

# IS IT FAIR TO CRIMINALIZE POSSESSION OF FIREARMS BY EX-FELONS?

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## I. INTRODUCTION

Steven Gomez was being held in the county jail when he learned that he had been acquitted of the charges against him.<sup>1</sup> Upon hearing that Gomez would be released shortly, Imran Mir, a fellow inmate who had been charged with participating in an international drug conspiracy, offered Gomez \$10,000 per person to kill the six witnesses who were going to testify against Mir.<sup>2</sup> Gomez reported Mir's offer to the jail guards. Eventually, the customs agent working on Mir's case promised anonymity and protection to Gomez in return for his help in gathering evidence against Mir.<sup>3</sup> Gomez then pretended to accept Mir's offer and, over the next three months, received detailed information about each targeted witness, was promised weapons to carry out the killings, and received a cash down payment from Mir.<sup>4</sup> But, when the government charged Mir with solicitation to commit murder, the Assistant United States Attorney disclosed Gomez's full name in the indictment.<sup>5</sup>

Shortly after he was released, Gomez was accosted by a man with a gun who accused Gomez of cooperating with law enforcement and insinuated that there was a contract out on Gomez's life.<sup>6</sup> The federal agents, the county sheriff, and Gomez's parole officer all refused to take Gomez into protective custody.<sup>7</sup> Gomez then started running for his life, sleeping at friends' houses and living on the streets.<sup>8</sup> After receiving death threats in several locations and not knowing what else to do, Gomez took possession of a twelve-gauge shotgun that had been stored at a friend's house even though he was generally prohibited from possessing a firearm under federal law due to a prior felony conviction.<sup>9</sup> Federal agents later sought to make contact with Gomez, not to belatedly offer him protection,

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1. *United States v. Gomez*, 92 F.3d 770, 772 (9th Cir. 1996).

2. *Id.*

3. *Id.*

4. *Id.* at 772–73.

5. *Id.* at 773.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 773–74.

but to get further help in making their case against Mir.<sup>10</sup> After two days of searching, they found him at a friend's house, carrying the shotgun.<sup>11</sup>

Gomez was later indicted on two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1),<sup>12</sup> one count for the shotgun, the other for the shells in it.<sup>13</sup> Given his dire situation and the government's refusal to protect him, Gomez sought to introduce evidence tending to prove that his possession of the shotgun was justified, but the district court refused to allow this affirmative defense.<sup>14</sup> The Ninth Circuit Court of Appeals reversed. Viewing the evidence in the light most favorable to Gomez, the court found that Gomez's situation fit within the very narrow justification exception to the federal felon-in-possession statute.<sup>15</sup> Therefore, Gomez should have been allowed to present his justification defense to the jury.<sup>16</sup>

Gomez's case neatly lays out some of the costs and benefits of prohibiting ex-felons from possessing firearms, and the sympathetic defendant helps create an objective perspective and dispel some biases that easily cloud the issue of whether ex felons should be able to arm themselves. This Note will attempt to objectively tally up the ways that prohibiting ex-felons from possessing firearms both helps and harms members of society, using data to support arguments wherever possible. Data are not available on topics such as where ex-felons reside, their

10. *Id.* at 773.

11. *Id.*

12. 18 U.S.C. § 922(g) states, in part: "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(g) (2012).

13. *Id.* at 774.

14. *Id.*

15. *Id.* at 775–78. The Ninth Circuit found that if Gomez's evidence were believed, it would be sufficient to meet the four elements of a justification defense under § 922(g): "(1) he was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm." *Id.* at 775, 778. The government contested each of the elements on appeal, particularly whether the encounter and death threats created a "present threat of death" when the most recent death threat had been made two days prior. *See id.* at 775–78. The court held that, because Gomez was threatened by Mir, who was "deeply involved in the exportation of illegal substances," who had large amounts of money and his freedom at stake, and who was already planning to murder witnesses against him, it was reasonable for Gomez to believe that he was still under immediate threat two days after the latest death threat was made. *Id.* at 776.

16. Gomez had already served most of his sentence by the time his appeal was decided, and it "appear[ed] unlikely that he could be retried before his sentence expire[d]." *Id.* at 778. The court therefore vacated his conviction and remanded "with directions that the district court release him immediately, subject only to appropriate conditions to ensure his availability in case of retrial." *Id.*

experiences as victims of crime, or their perpetration of violent crimes, so the arguments presented here will necessarily only paint a partial picture. Part II sets forth some philosophical and legal background. Part III examines reasons why ex-felons legally possessing firearms could produce negative utility for society and digs deeper into the arguments and data offered to question the “common sense” that often underlies such positions. Part IV then considers reasons why ex-felons legally possessing firearms could produce positive utility for members of society. Part V will attempt to weigh the costs and benefits to determine net utility. In each part, the State of Missouri and the City of St. Louis will be used as case studies, wherever sufficient data are available, supplemented by national data when useful to fill in gaps.

## II. BACKGROUND

Despite the apparent unfairness and injustice of the government’s treatment of Steven Gomez,<sup>17</sup> he was lucky to prevail on appeal.<sup>18</sup> Those circuits that have permitted a justification defense to the federal felon-in-possession statute have construed the exception very narrowly.<sup>19</sup> If,

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17. See *Gomez*, 92 F.3d 770 at 778 & n.13 (“That Gomez approached the government with the information which formed the basis of Mir’s wrath against him, and did so without compulsion or hope of remuneration, speaks well for Gomez and not nearly so well for those in the government who betrayed his trust. To prosecute Gomez for trying to protect himself, when the government refused to protect him from the consequences of its own indiscretion, is not what we would expect from a fair-minded sovereign. . . . The government quibbles that it never promised Gomez confidentiality as a condition for his cooperation. At this stage we must, of course, accept Gomez’s version of the events but, as a matter of fairness and justice, we don’t see why it matters. Let’s say Gomez lacked the foresight to extract a promise of confidentiality from the government before disclosing his information and helping it obtain more. Does the government then have no moral obligation to avoid unnecessary harm to one of its citizens, particularly one who has stepped forward to help prevent harm to others?”).

18. His sentence was vacated, but not before he had served all but two months of the sentence. See *id.* at 778.

19. See, e.g., *United States v. Mooney*, 497 F.3d 397, 406 (4th Cir. 2007) (“Because Congress, in enacting § 922(g), ‘sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society,’ we ‘construe the justification defense for possession of a firearm by a felon very narrowly.’ Indeed, we reserve its application for the ‘rarest of occasions.’”) (first quoting *Small v. United States*, 544 U.S. 385, 398 (2005); then quoting *United States v. Perrin*, 45 F.3d 869, 875 (4th Cir. 1995)); *United States v. Paolello*, 951 F.2d 537, 542 (3d Cir. 1991) (“The restrictive approach is sound. Congress wrote section 922(g) in absolute terms, banning any possession of firearms by all convicted felons. To ensure that this strict prohibition is effectuated, we should require that the defendant meet a high level of proof to establish the defense of justification.”); cf. *Dixon v. United States*, 548 U.S. 1, 17 (2006) (“Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt. In light of Congress’ silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress ‘may have contemplated’ it in an offense-specific context. In the context of the firearms offenses at issue—as will usually be the case,

instead, Gomez had been shot at while walking home from work eight months prior,<sup>20</sup> had been attempting to protect his business after a series of recent robbery attempts,<sup>21</sup> or had overheard a death threat only four hours earlier from a person who had already robbed and shot him one year prior,<sup>22</sup> Gomez would likely have lost his fight to use the justification defense. In each of these situations, despite an ex-felon having a strong case that possession of a firearm is justified under notions of fairness and natural law,<sup>23</sup> courts have found that such possession cannot be legally justified under the narrow exception to the federal felon-in-possession law.<sup>24</sup>

#### A. *Natural Law and Self-Preservation*

Thomas Hobbes described the “Right of Nature” as “the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall

given the long-established common-law rule--we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence.”) (citation omitted).

20. *See* State v. Crittendon, 883 F.2d 326, 329–30 (4th Cir. 1989) (“Ragib, whose work as a freelance photographer requires him to attend evening social events, was shot while returning home late in the evening on July 5, 1987. Prior to his shooting, Ragib’s wife received several death threats over the telephone. Ragib testified that he purchased and carried the .357 revolver solely to protect himself against the possibility of another shooting. . . . While his fear of another attack may have been rational and might have been his real motivation for carrying a revolver, generalized fears will not support the defense of justification.”).

