged, individualist cowboy in U.S. mass culture); JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 82–86 (2009) (discussing the trope of gun ownership as essential to protection of the home); TUSHNET, *supra* note 13, at 75 (arguing that attitudes about gun control and the Second Amendment are inextricably tied to views about U.S. society); see also CHARLES E. COBB, JR., *THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* (2014) (arguing that gun ownership and armed self-defense were essential to the success of the civil rights movement); NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* (2014) (chronicling the social function of gun ownership in black communities combating racial oppression).

106. 554 U.S. 570 (2008).

107. 561 U.S. 742 (2010).

108. See *Heller*, 554 U.S. at 595; *McDonald*, 561 U.S. at 750.

political clout,¹⁰⁹ how can gun owners be characterized as a beleaguered population?

These critiques miss the ways in which the political valence of the gun debate has contributed to an overreliance on criminal law to regulate gun possession. Gun control proponents have long sought to advance legal measures that make it harder for individuals to own guns; gun rights advocates have strongly opposed these measures.¹¹⁰ But this easy story misses a crucial point of consensus. Both sides of the gun control debate have occasionally compromised, and these compromises have generally yielded criminal statutes designed to impose harsh punishments on unlawful gun owners.¹¹¹ That is, in a polarized political climate, there is occasionally a space for consensus gun control—criminal law.¹¹²

In the drug context, there may have been (and may still be) noncriminal alternatives to the criminal model (e.g., education, medical treatment for addicts, and other social and economic policies to address root causes of drug use),¹¹³ but political actors coalesced around a model of criminalization and incarceration. Similarly, in the gun possession context, the realpolitik compromise *has* yielded regulation, but regulation in the form of criminal statutes.¹¹⁴

109. See, e.g., Joan Burbick, *Cultural Anatomy of a Gun Show*, 17 STAN. L. & POL'Y REV. 657, 665 (2006); Michael J. Zimmer, *Inequality, Individualized Risk, and Insecurity*, 2013 WIS. L. REV. 1, 60 n.319; *GOP Adopts Strongly Pro-Gun Platform*, NRA (Aug. 31, 2012), <http://www.nraaila.org/news-issues/articles/2012/gop-adopts-strongly-pro-gun-platform.aspx> [<https://perma.cc/2XRG-9WUR>].

110. See generally Franklin E. Zimring, *Continuity and Change in the American Gun Debate*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 13, at 29–43.

111. See *infra* Part III.B.

112. See James B. Jacobs & David Kairys, *Can Handguns Be Effectively Regulated?*, 156 U. PA. L. REV. PENNUMBRA 188, 190 (2007) (“There are many types of gun control that range from imprisoning armed felons to imposing tort liability on manufacturers. The most politically popular type of gun control in the U.S. is the severe punishment of crimes committed with firearms. All Americans support severe sentences for firearms offenders, except for those who advocate reduced punishment and imprisonment across the board.”); see also Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL RTS. J. 335, 355–56 (2004) (arguing that gun control and gun rights activists have both come to frame their positions in terms of violent crime).

113. See, e.g., Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. INT'L L. & POL. 555, 570–77 (2005); Stephen Hunter et al., *New Jersey's Drug Courts: A Fundamental Shift from the War on Drugs to a Public Health Approach for Drug Addiction and Drug-Related Crime*, 64 RUTGERS L. REV. 795, 818–20 (2012).

114. For examples of such criminal possession statutes, see, e.g., 18 U.S.C. § 922(g)(1) (2012) (outlawing gun possession by individuals with felony convictions); *id.* § 924(c) (imposing mandatory-minimum prison term for possessing a gun during commission of a drug offense or a “crime of violence”); COLO. REV. STAT. ANN. § 18-12-102 (West 2013) (outlawing possession of “firearm silencer[s], machine gun[s], short shotgun[s], [and] short rifle[s]”); GA. CODE ANN. § 16-11-123 (2011) (imposing a five-year penalty for possessing certain types of firearms); IND. CODE ANN. § 35-47-1-7 (LexisNexis 2009) (cataloging classes of individuals who may possess firearms; these classes exclude individuals who: “have a conviction for a crime for which the person could have been sentenced for more than one (1) year,” “have a record of being an alcohol or drug abuser,” “have a conviction for resisting law enforcement . . . within five (5) years before the person applies for a license or permit under this chapter”); MASS. ANN. LAWS ch. 269, § 10 (LexisNexis 2015) (imposing

In an effort to explore the potential costs of this compromise, this part addresses the criminal treatment of gun possession through the three critical lenses introduced in Part I. First, it examines how demographic and race-based critiques apply to the enforcement of criminal gun statutes. Next, it shifts focus to the civil libertarian critiques introduced above, namely the increasing power consolidated in the hands of police and prosecutors in the enforcement of criminal gun statutes. Finally, this part addresses the role of weapons charges as a driver of mass incarceration and as implicating concerns about collateral consequences.

A. *Demographics: Different Crimes, Same Defendants*

Initially, what makes the racial politics of criminalizing gun possession so fascinating is the way in which it complicates and subverts the familiar cultural narrative of gun debates and scholarship. One consequence of the political Right's support for gun rights is the popularization of the image of the gun owner as rural white male. This idealized gun owner has become a symbol of sorts in a wide variety of political debates and, indeed, in a range of scholarly debates regarding the legal treatment of firearms and self-defense.¹¹⁵

If we are concerned about the effects of criminal regulation, however, this framing may be inaccurate and terribly deceptive. Even if the stereotypical white male NRA member were the prototypical gun owner,¹¹⁶ this does not mean that he would be the prototypical defendant in a criminal weapons case.¹¹⁷ Further, this cultural narrative downplays the significant role that racially inflected politics historically have played in gun control

penalties for the possession of sawed-off shotguns); N.C. GEN. STAT. § 14-415.1 (2013) (outlawing possession of firearms by all convicted felons); 18 PA. CONS. STAT. ANN. § 6105 (West 2016) (same); S.C. CODE ANN. § 16-23-30 (2011) (same).

115. See generally Richard Slotkin, *The Cult of the Colt in American Culture*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 13, at 54–67.

116. Recent scholarly interventions in the legal literature on gun regulation have sought to undermine the image of gun ownership as a tool of white supremacy or as the exclusive province of white Americans. See, e.g., COBB, *supra* note 105, at 114–48; JOHNSON, *supra* note 105, at 13–15; cf. ROBERT F. WILLIAMS, *NEGROES WITH GUNS* (Marc Schleifer ed., 1962) (describing proponents of armed resistance within the Civil Rights movement). These accounts treat guns as a social and political equalizer, a means of empowering an otherwise disenfranchised or repressed minority. See, e.g., COBB, *supra* note 105; JOHNSON, *supra* note 105, at 187–226; see also John Salter & Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities Whom Government Is Unwilling or Unable to Protect*, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 185, 185–93 (Don B. Kates, Jr. ed., 1979) [hereinafter RESTRICTING HANDGUNS]; cf. Carol Ruth Silver & Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent Sexist Society*, in RESTRICTING HANDGUNS, *supra*, at 139, 148–50 (arguing that gun ownership is important to women as a means of counteracting male violence). While these revisionist histories certainly provide support to my broader claim that we should be careful about making policy decisions based on an imagined white male gun owner, this Article does not purport to make any claims about the relative importance of guns or gun ownership in black and white communities.

117. Cf. Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 545–52 (2010) (raising a similar argument in the context of “castle doctrine” self-defense statutes).

efforts.¹¹⁸ While critics of the War on Drugs' disparate racial impact have offered up powerful statistical evidence of the racial breakdown of drug arrests and charges, scholars generally have not focused on the racial breakdown of weapons arrests and charges. Indeed, in his critical review of Alexander's account, legal historian Anders Walker contends that the existing "New Jim Crow" narrative downplays the role of gun possession crimes as drivers of racially disparate incarceration rates.¹¹⁹

While Walker does not offer the sorts of compelling data that help support Alexander's claims about the War on Drugs,¹²⁰ and while fewer published studies focus on the racial dynamics of criminal gun law, the evidence that we do have suggests that people of color bear the brunt of enforcement. As of 1995, nationwide FBI crime reports showed that weapons arrest rates were five times greater for blacks than white.¹²¹ In 2000, 54 percent of the state court defendants convicted for weapons crimes were black, as compared to 44 percent white.¹²² This is a higher percentage than in all but three of the eighteen other categories of crimes tracked by the Bureau of Justice Statistics (BJS) and a higher percentage than the total for all offenses (54 percent white; 44 percent black; and 2 percent "other").¹²³ In 2004, these statistics for state courts were nearly identical—55 percent of defendants convicted of weapons offenses were black, a higher percentage than for drug offenses (46 percent) and all offenses (38 percent).¹²⁴ Further, as of December 31, 2013, BJS estimated that 24,400 black inmates

118. See, e.g., T. Markus Funk, *Gun Control in America: A History of Discrimination Against the Poor and Minorities*, in GUNS IN AMERICA: A READER 390, 390 (Jan E. Dizard et al. eds., 1999) [hereinafter GUNS IN AMERICA] ("One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, cannot be trusted with firearms."); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1712 (2012); Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 245 (2008).

119. See Walker, *supra* note 11, at 868–72.

120. See *id.* Walker's discussion of "the liberal war on guns" focuses exclusively on a single sting operation conducted in St. Louis by the Bureau of Alcohol, Tobacco, and Firearms. See *id.* For a description of the sting operation, see generally Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Seizures of Guns and Drugs*, ST. LOUIS POST-DISPATCH (July 11, 2013, 11:00 PM), http://www.stltoday.com/news/local/crime-and-courts/four-month-atf-operation-in-st-louis-yields-arrests-seizures/article_42e103ee-7fd8-51ec-85b6-b4a87ba9f13e.html [https://perma.cc/ES6R-WVVQ].

121. Press Release, Bureau of Justice Statistics, Weapons Offenses and Offenders: Firearms, Crime, and Criminal Justice 2 (Nov. 12, 1995), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=711> [https://perma.cc/JE22-G2XP].

122. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 450 (2003).

123. *Id.* The two categories of crimes with larger percentages of black defendants convicted were robbery (64 percent) and drug trafficking (55 percent). *Id.* The percentage for manslaughter was also 54. *Id.*

124. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t5452004.pdf> [https://perma.cc/94FH-7ABE]. The 2002 statistics demonstrate a similar pattern—50 percent of defendants convicted for weapons charges were black, as compared to 43 percent for drug offenses, and 37 percent for all offenses. See *id.*

were serving time in prison for weapons charges, as compared to 13,900 Hispanic inmates, and 11,200 white inmates.¹²⁵

While perhaps not reflective of national demographics, the data for New York City paint an even starker picture. In 2012, only 4.2 percent of the 3287 individuals arrested for firearms charges were white; 73.2 percent were black, and 21.5 percent were Hispanic.¹²⁶ In 2013, of 2915 arrestees, 69.3 percent were black, 21.6 percent were Hispanic, and 8.6 percent were white.¹²⁷ Further, these statistical disparities resonate with empirical examinations of the NYPD's stop-and-frisk policing campaigns.¹²⁸

In 2003, Jeffrey Fagan and Garth Davies published a study that focused on the use of stop-and-frisk and "gun-oriented" policing tactics in New York City.¹²⁹ For the previous decade, the NYPD had pursued an aggressive set of strategies that focused on "two related problems: social and physical disorder and gun violence."¹³⁰ The combination of broken-windows or "order maintenance policing" and the concern for directly curbing gun violence yielded a mode of policing in which officers frequently stopped and frisked individuals.¹³¹ In their study, Fagan and Davies examined the racial consequences of these tactics, breaking down stops according to both the alleged criminal conduct being investigated and the race of the stopped individual.¹³² They compared four different offense types: (1) violent; (2) property; (3) drugs; and (4) weapons.¹³³ Using arrest rates per 100,000 New Yorkers, regression analysis, and stop-to-arrest ratios, Fagan and Davies found that "[f]or weapons [offenses], the arrest rates for African Americans is five times higher than the rate for whites and three times higher than the rate for Hispanics."¹³⁴ In short, the stop-and-frisk strategy produced a system in which police arrested people of color at

125. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/K333-EMZ4>]. BJS only considered individuals serving more than one year in prison.

