

The Complex Interplay Between the Controlled Substances Act and the Gun Control Act

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ABSTRACT

Federal narcotics policy and firearms regulation intersect at several points. One of these junctures is 18 U.S.C. §922(g)(3), which incorporates the Controlled Substances Act (CSA) by reference and thereby prohibits violators of the CSA from possessing a firearm. This statutory intersection results in more than 14,200 individuals per year failing a background check for gun purchases, and more than 600 convictions per year for possession of guns by drug users. At the same time, the federal NICS background check database contains only 67,000 or so records of drug users, due to widespread underreporting by state law enforcement agencies, courts, correctional institutions, and drug treatment facilities. Circuit courts have consistently upheld the constitutionality of §922(g)(3). Incorporation of the CSA into firearm prohibitions poses difficult policy tradeoffs. On the one hand, longstanding problems with the CSA, including the trending conflict between federal and state marijuana laws, spill over into prosecutions for weapons violations and denials of prospective firearm purchases. Moreover, other substance abuse categories with higher correlations to gun violence, such as alcoholism, are entirely missing from the regulatory framework. On the other hand, the CSA has ended up playing a vital role in the firearm regulatory regime, and in gun violence prevention. This paper will explore the interplay between the CSA and gun control from both an ex ante perspective (background checks for gun purchases) and an ex post perspective (arrests and convictions for users-in-possession of firearms). It also proposes legislative and administrative refinements that could resolve some of the problems with the existing regime.

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I. INTRODUCTION

Federal narcotics policy and firearms regulation intersect at several points. One of these junctures is 18 U.S.C. §922(g)(3),¹ which in its current form incorporates the Controlled Substances Act (CSA) by reference and thereby prohibits violators of the CSA from possessing a firearm. The wording of this provision does not mention that a conviction is a requirement—it says that a *user* who has never faced criminal charges is ineligible for firearm purchases or possession. This statutory intersection currently results in more than 14,200 individuals per year failing a background check for gun purchases,² and around two hundred convictions per year for possession of guns by drug users as the lead charge.³ At the same time, the federal National Instant Criminal Background Check System (NICS) database contains only 67,000 or so records of drug users,⁴ due to widespread underreporting by state law enforcement agencies, courts, correctional institutions, and drug treatment facilities.⁵ Circuit courts have consistently upheld the constitutionality of §922(g)(3),⁶ even in the years following change in Second Amendment analysis

¹ The Gun Control Act of 1968, codified as amended at 18 U.S.C. §§ 921–927 (1976), included Titles IV and VII of the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, Title IV, Sec. 902, June 19, 1968, 82 Stat. 226, and the Gun Control Act, Title VII of Pub. L. No. 90-351, June 19, 1968, 82 Stat. 236. These enactments extended dealer licensing requirements to local gun shops, where previous only interstate sales came under the statute’s purview. *See* 18 U.S.C. § 921(a)(11). In addition, the 1968 law expanded the list of individuals prohibited from the sale, shipment, or receipt of firearms to include those who used or were addicted to drugs and those adjudicated mental defectives or committed to mental institutions. 18 U.S.C. § 922(g)(3), (4). *See* Scott Jacobs, *Toward a More Reasonable Approach to Gun Control: Canada as a Model*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 315, 328 (1995).

² *See* FED. BUREAU OF INVESTIGATION, FEDERAL DENIALS: REASONS WHY THE NICS SECTION DENIES (1998–2020), https://www.fbi.gov/file-repository/federal_denials.pdf/view (last visited May 31, 2020) [hereinafter *Federal Denials*]. The historical average is closer to 7,400 denials per year for drug users. To arrive at this number, I divided the total historical number by the number of months for the historic period, then used this to calculate an average yearly amount.

³ *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), FEDERAL WEAPONS PROSECUTIONS CONTINUE TO CLIMB IN 2019 (June 5, 2019), <https://trac.syr.edu/tracreports/crim/560/>.

⁴ *See* FED. BUREAU OF INVESTIGATION, ACTIVE RECORDS IN THE NICS INDICES (2020), https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view (last updated April 30, 2020).

⁵ BECKI GOGGINS & SHAUNA STRICKLAND, *BJS Report: State Progress in Record Reporting for Firearm-Related Background Checks: Unlawful Drug Users*, (July 2017), <https://www.ncjrs.gov/pdffiles1/bjs/grants/250782.pdf>.