21. *See* United States v. Harper, 802 F.2d 115, 117–18. (5th Cir. 1986) (“Harper contends that he purchased the gun mentioned in count 2 of the indictment from a pawnshop for the purpose of protecting himself and his fiancée at his business, which had been the object of several robbery attempts between April 1984 and September 1985. . . . There was no evidence that he was in danger of imminent bodily harm at the moment he purchased and possessed the gun; therefore, Harper is not entitled to the protection of the defense.”).

22. *See* United States v. Alston, 526 F.3d 91, 95 (3d Cir. 2008) (“Crediting his testimony, it is difficult to second guess or to ignore Alston’s fear of Bentley, one of the persons who robbed and shot him five times, and against whom he pressed charges that eventually resulted in an acquittal, and who apparently lived in sufficient proximity that total avoidance was impossible or at least unlikely. . . . Although Alston may have been under an unlawful threat of death or serious bodily injury, it is clear that at the time he was arrested, there was no evidence that Alston was under a present threat, that is, it was not an imminent threat.”).

23. *See, e.g.*, THOMAS HOBBS, LEVIATHAN 66 (1651); 3 WILLIAM BLACKSTONE, COMMENTARIES \*4; THE FEDERALIST No. 28 (A. Hamilton) (Clinton Rossiter ed., 1961). For a general discussion of the right to self-preservation as modified by the Second Amendment, see Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

24. *See supra* notes 20–22.

conceive to be the aptest means thereunto.”<sup>25</sup> John Locke called it “reasonable and just I should have a Right to destroy that which threatens me with Destruction.”<sup>26</sup> Sir William Blackstone concluded that, “Self-Defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.”<sup>27</sup> And Alexander Hamilton, most relevant to the facts of Gomez’s case, stated: “If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.”<sup>28</sup>

### *B. Justification Under United States Common Law*

Obviously, there is a great deal of space between Hobbes’s “doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto” and laws prohibiting ex-felons from possessing firearms for self-defense. Likewise, the way that federal courts of appeals have so far applied the justification defense to violations of 18 U.S.C. § 922(g) is much more circumscribed than the natural right of self-preservation. The circuits that allow a justification defense<sup>29</sup> use elements tests that generally require a defendant to show by a preponderance of the evidence that he “(1) reasonably feared death or serious injury from an imminent threat, (2) [did] not recklessly place[] himself in the path of that threat, (3) had no reasonable alternative to possession, (4) reasonably believed that possession would avert the threat and (5) maintained

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25. THOMAS HOBBS, *LEVIATHAN* 66 (1651) (“And consequently it is a precept, or generall rule of Reason, “That every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre.” The first branch, of which Rule, containeth the first, and Fundamentall Law of Nature; which is, ‘To seek Peace, and follow it.’ The Second, the summe of the Right of Nature; which is, ‘By all means we can, to defend our selves.’”).

26. John Locke, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 296–97 (P. Laslett rev. ed., 1960). *See also id.* at 289 (“Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.”).

27. 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*4.

28. *THE FEDERALIST* No. 28 (A. Hamilton) (Clinton Rossiter ed., 1961).

29. All but the Seventh and Eighth Circuits have allowed a justification defense. *See United States v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007) (collecting cases). The Eighth Circuit has suggested that it would follow the elements used by the Fifth Circuit in an appropriate case. *United States v. Poe*, 442 F.3d 1101, 1103 (8th Cir. 2006).

possession only as long as necessary to avoid the threat.”<sup>30</sup> The Courts of Appeals have made clear that, under such elements tests, ex-felons cannot choose firearms as a means of self-preservation in most circumstances.<sup>31</sup>

For example, the Third Circuit held in *United States v. Alston*, that an ex-felon may not possess a firearm to pass through an area where a death threat was made against him by a man who had previously shot the ex-felon and against whom the ex-felon had testified in court.<sup>32</sup> The *Alston* court pointed to the Seventh Circuit’s explanation that “only in the most extraordinary circumstances, illustrated by *United States v. Gomez*, where the defendant had sought protection from the authorities without success, will the [justification] defense entitle the ex-felon to arm himself in advance of the crisis merely because he fears, however sincerely and reasonably, that he is in serious danger of deadly harm.”<sup>33</sup> The *Alston* court concluded that, “[t]o hold otherwise would immunize a convicted felon from prosecution for carrying a firearm solely based on a legitimate fear for life or limb.”<sup>34</sup> The Seventh Circuit has summarized the circumscribed nature of the common law justification defense to felon-in-possession laws, stating: “The defense of necessity will rarely lie in a felon-in-possession case unless the ex-felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another is being threatened.”<sup>35</sup> Thus, the Courts of Appeals have interposed space between an ex-felon’s natural right of self-preservation and the common law defense of justification, excusing this space as the standard burden of

30. See, e.g., *United States v. Moore*, 733 F.3d 171, 174 (6th Cir. 2013). This formulation varies somewhat from circuit to circuit. For example, the Fifth Circuit considers whether the defendant recklessly or negligently placed himself in a dangerous situation, whereas the Sixth Circuit only considers recklessness. Compare *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998), with *Moore*, 733 F.3d at 174. Another example variation: the Fifth Circuit appears to let the first four elements dictate the permissible length of possession, as opposed to adding a separate element like the Sixth Circuit does. Compare *Posada-Rios*, 158 F.3d at 873, with *Moore*, 733 F.3d at 174.

31. See *supra* note 19.

32. *United States v. Alston*, 526 F.3d 91, 95–96 (3d Cir. 2008).

33. *Id.* at 97 (citation omitted) (quoting *United States v. Perez*, 86 F.3d 735, 737 (7th Cir. 1996)).

34. *Id.* at 96. The Seventh Circuit explains in greater detail:

If ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters. Upon release from prison most felons return to their accustomed haunts. Even those who go straight will in all likelihood continue to live in dangerous neighborhoods and consort with some dangerous people. Many of them will not go straight, but will return to dangerous activities such as the drug trade. Every drug dealer has a well-grounded fear of being robbed or assaulted, so that if Perez’s defense were accepted felon-in-possession laws would as a practical matter not apply to drug dealers.

*Perez*, 86 F.3d at 737.

35. *Id.*

proving an affirmative defense under the common law, bolstered by deference to the expressed intent of Congress.<sup>36</sup>

### *C. Truncating the Right to Self-Preservation*

It is questionable that the space between the right of self-preservation and the defense of justification should be so wide. This note considers the possibility that the Courts of Appeals, by leading the way in narrowly interpreting the justification exception to felon-in-possession laws (thus removing it farther from circumstances where self-preservation rights would normally apply), have perpetrated an injustice upon ex-felons, or at least upon those who are trying to go straight but continue to live in dangerous neighborhoods where law enforcement cannot significantly reduce the occurrence of violent crime. On the one hand, the Third Circuit suggests that a person should not have to relocate out of fear and notes that economic or family circumstances may foreclose relocation as an option.<sup>37</sup> On the other hand, many circuits brazenly conflate ex-felons attempting to “go straight” with ex-felons who are “looking for trouble,” “return[ing] to dangerous activities,” or “engag[ing] in criminal activity.”<sup>38</sup> For instance, the Seventh Circuit argues that if ex-felons who are not engaged in criminal activity but do have a “well-grounded fear” of serious bodily injury are allowed to possess firearms for self-preservation, “felon-in-possession laws would as a practical matter not apply to drug dealers.”<sup>39</sup> This reasoning ignores the likelihood that dealing illegal drugs would be found to constitute recklessly or negligently placing oneself in the path of danger, which would eliminate the possibility of using the justification defense under the elements tests devised by the Courts of Appeals.<sup>40</sup> The Seventh Circuit provides no logically consistent reason why ex-felons who possessed a firearm in reasonable anticipation of danger but are not

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36. See *supra* note 19.

37. *Alston*, 526 F.3d at 95 (“It may be argued that Alston should have pulled up stakes and moved to a location where he would be unlikely to encounter Bentley. But economic or family circumstances may foreclose such an option. In any event, a victim should not have to relocate because of fear of possible retaliation.”).

38. See, e.g., *Perez*, 86 F.3d at 737.

39. See *Perez*, 86 F.3d at 737 (“If ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters. Upon release from prison most felons return to their accustomed haunts. Even those who go straight will in all likelihood continue to live in dangerous neighborhoods and consort with some dangerous people. Many of them will not go straight, but will return to dangerous activities such as the drug trade. Every drug dealer has a well-grounded fear of being robbed or assaulted, so that if Perez’s defense were accepted felon-in-possession laws would as a practical matter not apply to drug dealers.”).