126. RAYMOND W. KELLY, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 12 (2012), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2012_year_end_enforcement_report.pdf [<https://perma.cc/SG7D-HJMB>].

127. WILLIAM J. BRATTON, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 12 (2013), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2013_year_end_enforcement_report.pdf [<https://perma.cc/CUF9-EU3C>].

128. Jeffrey A. Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 13, at 191–221.

129. *Id.*

130. *Id.* at 193.

131. *See id.* at 193–95. On broken-windows policing, see generally Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 342 (1998); James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/8C9U-MXGB>].

132. *See* Fagan & Davies, *supra* note 128, at 199–209.

133. *Id.* at 202.

134. *Id.*

greater rates than whites.¹³⁵ And, most notably for our purposes, weapons charges show the greatest racial disparity—even higher than the rates for drug offenses.¹³⁶

But it is not just the arrest rates that are significant. Fagan and Davies's data suggest that the ratio of stops to arrests is much higher in cases where officers were searching for weapons.¹³⁷ Among black people stopped between 1997 and 1999, for example, the ratio of stops to arrests for weapons crimes was 20.08, as compared to 7.03 for violent crimes, 7.04 for property, and 6.94 for drugs.¹³⁸ That is, stop-and-frisk tactics clearly led to many stops that did not produce evidence of a crime, but stops conducted on the basis of suspicion of weapons possession appear to have operated as more of a dragnet, turning up less criminal activity but yielding more confrontations with civilians.

Notably, this disparity between weapons offenses is even greater for black defendants than for white and Hispanic defendants.¹³⁹ Whereas the stop-to-arrest ratios for violent, property, and drug crimes across the three racial groups are roughly similar, the stop-to-arrest ratio for weapons is substantially higher for black stoppees (20.08, as compared to 16.74 for Hispanic stoppees and 15.89 for white stoppees).¹⁴⁰ Further, the 2014 National Academy of Sciences report identified this dynamic in the stop-and-frisk context, noting that “studies show that blacks who are stopped and frisked are less likely than whites to be in possession of guns or other contraband and are no more likely to be arrested.”¹⁴¹

If concerns about racial disparity have driven the critiques of the War on Drugs, then it appears that they should factor into discussions about the criminal regulation of gun possession too. Certainly, scholars have yet to produce statistical evidence that is as comprehensive as that cited in drug war criticisms. Further, it is important to acknowledge a key distinction between the sets of data discussed here and those mentioned in Part I.A¹⁴² and examined by other drug war critics: we do not know how these arrest and conviction rates relate to actual commission of offenses. That is, part of the power of the drug arrest and conviction statistics is the evidence that suggests that the rates reflect disparate enforcement, rather than disparate criminality.¹⁴³ We know that white people engage in illicit drug use, but

135. The next section on policing addresses at greater length the relationship between stop-and-frisk and the criminal regulation of gun possession. See *infra* Part II.B.1.

136. See Fagan & Davies, *supra* note 128, at 202.

137. See *id.*

138. *Id.* The ratios that Fagan and Davies produced in their study reflect the ratio between stops for given conduct and arrests resulting from such stops. *Id.* at 202–04. That is, the weapons number reflects the ratio of stops motivated by a weapons investigation (i.e., where an officer was looking for weapons) and arrests resulting from those stops. *Id.*

139. See *id.*

140. *Id.*

141. NAT'L RESEARCH COUNCIL, *supra* note 24, at 123 n.22.

142. See *supra* notes 29–29 and accompanying text.

143. See *supra* notes 28–32 and accompanying text.

are less likely to face criminal consequences.¹⁴⁴ Without data about who owns, possesses, or carries guns illegally, we simply do not know whether the same disparate enforcement dynamic is at work, or whether the numbers for arrests and convictions accurately reflect the demographics of illegal gun possession.¹⁴⁵

But the prevalence of felon-in-possession statutes and the close relationship between antigun and antidrug initiatives suggests that criminal regulation of gun possession may well reinscribe the inequalities of the drug war.¹⁴⁶ That is, to the extent that the War on Drugs has led to more people of color with felony convictions,¹⁴⁷ a system of gun control that requires mandatory minimum prison terms for felons risks sending the same individuals to prison for extended sentences. Because of this dynamic, it may be that rates of illegal gun possession actually are reflected (at least to a certain extent) in the racial disparity in convictions for gun possession crimes.¹⁴⁸ While such a situation clearly would be distinguishable from the selective enforcement in the drug context, this distinction should not necessarily resolve distributional concerns. Defining a crime is a political act, and the decision that an individual with a criminal record for drug offenses cannot possess a gun lawfully rests on a political definition not only about guns, but about drugs as well. We cannot (or should not) look at guns in a vacuum as divorced from other areas of a criminal justice system plagued by inequality. What makes a specific instance of gun possession criminal may be the criminal history of a defendant, meaning that felon-in-possession laws are embedded in a broader range of decisions about criminal law and its enforcement.

Further, the statistics that we do have indicate that gun possession offenses serve as a space to empower police and to exacerbate the dynamics of broken windows and stop-and-frisk.¹⁴⁹ In a system of hyper-policing,¹⁵⁰

144. See generally *supra* notes 28–32 and accompanying text.

145. See Fagan & Davies, *supra* note 128, at 202. Fagan and Davies concede that “these differences beg the question of differential offending rates, and the true offending rate may be unknowable.” *Id.*

146. See, *The State of Civil and Human Rights in the United States, Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights* (Dec. 9, 2014) (Written Testimony of Julie Stewart, President and Founder of Families Against Mandatory Minimums), <http://famm.org/read-our-testimony-to-the-u-s-senate-subcommittee-on-the-constitution-civil-rights-and-human-rights/> (“Black offenders constitute a majority of offenders who qualify for the Armed Career Criminal Act’s 15-year mandatory minimum penalty (63.7%) and of offenders who remain subject to its mandatory minimum penalty at sentencing (63.9%). White and Hispanic offenders, by comparison, constitute only 29.5 percent and 5.2 percent of offenders who qualify for the Armed Career Criminal Act’s 15-year mandatory minimum penalty, respectively.”) [<https://perma.cc/AZN2-HHBF>].

147. See generally Part I.A.

148. Cf. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 *YALE L.J.* 2236, 2297 (2014) (describing “illegal gun possession, particularly by those already involved in the criminal justice system,” as “a norm of street life” in some lower-income urban communities).

149. See generally *supra* notes 129–40.

150. Scholars have identified broken windows policing and other aggressive enforcement mechanisms in specific communities as “hyper-policing.” See, e.g., Allegra M. McLeod,

any category of offenses that empowers police to search also raises questions of racial biases (implicit or explicit). Indeed, in the early 1990s, James Q. Wilson, the father of broken-windows policing,¹⁵¹ endorsed the use of stop-and-frisk tactics to combat illegal guns, but—in so doing—explicitly conceded that such a system would have a disparate impact: “Innocent people will be stopped. Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race.”¹⁵² To Wilson, the distributive consequences of using aggressive criminal regulation of gun possession were clear, but worth it.¹⁵³ The costs of gun crime—particularly the costs of gun crime in low-income urban communities of color—are undoubtedly high. But—as in the context of crack cocaine—the very real presence of danger might not justify *any* policy response. The War on Drugs has helped to drive home the significance of the race-based costs of widespread criminalization and criminal enforcement. In order to conclude—like Wilson does—that these costs are justified in the gun possession context, we *must* address the racial costs of the current regime and of further criminal regulation of gun possession.¹⁵⁴

B. *The Role of Police and Prosecutors*

While scholars have criticized the War on Drugs as a locus for the aggrandizement of police and prosecutorial power,¹⁵⁵ these critiques have gained less traction in the context of criminal regulation of gun possession.¹⁵⁶ I have already addressed the civil libertarian concerns in the

Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform, 102 CALIF. L. REV. 1553, 1577 (2014); Robert J. Sampson, *When Things Aren't What They Seem: Context and Cognition in Appearance-Based Regulation*, 125 HARV. L. REV. F. 97, 103 (2012).

151. See Wilson & Kelling, *supra* note 131.

152. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG. (Mar. 20, 1994), <http://www.nytimes.com/1994/03/20/magazine/just-take-away-their-guns.html?pagewanted=all> [<https://perma.cc/8JEU-MYJ9>].

153. *Id.* For a critique of Wilson's argument and his casual acceptance of the racial consequences of his proposal, see generally Adina Schwartz, “*Just Take Away Their Guns*”: *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996).

154. See James Forman, Jr., *The Society of Fugitives*, ATLANTIC (Oct. 2014), <http://www.theatlantic.com/magazine/archive/2014/10/the-society-of-fugitives/379328/>

(“Now that this war [on drugs] has become a damaged brand, the measures have been repackaged and resold as part of a war on guns. Thus, during the recent debate over New York City's stop-and-frisk policy, then-police chief Raymond Kelly argued that aggressive stop-and-frisk tactics ‘take guns off the street and save lives.’ Opponents countered (correctly) that armed offenders are the exception, even in low-income minority neighborhoods, and that it is a mistake to police all blacks as if they were high-rate offenders.”) [<https://perma.cc/X8K3-76J8>].

155. See *supra* notes 55–73 and accompanying text.

156. *But see* David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, in RESTRICTING HANDGUNS, *supra* note 116, at 194, 194–215; David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 320–23 (1993).

drug war context,¹⁵⁷ so this section examines the potential applicability of those same critiques in the gun context.

1. Police Power

From a policing standpoint, possessory drug crimes allow for the sort of aggressive and interventionist preventative policing discussed in the prior section.¹⁵⁸ In his paean to stop-and-frisk as the cure for gun violence, Wilson not only conceded the troubling racial politics of his proposal,¹⁵⁹ but also embraced a broadly aggressive and interventionist view of policing:

Each patrol officer can be given a list of people on probation or parole who live on that officer's beat and be rewarded for making frequent stops to insure that they are not carrying guns. Officers can be trained to recognize the kinds of actions that the Court will accept as providing the "reasonable suspicion" necessary for a stop and frisk. Membership in a gang known for assaults and drug dealing could be made the basis, by statute or Court precedent, for gun frisks. And modern science can be enlisted to help. . . . What is needed is a device that will enable the police to detect the presence of a large lump of metal in someone's pocket from a distance of 10 or 15 feet. Receiving such a signal could supply the officer with reasonable grounds for a pat-down. Underemployed nuclear physicists and electronics engineers in the post-cold-war era surely have the talents for designing a better gun detector.¹⁶⁰

Wilson's proposal for a gun detector may sound far-fetched, but we should not discount the significance of its underlying rationale. He had identified a major threat to public safety—gun violence—and determined that one important component of the threat was the ubiquity of unlicensed or unlawfully possessed guns.¹⁶¹ Wilson even conceded that enforcing gun laws might disproportionately affect men of color.¹⁶² But the structure of Wilson's argument appears to take for granted the sorts of civil libertarian concerns outlined in Part I.B.

The implication of Wilson's embrace of aggressive and intrusive surveillance and policing is that the societal benefits of reducing gun violence substantially outweigh any possible concerns about privacy or state power. But the failure to mention these concerns also suggests that they simply did not rank very high on Wilson's order of priorities. My intention here is not to venture further into Wilson's oeuvre or to make this section about one scholar and his views on crime, police, and policing.

157. *See supra* Part I.B.

158. *See supra* notes 129–53 and accompanying text.

159. *See supra* notes 151–53 and accompanying text.

160. Wilson, *supra* note 152. In repeatedly invoking Wilson and his support for strong enforcement of criminal gun possession statutes, I in no way mean to suggest that all supporters of criminal gun control mechanisms share Wilson's views or his priorities. On the contrary, much of my contention in this Article rests on the premise that many supporters of criminal gun control statutes *do not* share Wilson's ideological and political priors.