⁶ *See* United States v. Cook, 914 F.3d 545 (7th Cir. 2019); United States v. Yates, 746 Fed. Appx. 162 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 616 (2018) (unreported) (per curiam); Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1396 (2017); United States v. Carter, 750 F.3d 462 (4th Cir. 2014), *cert. denied*, 574 U.S. 907 (2014); United States v. May, 538 Fed. Appx. 465 (5th Cir. 2013) (unreported); United States v. Jacobson, 406 Fed. Appx. 91 (8th Cir. 2011) (unreported) (per curiam); United States v. Seay, 620 F.3d 919 (8th Cir. 2010); United States v. Yancey,

following the *Heller*⁷ decision. This symposium contribution will explore the interplay between the CSA and gun control from both an ex ante perspective (background checks for gun purchases) and an ex post perspective (arrests and convictions for users-in-possession of firearms).

The incorporation of the CSA into firearm prohibitions poses difficult policy tradeoffs. On the one hand, longstanding problems with the CSA, including the growing conflict between federal and state marijuana laws, spill over into prosecutions for weapons violations and denials of prospective firearm purchases. Even where marijuana use is legal under state law, marijuana users remain legally ineligible for firearm ownership nationwide as marijuana remains illegal under federal law.⁸ The federal firearm disqualification extends to prescription use of medical marijuana as well.⁹ Moreover, other substance abuse categories with higher correlations to gun violence, such as alcoholism, are entirely missing from the federal regulatory framework.¹⁰

At the same time, there are some features of the current arrangement offsetting the downsides, at least in part. Gun control is an area of persistent political failure in our society—most Americans want more restrictions on access to firearms,¹¹ albeit without a complete ban, but partisan gridlock on this issue stays at a perennial impasse. In addition, the 1986 amendments to the Gun Control Act¹² that incorporated the CSA resolved serious problems with §922’s original ambiguous verbiage, and it undoubtedly helped reduce judicial confusion about what “drugs”

621 F.3d 681 (7th Cir. 2010) (per curiam); *United States v. Richard*, 350 Fed. Appx. 252 (10th Cir. 2009) (unreported).

⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁸ *See infra* Part III and sources discussed therein.

⁹ *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, OPEN LETTER TO ALL FEDERAL FIREARMS LICENSEES (Sept. 2011) <https://www.atf.gov/file/60211/download>.

¹⁰ *See infra* Part IV and sources cited therein.

¹¹ *See* GALLUP: *Guns*, <https://news.gallup.com/poll/1645/guns.aspx> (last visited Oct. 12, 2020) (showing through various poll questions that most Americans want stricter gun laws, though not a complete handgun ban); *see also* POLLING REPORT: *Guns*, <https://www.pollingreport.com/guns.htm> (last visited May 31, 2020) (similar results); Margaret Talbot, *The 2020 Democrats and the New Politics of Gun Violence*, THE NEW YORKER (Dec. 8, 2019), <https://www.newyorker.com/magazine/2019/12/16/the-2020-democrats-and-the-new-politics-of-gun-violence>; Rachel Treisman, *Poll: Number of Americans Who Favor Stricter Gun Laws Continues to Grow*, NPR (October 20, 2019), <https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow>.

¹² Firearm Owners Protection Act (FOPA), Pub. L. No. 99-308, § 102(6)(B), substituted “is an” for “who is an” and “any controlled substance (as defined in section 102 of the Controlled Substances Act (U.S.C. 802));” for “marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954[.]” *See infra* Part II.D for the history of amendments that brought § 922(g)(3) to its present form.

made a user ineligible for gun ownership. The current wording of the statute is clearer than the original version.

From a law enforcement perspective, gun control laws, such as those under 18 U.S.C §922 and §924, probably facilitate investigations by providing alternative grounds for officers to meet the evidentiary requirements for obtaining warrants or making arrests.¹³ From a prosecution standpoint, firearms violations normally function as additional counts in the charges against drug traffickers, and as sentencing enhancements.¹⁴ Gun possession charges can serve as failsafe or "backup" charges for prosecutors in difficult cases, because of the streamlined elements under the statutes and evidence (the mere possession of guns is usually proof in itself). Thus, the firearm laws may give prosecutors in drug cases more leverage during plea negotiations or with turning a conspirator into a government informant; the firearm charges make the prosecutions more likely to be effective or successful; and the firearm sentencing enhancements ratchet up the sentences for major drug traffickers, which serves both to remove players from the trafficking industry and as a deterrent to would-be traffickers.