40. See *supra* note 30 and accompanying text.

engaged in criminal activity should be denied the opportunity to prove the elements of a justification defense. After all, calling the police only rarely stops a violent crime in progress.<sup>41</sup>

#### *D. Do Felon-In-Possession Laws Do More Good or Harm?*

Natural law theorists suggest that individuals who are not committing an offense against another person should be able to use any reasonable means to preserve their lives.<sup>42</sup> But when those individuals are ex felons, would embracing such theories create more danger for society than they would alleviate? This note will take a utilitarian approach to answering that question. Although this note will not directly address the legal arguments being tested in the wake of *District of Columbia v. Heller*<sup>43</sup> and *McDonald v. City of Chicago*,<sup>44</sup> such an inquiry may be of some use in arguing for or against a government's compelling interest in keeping ex-felons from possessing firearms.<sup>45</sup> This is an important issue, even aside

41. See BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES, Table 107 (2011), available at <http://www.bjs.gov/content/pub/pdf/cvus08.pdf> (noting that police respond to less than one-third of reported crimes of violence within five minutes and to less than two-thirds of reported crimes of violence within ten minutes). It may be worth noting some of the limitations of response time data. The BJS data referenced above comes from the National Crime Victimization Survey, and the recollections upon which the survey data is based could be inexact. See BUREAU OF JUSTICE STATISTICS, SURVEY METHODOLOGY FOR CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008, 6 (2011), available at <http://www.bjs.gov/content/pub/pdf/cvus/cvus08mt.pdf> (“Other sources of nonsampling error are related to the inability of the respondents to recall in detail the crimes which occurred during the six months prior to the interview.”). Further, the BJS data do not include information about the timing of the emergency call to which police were responding. If the victim could only place the call after the completion of the crime, and no injury occurred, then there would be no need for a rapid response time. Such results, if common, would cause the data to misrepresent the frequency of a speedy police response to an ongoing emergency. See generally Carl Bialik, *Detroit Police Response Times No Guide to Effectiveness*, THE WALL STREET JOURNAL ONLINE, <http://www.wsj.com/articles/SB10001424127887323997004578642250518125898>. However, the existence of such results, where a victim could only place the emergency call after the crime had already been completed, supports the argument that calling the police is not a sufficient alternative to protecting oneself against a well-founded fear of violence.

42. See *supra* notes 25–28 and accompanying text. See also JOHN LOCKE, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 297 (P. Laslett rev. ed., 1960) (“[F]or, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common-law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey . . .”).

43. 554 U.S. 570 (2008).

44. 561 U.S. 742 (2010).

45. See generally Deborah Bone, *The Heller Promise Versus the Heller Reality: Will Statutes Prohibiting the Possession of Firearms by Ex-Felons Be Upheld After Britt v. State?*, 100 J. CRIM. L. & CRIMINOLOGY 1633, 1635–38. Bone notes, “[p]rior to Heller, the original Federal Firearms Act was



from any federal constitutional controversy created by *Heller* and *McDonald*, as several states have amended their constitutions to require regulations of firearm possession to pass strict scrutiny.<sup>46</sup> Missouri, for example, recently fought a series of legal battles over the constitutionality of its felon-in-possession law.<sup>47</sup> Missouri's experience demonstrates how

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challenged in two circuit courts under the Second Amendment, and both circuit courts upheld the statute on the grounds that the Second Amendment did not create an individual right to bear arms, a premise that the Supreme Court has since rejected." *Id.* at 1635 (citing *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942); *Heller*, 128 S. Ct. 2783, 2797). Bone then quotes *Lewis v. United States*, 445 U.S. 55 (1980), in which the Supreme Court upheld felon-in-possession laws against a constitutional challenge, relying again on the collective right theory of the Second Amendment that *Heller* overruled:

The firearm regulatory scheme at issue . . . is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is some rational basis for the statutory distinctions made . . . or . . . [if] they have some relevance to the purpose for which the classification is made.

*Id.* at 1637 (quoting *Lewis*, 445 U.S. at 65). Bone concludes, "[i]n essence, *Heller*'s adoption of an individual rights theory of the Second Amendment invalidates the holding in *Lewis* and wipes the slate clean of case law directly supporting ex-felon possession restrictions—except, of course, that the *Heller* opinion calls such laws permissible." *Id.* at 1637–38 (citing *Heller*, 128 S. Ct. at 2816–17). See also Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 465–66. (2004) ("Most laws limit or restrict liberties. When the constitutionality of these laws is challenged, courts respond by dividing liberties into two kinds: fundamental and non-fundamental. Some liberties (e.g., speech) are fundamental because they are explicitly enumerated in the Constitution. Other liberties (e.g., marriage) are fundamental because they are said to be 'implicit in the concept of ordered liberty.' The constitutionality of legislation that restricts a fundamental liberty is subjected to 'strict scrutiny' and is evaluated by applying the onerous 'compelling state interest' test. Under this test, the challenged law will be upheld only if it is necessary to achieve a compelling government purpose. In other words, the government's objective must be essential, and the law must be the least restrictive means to attain it.").

46. See 2012 La. Acts 874, § 1 ("Be it resolved by the Legislature of Louisiana, two-thirds of the members elected to each house concurring, that there shall be submitted to the electors of the state, for their approval or rejection in the manner provided by law, a proposal to amend Article I, Section 11 of the Constitution of Louisiana, to read as follows: . . . Any restriction on this right shall be subject to strict scrutiny."); 2013 Ala. Laws 267 ("AN ACT Proposing an amendment to Article I, Section 26 of the Constitution of Alabama of 1901; to provide that every citizen has a fundamental right to bear arms and that any restriction on this right would be subject to strict scrutiny . . ."); *Dotson v. Kander*, 464 S.W.3d 190, 196 (Mo. 2015) ("SJR 36 proposed the following changes to Mo. Const. art. I, sec. 23 . . . That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned . . . Any restriction on these rights shall be subject to strict scrutiny . . .").

47. See *Dotson*, 464 S.W.3d 190 (upholding the ballot initiative that added strict scrutiny to Missouri's constitutional right to bear arms); *State v. Merritt*, 467 S.W.3d 808, 816 (Mo. 2015) (upholding Missouri's felon-in-possession law against a facial challenge to its constitutionality); *State v. McCoy*, 468 S.W.3d 892, 899 (Mo. 2015) (same); *State v. Robinson*, No. SC94936 (Mo. July 15, 2015) (challenging felon-in-possession law as unconstitutional both facially and as applied to an individual with only one non-violent felony conviction from eleven years prior for unlawfully carrying a weapon for self-defense); *State v. Lomax*, No. SC94989 (Mo. Oct. 27, 2015), (challenging felon-in-possession law as unconstitutional as applied to an individual with a long history of criminality but no violent felony convictions); *State v. Clay*, 481 S.W.3d 531 (Mo. 2016) (holding that Missouri's

perceptions of the justice of forbidding ex-felons from possessing firearms are used to bolster legal arguments in support of felon-in-possession laws.

Missouri voters passed a ballot initiative in August 2014, amending article I, section 23 of the Missouri Constitution to declare the “right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power . . . unalienable” and that “[a]ny restriction on these rights shall be subject to strict scrutiny.”<sup>48</sup> Among the exceptions included in the amendment is: “Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons . . .”<sup>49</sup> Subsequent to the amendment, individuals convicted of both violent and non-violent felonies have challenged the constitutionality of Missouri’s felon-in-possession law,<sup>50</sup> arguing that it abridges a fundamental right without passing strict scrutiny analysis.<sup>51</sup> The arguments marshaled and the data gathered by both sides in these cases aid the analysis of the costs and benefits of ex-felon firearm possession,<sup>52</sup> and Missouri’s experience on this new frontier of firearm-possession jurisprudence<sup>53</sup> makes it an interesting case study as well.

constitution does not prohibit the legislature from restricting nonviolent felons’ right to possess firearms); *State v. Robinson*, 479 S.W.3d 621 (Mo. 2016) (same); *see also Clay*, 481 S.W.3d at 538–41 (Teitelman, J., dissenting) (arguing that the State failed to meet its burden of proving that Missouri’s felon-in-possession statute is narrowly tailored, because the State’s evidence failed to show that permanently prohibiting nonviolent ex-felons from possessing firearms served the interest of public safety).

48. *Dotsen v. Kander*, 464 S.W.3d 190, 196 (Mo. 2015).

49. *Id.*

50. Mo. Rev. Stat. § 571.070.1(1) (2014).

51. *See supra* note 47.