161. *See id.*

162. *See id.*; *see also supra* notes 151–53 and accompanying text.

Rather, by highlighting Wilson's priorities in this single, short piece from 1994, I mean to emphasize the tension between the view of law enforcement that Wilson endorsed and the skeptical view that has come to dominate many critiques of the War on Drugs: to Wilson, preventing crime justified racially disparate intrusions on civil liberties; to drug war critics, the social costs of enforcement might be as great as the costs of crime.¹⁶³ Notably, Wilson has argued elsewhere that "real progress in reducing gun violence almost certainly requires methods—aggressive patrolling, undercover operations, tougher sentences—that liberals instinctively dislike."¹⁶⁴ It may be that Wilson is wrong that his favored criminal solutions to gun violence are the best (or only) solutions to the social scourge of gun violence. But he certainly is right to note the illiberal nature of the remedy. Gun control proponents might conclude—as Wilson does¹⁶⁵—that the benefits of an aggressive criminal regulatory approach to gun possession trump any costs. And it is important to note that many of the particularly aggressive criminal regulation schemes arose in response to deadly waves of gun violence.¹⁶⁶ But a theory of criminal law and law enforcement consistent with the civil libertarian critiques raised in the drug context should require a much more nuanced cost-benefit analysis that takes seriously the growing power of police and the potential risks to individual liberties.¹⁶⁷

In practice, the policing of gun possession raises many of the same concerns as the policing of drug possession. Indeed, in scholarly literature, judicial opinions, and political rhetoric, drugs and violent gun crime are often treated as inextricably tied.¹⁶⁸ In her recent account of the relationship between drugs and violence, Shima Baradaran Baughman argues that the perceived nexus between drugs and violence has served as a driving force for much of the draconian legal treatment of drugs and drug users.¹⁶⁹ This rhetorical link between drug crime and violent crime has

163. See generally *supra* Part I.B.2.

164. JAMES Q. WILSON, THINKING ABOUT CRIME 265 (rev. ed. 1983).

165. See *id.*; Wilson, *supra* note 152.

166. See, e.g., Philip J. Cook & Jens Ludwig, *Public Policy Perspectives: Principles for Effective Gun Policy*, 73 FORDHAM L. REV. 589, 604 (2004).

167. See Hardy & Chotiner, *supra* note 156, at 194 ("[M]any committed civil libertarians seem little interested in the potential dangers to traditional civil liberties and privacy of a national handgun confiscation effort.").

168. See, e.g., *Smith v. United States*, 508 U.S. 223, 240 (1993); *United States v. Carter*, 669 F.3d 411, 419 (4th Cir. 2012); Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015); Ouziel, *supra* note 148, at 2281–82 ("The near inseparability of drugs and violence in the inner city is so well-recognized that it has spawned permitted evidentiary inferences in gun and drug cases.").

169. See generally Baradaran, *supra* note 168. It is worth noting that many scholars and commentators have argued—consistent with Baradaran's claim—that the causal chain between guns and violence runs counter to the narrative endorsed by drug prohibitionists. Instead of claiming that drugs and the drug trade are inherently violent and therefore must be criminalized, these scholars contend that it is *criminalization itself* that has spawned the violence and danger that permeates the drug trade. See, e.g., Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 575 (1995); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 554 (1997) ("Would

effectively elided the distinction, practically rendering it moot.¹⁷⁰ For example, courts frequently allow the presence of a gun to trigger an inference that a defendant who possessed drugs was engaged in higher-level drug dealing.¹⁷¹

The focus on the nexus between drugs and violence, therefore, should be critical to our understanding of the relationship between guns and drugs in the policing context. As discussed above, critics of the War on Drugs have accurately identified an erosion in Fourth Amendment rights brought about by judicial deference to law enforcement officers in drug contexts.¹⁷² But it is important to recognize that the perceived violence of the drug trade has shaped these pro-police decisions—a concern for “officer safety” underlies courts’ endorsement of intrusive and aggressive policing.¹⁷³ While courts refer to the dangers of drugs and the social importance of squelching drug

drug legalization prevent the crime, violence, and corruption? This author answers with an emphatic ‘yes.’”); Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 621–22 (2001) (“The higher prices caused by prohibition might also encourage violence by increasing the rents to certain factors.”); David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 706 (2003) (“Violence in drug markets is often used as an argument for enforcement, but the fact that drug markets are illegal means that commercial disputes must be resolved outside the courts, with threatened or actual violence being the principal means for resolution. In fact, the use of violence to settle disputes in these markets appears to be an inevitable consequence of any policy except legalization.” (footnotes omitted)); Daniel Robelo, *Demand Reduction or Redirection? Channeling Illicit Drug Demand Towards a Regulated Supply to Diminish Violence in Latin America*, 91 OR. L. REV. 1227, 1250 (2013) (“[D]rug prohibition remains a central cause of organized crime and violence in the Americas . . .”).

170. See, e.g., Baradaran, *supra* note 168, at 253–59 (collecting cases).

171. See, e.g., *United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002) (listing the presence of a firearm and ammunition as the government’s circumstantial evidence of defendant’s intent to distribute methamphetamine); *United States v. Bryson*, 110 F.3d 575, 585 (8th Cir. 1997) (noting that the “[e]vidence of loaded firearms” near drug paraphernalia is “probative of intent to distribute”); *United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) (describing government evidence of a firearm as “consistent with a finding of possession with intent to distribute”); *United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990) (stating that guns are “generally considered . . . tool[s] of the trade for drug dealers”).

172. See *supra* notes 67–69 and accompanying text.

173. See, e.g., *Bailey v. United States*, 133 S. Ct. 1031, 1048 (2013) (Breyer, J., dissenting) (noting that officers may fear they have been spotted as a reason to justify seizing a suspect); *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring) (“When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment.”); *United States v. Robinson*, 414 U.S. 218, 226 (1973); *United States v. Collier*, 419 F. App’x 682, 685 (8th Cir. 2011) (“At the suppression hearing, Stucker testified regarding his knowledge ‘that narcotics are often associated with weapons,’ an awareness that we have credited as a ground for heightened concern for officer safety.” (citation omitted)); *United States v. Maddox*, 388 F.3d 1356, 1365 (10th Cir. 2004) (explaining that “a protective detention [is] justified on officer safety grounds” when there is a reasonable suspicion a person is a danger to those on the scene); *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998) (holding that a reasonable suspicion of illegal drugs in a vehicle justifies a weapons search “to ensure the officer’s safety and the safety of others”); *United States v. Menard*, 95 F.3d 9, 10–11 (8th Cir. 1996) (“A police officer who has legitimate contact with another person, and who has reason to believe that person may be armed and dangerous, may conduct a pat-down search to protect officer safety, regardless of whether there is also probable cause to arrest.”).

use,¹⁷⁴ the critical language that the courts deploy is one of safety and security—not just for the public, but also for the officer.

My claim relates to Baradaran Baughman's—many of the erosions and carve-outs in Fourth Amendment jurisprudence, which are frequently attributed to the War on Drugs, are actually traceable directly to the criminal regulation and policing of firearms.¹⁷⁵ The judicially created “drug exception to the Constitution”¹⁷⁶ finds root in a set of assumptions about drugs and violence. More specifically (but perhaps less explicitly), it relies on assumptions about the relationship between guns and the drug trade and about the sorts of people who use and deal drugs.¹⁷⁷ The operative concern that has shaped the judicial expansion of police powers in the drug context is not only deference to legislative determinations about drugs and their danger, but also fear for officer safety in communities and contexts in which guns might be ubiquitous.

Indeed, as noted in the stop-and-frisk context, it was guns as much, if not more so, than drugs that justified the aggressive and intrusive practice.¹⁷⁸ Additionally, modern Fourth Amendment jurisprudence finds its roots in the context of possessory gun offenses.¹⁷⁹ Even as the Warren Court was expanding the protections afforded to criminal defendants and curbing police abuses,¹⁸⁰ it relied on the 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.¹⁸¹

174. *See, e.g.*, *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997) (describing the “scourge of drug abuse [that] took root in the United States”); *Shields v. Burge*, 874 F.2d 1201, 1204 (7th Cir. 1989) (“[I]llicit drug use, and the commerce in illicit drugs, are scourges on our society. . .”).

175. *See, e.g.*, *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (emphasizing “danger” as a key component in justifying no-knock searches); *Adams v. Williams*, 407 U.S. 143, 149 (1972) (allowing officer's search of a vehicle without consent because of reported presence of drugs and a gun); *United States v. Musa*, 401 F.3d 1208, 1214 (10th Cir. 2005) (identifying suspected drug dealers history of gun ownership as justifying no-knock entry); *United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (“Guns *and* drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers—an important narrowing factor.”); *United States v. Singer*, 943 F.2d 758, 762 (7th Cir. 1991) (holding that drug dealer's possession of a gun justified no-knock warrant).

176. *Skinner v. Ry. Labor Execs' Ass'n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting); *see also supra* note 73.

177. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring) (“Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture.”).

178. *See supra* notes 129–41 and accompanying text.

179. *See, e.g.*, Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk”*, 94 B.U. L. REV. 1495, 1540 (2014); Dubber, *supra* note 10, at 875–90; Schwartz, *supra* note 153, at 326–33.

180. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Brady v. Maryland*, 373 U.S. 83 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

181. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968).

In *Terry v. Ohio*,¹⁸² a case involving the unlawful carrying of a concealed firearm, the Supreme Court authorized a class of warrantless searches and carved out an exception to the newly expanded exclusionary rule, laying the groundwork for contemporary police practices.¹⁸³ Specifically, the Court held that a search was “reasonable” under the Fourth Amendment when

a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing *may be armed and presently dangerous*, where in the course of investigating this behavior[,] . . . nothing in the initial stages of the encounter serves to dispel his *reasonable fear for his own or others' safety*, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons *in an attempt to discover weapons which might be used to assault him*.¹⁸⁴

Predating the declaration of the War on Drugs, then, *Terry* and its logic remain clearly rooted in the fear of violence that guns produce. The Court's calculus does not require a broader examination of gun violence in society or of the broader state interest in regulating gun possession. Rather, the Court's focus in *Terry* and its progeny remained on the officer's safety.

We can trace this enforcement dynamic and its similarity to drug policing to the peculiarity of possession offenses. Indeed, the two Fourth Amendment cases decided alongside *Terry*—*Sibron v. New York*¹⁸⁵ and *People v. Peters*¹⁸⁶—both dealt with the issues of proxy or possession crimes. In *Peters*, an off-duty officer apprehended a suspect who he thought had tried to break into an apartment and searched him, ultimately recovering burglary tools.¹⁸⁷ In *Sibron*, an officer stopped and frisked a suspect who he thought might be selling drugs and found bags of heroin.¹⁸⁸ Not only was the Court concerned with officer safety, but it also confronted the enforcement of possessory proxy crimes.¹⁸⁹ The combination of the preoccupation with officer safety and the presence of possessory offenses means that an officer's suspicions can quickly trigger not only questioning, but a search. And how does an officer form such suspicions? Absent random searches or searches based on some sort of bias, it is not entirely clear. For possessory crimes, one of the primary concerns from a civil libertarian perspective remains the lack of external indicators. In fact, the

182. 392 U.S. 1 (1968).

183. *See id.* at 27.

184. *Id.* at 30 (emphasis added).

185. 392 U.S. 40 (1968).

186. 254 N.Y.S.2d 10 (County Ct. 1964), *aff'd*, 265 N.Y.S.2d 612 (App. Div. 1965), *aff'd*, 219 N.E.2d 595 (N.Y. 1966), *aff'd sub nom. Sibron*, 392 U.S. 40. The Court disposed of the appeals in *Peters* and *Sibron* in the same opinion. *See Sibron*, 392 U.S. at 44.

187. *See Sibron*, 392 U.S. at 48.

188. *See id.* at 45.