52. Such data, depending on how they are presented, are not always appreciated by courts. *See, e.g., State v. Merritt*, 467 S.W.3d 808, 814 n.6 (disregarding evidence that goes to the failure of Missouri’s felon-in-possession law to achieve its purpose because such statistics “prove nothing about the law’s design.”).

53. For examples of the legal profession grappling with the *Heller* and *McDonald* decisions, *see, e.g., United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010) (looking to First Amendment jurisprudence and applying intermediate scrutiny to a challenged law prohibiting possession of a firearm with a serial number removed because the law only regulated the manner of possession); Michael B. de Leeuw, *The (New) Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L. REV. 1449 (2012) (giving “an overview of the post-*Heller*/*McDonald* world, arguing that there is no consensus on what rights the Second Amendment confers and analyzing the possible scopes of the Second Amendment” and considering how states could confer greater individual gun rights than the constitution); Brannon P. Denning & Glenn H. Reynolds, *Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009) (reviewing developments in lower federal courts after the *Heller* decision); C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695 (2009) (discussing how federal felon-in-possession laws could be consistent with the Second Amendment after *Heller*).

Determining whether felon-in-possession laws are just or fair, and investigating the component question of whether they do more good or harm, is important not only for the role it may play in determining whether governments have a compelling interest in restricting firearm possession by the entire class of ex-felons, but also because society should aim to have just and fair laws that are interpreted in ways that do not “work manifest injustice.”<sup>54</sup>

### III. REASONS EX-FELONS SHOULD NOT BE ABLE TO POSSESS FIREARMS

This part is largely based on the idea that those who have once been convicted of a felony offense have demonstrated a greater willingness to do wrong, and therefore cannot be trusted to possess firearms. Data do show a correlation between felony convictions and subsequent arrests for violent crimes.<sup>55</sup> The Supreme Court of Missouri, in finding that Missouri’s felon-in-possession<sup>56</sup> statute passes strict scrutiny, noted, “[i]t is well-established that felons are more likely to commit violent crimes than are other law abiding citizens”<sup>57</sup> and “[f]urthermore, ‘someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use.’”<sup>58</sup>

The State of Missouri has raised similar arguments in its briefs for cases involving firearm possession.<sup>59</sup> *Amici* in a recent Missouri case,

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54. Courts are more likely to make exceptions to laws whose general terms “work manifest injustice.” See *Baender v. Barnett*, 255 U.S. 224, 225–26 (1921); see also *id.* at 226 (“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, ‘that whoever drew blood in the streets should be punished with the utmost severity,’ did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—‘for he is not to be hanged because he would not stay to be burnt.’”) (quoting *United States v. Kirby*, 74 U.S. 482, 486–87 (1869)).

55. Though, placing one more criminal prohibition—one that comes with a lighter penalty in many instances—on top of existing criminal laws seems unlikely to deter individuals who society does not believe can be trusted not to break the law again. See *infra* notes 113–17, 123 and accompanying text.

56. Mo. Rev. Stat. § 571.070.1(1) (2014).

57. *Merritt*, 467 S.W.3d at 814 (quoting *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011)).

58. *Id.* (quoting *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010)).

59. See, e.g., Appellant’s Brief, at 16–17, *State v. Merritt*, 467 S.W.3d 808 (Mo. 2015) (“Given the fact that felons have already shown a willingness to violate the law, keeping firearms out of their

including the City of St. Louis, further developed this argument, proffering studies that purportedly show that “felons, regardless of the nature of their prior felony, are more likely to commit future violent crimes than non-felons.”<sup>60</sup> First, St. Louis asserts that “[n]on-violent criminal history predicts violent recidivism almost as strongly as does a violent criminal history.”<sup>61</sup> Next, the city contends that some “criminals with prior offenses are more likely to be carrying guns during their subsequent offenses.”<sup>62</sup> St. Louis adds, “[h]andgun purchasers with prior misdemeanor convictions are at an increased risk for future criminal activity, including violent and firearm-related crimes.”<sup>63</sup> Finally, St. Louis asserts, “denial of handgun purchase is associated with a reduction in risk for later criminal activity of approximately 20 to 30 percent.”<sup>64</sup> All of these statistics, taken as representative and significant, suggest that society benefits from laws prohibiting ex-felons from possessing handguns because such laws reduce criminal activity and, in particular, reduce violent criminal activity.

Whether or not the proffered studies and statistics are properly relied upon or convincingly support the proposition that ex-felons should not be allowed to possess firearms,<sup>65</sup> a common sense argument can be made that firearms possessed by individuals who have previously been convicted of a serious criminal offense are more harmful to society than firearms possessed by individuals who have never been convicted of a serious offense.<sup>66</sup> Arguments that ex-felons are less likely to act lawfully, having already demonstrated a willingness to break the law, are often supported

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hands bears a substantial relationship to the government’s function in protecting public safety.”) (citing *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011)).

60. Brief of the City of St. Louis et al., *amici curiae*, at 13, *State v. Robinson*, No. SC94936 (Mo. July 14, 2015).

61. *Id.* at 13–14 (citing James Bonta, Karl Hanson & Moira Law, *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 *PSYCHOL. BULL.* 128–29 (1998)).

62. *Id.* at 14 (“The Bureau of Justice Statistics has also indicated that criminals with prior offenses are more likely to be carrying guns during their subsequent offenses. The Bureau reports that drug offenders who were recidivists were more likely to be carrying a firearm during their offense than first-time drug offenders (9% versus 6% of State inmates and 11% versus 5% of Federal inmates.”) (citing CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, FIREARM USE BY OFFENDERS 6 (2001), available at <http://bjs.gov/content/pub/pdf/fuo.pdf>).

63. *Id.* at 14–15 (quoting Garen Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 *JAMA* 2083 (1998)).

64. *Id.* at 15 (quoting Mona A. Wright, Garen J. Wintemute & Frederick P. Rivara, *Effectiveness of Denial of Handgun Purchase to Persons Believed to Be at High Risk for Firearm Violence*, 89 *AM. J. PUB. HEALTH* 88, 89 (1999)).

65. See *infra* Part IV for challenges to such statistical data and its application to this issue.

66. See *infra* Part V for a discussion of how any harm to society compares to any harm to the individual ex-felons.

by recidivism statistics.<sup>67</sup> In Missouri from 1997 to 2012, for example, 369,448 individuals were convicted of a felony offense.<sup>68</sup> Twenty-six percent of those individuals had a new conviction within five years from the start of probation or release from prison.<sup>69</sup> This rate of offending is much higher than that of the general population.<sup>70</sup> If ex-felons are more likely to commit unlawful acts, a prohibition on their possession of firearms seems a reasonable hedge against the risk that they may also be more likely to use firearms violently.

Thus, the best arguments for prohibiting ex-felons from possessing firearms are the simplest. According to the statistics, their previous criminal conduct, whether violent or not, accurately predicts an increased risk of future violent activity. Mitigating that risk by establishing a threshold crime that allows for punishment before ex-felons take the next step to violently use a firearm creates a buffer of deterrence and incapacitation that benefits society more than it harms individuals.

#### IV. REASONS EX-FELONS SHOULD NOT BE PROHIBITED FROM POSSESSING FIREARMS

Before declaring that the benefits felon-in-possession laws bring to society are greater than the harms they cause, those harms must also be tabulated. In order to make such a calculation, I will lay out some of the

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67. *See, e.g.*, United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011) (“It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens. *See, e.g.*, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994 at 6 (2002) (finding that within a population of 234,358 federal inmates released in 1994, the rates of arrest for homicides were 53 times the national average).”).

68. MISSOURI SENTENCING ADVISORY COMMISSION, ANNUAL REPORT ON SENTENCING AND SENTENCING DISPARITY 2012, 40 (2014).

69. *Id.*

70. The FBI’s *Uniform Crime Reports* list 1,165,383 violent crimes and 8,277,829 property crimes reported to law enforcement agencies in 2014, when the estimate population of the United States was 318,857,056. CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, *Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1995–2014*, CRIME IN THE UNITED STATES 2014, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> (last visited Jan. 24, 2016).

This gives a rate of approximately 0.03 crimes reported per person for that year. Though convictions and reports are obviously different, and the crimes being counted by the Missouri Sentencing Advisory Commission, *see supra* note 68, may not be exactly the same as those being counted by the FBI, the gulf between crimes reported per person and recidivism rates is so vast as to make it safe to conclude that ex-felons are convicted at far higher rates than the general population. Keep in mind that there are many factors other than the actual number of illegal acts committed that contribute to the recidivism rate, for instance: increased police attention, the impeachment value of prior convictions, and the plea bargaining leverage provided by enhanced punishments for repeat offenders.

potential benefits of allowing ex-felons to possess firearms. This section considers the safety benefits of ex-felon firearm possession, both for the ex-felons themselves and for their neighborhoods. Next, it critically evaluates the statistics used to support the proposition that ex-felons should not be allowed to possess firearms. Finally, it considers ways the legal system already allows for firearm possession by ex-felons to examine the situations in which society considers such possession to be a small risk.

#### *A. Economic Problems of Ex-Felons*

The root of the problems with basing firearm possession prohibitions on an individual's status as an ex-felon is economic. A recent summary of studies done regarding the challenges facing ex-felons upon their release from incarceration states:

Felony imprisonment results in social stigma, the erosion of job skills, and disqualification from stable government and union jobs. Accordingly, former prisoners experience lower wages, slower wage growth, and, importantly, greater unemployment. According to Bruce Western, the average annual number of weeks ex-inmates worked dropped from thirty-five before imprisonment to twenty-three after, and they tended to have much shorter job tenure. Additionally, imprisonment was related to poor employment continuity for many years after release. After release, offenders are typically shunted into secondary labor markets with little job security, little opportunity for advancement, and miniscule earnings.<sup>71</sup>

At least partially because of these economic limitations,<sup>72</sup> ex-felons reside largely in high-crime areas and experience more frequent instances of

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71. John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1050–51 (2009) (citing BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 116, 120–21, 123, 127, 412–13 (Russell Sage 2006); Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 412 (2001); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 32–35 (Chicago 2007); Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863, 864 (2006) (finding “no substantial evidence of a negative effect of incarceration length on employment or earnings”).

72. See JOHN SCHMITT & KRIS WARNER, CENTER FOR ECONOMIC AND POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET (2010).

violence.<sup>73</sup> Therefore, ex-felons have a strong self-preservation motivation to possess firearms. More importantly, given the network of risk factors present in poor, high-crime neighborhoods, explanations for recidivism should encompass more than simply individual lawbreaking tendencies.<sup>74</sup> A proper calculation of the social utility of prohibiting firearm possession by ex-felons must account for both the experience of ex-felons as victims of violent crime and the factors that undermine arguments that ex-felons endanger society when they are permitted to possess firearms.

Most of the social utility generated by allowing ex-felons to possess firearms is due to ex-felons' ability to protect themselves and deter violence. Because ex-felons are increasingly concentrated in poor neighborhoods in our nation's central cities,<sup>75</sup> they face higher instances of both violent and nonviolent crime. According to the FBI, in 2014, just over half of all violent crimes reported in the United States occurred in cities with a population of at least 100,000 people, where less than thirty percent of the United States population resides.<sup>76</sup> People who live in lower-income neighborhoods are not only more likely to have run-ins with law enforcement officers, but also they are more likely to need protection in the absence of law enforcement officers.<sup>77</sup> One illustration of the frequency of ex-felon victimization is the struggle in states over claims made by ex-felons for compensation from victims' funds.<sup>78</sup> In Maryland,

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73. See Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. R. SOC. 89, 102 (2003) ("Other research has shown that returning prisoners are increasingly concentrated in our nation's central cities and within them, in a relatively small number of neighborhoods that often are characterized by severe poverty, social disorganization, and high crime rates.") (citing JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE, URBAN INSTITUTE (2001), available at [http://www.urban.org/research/publication/prisoner-reentry-perspective/view/full\\_report](http://www.urban.org/research/publication/prisoner-reentry-perspective/view/full_report); Todd R. Clear, Dina R. Rose, Elin Waring & Kristen Scully, *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33 (2003); PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003)).

74. See generally Jeffrey Fagan & Valerie West, *Incarceration and the Economic Fortunes of Urban Neighborhoods*, in ECONOMICS AND YOUTH VIOLENCE: CRIME, DISADVANTAGE, AND COMMUNITY 207 (Richard Rosenthal et al. eds., 2013), discussing and citing research that reveals the clustered factors associated with crime and incarceration and "the reciprocal effects of crime, incarceration, and neighborhood social and economic disadvantage."

75. *Id.*

76. CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, *Crime Trends by Population Group, 2013–2014*, CRIME IN THE UNITED STATES 2014, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-12> (last visited Jan. 8, 2016).

77. See *supra* notes 20–22 and accompanying text.

78. See, e.g., Gary Hunter, *Maryland: Convicted Felons Receive Victims' Compensation*, PRISON LEGAL NEWS, Apr. 2011, at 36.

for example, the chairman of the Criminal Injuries Compensation Board was moved to state: “If someone with an extensive criminal background who has changed their life and is moving on and they happened to be the innocent victim of a crime, why shouldn’t that person be compensated?”<sup>79</sup> The co-author of a case study on Maryland’s compensation program noted, “[t]here is a lot of fluidity between being a victim and being a criminal. It’s not necessarily two distinct, separate groups of people.”<sup>80</sup> If ex-felons are frequent victims of crime, there is more potential utility to be gained by allowing them to possess firearms for self-protection.

Since law enforcement plainly cannot keep violent crime from occurring in these neighborhoods,<sup>81</sup> residents who are concerned about

79. *Id.* Sandy A. Roberts added: “The issue is whether they were involved in a crime at the time they were injured, not their background.” *Id.*

80. *Id.*; See also LISA NEWMARK & MEGAN SCHAFFER, THE URBAN INSTITUTE, CRIME VICTIMS COMPENSATION IN MARYLAND: ACCOMPLISHMENTS AND STRATEGIES FOR THE FUTURE (2003), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410799-Crime-Victims-Compensation-in-Maryland.PDF>.

81. And, of course, government, including law enforcement, has no legal duty to protect citizens from private violence. Nor do citizens have a claim against the government when law enforcement chooses not to enforce the law to prevent violence. See *Deshaney v. Winnebago Cty. Dep’t of Soc. Services*, 489 U.S. 189, 197, 201 (1989) (“As a general matter, then, we conclude that a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. . . . Petitioners concede that the harms Joshua suffered occurred not while he was in the State’s custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.”); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (“[T]he framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented. . . .”). Judge Kozinski of the Ninth Circuit reflects on the effect that ineffective police protection has on both the Second Amendment and felon-in-possession laws in *United States v. Gomez* (though it should be noted that both concurring judges refused to join in the footnote that included these reflections):

In modern society, the right to armed self-defense has become attenuated as we rely almost exclusively on organized societal responses, such as the police, to protect us from harm. . . .

The tradeoff becomes more dubious, however, when a citizen makes a particularized showing that the organs of government charged with providing that protection are unwilling or unable to do so. At that point, the Second Amendment might trump a statute prohibiting the ownership and possession of weapons that would be perfectly constitutional under ordinary circumstances. Allowing for a meaningful justification defense ensures that 18 U.S.C.

§ 922(g)(1) does not collide with the Second Amendment.

92 F.3d 770, 774 n.7 (9th Cir. 1996) (citing Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 117–20, 130 (1987) (“The fundamental right to self-preservation, together with the basic postulate of liberal theory that citizens only surrender their natural rights to the extent that they are recompensed with more effective political rights, requires that



their safety or the safekeeping of their property<sup>82</sup> have reasons to take protective measures of their own.<sup>83</sup> And many alternative protective measures, like “[k]eeping a dog, installing a burglar alarm, or moving to a neighborhood with a lower rate of crime,” are more expensive than firearm possession.<sup>84</sup> Thus, private individuals undertaking to protect themselves by possessing firearms do good for society by deterring or preventing crime,<sup>85</sup> apart from the obvious harm they can cause if an ex-felon in

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every gun control law be justified in terms of the law’s contribution to the personal security of the entire citizenry.”)). Cf. Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 482 (2004) (“The right of self-protection might not apply to gun possession if rates of violent crime were low, or if guns were a totally ineffective means of self-protection. But despite enormous progress throughout the past decade, rates of violent crime in the United States remain the highest among Western industrialized countries.”).

82. See, e.g., Respondent’s Brief, at 8, *State v. Robinson*, No. SC94936 (Mo. Sept. 28, 2015) (“Respondent, Raymond Robinson, is a fifty-five-year-old single man who lives in North St. Louis City and requires a cane to walk as a result of a chronic hip injury. Respondent supported himself by doing rehabilitation work on old doors and windows for churches and residential buildings in the community for cash payment. Because Respondent at times carried amounts of cash on him from his job, he owned a handgun for personal protection.”) (citations omitted).