189. That is, possession of burglary tools is a proxy for burglary. It is a criminal act that might be considered predictive of future (or past) wrongdoing. *See Dubber, supra* note 10, at 836. The act that is criminalized (the possession) is not the ultimate wrong that the state wishes to prevent (the burglary), but it may be easier to arrest, charge, and convict on the proxy crime. *See id.*

search itself becomes the core mechanism for the enforcement of possessory crimes.

An essay originally published in 1976 bemoaning the lack of civil libertarian critiques of gun control highlighted this very dynamic:

[T]he keeping of marijuana or a handgun in home, office, auto, or on the person is virtually impossible to detect except by searching those things. In general, the Fourth Amendment allows such searches only if there is probable cause to believe contraband will be found. But if ownership of the banned item is sufficiently widespread, and/or the incentive to acquire sufficiently great, the number of searches that can *legally* be made will simply not be enough to deter continued violation. To give the ban any chance of substantial success, the police must use random or other illegal searches, which it is hoped can provide enough evidence against enough violators so that they can be convicted and severely enough punished to frighten the unapprehended majority of violators into voluntary compliance.¹⁹⁰

Forty years later, these critiques are no more prevalent than in the 1970s, but they remain pertinent. The same elements of drug possession that make it a crime that invites intrusive policing—difficulty to detect, prevalence of offense, and lack of easily identifiable victim—are similarly present in the case of gun possession.¹⁹¹ The point is not that most people own guns, or that most gun owners own their guns illegally.¹⁹² Rather, the issue is what enforcement of gun possession statutes looks like. Because the crimes do not require any conduct outside of pure possession,¹⁹³ they raise a puzzle for police—how to identify and weed out misconduct that might have no outward indicators or manifestations. An individual might keep an arsenal of unlicensed guns in her home, but unless she displays one publicly, fires one, or in some way makes others aware of her guns, how can police find out about the weapons? This was, of course, the conundrum that Wilson addressed by advocating widespread stops.¹⁹⁴

The concern about invasions of privacy or, more specifically, invasions of the home or private property might serve as a rallying cry for gun rights advocates and voices on the libertarian Right. If the only way to detect possessory gun violations is for the state to invade, to inspect, and to

190. Hardy & Chotiner, *supra* note 156, at 200.

191. See *generally* Dubber, *supra* note 10 (discussing the properties of possession offenses).

192. See Forman, *supra* note 154 (arguing that the misperception of an armed black urban populace contributes to racial inequalities in the criminal justice system).

193. That being said, possession offenses might certainly arise in the commission of other crimes that have clear victims or that involve a range of prohibited conduct outside of mere possession. That possession crimes may serve as a proxy for other misconduct explains why police and prosecutors find such laws appealing. Indeed, the stacking of charges by prosecutors becomes a major driver of both enhanced prosecutorial power and also of increasing prison time. If a defendant possessed (or constructively possessed) a firearm in the course of other conduct—either violent crime or, frequently, nonviolent drug crime—the enhanced sentence that a gun charge might bring becomes a powerful bargaining chip for prosecutors. The next section will take up this issue at greater length.

194. See Wilson, *supra* note 152.

intrude, don't these statutes fly in the face of the Enlightenment principles animating the Bill of Rights? Viewed through this lens, gun possession—like drug possession—serves as a public welfare offense that threatens the public/private distinction by inviting state intrusion into private spaces like the home, the vehicle, and the person.¹⁹⁵

But this line of criticism only gets us so far. Given that this Article aims to address drug war critics, many of whom align with the political Left, a property-rights-based critique of gun-centric policing probably offers limited appeal. Certainly, gun and drug possession crimes may undermine the public/private distinction, but the concerns about the War on Drugs traced in Part I were hardly premised on a property-rights-centric world view.¹⁹⁶ These shared critiques of possessory gun and drug offenses may prove compelling to many who already oppose *both* gun control and drug prohibition,¹⁹⁷ but if our goal is to construct a broader critical paradigm from attacks by the Left on the War on Drugs, then we need to dig beyond the sanctity of the home or private property.¹⁹⁸

Central to this project is stripping away the cultural and political coding in which discussions of criminal law and criminalization have become embedded. That is, the purpose of the frame established in Part II is to suggest that the same critiques that have been embraced in one context might have real bite in the context of a legal debate with very different political valence.¹⁹⁹ In the gun context, a look back at *Terry*, stop-and-frisk, and the distributive consequences of policing suggests that enforcing gun possession statutes raises concerns beyond property rights, concerns that have rightly gained ground in the context of the War on Drugs.

In one of the few scholarly works to examine the peculiar properties of possessory crimes, Markus Dubber has compared the broad class of offenses to vagrancy statutes—generally applicable laws that raise the specter of unrestrained policing and the state preying on the powerless.²⁰⁰ In Dubber's narrative, possessory crimes function as a dragnet of sorts, granting the state a broad legal authorization for criminal social control.²⁰¹ Possessory offenses do not address harm directly; rather, they target risks that might ultimately grow into harms.²⁰² They are a proxy for past, future, or ongoing criminality. If the state seeks to identify and incarcerate

195. See Dubber, *supra* note 10, at 849–55.

196. Cf. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001, 1002 (1996) (noting the traditional ideological valences of public and private in discussions of the public/private distinction).

197. Cf. Husak, *supra* note 15, at 445 n.28 (noting that Libertarians “have the virtue of consistency on these topics”).

198. As Jeannie Suk has argued, the relationship among the home, criminal law, privacy, and Left attitudes toward the role of the state is particularly vexed. See generally SUK, *supra* note 105.

199. See Husak, *supra* note 15, at 438 (“The true test of our commitment to a theory is whether we are willing to accept its implications when we might prefer not to do so.”).

200. See Dubber, *supra* note 10, at 908–34.

201. See generally *id.*

202. See *id.* at 836; Husak, *supra* note 15, at 445.

individuals suspected of posing a greater risk to public safety, then criminal statutes that allow for more stops, more searches, and more arrests provide an ideal weapon in the War on Crime.²⁰³ These offenses become emblematic of an expansive approach to criminalization and law enforcement:

So broad is the reach of possession offenses, and so easy are they to detect and then to prove, that possession has replaced vagrancy as the sweep offense of choice. Unlike vagrancy, however, possession offenses promise more than a slap on the wrist. Backed by a wide range of penalties, they can remove undesirables for extended periods of time, even for life. Also unlike vagrancy, possession offenses so far have been insulated against constitutional attack, even though they too break virtually every law in the book of cherished criminal law principles.²⁰⁴

Viewed through this lens, possessory gun offenses by their nature reinscribe the power dynamics, prejudices, and suspicions that have led critics to decry drug policing.

Searching for guns—like searching for drugs—can easily become pretextual, a proxy for some general prediction of risk, danger, or lawlessness. As discussed above, the data compiled by Fagan and Davies show that, in the late 1990s, NYPD officers used alleged weapons violations as the justification for many stops.²⁰⁵ Further, the data show that these stops resulted on average in markedly fewer arrests than stops for other crimes.²⁰⁶ Taking their study in conjunction with both Dubber's theory and the broader critical literature on predictive policing, we might well conclude that the policing of possessory gun crime looks a great deal like what Wilson hoped for and what critics should fear.²⁰⁷ Many searches yield little evidence of wrongdoing but increase a system of hyper-policing for individuals (particularly men of color) who are deemed "suspicious."²⁰⁸

Just as police in the drug context have been empowered to fight a war against the citizenry, in the gun context, officers now operate in a space in which they are trained to view citizens as armed—potential threats not only to the public, but also to the officers' personal safety.²⁰⁹ Certainly, guns pose a direct threat to officers that drugs simply do not.²¹⁰ And guns clearly possess a closer tie to violence and immediate third-party harms. But if we were concerned about the escalation of a war mentality and a proliferation of potentially violent confrontations between police and civilians in the drug context, then we cannot discount possessory gun crime

203. See William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 853 (2001).

204. Dubber, *supra* note 10, at 836.

205. See *supra* notes 129–40 and accompanying text.

206. See *supra* note 139 and accompanying text.

207. See *supra* notes 160–65, and accompanying text.

208. See Forman, *supra* note 154.

209. See generally *United States v. Perdue*, 8 F.3d 1455, 1462–63 (10th Cir. 1993) (discussing officer safety as a justification for expanding the scope of *Terry* searches).

210. See generally *infra* Part III.

as a space that has yielded both massive judicial deference to officers and also a normalization of officer force.

2. Prosecutorial Discretion

Despite widespread support from the political Left, the criminal regulation of firearms reflects many of the general properties associated with the harsh turn in criminal sentencing that accompanied the War on Crime. While mandatory minimum sentences that empower prosecutors in the plea bargaining process are common across criminal gun possession statutes,²¹¹ two specific antigun measures warrant particular attention²¹²—the Armed Career Criminal Act²¹³ (ACCA) and Virginia’s “Project Exile.”²¹⁴ Both target unlawful gun possession and impose strict penalties on bad actors (i.e., individuals with criminal histories) who possess firearms.²¹⁵

Originally enacted in 1984,²¹⁶ 18 U.S.C. § 924(e) (where ACCA is codified) operates as both a three-strikes sentencing provision and a “felon-in-possession” statute. Pursuant to the statute, a criminal defendant is subject to a fifteen-year mandatory minimum prison sentence if: (1) she violates the federal gun possession provision set forth in 18 U.S.C. § 922(g); and (2) has three prior convictions for “a violent felony or a serious drug offense, or both.”²¹⁷ Subsection (c) of the same statutory provision also sets forth a series of sentence enhancements for the use or possession of a gun during the commission of “any crime of violence or drug trafficking crime.”²¹⁸ While greater sentences accrue if the defendant fired the gun or brandished it, merely “carrying” or “possessing” the gun leads to a five-year mandatory minimum sentence.²¹⁹ Further, these mandatory minimum sentences under § 924(c) must be served consecutively, or “stacked,” so that a single incident can yield a massive mandatory minimum penalty.²²⁰

Conceived over a decade later in Richmond, Virginia, Project Exile aimed to take advantage of harsh federal gun laws, such as ACCA and § 924(c).²²¹ This combined state/federal initiative “targeted gun violence in

211. See, e.g., Schenwar, *supra* note 16; Jennifer Seltzer Stitt, *Worth Fighting For: Keeping the Promise of Sentencing Reform*, 23 FED. SENT’G REP. 126, 128–29 (2010).

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

213. 18 U.S.C. § 924(e) (2012).

214. *Project Exile*, U.S. ATTY’S OFF. E.D. VA., http://www.ojjdp.gov/pubs/gun_violence/profile38.html [<https://perma.cc/797E-GTXN>].

215. Both of these approaches to gun regulation are significant not only because they replicate many of the harsh sentencing dynamics associated with the War on Drugs, but also because they demonstrate an important principle of much criminal gun possession law: they are bipartisan success stories. See *infra* Part III.B.

216. See *Taylor v. United States*, 495 U.S. 575, 581 (1990).

217. 18 U.S.C. § 924(e)(1).

218. *Id.* § 924(c)(1)(A).

219. *Id.* § 924(c)(1)(A)(i).

220. *Id.* § 924(c)(1)(D)(ii).