83. See Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 482 (2004) (“Guns often are a viable means of protection from these threats. Victims who use a gun to resist robbery or assault are less likely to be injured than those who use other means of self-protection or do not resist at all—even when the unlawful aggressor is armed. Moreover, gun ownership reduces the likelihood of being victimized in the first place. Convicted felons admit a fear of armed victims, and make efforts to try to avoid them. No one pretends that more effective law enforcement can significantly alter these facts in the foreseeable future. As long as the state is unable to protect innocent victims, the case for allowing gun ownership for purposes of self-protection becomes more plausible.”) (citing GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 171 (New York: Aldine De Gruyter, 1997); JAMES WRIGHT AND PETER ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 149 (Hathorne, N.Y.: Aldine de Gruyter, 1986)).

84. *Id.* at 485. Husak notes, “[a]s a result, an inchoate offense of gun possession would have its greatest impact on the poor. Attempts to prohibit guns would restrict the availability of an effective means of self-protection from low-income homeowners who are the least able to afford higher quality, more expensive substitutes.” *Id.* See also *supra* note 35 and accompanying text; *Alston*, 526 F.3d at 95 (“It may be argued that Alston should have pulled up stakes and moved to a location where he would be unlikely to encounter Bentley. But economic or family circumstances may foreclose such an option. In any event, a victim should not have to relocate because of fear of possible retaliation.”).

85. The defensive use of firearms has been a contentious topic, but in 2013, the Institute of Medicine and the National Research Council noted:

Almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million (Kleck, 2001a), in the context of about 300,000 violent crimes involving firearms in 2008 (BJS, 2010).

INSTITUTE OF MEDICINE & NATIONAL RESEARCH COUNCIL, *PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE* 15 (Alan I. Leshner et al., eds. 2013) (citing Gary Kleck, *The Frequency of Defensive Gun Use: Evidence and Disinformation*, in *ARMED: NEW PERSPECTIVES ON GUN CONTROL* 213–84 (Gary Kleck & Don B. Kates eds., 2001)); BUREAU OF JUSTICE STATISTICS, *supra* note 41. Further:

possession of a firearm decides to commit violence. Both considerations matter.

However, using recidivism data to support the premise that ex-felons are more likely to engage in violent behavior is questionable for several reasons. Recidivism studies do not untangle the complex web of social and economic factors that connect living in impoverished, high-crime neighborhoods with both initial criminal activity and recidivism.<sup>86</sup> Data showing a large gap in recidivism between ex-felons sentenced to probation and sentenced to incarceration illustrate this. In Missouri from 1999–2014, “[t]he data shows [sic] that offenders sentenced to probation have lower recidivism rates than prison based sentences. After five years, probationers are two-thirds less likely to be later incarcerated than offenders released from prison, and two-thirds less likely to be convicted of a new offense.”<sup>87</sup> Comparing probationers to incarcerated offenders with similar criminal history, probationers are up to fifteen percent less likely to be later incarcerated, though the gap shrinks once the criminal histories include previous incarceration.<sup>88</sup> These gaps suggest that incarcerated individuals have a harder time avoiding criminal activity, not because of their tendencies, but because incarceration breaks their connection with their employment and community, leading to economic hardship which forces them to live in high-crime areas and make dubious economic choices, creating a vicious cycle.<sup>89</sup> This undermines the idea that the violent tendencies of ex-felons justify restricting their right to possess firearms and suggests that solutions to recidivism and violent crime lie beyond the reach of the criminal law.

More basically, supporters of broad felon-in-possession laws either misrepresent or misunderstand the data that purportedly confirm the utility of such laws. For example, in a brief filed in the Supreme Court of

Studies that directly assessed the effect of actual defensive uses of guns (i.e., incidents in which a gun was “used” by the crime victim in the sense of attacking or threatening an offender) have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies (Kleck, 1988; Kleck and DeLone, 1993; Southwick, 2000; Tark and Kleck, 2004).

*Id.* (citing Gary Kleck, *Crime-Control Through the Private Use of Armed Force*, 35 SOCIAL PROBLEMS 1 (1988); Gary Kleck & Miriam A. DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J. QUANTITATIVE CRIMINOLOGY 55 (1993); Lawrence Southwick, *Self-Defense with Guns—The Consequences*, 28 J. CRIM. JUST. 351 (2000); Jongyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861 (2004)).

86. *See supra* notes 71–74 and accompanying text.

87. MISSOURI SENTENCING ADVISORY COMMISSION, ANNUAL REPORT ON SENTENCING AND SENTENCING DISPARITY 2014, 51 (2015), <https://www.courts.mo.gov/file.jsp?id=93233>.

88. *Id.* at 52.

89. *See also supra* notes 71–74 and accompanying text.

Missouri in *State v. Robinson*, amici including the City of St. Louis attempt to argue that all felons, whether violent or non-violent, have a higher propensity to commit violent crime, which justifies broad felon-in-possession laws.<sup>90</sup> The amici state, “[n]on-violent criminal history predicts violent recidivism almost as strongly as does a violent criminal history.”<sup>91</sup> The amici somehow missed that, in support of this statement, they were citing to a study entitled “The Prediction of Criminal and Violent Recidivism Among *Mentally Disordered Offenders: A Meta-Analysis*,”<sup>92</sup> in which seventy percent of the offenders analyzed had been diagnosed with schizophrenia.<sup>93</sup> Data collected using a sample of mentally disordered individuals cannot say anything about the whole population of individuals with criminal history and therefore cannot support the amici’s proposition.<sup>94</sup>

The *Robinson* amici compound their error by citing other studies focusing on narrow, unrepresentative populations, as well as studies using only anecdotal evidence.<sup>95</sup> The amici also cite a study of handgun purchasers in California to support their assertion that even a criminal history including a non-violent misdemeanor was enough to make a subsequent arrest for a violent offense five times more likely.<sup>96</sup> This study

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90. Brief of the City of St. Louis et al., *amici curiae*, at 13, *State v. Robinson*, No. SC94936 (Mo. July 14, 2015) [hereinafter *Amici Brief*].

91. *Id.*

92. *Id.* at 13–14 (citing James Bonta, Karl Hanson & Moira Law, *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 *PSYCHOL. BULL.* 128–29 (1998)) (emphasis added).

93. Bonta et al., *supra* note 92, at 126–27.

94. See MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 271–72 (3d ed. 2015) (“The objective of random sampling is to be able to draw valid statistical inferences about properties or parameters of the population from which the sample is drawn. . . . Without the probability space generated by the random sampling procedure it becomes impossible, or at best speculative, to assign quantitative statements about the reliability of inferences based on the sample.”). For a brief summary of the flawed presentation of statistical evidence by the State of Missouri in a series of cases challenging the constitutionality of Missouri’s felon in possession law, see *State v. Clay*, 481 S.W.3d 531, 540 (Mo. 2016) (Teitelman, J., dissenting).

95. *Amici Brief*, *supra* note 90, at 14 (citing CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *FIREARM USE BY OFFENDERS*, 1, 6 (2001), <http://bjs.gov/content/pub/pdf/fuo.pdf>; Michael Luo, *Felons Finding It Easy to Regain Gun Rights*, *N.Y. TIMES* (Nov. 13, 2011), <http://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html>).

96. *Id.* at 14–15 (citing Garen Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 *JAMA* 2083 (1998)). The study counts arrests as “new criminal activity” because that approach “is common in criminological research.” Wintemute et al., *supra*, at 2086. While studies trying to quantify all crime may want to account for crimes that are not noticed or not solved, this study is trying to link firearm purchases by specific individuals to crime committed by specific individuals. Using arrests in this scenario, rather than convictions, is entirely speculative. There is a much larger

has two flaws in addition to being a non-representative sample: (1) approximately one-eighth of their study population had their prior criminal records purged by the State of California, which the authors noted “injects a level of uncertainty into [their] final findings that cannot be completely quantified,”<sup>97</sup> and (2) the study could not identify which violent crimes involved firearms.<sup>98</sup> With all of these shortcomings, the study does not say anything about whether criminal history affects firearm crime and cannot say anything about how society is affected by various types of ex-felons being permitted to possess firearms.<sup>99</sup> The dissenting judge in *Robinson* concluded, “[t]he lack of even rudimentary scientific rigor leaves the State to rely on what amounts to assumptions, conjecture, and ‘common sense’ unmoored by relevant, established facts.”<sup>100</sup> All together, these studies suggest that ex-felons with mental disorders should be kept from possessing firearms for society’s sake, but they say nothing else quantifiable about the costs and benefits for American society of ex-felon possession of firearms.

### *B. Legal Theories that Support Ex-Felon Possession of Firearms*

There are also several legal theories in American jurisprudence that suggest reasons why ex-felons should not be prohibited from possessing firearms. Most notably, almost all federal circuit courts have accepted, or at least acknowledged, the existence of justification defenses to prosecutions under the federal felon-in-possession statute, 18 U.S.C. § 922.<sup>101</sup> This implies that, at least in some circumstances when necessity

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universe of people outside the study who could have alternatively committed—or even been convicted of—the crimes for which the studied individuals were arrested.

97. Wintemute et al., *supra* note 96, at 2086.

98. *Id.* at 2084.

99. *See supra* note 94.

100. *State v. Clay*, 481 S.W.3d 531, 540 (Mo. 2016) (Teitelman, J., dissenting); *see also State v. Robinson*, 479 S.W.3d 621, 624 (Mo. 2016) (Teitelman, J., dissenting) (noting that Judge Teitelman published his dissent for *Robinson* and the cases decided concurrently in *State v. Clay*).

101. *See supra* notes 29–36 and accompanying text; *see also, e.g., United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994); *United States v. Paolello*, 951 F.2d 537 (3d Cir. 1991); *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995), cert. denied 515 U.S. 1126 (1995); *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982); *United States v. Singleton* (6th Cir. 1990), 902 F.2d 471, cert. denied 498 U.S. 872 (1990); *United States v. Sahakian*, 965 F.2d 740 (9th Cir. 1992); *United States v. Rice*, 214 F.3d 1295 (11th Cir. 2000); *see also United States v. Poe*, 442 F.3d 1101 (8th Cir. 2006) (indicating that, although Eighth Circuit has never recognized justification as defense to violation of 18 USC § 922(g), if such defense were available, it would follow the Fifth Circuit’s articulation of elements of defense).

or duress is great,<sup>102</sup> the need of an individual to possess a firearm can outweigh the government purpose to promote public safety.<sup>103</sup> Congress also acknowledged that some ex-felons do not warrant full dispossession when it created the exceptions in 18 U.S.C. § 921(a)(20).<sup>104</sup> Presumably, the felony offenses Congress chose to exempt do not indicate a risk of future violence that is significant enough to justify this specific restriction of the freedom of the ex-felons convicted of such offenses. It would then follow that ex-felons who have committed any felony offense that could be shown to indicate a similarly insignificant risk of future violence would also merit exceptions to felon-in-possession laws.<sup>105</sup>

One (perhaps novel) argument is based on courts sentencing individuals convicted of violent felony offenses to a term of probation.<sup>106</sup> For instance, nationally, seven percent of convicted murderers and twenty-eight percent of those convicted of aggravated assault were sentenced to

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102. “Traditionally, in order for the necessity defense to apply, the coercion must have had its source in the physical forces of nature. The duress defense was applicable when the defendant’s acts were coerced by a human force. This distinction served to separate the two similar defenses. But modern courts have tended to blur the distinction between duress and necessity.” *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) (citing WAYNE LAFAVE & AUSTIN SCOTT, *HANDBOOK ON CRIMINAL LAW* § 50, at 383 (1972)).

103. *See, e.g., United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) (“We do not believe that Congress intended to make exfelons helpless targets for assassins. The right to defend oneself from a deadly attack is fundamental.”).

104. “(20) The term ‘crime punishable by imprisonment for a term exceeding one year’ does not include—(A) any . . . offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” Also, *see generally* Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 120–21 (2013).

105. *See, e.g.,* C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 728, 730–31 (2009) (“In applying all of this history (or lack thereof) to arms disabilities for felons, the first line—between a justified and unjustified disability—should be between ‘crimes of violence’ and other felonies. Such a distinction is not merely based on the UFAs, FFA, and related history from the 1920s and 1930s, although that history merits some weight for its own sake as the first time the question of felon disarmament was considered. Rather, the ‘crime of violence’ concept developed then tracks, both historically and rationally, the basis on which a disability should proceed constitutionally: by focusing on convictions indicating that one actually poses some danger of physically harming others rather than simply being dishonest or otherwise unsavory. . . . But absent conviction for some ‘crime of violence,’ wherever exactly that line lies, it is difficult to see how the Second Amendment could allow a convict to be disabled from keeping or bearing arms. Historically, such a prohibition lacks support before the 1960s. Rationally, there does not seem to be even a legitimate state interest in disarming someone like Martha Stewart, apart from increasing her punishment; yet simple vindictiveness is hard to accept as sufficient ground for stripping someone of a constitutional right.”).

106. Individuals in this situation test the boundary between the classes “felon” and “ex-felon.”

probation.<sup>107</sup> “Nineteen percent [of convicted violent felons in the most populous seventy-five counties] received a probation term without incarceration.”<sup>108</sup> In Missouri from 2007–2012, 1.2% of 570 people convicted of second-degree murder (A felony) under § 565.021 RSMo, 54.5% of 3,046 people convicted of second-degree assault (C felony) under § 565.060 RSMo, and 63.0% of 3,027 people convicted of second-degree domestic assault (C felony) under § 565.073 RSMo were sentenced to probation.<sup>109</sup> The fact that all of these convicted violent felons, including some murderers, can be trusted to remain free and respect the conditions of their probation, including obeying felon-in-possession laws, suggests that courts do not perceive an especially high risk of violent re-offense among a substantial segment of the convicted felon population.

One final consideration before attempting to tally the costs and benefits of felon-in-possession laws: some of those convicted of felony offenses are innocent of the crimes for which they were found guilty.<sup>110</sup> Restricting the rights of the wrongfully convicted can only cause harm, unless the individual was otherwise predisposed to violence and happens to be deterred by the prohibition he is now subject to, or unless the process of being convicted and punished can cause an individual to gain violent tendencies that are kept in check by felon-in-possession laws.

## V. UTILITARIAN CALCULUS

The utilitarian calculus attempted in this note will be based on a general ethical principal that morally good acts are “those acts whose consequences tend to promote the greatest good for the greatest number of individuals.”<sup>111</sup> When considering prohibitions of ex-felon firearm possession, then, the relevant positive consequences are the amount of harm prevented by such laws and the number of people for whom harm

107. BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2004—STATISTICAL TABLES, 1.2 (2004), <http://www.bjs.gov/content/pub/html/scscf04/tables/scs04102tab.cfm>.

108. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, VIOLENT FELONS IN LARGE URBAN COUNTIES I (2006), <http://bjs.gov/content/pub/pdf/vfluc.pdf>.

109. MISSOURI SENTENCING ADVISORY COMMISSION, ANNUAL REPORT ON SENTENCING AND SENTENCING DISPARITY 2012, 40 (2014), <http://doc.mo.gov/Documents/MOSAC-Annual-Report-2014.pdf>.

110. See, e.g., the list of cases at <http://www.innocenceproject.org/cases/>.

111. See Charles Camic, *The Utilitarians Revisited*, 85 AM. J. SOC. 516, 520 (1979). For a discussion of how Camic arrived at this “distinguishing feature of utilitarian moral philosophers,” see *id.* at 519–20.

has been prevented.<sup>112</sup> When considering allowing ex-felons to possess firearms, the relevant positive consequences are similarly the amount of harm prevented by such possession and the number of people for whom harm has been prevented by such possession.

The biggest challenge is that both numbers are likely to be very small.<sup>113</sup> Felon-in-possession laws do not proscribe or punish harm itself, but instead attempt to avert the possibility of harm.<sup>114</sup> This means that actual harm will materialize in only a fraction of the instances in which an ex-felon would be subject to punishment for unlawfully possessing a firearm.<sup>115</sup> The calculation is further complicated by the fact that all ex-felons who are correctly convicted of unlawful possession of a firearm have demonstrated that they are not deterred by the potential for punishment.<sup>116</sup> And “[t]he persons who pose the greatest risk of gun violence are probably those who will go to the greatest lengths to circumvent the law and obtain a gun despite whatever legal machinery is

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112. Subjective benefits such as psychological comfort are even more difficult to calculate than the instances of physical harm this note attempts to estimate, so they are not considered, either for potential victims of firearm crime or for those ex-felons whose personal well-being is increased just by knowing they possess a firearm. See Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 477 n.126 (2004) (“Some utilitarian disadvantages of attempts to proscribe guns are very hard to calculate.”). Similarly, the one-time effect on individuals’ psychological well-being that repeal or amendment of felon-in-possession laws might cause is not considered. Readers are welcome to speculate and add to this calculus. Douglas Husak gives a perfect example of the difficulty in weighing subjective considerations:

Moreover, empirical data about the need or efficacy of guns for self-protection may not be all that matter. Most persons who keep guns in the home report that they feel safer from crime. Possession of a gun reduces the sense of helplessness and increases the perception of individual control. Perhaps these feelings of security should be discounted if they were based on misinformation. Respondents typically overestimate their likelihood of being victimized, and thus adopt greater precautions than would be recommended on the basis of empirical evidence. But many Americans remain paralyzed by their fears of violent crime. Anything that makes them *feel* less vulnerable has *some* value.