221. See Richman, *supra* note 214, at 370.

the Richmond area by funneling all gun arrests made by state and local authorities to federal court, where, if at all possible, defendants were to be prosecuted under federal firearm statutes.”²²² The two legal regimes operate in tandem to increase the ability of prosecutors to incarcerate more people for more time. In fact, the Department of Justice’s “Project Safe Neighborhoods Tool Kit” encourages state prosecutors to use federal firearm statutes to pressure defendants to accept longer than usual state sentences.²²³

In the drug context, critics have focused on the ways in which mandatory minimum sentences have encouraged plea bargaining and empowered prosecutors to control cases from start to finish.²²⁴ And ACCA and state/federal initiatives like Project Exile reflect the same dynamic. A prosecutor’s ability to tack on an additional charge under ACCA creates a sentencing regime in which the gun-based enhancement can lead to a much longer prison term than can the underlying crime itself.²²⁵ That is, a prosecutor can “stack” charges—essentially employing multiple counts to address the same underlying conduct.²²⁶

While ACCA, § 924(c), and Project Exile have received scholarly criticism,²²⁷ the link to the War on Drugs and its attendant critiques are less often a clear focal point. Authors tend to focus on flawed statutory provisions, federalism concerns, or critiques endemic to these cases, rather than on broader systemic or structural concerns about the heavy punishment meted out for nonviolent crime.²²⁸ That is, in the scholarly discourse, these are statutes or programs that require some fine tuning, rather than a criminal regulatory regime with an underlying problem (or set of problems). Nevertheless, as charges pursuant to § 924(e) and § 924(c) have increased,²²⁹ judges have begun to voice their concern that the use of

222. *Id.*; see also David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1447–48 (2011) (“The initiative included training for local law enforcement, a public relations campaign aimed at increasing community involvement in crime fighting, and an advertising campaign designed to get out the message that ‘An Illegal Gun Gets You Five Years in Federal Prison.’” (citing Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 251, 254 (Jens Ludwig & Philip J. Cook eds., 2003))).

223. See 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).

224. See generally *supra* Part I.B.2.

225. See, e.g., *Holloway v. United States*, No. 01-CV-1017, 2014 WL 1942923, at *1 (E.D.N.Y. May 14, 2014).

226. See, e.g., *id.*

227. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 25 n.81 (2012) (noting the vindictive use of § 924(c) by prosecutors); Molly Booth, Comment, *Sentencing Discretion at Gunpoint: How to Think About Convictions Underlying § 924(c) Mandatory Minimums*, 77 U. CHI. L. REV. 1739, 1740 (2010).

228. I will return to this question of whether gun possession might be considered “violent crime” in Part III.A. See *infra* notes 285–92 and accompanying text.

229. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1177 (2010) (noting that ACCA convictions increased from 250 firearm cases in 1996 to 647 by 2008).

mandatory minimum sentences in this context has led to prosecutorial overreach verging on miscarriages of justice.

In *Holloway v. United States*,²³⁰ Judge John Gleeson, a former Assistant U.S. Attorney, delivered a scathing indictment of the prosecutorial practices that led to the defendant's fifty-seven year sentence for armed robbery—twelve years for the robbery and forty-five for the gun charges.²³¹ The defendant turned down a plea deal that would have yielded a 130 to 147 month prison sentence and, in so doing, exposed himself to an additional forty-six years of mandatory prison time.²³² Judge Gleeson concluded that the case before him

encapsulate[d] several of the problems that have plagued our federal criminal justice system in recent years. Specifically, it is a window into (1) the excessive severity of sentences, (2) racial disparity in sentencing, and (3) prosecutors' use of ultraharsh mandatory minimum provisions to annihilate a defendant who dares to go to trial.²³³

The prosecution had imposed a “trial penalty” on the defendant—“the price Holloway was required to pay for exercising his right to put the government to its burden of proving him guilty beyond a reasonable doubt [was] 46 years in prison.”²³⁴ And the court had no option but to impose this sentence because the prosecution had opted to charge Holloway with three weapons counts—the law dictated that the sentences must be “stacked,” yielding the forty-five additional years.²³⁵

While there are strong reasons to doubt the worth of such a sentencing scheme and the value of such a long sentence under either a retributivist or deterrence theory,²³⁶ the duration itself is not the issue. A system that yields such lengthy sentences might certainly raise concerns,²³⁷ but it also raises important questions about the role of the prosecutor and her ability to shape single-handedly the contours of our criminal justice system. As in the drug context, the presence not only of mandatory minimum sentences, but also of charges that can be identified many times over for a single

230. No. 01-CV-1017, 2014 WL 1942923 (E.D.N.Y. May 14, 2014).

231. *Id.* at *1. It is worth noting that *Holloway* involved robberies committed “at gunpoint,” *id.*, and as such dealt with conduct that falls much more clearly into the rubric of “violent crime” than the pure possessory offenses on which I am generally focused. *Cf. infra* notes 285–92 and accompanying text (discussing possession as “violent”).

232. *Holloway*, 2014 WL 1942923, at *1.

233. *Id.*

234. *Id.*

235. *Id.* That the ultimate sentence was forty-six—rather than forty-five—years longer than the proffered plea agreement resulted from a twelve-year mandatory term for the underlying robberies, rather than the eleven-year term that the government had been willing to agree to at the plea bargain stage. *See id.*

236. However, such schemes and such an institutional design are very much in line with an incapacitation-based regime. If we adopt the critical or “new penological” view of criminal law as a form of social control, *see generally supra* note 10; *infra* note 273, then an approach to sentencing that ratchets up punishments for those identified as menaces or intractable might well become emblematic of the desired statutory framework.

237. *See generally infra* Part II.C.

instance of illicit conduct raise significant problems.²³⁸ The prosecutor in *Holloway* was able to impose the massive trial penalty not only because of the steep mandatory minimum offenses, but also because of the ease with which multiple counts could be articulated.²³⁹

Indeed, in the § 924 context (including both § 924(c) and ACCA), *Holloway* is not unique as a case in which: (1) the underlying unlawful conduct yielded less punishment than did the presence of a firearm; and (2) the court bemoaned the role of prosecutorial discretion.²⁴⁰ In *United States v. Ballard*,²⁴¹ the District Court stated that “[t]he distorting effects of mandatory minimum sentences [had] never [been] more evident” and decried the government’s desired result as “unconscionable” in a case where a trial penalty resulted in the defendant receiving a 601-month sentence, while his codefendant only received 168 months.²⁴² In *United States v. Harris*,²⁴³ the Ninth Circuit noted that § 924(c) “removed the carefully circumscribed discretion granted to district courts . . . to consider possible mitigating circumstances” and urged Congress to reconsider its “harsh scheme of mandatory minimums sentences.”²⁴⁴ In *United States v. Herbert*,²⁴⁵ Judge Harold DeMoss, Jr., concurred in a Fifth Circuit § 924(c) case, but wrote separately to critique the “draconian” use of the statute.²⁴⁶ Similarly, in *United States v. Hunter*,²⁴⁷ an Eighth Circuit § 924(c) case, Judge Myron Bright wrote a separate opinion

to express [his] view that [the defendant’s] sentence, including his mandatory life sentence, is “out of this world.” This case is yet “another example of a harsh sentence that is required for a non-violent crime in what now seems generally recognized as this country’s continuing but unsuccessful War on Drugs.”²⁴⁸

238. Notably, Judge Gleeson’s condemnation of mandatory minimums and prosecutorial discretion in *Holloway* hardly was unusual. Judge Gleeson has repeatedly expressed skepticism about these same issues in the context of drug offenses. *See, e.g.*, *United States v. Kupa*, 976 F. Supp. 2d 417, 417–18 (E.D.N.Y. 2013); *United States v. Dossie*, 851 F. Supp. 2d 478, 478–79 (E.D.N.Y. 2012).

239. *Cf. Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (“With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.” (quoting Robert Jackson, Attorney General, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940))).

240. *See, e.g.*, *United States v. Cejas*, 761 F.3d 717, 732 (7th Cir. 2014); *United States v. Moody*, 770 F.3d 577, 580 (7th Cir. 2014).

241. 599 F. Supp. 2d 539 (S.D.N.Y. 2009), *aff’d sub nom.* *United States v. Steele*, 390 F. App’x 6 (2d Cir. 2010).

242. *Id.* at 539, 543.

243. 154 F.3d 1082 (9th Cir. 1998).

244. *Id.* at 1085.

245. 131 F.3d 514 (5th Cir. 1997).

246. *Id.* at 526 (DeMoss, J. concurring).

247. 770 F.3d 740 (8th Cir. 2014).

248. *Id.* at 746–47 (Bright, J., concurring) (quoting *Walking Eagle v. United States*, 742 F.3d 1079, 1083 n.2 (8th Cir. 2014)).

Judge Bright's concurrence powerfully draws the relationship to the War on Drugs that is too little explored and criticized. Nevertheless, it may be that the § 924(c) cases are less compelling as an entrée into the critique of gun possession crimes because they involve crimes other than the gun possession itself. To appreciate the broader theoretical critique traced by Dubber and suggested by other critics of crime as social control,²⁴⁹ it might be more illustrative to focus on ACCA and the fixation on possession itself.

The costs of ACCA's possessory focus are evident perhaps most clearly in *United States v. Young*.²⁵⁰ In *Young*,

Edward Young received a mandatory fifteen-year prison sentence for the crime of possessing seven shotgun shells in a drawer. He came into possession of the shells while helping a neighbor sell her late husband's possessions. When he eventually discovered them, he did not realize that his legal disability against possessing firearms—resulting from felonies committed some twenty years earlier—extended to ammunition. Under the [ACCA], Young received a mandatory fifteen-year sentence.²⁵¹

Whatever our preferred theory of punishment, Young's spending over two years in prison for each shell certainly strains most conceptions of proportionality.

On Appeal, Young argued that the conviction violated his Eighth Amendment right against cruel and unusual punishment.²⁵² He lost.²⁵³ While the court conceded that "[t]he magnitude of Young's crime was low, as was his culpability and motive,"²⁵⁴ the court went on to conclude that "Young's recidivism, resulting from numerous felony convictions roughly twenty years prior to his present offense, increases the gravity of his offense."²⁵⁵ *Young*, then, stands as a powerful illustration of the criminal law as a means of controlling populations and predicting dangerousness. In some sense, the ACCA charge and conviction resembles a status crime rather than a conduct crime. Young had been branded a bad actor—a threat to public safety—and, as such, was subject to the sort of harsh justice meted out by ACCA.

It's hard not to reflect on Dubber's analogy of possessory offenses and vagrancy.²⁵⁶ By presenting official actors (i.e., police and prosecutors) with a powerful weapon to deploy against potential social deviants, ACCA provides a vehicle for preemptive policing (or, at the very least, policing by

249. See generally *supra* note 10; *infra* note 273.

250. 766 F.3d 621 (6th Cir. 2014) (per curiam).

251. *Id.* at 623 (citation omitted).

252. See generally *id.* Douglas Berman, a prominent criminal law scholar and critic of harsh sentencing in the drug context, argued on Young's behalf. See *Sixth Circuit to Hear Oral Argument on Extreme Application of ACCA in US v. Young*, SENT'G L. AND POL'Y, (Mar. 12, 2014, 8:12 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2014/03/sixth-circuit-to-hear-oral-argument-on-extreme-application-of-acc-a-in-us-v-young.html [https://perma.cc/B9WA-2U5U].

253. *Young*, 766 F.3d at 630.

254. *Id.* at 627.

255. *Id.* at 628.

256. See *supra* notes 202, 206.

proxy).²⁵⁷ Whether we view this mechanism critically as a means of repression, or more positively as a vehicle for prevention, the fact remains that ACCA—like criminal drug statutes—serves as an area in which state actors may rely on their own intuition to determine who walks free and who spends a life behind bars.

Further, it is important to recognize the relationship between the racial critique of gun possession statutes and prosecutorial discretion. In *Holloway*, Judge Gleeson noted that prosecutorial discretion in the gun context not only raised concerns over incarceration, but also its distributional consequences²⁵⁸:

Black men like Holloway have long been disproportionately subjected to the “stacking” of § 924(c) counts. The Sentencing Commission’s Fifteen-Year Report states that black defendants accounted for 48% of offenders who qualified for a charge under § 924(c), but they represented 56% of those charged under the statute and 64% of those convicted under it.²⁵⁹

The troubling racial dynamics of prosecutorial discretion in the gun context is not confined to § 924 cases. In *United States v. Jones*,²⁶⁰ the defendant brought a constitutional challenge to Project Exile, arguing that it violated his Fourteenth Amendment right to equal protection under the law, both because it shifted cases into federal courts to decrease the number of black would-be jurors in the jury pool and because prosecutors selectively prosecuted black defendants.²⁶¹ Specifically, the defendant emphasized that the jury pool for the city of Richmond was 75 percent black, while the jury pool for the Eastern District of Virginia was only 10 percent black, and that Assistant United States Attorneys admitted that they sought to “avoid ‘Richmond juries.’”²⁶² Despite rejecting the claims, the court “express[ed] its concern about the discretion afforded individuals who divert cases from state to federal court for prosecution under Project Exile.”²⁶³

Indeed, the limited academic engagements with the racial disparity of gun prosecutions have focused on § 924 cases. Sonja Starr and Marit Rehavi have noted that “the non-drug mandatory minimum that was the most common and the most responsible for driving sentencing disparities was the enhancement for crimes involving firearms, found in 18 U.S.C § 924(c).”²⁶⁴ They go on to note that the “statute has particularly harsh penalties” and that “[p]rosecutors have considerable discretion in applying this statute, especially when the facts make the relationship of a gun to an offense ambiguous (for instance, when the gun is found in the defendant’s

257. On the elision of violence and risk under ACCA, see Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 604–10 (2011).