*Id.* at 483.

113. See, e.g., Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 476 (2004) (“Perhaps the most worrisome feature of statutory schemes to prohibit gun or drug possession is the willingness to use the criminal law to prevent the risk of harm, even though that harm would materialize in only a tiny fraction of the cases in which persons are subject to punishment. The net of criminal liability is deliberately cast far and wide to catch enormous numbers of offenders, fully aware that only a small percentage of those who are punished would ever have caused the harm to be prevented.”).

114. *Id.* at 438–40 (“These offenses do not proscribe harm itself, but rather the possibility of harm—a possibility that need not (and typically does not) materialize when the offense is committed”).

115. *Id.* at 476.

116. See *id.* at 448–49 (“Even if this regulatory scheme were tightened, however, we could be sure that countless guns would continue to find their way into the wrong hands. Relatively few gun-using criminals bought their weapons, either from licensed dealers or on the black market. About half report that they stole their gun, borrowed it, or received it in a trade or as a gift.”).

designed to prevent them from doing so.”<sup>117</sup> The instances where felon-in-possession laws can be counted as preventing harm, then, are those where someone was deterred from causing harm by the increased risk of simple possession or those where someone who was intending to cause harm with a firearm is caught in possession before causing harm and thereby prevented or deterred from causing that harm.

There are also relevant negative consequences to consider. Prohibition entails punishment, and so every conviction under a felon-in-possession statute must be tallied up as harm caused.<sup>118</sup> Some of the harm caused by conviction and punishment will be cancelled out by the harm that was prevented by incapacitating a violent ex-felon with a firearm before that individual could make use of the firearm, but some individuals who would not have caused harm will also be swept up by the law.<sup>119</sup> Likewise, ex-felon firearm possession can have negative consequences beyond those that felon-in-possession laws seek to prevent. For instance, firearms used improperly can harm rather than protect innocent victims.<sup>120</sup> The question again is whether the harm prevented plus the good produced is greater than the harm generated minus the good foregone.

All of these calculations are especially difficult to make because of the limited data available on ex-felons and their place in American society. As one group of researchers summarized the problem:

117. *Id.* at 449.

118. Many of these convictions will result in punishing someone who did not intend to cause any harm, either because they only possessed the firearm for self-protection, or because they had already caused the intended harm and were caught in unlawful possession too late. Though, in the second case, concurrent sentencing would result in no harm caused by the felon-in-possession statute. *See also* Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL 437, 476 (2004) (“Perhaps the most worrisome feature of statutory schemes to prohibit gun or drug possession is the willingness to use the criminal law to prevent the risk of harm, even though that harm would materialize in only a tiny fraction of the cases in which persons are subject to punishment. The net of criminal liability is deliberately cast far and wide to catch enormous numbers of offenders, fully aware that only a small percentage of those who are punished would ever have caused the harm to be prevented. Of course, all inchoate offenses sweep widely. Only some of those who conspire to kill, for example will actually succeed in bringing about a death. If we concede (as we must) that the criminal law may be invoked to prevent harm before it occurs, we are certain to punish persons for conduct that would not, in fact, have resulted in harm.”).

119. *Id.* at 477–78 (“Recall that our present strategy is selective rather than comprehensive; it endeavors to reduce the risk of harm by trying to keep guns out of the hands of dangerous persons. No efforts are made to ensure that given individuals are indeed dangerous before they are barred from owning guns. Instead persons are disqualified on actuarial grounds—that is, because of their membership in designated groups. The difficulty with this approach is evident. Most (and perhaps all) of the disqualified groups contain significant numbers of members who are not dangerous, and whose gun ownership would not create a substantial risk of harm—at least, no greater than that of the average person.”).

120. *See, e.g.,* Arthur Kellermann & Donald Reay, *Protection or Peril: An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557 (1986).



For more than 200 years, prisons have occupied a prominent place in the criminal justice system. Over the past 30 years, America has significantly expanded the uses of prisons, with the result that the incarceration experience now penetrates deeply into the fabric of American life. Yet remarkably little is known about the impact of imprisonment on the individuals who are sent there or the concentric circles of family, peer groups, neighborhoods, and the larger society that are affected by our imprisonment policies.<sup>121</sup>

Better data, especially on the locations where ex-felons reside, their experiences as victims of crime, and their perpetration of violent crimes would help with this calculation immensely.

#### VI. CONCLUSION

It seems more likely that felon-in-possession laws lead to net disutility, as some individuals are severely negatively impacted, and the benefits of prohibition only accrue in marginal cases, largely because possession laws are difficult to enforce before a violent event has occurred and those intent on violence are the least likely to be deterred by one more layer of illegality. There are alternatives, though, that may shift the balance of utility back to a net positive for felon-in-possession laws.

The first alternative would be to broaden the justification defense to felon-in-possession laws. Courts can permit ex-felons with a reasonable, ongoing fear of serious violence who cannot afford to move away from the threat to possess firearms to the extent required for self-preservation. Those ex-felons who have returned to criminal activity would be unable to avail themselves of the justification defense because their criminal activity would violate the elements of the defense, which do not permit recklessly putting oneself in the path of danger.<sup>122</sup> But courts would no longer consign ex-felons to defenselessness on top of all the other struggles they face upon their release from incarceration. The benefits to those ex-felons attempting to go straight are obvious. They can now feel safer and defend themselves if necessary, and armed ex-felons would contribute a deterrent effect on crime in their neighborhoods. The harms to society from expanding the justification defense would include any cases of accidental misuse of those firearms that would not have occurred otherwise, likely a

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121. Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. R. SOC. 89, 106 (2003).

122. See *supra* notes 38–40 and accompanying text.

minor consideration. Even more marginal is the potential for those ex-felons involved in criminal activity to get away with illegal possession because of the expanded justification defense.<sup>123</sup>

Another alternative is to more narrowly tailor felon-in-possession laws. This was the approach federal law took from 1938 until 1961.<sup>124</sup> Federal law already exempts those convicted of a short list of non-violent crimes,<sup>125</sup> and there are many similar, non-violent offenses (in the ever-growing list of regulatory crimes that now carry potential penalties in excess of one year) that could be included.<sup>126</sup> Legislatures could even refine the firearm disability, based on, for example, whether the ex-felon lived in a dangerous area where police were unable to prevent violence, whether the ex-felon had shown any signs of violence or poor decision making in the past, whether the ex-felon had mental health issues, or whether the ex-felon avoided violating parole or probation terms set by the court.<sup>127</sup>

Though it seems that felon-in-possession laws are in many ways overbroad and likely to cause harm while doing only marginal good, this conclusion is far from clear, and the main proposed takeaway from this attempt to estimate a utilitarian moral determination regarding felon-in-possession laws is the continued need for more information on ex-felons and their reintegration into American society.<sup>128</sup> With a large and growing population of ex-felons in the United States,<sup>129</sup> the justice or injustice

123. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 734 (2009) ("A would-be recidivist always faces the deterrence of the punishment for his next underlying crime, including enhanced punishment if he uses a gun. If that does not deter him, he probably would not obey the preventive arms disability, so this issue is already at the margins.")

124. Compare Federal Firearms Act, ch. 850, § 1(6), 52 Stat. 1250, 1250 (1938) (prohibiting possession of firearms by those convicted of a "crime of violence," defined as "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year."), with An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961) (barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm). See generally C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009) (examining the history of felon-in-possession laws).

125. See *supra* note 104 and accompanying text.

126. See, e.g., *State v. Clay*, 481 S.W.3d 531, 540 (Mo. 2016) (Teitelman, J., dissenting) (discussing the long and growing list of nonviolent and impersonal regulatory felonies, including price-fixing, "disclosing the name or address of contributors to the Missouri National Guard Trust Fund," failing to fill out a federal tax withholding form, and betting on a horse race while outside the enclosure of a licensed horse racing track).

127. Legislatures could also empower courts or boards to make such determinations.

128. See *supra* note 121 and accompanying text.

129. See THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON (1997); Sarah Shannon et al., *Growth in the*

caused by felon-in-possession laws will be a question of increasing importance that the nation should try to get right.

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*U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, <http://paa2011.princeton.edu/papers/111687>  
(last visited Jan. 10, 2016).