258. *Holloway v. United States*, No. 01-CV-1017, 2014 WL 1942923, at *1 (E.D.N.Y. May 14, 2014).

259. *Id.* (citations omitted).

260. 36 F. Supp. 2d 304 (E.D. Va. 1999).

261. *Id.* at 310–11.

262. *Id.* at 313.

263. *Id.* at 311.

264. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 30 (2013).

car trunk).”²⁶⁵ Another critic notes that in districts such as the Eastern District of Michigan, Southern District of New York, and Southern District of Ohio, 90 percent of the prosecutions were against black defendants.²⁶⁶

In short, the current statutory framework for criminal gun possession displays a disturbing overreliance on the discretion of prosecutors to identify who are the true bad actors and determine who deserves the full brunt of the state’s violence. In this respect, the statutes discussed in this section mirror the worst elements of the War on Drugs, as well as the flawed mode of policing in both contexts. Legal actors (courts and legislators) have deferred to law enforcers (police and prosecutors). The War on Drugs and its attendant critiques have shown us the costs of this deference. Similar deference in the gun context may well produce similar costs.

C. Driving Mass Incarceration

Like criminal drug statutes, existing and proposed criminal gun possession statutes should also trigger skepticism from critics of mass incarceration. If we are concerned about mass incarceration because of its social or economic costs, we should subject to close scrutiny any legislation that further ramps up punishment or potentially increases the number of individuals serving extended sentences. While fewer people are incarcerated for possessory gun crimes than drug crimes, gun crimes play a substantial role in the current moment of mass incarceration.²⁶⁷ In 2012, for example, firearms charges accounted for 9.8 percent of all federal charges for which a defendant was sentenced.²⁶⁸ In 2013, of the 193,775 sentenced inmates in federal custody, an estimated 30,000 (approximately 15.5 percent) were incarcerated for weapons charges.²⁶⁹ This percentage, while substantially less than the percentage of federal inmates serving drug sentences (50.7 percent), was greater than any other specific class of federal crimes, including immigration offenses (9.9 percent) and violent crimes (7.0 percent).²⁷⁰ Further, between 1999 and 2011, firearms charges were the second leading cause for nonviolent life-without-parole sentences.²⁷¹

In a sense, then, this section follows directly from the discussion of mandatory minimum sentencing and ACCA in the context of prosecutorial

265. *Id.*

266. *See* Gardner, *supra* note 223, at 317.

267. *See generally* U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2012 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf [<https://perma.cc/9N6X-HF7R>].

268. *Id.* at 1.

269. E. ANN CARSON, U.S. DEP’T OF JUSTICE: BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 17 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/M99A-4JFB>].

270. *See id.*

271. ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 25 (2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf> [<https://perma.cc/2CJF-3KBB>].

discretion. As a category of criminal offenses defined by sentencing enhancements, mandatory minimum sentences, and predicting future threats, possessory gun crimes embody many of the reigning pathologies of criminal law. As Dubber puts it, “[T]he point of [possession] offenses is the identification and neutralization of sources of danger, i.e., threats of threats.”²⁷² In their focus on prevention, possession crimes in the gun context embrace incapacitation as a primary purpose of punishment.²⁷³

These statutes illustrate the troubling duality that has come to define the contemporary moment in the U.S. criminal justice system. On the one hand, the crimes are almost regulatory in nature,²⁷⁴ a version of “public welfare” offenses.²⁷⁵ Quintessential *malum prohibitum* offenses, possessory gun crimes ultimately serve as a means of regulating dangerous products just as much as (if not more so than) dangerous conduct.²⁷⁶ In this respect, gun possession statutes sound in the register of utilitarianism or some broader consequentialist ethos. Largely divorced from discussions of mens rea, the statutes purport to serve as a vehicle (albeit an indirect one) for curbing gun violence. On the other hand, these statutes carry with them the weight of substantial prison time. In the broader context of three-strikes sentencing regimes and punitive, tough-on-crime politics, gun possession statutes bear the heavy mark of the sharply retributive turn that U.S. criminal justice policy took over the latter portion of the twentieth

272. Dubber, *supra* note 10, at 843.

273. *See id.* at 841–45. “[T]he Model Code’s mechanisms for the early detection and diagnosis of correctional needs became a vast net of mass incapacitation. . . . So, possession offenses were transformed from opportunities for early correctional intervention into opportunities for lengthy, perhaps permanent, incapacitation.” *Id.* at 992. In this respect, these possessory offenses illustrate the incapacitacionist turn that scholars have identified as comprising “the new penology.” *See* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on an Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 449 (1992); *see also* Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 252–54 (2009); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509, 553 (2014).

274. *See* United States v. Young, 766 F.3d 621, 624 (6th Cir. 2014) (noting that the defendant in an ACCA case “describes [the crime] as a mere technical violation of the statute” and “[c]ompar[es] his crime to overtime parking”).

275. *See* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933).

276. Indeed, under many statutes, the manner in which or the purpose for which a defendant possesses the firearm in question has no bearing on her guilt or the sentence that she must serve. *See* Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 492 (2004). The only question for a prosecutor, a judge, or (in rare cases) a jury is generally whether the defendant possessed a gun to which she was not lawfully entitled. *See* Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1187 (2010). “How?”, “where?”, “when?”, and “why?” she possessed the gun may all be questions of great importance to a determination of moral culpability or social risk. But they are wholly irrelevant to most of the legal frameworks that currently structure the criminal regulation of gun possession. Put more simply, mens rea, the touchstone of much U.S. criminal law, largely drops out of the possession equation. *See* Dubber, *supra* note 10, at 859.

century.²⁷⁷ Therefore, these possessory gun crimes stand at once as markers of two concurrent, and seemingly inconsistent, trends in U.S. penal culture: criminal law as the regulatory mechanism of choice and punitive, extended incarceration as the dominant form of punishment. That is, the state governs through crime, stripping the criminal offense of many of its exceptional qualities;²⁷⁸ yet, the state punishes as though the criminal law remains exceptional, a space reserved for those who have violated the deep-seated moral values of the community, rather than those who have fallen afoul of yet another legislative diktat.

In this respect, the parallel to criminal drug statutes is compelling. 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.

III. DIFFERENT CRIMES, SAME CRITIQUES?

Are the critiques outlined in Part II meaningful, and, if so, what should that signify for discussions about the scope of criminal law and the criminal regulation of firearms? If we take seriously the fears that have led to widespread scholarly condemnation of the War on Drugs, what should this tell us about the legal treatment of gun possession? Perhaps, more generally, how might we imagine a legal architecture for gun regulation that avoids the pitfalls of the War on Drugs? In an effort to answer these questions, this part focuses first on the theoretical issues with the application of the drug war critiques to gun possession and then address the alternative normative proposals or positions that my critiques might trigger.

A. *Potential Limits to the Application*

Regardless of any possible similarities between the analyses in Parts I and II, staunch gun control advocates may remain unmoved by the parallels traced in this Article and may argue that the critiques of the War on Drugs have no real lesson to teach us about how to regulate gun possession. Support for stringent gun control has become deeply embedded in the contemporary liberal/progressive worldview and enjoys an important place

²⁷⁷ Indeed, it is worth noting that ACCA not only embeds the three-strikes provision in § 924(e), but that § 924(c) includes a subsection that triggers an additional twenty-five year sentence for any repeat offender of the felon-in-commission provision. 18 U.S.C. § 924(c)(1)(C) (2012).

²⁷⁸ See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 729 (2005) (arguing that criminal law loses its “moral force” as an embodiment of cultural norms and condemnation when it becomes too widely used).

in the package of views generally shared by the U.S. Left.²⁷⁹ Additionally, support for gun control as a means of curtailing gun violence remains strong in black communities that have borne the brunt of the nation's gun violence.²⁸⁰ While support for the War on Drugs has waned, and while those on the political Left have been some of the most vociferous critics of criminal drug policies,²⁸¹ any argument that cuts against the grain of these deeply held beliefs about guns will presumably face strong opposition.²⁸² Put simply, to gun control advocates, guns are categorically *different*.

In his work on “cultural cognition,” Dan Kahan has focused on the gun control debate and argued that the political divide on gun regulation cannot be understood on purely rational terms.²⁸³ “Whatever they say in public,” contends Kahan, “those involved in the gun control debate are not really motivated by beliefs about guns and crime. . . . What *does* motivate them, a wealth of sociological and historical literature suggests, is their attachment to competing cultural styles that assign social meanings to guns.”²⁸⁴ According to Kahan and other scholars of gun law and policy, attitudes toward guns are articles of faith, often deeply embedded in views of self and society.

Further, to some, gun possession is too close to violence on a broader chain of causation and therefore must be treated as a violent crime in and of itself. I argue that the legal treatment of guns and drugs should be rooted in a discussion of the best way to regulate markets in dangerous products, but it is important to recognize that all dangerous markets are not the same. Dangerous and deadly are not necessarily synonymous. That is, while much of the current criticism of marijuana criminalization finds support in scientific evidence about the limited health risks of marijuana use, no such evidence exists to disprove the uncontested fact that guns are lethal weapons.

This rationale finds purchase in the ACCA context, where courts have treated simple possession of certain types of guns to be “crimes of

279. See, e.g., WINKLER, *supra* note 13, at 196–98; Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 451–61 (1999); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 64 (2002).

280. See generally Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013) (characterizing a “modern orthodoxy” in many urban, black communities that supports strict gun regulations).

281. See generally *supra* Part I.

282. See generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 104–07 (2013); Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569 (2006); David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1482 (2014); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); Kahan, *supra* note 279, at 451–62.

283. See generally Kahan, *supra* note 279, at 451–62.

284. *Id.* at 452; see also TUSHNET, *supra* note 13; Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329, 1329 (2003) (“[D]o facts actually affect gun policy in the real world? Kahan and Braman argue, persuasively, that ‘cultural worldviews’ influence how individuals perceive gun control measures. We are convinced.” (footnote omitted)).

violence” sufficient to satisfy the statute’s residual clause.²⁸⁵ Indeed, in the oral argument for *United States v. Johnson*,²⁸⁶ the Supreme Court focused on this very proximity between possession and harm in considering the potential vagueness of ACCA’s residual clause.²⁸⁷ While the defendant contended that “merely possessing [a short-barreled shotgun] is a very far cry from using it in a crime,”²⁸⁸ much of the argument revolved around an implicit rejection of the harm principle. The justices expressed little interest in any overt act by the defendant and instead sought to identify where possessing a short-barreled shotgun fell on the spectrum from possessing burglary tools (not violent)²⁸⁹ to nuclear weapons (violent).²⁹⁰ Indeed, in his dissent from the Court’s opinion in *Johnson*, Justice Alito concluded that the defendant’s possession offense was a crime of violence because his “conduct posed an acute risk of physical injury to another.”²⁹¹

While it is important to note this general category of objections to the comparison of guns to drugs (i.e., gun possession is violent), it is unclear how far that line of reasoning can or should extend. This was the challenge in the *Johnson* argument, and it should be a challenge for us as we look back at the War on Drugs. If our focus is less on an act than the dangerousness of an item or substance, maybe that should cut against our use of “nonviolent drug offense” to describe possession or distribution of heroin, crack cocaine, methamphetamine, or other drugs known to have severe or even lethal health effects.

We do not have a good theoretical framework or justification for when to abandon the harm principle and when to cease requiring an overt act. Ultimately, these may be questions for legislators rather than courts. But if the government’s rationale in *Johnson*—a version of the guns/violence nexus critiqued by Baradaran Baughman²⁹²—is justifying the exceptional treatment of guns, then it is important for criminal law scholars to examine this justification. Most importantly, if it applies to guns (or at least certain types of guns), then is there a limiting principle? Or might it necessitate a broader embrace of the preventative theory of punishment critiqued by Dubber?

Ultimately, whether guns are too closely aligned with violence and immediate third-party harms to be likened to (dangerous) narcotics, or whether guns remain culturally, rhetorically, or expressively distinct, the

285. See, e.g., *United States v. Johnson*, 526 F. App’x 708, 711 (8th Cir. 2013), *rev’d* 135 S. Ct. 2551 (2015); *United States v. Lillard*, 685 F.3d 773, 776 (8th Cir. 2012); *United States v. Marquez*, 626 F.3d 214, 221 (5th Cir. 2010); see also Ristroph, *supra* note 257, at 604–10.

286. 526 F. App’x 708 (8th Cir. 2013).

287. Transcript of Oral Argument at 6, *Johnson*, 135 S. Ct. 2551 (No. 13-7120) (Justice Kagan: “But if I understand the government’s argument, it’s that there’s a very strong correlation between possession in this case and use for criminal purposes of a kind that clearly would pose a risk of—of violent conduct and injury”).

288. *Id.* at 14.

289. See *id.* at 16.

290. See *id.* at 11.

291. *Johnson*, 135 S. Ct. at 2584 (Alito, J., dissenting).

292. See *supra* notes 168–75 and accompanying text.

comparative move made in Part II may not appeal to gun control proponents. Nevertheless, accepting the line of reasoning advanced in this Article does not necessarily mean conceding that: (1) (all types of) guns are analogous to (all types of) drugs; (2) private possession of any type of gun is socially beneficial; or (3) gun ownership or increased gun ownership is normatively desirable. That is, the applicability of drug war critiques to gun possession need not yield an explicitly “pro-gun” result or normative proposal. Even if guns provided no social benefit and even if gun ownership were emblematic of a deeply flawed aspirational view of how society should function, that does not vitiate the salience of the critiques. Further, while some critiques of the War on Drugs may be predicated on a conclusion that drugs are not that harmful or dangerous, the critiques identified in Part I do not require such a conclusion. In the strong form outlined above, these critiques rest largely on evaluations of the social costs of criminal regulation, rather than on some assessment of the relative worth of the regulated substances.²⁹³ To suggest that the “New Jim Crow” scholars are arguing that drugs are good or that drug use yields social benefits misses their commentary’s deeper structural critique.

Indeed, the treatment of crack cocaine might provide a useful illustration to consider the case of gun possession. Unlike marijuana, crack cocaine has enjoyed no social destigmatization. It may be that the arguments that underpinned the 100:1 disparity have been discredited, but there has been no significant scholarly or public support for a noncriminal model of regulating crack. That being said, the dangerous nature of the substance did not prevent a range of scholarly and judicial critiques of the sentencing and enforcement mechanisms of crack cocaine’s criminal treatment.²⁹⁴ And, the dangerous nature of the substance did not stop Congress from acting to remedy through the FSA²⁹⁵ (at least in part) the racial inequities of previous policies. Crack addiction and the violence associated with the crack trade exacted massive tolls on poor communities of color—but so too did the use of criminal law to address these problems.²⁹⁶

Therefore, if we take these criticisms seriously, we must be willing to confront their applicability to existing and proposed criminal regulations on gun possession. If the arguments outlined in Part I make the War on Drugs so deeply unpalatable and unjust, then should we not be willing to consider criminal gun control through this critical lens?²⁹⁷ Criminal law may have

293. Drug war critics may weigh the costs and benefits of making drugs more widely available, but the critiques of the current legal framework of criminal prohibition frequently stand on their own; that is, the costs are so great that few benefits could conceivably outweigh them. Or, even if criminal regulation might result from a careful balancing of costs and benefits, this balancing has been troublingly lacking from the legal and scholarly discourse surrounding criminal gun regulation.

294. *See supra* notes 34–42.

295. *See supra* notes 39–43.

296. *See supra* notes 34–42.

297. While I am focused primarily on gun possession statutes as an analog here, the logic of this Article extends further. My claim is that criticism of the War on Drugs has highlighted structural flaws in the criminal justice system—flaws that persist outside of the

an important role to play in addressing gun violence.²⁹⁸ But the criminal statutes that regulate gun possession risk reproducing the same systemic pathologies, collateral costs, and distributional inequities that have defined the War on Drugs. That harsh statutory punishment for unlawful gun possession might offer a range of social benefits does not render it immune from consideration of potential costs. If we have identified the costs of regulating through crime, then these costs should become a part of *all* conversations about regulating through crime—not just conversations about drugs.

Over the past decade, as the scholarly criticism of the War on Drugs has increased, scholarly treatments of gun regulation have often taken a different turn.²⁹⁹ Whereas the drug war criticisms reflect an embrace of realist or post-realist methodologies,³⁰⁰ the gun debate has enjoyed a formalist shift as scholars have focused on the language of the Second Amendment.³⁰¹ In the drug context, scholars have devoted their efforts to examining the effects of the War on Drugs and to describing and testing possible legal alternatives.³⁰² In the gun context, however, recent years have seen a shift away from studies of the law in action to careful examinations of the law on the books.³⁰³ Exemplified by the post-*Heller* and *McDonald* fascination with the original meaning of the Second Amendment, the focal point of many gun rights advocates and gun control proponents has become an ostensibly apolitical space of historical and textual interpretation. Rather than examining the *effects* of various extant or proposed gun statutes, scholars and courts have become preoccupied with eighteenth-century views of gun ownership.³⁰⁴ Rather than focusing on the impact of possessory gun statutes on civil rights and liberties or on the

drug context. If these concerns have yielded such a compelling and stinging rebuke of U.S. drug policies, then shouldn't scholars concerned about injustice in the criminal justice system be concerned about their relevance to other criminal regulatory regimes? In this respect, gun possession statutes serve as a test case, rather than a one-off analogy. It may be that the possessory aspect of both categories of laws makes the application particularly salient, but that does not mean that the critique should end here.

298. Cf. Husak, *supra* note 15, at 445 (“No one can dispute that the criminal law should play an important role in proscribing the harms caused by guns and drugs. The use of a gun to wound, or the use of a drug to poison, unquestionably are and ought to be criminal acts.”).

299. See Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1191 n. 27 (2015) (collecting sources).

300. See generally *supra* Part I.

301. See, e.g., THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON *DISTRICT OF COLUMBIA V. HELLER* (Saul Cornell & Nathan Kozuskanich eds., 2013).

302. See *supra* Part I.A; see also *supra* note 113 and accompanying text.

303. See Zimring, *supra* note 110, at 39–40. One reason for this shift may be the great impact that Second Amendment scholarship has had on the Court's reasoning. See Joseph Blocher, *New Approaches to Old Questions in Gun Scholarship*, 50 TULSA L. REV. 477, 478 (2015) (expressing optimism about recent strands in gun scholarship).

304. See Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 825 (2014) (“[S]ometimes gun rights talk displays an almost adamant refusal to accept not the size or existence of externalities, but their relevance. This imperviousness to public policy considerations finds some rhetorical support in *Heller* itself, as the majority appeared to indicate that the right to keep and bear arms is immune to considerations of social cost.”).

laws' distributional consequences, scholars have become preoccupied with the Second Amendment.

To put a finer point on it, the Second Amendment frame often obscures the practical realities of the criminal justice system.³⁰⁵ When all we consider is a right to bear arms and possible intrusions on that right, we lose perspective on the legal institutions that would both enforce that right and also might intrude on it. In the context of prohibitionist tendencies against guns and drugs, this sort of conversation encourages a focus on whether the prohibited item is bad and whether society would be better without it, rather than on the legal mechanics—and consequences—of prohibition. Legal philosopher and scholar of overcriminalization Douglas Husak characterizes this view as “the common mistake of supposing that the criminal law operates by preventing given forms of conduct.”³⁰⁶ As he puts it,

If that [supposition] were so, the only substantive consideration that would be relevant to criminalization would be the value of the liberty that is lost when conduct is prohibited. According to this supposition, questions about the legitimacy of the criminal sanction could be resolved by pretending that the state possessed a magic wand that could make all guns or drugs (for example) disappear. In reality, of course, the criminal law functions quite differently; it *proscribes*, but may not *prevent*.³⁰⁷

The state lacks a magic wand. Instead, the state has criminal statutes, law enforcement officers, and the vast infrastructure of the criminal justice system.

The challenge of addressing social problems and the reach of criminalization when faced with the “magic wand” frame has recurred throughout scholarly and political treatments of gun possession. In a 1976 collection of policy proposals, *Crime and Punishment: A Radical Solution*, then-National Director of the ACLU Aryeh Neier included a chapter entitled, “Take Away All Guns.”³⁰⁸ In a book that includes proposals to decriminalize a range of sexual offenses and abandon many drug war policies, Neier identifies violent state intervention as the ideal solution to the problem of gun violence.³⁰⁹ Yet, in a concluding paragraph, Neier concedes his reliance on the frame that Husak would identify decades later:

Elsewhere . . . I propose that the state do less. Here, I want the state to do more. I want the state to take away people's guns. But I don't want the state to use methods against gun owners that I deplore when used in enforcement of laws against naughty children, sexual minorities, drug

305. That being said, it is worth noting that the Second Amendment may provide a defense to individuals charged with possessory gun crimes and may alter courts' Fourth Amendment analysis. *Cf. Adams v. Williams*, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting) (concluding that a state law allowing concealed carrying of firearms should have barred an officer's search of a defendant).

306. Husak, *supra* note 15, at 469.

307. *Id.* (emphasis in original).

308. ARYEH NEIER, *CRIME AND PUNISHMENT: A RADICAL SOLUTION* 62–71 (1976).

309. *See generally id.*

users, and unsightly drinkers. Since *such reprehensible police practices are probably needed to make antigun laws effective*, my proposal to ban all guns should probably be marked a failure before it is even tried.³¹⁰

Past experience has shown us the realities of criminal intervention in social problems. And past experience has led to a range of recognized critiques. So why pretend that there could be a magic wand when we are presented with a social problem that we find particularly pressing or an item, substance, or behavior that we find particularly reprehensible?³¹¹

Given that there will still be gun regulation after *Heller* and *McDonald*, we must determine what such regulation should look like and which legal institutions should shape U.S. gun policy.³¹² “What will improve the gun debate at the top end of the policy community,” argues Franklin Zimring, one of the nation’s preeminent gun law scholars, “is careful attention to the differences between types and intensities of firearm regulation.”³¹³ By resituating the discussion of criminal gun statutes in the frame of the drug war critiques, I hope to reemphasize these institutional dynamics and the legal architecture of criminal regulation.

B. What Happens Next?

One challenge for a critical inquiry into the costs of possessory gun criminalization, or the broader use of flawed criminal statutes or policing techniques, is the practical advantage that criminal law often enjoys. This tendency to favor increasingly harsh criminal law solutions embodies what Stuntz described as the “pathological politics” of criminal law.³¹⁴ In the gun context, the story of criminal law’s prominence highlights criminalization as an easier alternative and easier space for bipartisanship.

ACCA and Project Exile provide useful illustrations of this point. Both pieces of “tough on crime” legislation represent compromises of a sort. In popular and scholarly discourse, gun control generally is treated as a polarized issue that breaks down along predictable political lines. Those on the political Left tend to support gun control, while those on the Right favor fewer restrictions on gun ownership. But ACCA and Project Exile represent a compromise between a law-and-order Right and an antigun Left.³¹⁵ For gun control proponents, these statutes represent not only a

310. *Id.* at 71 (emphasis added).

311. See Husak, *supra* note 15, at 438 (“The true test of our commitment to a theory is whether we are willing to accept its implications when we might prefer not to do so.”).

312. Based on the Supreme Court’s treatments of the other rights that have been incorporated against the states, it is implausible that the Court would hold that the right was absolute and that no gun regulation was constitutional. See *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (“[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . .”).

313. Zimring, *supra* note 110, at 42.

314. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

315. See, e.g., SIMON, *supra* note 4, at 143; Gary Fields, *Going After Crimes—and Guns*, WALL STREET J. (Aug. 5, 2008), <http://www.wsj.com/articles/SB121789872887012221> (“The National Rifle Association and the Brady Campaign to Prevent Gun Violence rarely

powerful public statement condemning the unlawful possession of guns, but also a rare moment of agreement with gun control opponents.³¹⁶ While many gun rights advocates certainly may be absolutists in their opposition to regulation on gun ownership, the NRA and other opponents of gun control regulation have frequently made an exception for criminal statutes. These statutes reflect a popular motto of the NRA—“guns don’t kill people; people kill people.”³¹⁷ That is, these statutes make regulating guns about targeting or identifying bad actors and punishing them, rather than directly regulating a product or market.

As discussed above, there is reason to be suspicious of both programs based on their distributional effects and collateral costs.³¹⁸ Such initiatives might curb gun violence or might allow for political action in a climate of polarization. Further, these programs (like many other gun control measures) might enjoy strong support from the communities most affected by gun violence. But for critics of the expanding criminal justice system, these bipartisan compromises should be a source of concern. Tough-on-crime initiatives remain tough-on-crime initiatives, regardless of their supporters’ motivations or good intentions. In these compromises, the vulnerable groups that suffer directly from tough-on-crime policies (e.g., individuals with criminal records and young men of color in heavily policed areas)³¹⁹ often do not have a seat at the bargaining table.³²⁰ The same sort of compromises that shaped U.S. drug policy and led to the mass incarceration and hyper-policing of entire communities pose the same risks to the same individuals who often find themselves the target of such preventative policies. Communities might certainly conclude that the costs of intrusive policing or widespread incarceration might be justified if these methods could prevent gun violence.³²¹ But it is important to recognize

agree on anything related to gun laws. But both support a law-enforcement program in Richmond that targets gun crimes.”) [<https://perma.cc/DU5J-Y9FC>]; Richman, *supra* note 214, at 372.

316. See, e.g., Fields, *supra* note 315; Richman, *supra* note 214, at 372.

317. See Lance Lindeen, Note, *Keep Off the Grass!: An Alternative Approach to the Gun Control Debate*, 85 IND. L.J. 1659 & n.2 (2010).

318. See *supra* notes 212–29.

319. This is not to say that tough-on-crime policies affect only a narrow swath of the population. Indeed, the power of Alexander’s *The New Jim Crow* narrative is the argument that the ripples of these policies radically alter many communities and society as a whole. See generally ALEXANDER, *supra* note 4.

320. Cf. Bernard Harcourt, *Matrioshka Dolls*, in TRACEY L. MEARES & DAN KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 87 (1999) (raising a similar argument in the context of urban policing).

321. Cf. Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, in MEARES & KAHAN, *supra* note 320, at 3, 3–30 (arguing that residents of a housing project should be permitted collectively to waive Fourth Amendment rights via referendum in an effort to curb crime). It is also worth noting that the War on Drugs and felon disenfranchisement means that many of the same individuals affected by gun possession statutes have been excluded from the voting process and therefore excluded from the community decision-making process. Put another way, defining “community” when speaking of community preferences can be quite challenging. See Harcourt, *supra* note 320, at 87. As a result, even if there might be reason to be more optimistic about local rather than

that such a decision may ultimately shift power away from the community and into the hands of police and prosecutors.

That aggressive policing and harsh criminal sentences have become the dominant paradigm for discussions of managing gun violence and gun possession does not mean that there might not be alternatives. As the gun control movement gained steam in the 1990s, criminal penalties were not the only goal sought by gun control proponents.³²² Beginning in the 1980s, tort litigation became a popular mechanism for victims of gun crime to seek redress, with litigation increasing over the following decades.³²³ Gun control advocates, plaintiffs' lawyers, and tort law scholars advanced a number of creative arguments, ranging from public nuisance claims against handgun manufacturers,³²⁴ to the use of strict liability for enabling torts,³²⁵ to negligent entrustment claims against retailers and dealers.³²⁶ Additionally, some cities have introduced community-based or extralegal strategies—including buyback programs and financial incentives to discourage offending.³²⁷

Others have provided extensive accounts of these various theories, their successes, and their failures.³²⁸ But I include this brief mention here to emphasize that many of those involved in devising legal solutions to the problems of gun violence have not always been constrained by a criminal regulatory paradigm. Based on judicial hostility and legislative responses (particularly the Protection of Lawful Commerce in Arms Act of 2005),³²⁹ a

federal gun laws, *see generally* Blocher, *supra* note 282, affected parties might well remain un- or underrepresented.

322. *See* Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry* 1–5, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton ed., 2005).

323. *See id.*

324. *See, e.g.*, Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J.L. REFORM 1 (2004); David Kairys, *The Cities Take the Initiative: Public Nuisance Lawsuits Against Handgun Manufacturers*, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA*, *supra* note 13, at 363, 369–79; Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521, 1521–22 (2000).

325. *See* Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 ARIZ. L. REV. 311, 313 (2001).

326. *See* Lytton, *supra* note 322, at 5.

327. *See, e.g.*, DAVID M. KENNEDY, *DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* (2011) (describing Boston's "Operation Ceasefire"); Devone L. Boggan, Opinion, *To Stop Crime, Hand Over Cash*, N.Y. TIMES (July 4, 2015), http://www.nytimes.com/2015/07/05/opinion/sunday/to-stop-crime-hand-over-cash.html?_r=0 [<https://perma.cc/CGR7-HHKN>].

328. *See, e.g.*, Jo-Ann Moriarty, *Lawsuit Aims at Gun Industry*, in *GUNS IN AMERICA*, *supra* note 118, at 480, 480–85; Andrew J. McClurg, *Handguns As Products Unreasonably Dangerous Per Se*, in *GUN CONTROL & GUN RIGHTS: A READER AND GUIDE* 291 (Andrew J. McClurg et al. eds., 2002) [hereinafter *GUN CONTROL & GUN RIGHTS*]; ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 143–46 (2008); Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms As Consumer Products*, in *GUN CONTROL & GUN RIGHTS*, *supra*, at 308.

329. 15 U.S.C.A. §§ 7901–7903 (2012). The Act was passed "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful

tort-based framework for gun regulation might well be a legal and political nonstarter. But, if the critiques raised in this Article are at all resonant, it might be worthwhile to consider whether this or other models (e.g., public-health based, civil regulatory, or perhaps other tort theories) might provide alternatives or supplements to the criminal law regime.

Further, any criminal regulation of gun possession need not resemble ACCA, Project Exile, or the current web of mandatory minimum sentencing provisions.³³⁰ Neither racialized enforcement nor prosecutorial overreach is inevitable. Indeed, it is conceivable that a modification in the drafting of criminal statutes, an alteration in police training, a new turn in the Court's jurisprudence, or a more sustained engagement with structural inequalities might reduce the social costs discussed above, so that they no longer stand as such a significant counterweight to criminal law's perceived benefits. That is, perhaps an application of these critiques to the gun context suggests the need for legislative action along the lines that yielded the FSA.

All of which is to say that depending on the reader's political, ideological, or experiential priors, the takeaway regarding the ideal way in which to regulate gun possession might be very different. The libertarian reader might view the analysis as supporting decriminalization. The strong gun control proponent might conclude that we should temper our use of mandatory minimum sentences and rethink policing techniques, but that criminal law remains the appropriate regulatory regime. The proponent of tort law as a social gap-filler might contend that this Article provides support for private law remedial schemes either in addition to or instead of criminal liability for nonviolent gun offenses.³³¹ Regardless, the point remains that if these analogies to the drug critiques hold any water, they should force us to confront the social costs of criminal gun regulation.

At the outset of this Article, I identified guns as a test case for the drug war's critical rubric. Regardless of how much mileage the application of these critiques to gun possession yields, my argument is a broader, methodological one—what so many scholars have done compellingly with the War on Drugs should serve as a framework for the way that we approach criminal law going forward. The drug war's popular demise has brought us a clear language and set of theoretical tools through which to address the collateral and distributional costs of governing through crime. If these critiques are so convincing in the drug context, a space that *was* a hard case for many people for many decades, then why not elsewhere?

In some sense, the question comes down to what we will take away from the War on Drugs. We now know that at least some of the banned substances were less dangerous than experts believed and that addiction

misuse of firearm products or ammunition products by others when the product functioned as designed and intended." *Id.* § 7901(b)(1).

330. *See supra* Part II.B.2.

331. *See, e.g.*, John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 326 (2011); Allen M. Linden, *Tort Law As Ombudsman*, 51 CAN. B. REV. 155, 164 (1973).

poses a serious public health problem that requires treatment.³³² These lessons are important. Yet they are limited in their application and tell us little about law, about governance, and about what to do when the next progressive criminalization effort rears its head.³³³ If we focus only on these lessons, we are left with debates and policy proposals that rely on the “magic wand” view of criminalization. But what if the lesson is broader? We live in a world of hard cases, and criminalization and turning to criminal punishment *should be hard*. Recognizing the seriousness of a social problem should not necessarily be enough to trigger a harsh criminal solution.³³⁴ Recognizing criminal law’s staggering social costs should be the legacy of the War on Drugs.

CONCLUSION

Just prior to the War on Crime’s inception, Sanford Kadish warned of the costs of criminal law and expressed concern about the overuse of a criminal regulatory paradigm.³³⁵ Writing in 1968, Kadish argued that

criminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used it is capable of producing more evil than good; that the decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses. . . . One hopes that attempts to set out the facts and to particularize the perils of overcriminalization may ultimately affect the decisions of the legislatures. But past experience gives little cause for optimism.³³⁶

If we are to learn from the War on Drugs and avoid repeating past mistakes, it means internalizing the critiques of criminal law, not only in the drug context but in other “hard cases.”

While the War on Drugs has wrought great harm, the increasingly widespread recognition of its failure has ushered in a moment of great possibility for criminal justice reformers. Criminal sanctions may remain the most popular or politically pragmatic option for gun control

332. See, e.g., HOWARD RAHTZ, *DRUGS, CRIME, AND VIOLENCE: FROM TRAFFICKING TO TREATMENT* 69–89 (2012).

333. By “progressive criminalization effort,” I mean not only “progressive” in the contemporary political vernacular (i.e., Left/liberal), but also “progressive” in a more historicized sense—that is, looking to the state to solve social problems. See WINKLER, *supra* note 13, at 196–98 (discussing President Franklin Delano Roosevelt’s push to enact federal gun control laws as a part of the New Deal “philosophy of using the government to protect ordinary Americans from the hazards of modern society”). This turn to the state need not be—and frequently is not—reliant on a view of the state as a punitive institution. But, gun control stands as a space that aligns these dual meanings of progressive with a reliance on state violence in the form of criminal law.

334. See generally Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1589 (2012).

335. See Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17 (1968) [hereinafter Kadish, *The Crisis of Overcriminalization*]; Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 910 (1962).

336. Kadish, *The Crisis of Overcriminalization*, *supra* note 335, at 33.

proponents,³³⁷ but political pragmatism should not curtail a serious conversation about the costs of the criminal model and its proper structure. By framing debates about gun laws within the context of the War on Drugs' denouement, I hope to sound a note of caution, to suggest that activists, attorneys, scholars, and legislators should tread lightly in uncritically embracing criminal solutions lest they reinvoke the collateral consequences of the last criminal war.

337. See, e.g., Jacobs & Kairys, *supra* note 112, at 190; Richman, *supra* note 214, at 372.