Those who fail the background check because they are flagged as a "drug user"—that is, they fall under §922(g)(3)—are already in the NICS system as known drug users or addicts, often because of repeated arrests on drug charges or a misdemeanor drug conviction.¹⁵ Those with felony drug convictions fail as felons, the largest category of prohibited persons.¹⁶ Of course, the NICS system has only a tiny fraction of the drug users in their system, as most of the drug courts, drug diversion programs, drug counselors, detox centers, methadone clinics, college and high school administrators (who suspend students for having drugs), and drug task forces do not bother reporting the individuals they are processing.¹⁷ With more support from state and federal officials, it would be entirely possible to get more of

¹³ See, e.g., *United States v. Leick*, 944 F.3d 1017, 1018 (8th Cir. 2019) (police-based warrant application on statements from suspect's girlfriend (part of an assault complaint) regarding suspect's regular drug use and gun possession).

¹⁴ See Kimberly J. Winbush, Annotation, *Proscription of 18 U.S.C.A. § 922(g)(3) that Persons Who Are Unlawful Users of or Addicted to Any Controlled Substance Cannot Possess Any Firearm or Ammunition in or Affecting Commerce*, 44 A.L.R. Fed. 3d Art. 3, §51 (2019) (Sentencing enhancements related to gun possession by drug user—Enhancement imposed). See also Stacey M. Studnicki, *Federal Sentencing Guidelines*, 1999 L. REV. MICH. ST. U. DET. C.L. 351, 369 (1998)(discussing the sentencing enhancement based on gun possession by a drug user in *United States v. Jarman*, 144 F.3d 912 (6th Cir. 1998)).

¹⁵ See *infra* Part II.C.

¹⁶ See 18 U.S.C. § 922(g)(1).

¹⁷ See BECKI GOGGINS & SHAUNA STRICKLAND, *BJS Report: State Progress in Record Reporting for Firearm-Related Background Checks: Unlawful Drug Users*, (July 2017), <https://www.ncjrs.gov/pdffiles1/bjs/grants/250782.pdf>.

these entities to report, especially if the reporting was computerized and automatic.¹⁸ Later in life, if the person has been "clean" for a while, there is a process to remove their names from the NICS do-not-sell list,¹⁹ though this process needs some improvements as well.²⁰

When known drug users fail a background check when trying to buy a gun—the 14,000+ who fail for no other reason than that they're a known drug user, which triggers §922(g)(3)—most of the time nothing happens to them; they just leave the store and go on their way, even though they just committed a felony by trying to buy a gun.²¹ The Government Accountability Office (GAO) has criticized this breakdown in the process.²² Peaceable drug users are one thing, but when a known drug user (someone with a history of arrests or misdemeanor convictions) is trying to buy a gun, and is desperate enough to walk into a gun store and lie on their background check form, violence could follow.

From a legal realist standpoint, the combination of §922(g)(1) and §922(g)(3) in the U.S. Code means that the Controlled Substances Act is actually the main device in our legal system that limits the number of firearms sold, the main device that in practice limits criminals' access to guns, and so on. Given that most felony convictions are drug-related, our otherwise-goofy federal drug law ends up being our primary operational form of gun control—nothing else even comes close, except the age requirements for purchasers. Despite the awful problems with the Controlled Substances Act and the mass incarceration it produces, one could argue that the CSA is our main form of gun control right now. It is the main reason the background check system matters at all.

We could reduce all the maximum sentences under the Controlled Substances Act to one year and a day, and sentence all convicted violators to time served (during arrest lockup and pretrial detention) and supervised release, and all the gun-control benefits of the CSA would remain in place. Those convicted of drug possession

¹⁸ See *id.*; see also WILLIAM P. BARR, *The Attorney General's Semiannual Report on the Fix NICS Act* (November 2019), <https://www.justice.gov/ag/page/file/1217396/download>.

¹⁹ See 28 C.F.R. § 25.10 (Correction of erroneous system information); FED. BUREAU OF INVESTIGATION: APPEALS AND VOLUNTARY APPEAL FILE (VAF), <https://www.fbi.gov/services/cjis/nics/national-instant-criminal-background-check-system-nics-appeals-vaf> (last visited May 31, 2020) [hereinafter VAF Brochure].

²⁰ See *Snyder v. United States*, No. 18-5504 RJB, 2019 WL 5592948, (W.D. Wash. Oct. 30, 2019); DRU STEVENSON, *New NICS Case: Snyder v. United States, Part I*, SECOND THOUGHTS, November 26, 2019, <https://sites.law.duke.edu/secondthoughts/2019/11/26/new-nics-case-snyder-v-united-states-part-i>; DRU STEVENSON, *New NICS Case: Snyder v. United States, Part II*, SECOND THOUGHTS, November 27, 2019, <https://sites.law.duke.edu/secondthoughts/2019/11/27/new-nics-case-snyder-v-united-states-part-ii>.

²¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, LAW ENFORCEMENT: FEW INDIVIDUALS DENIED FIREARMS PURCHASES ARE PROSECUTED AND ATF SHOULD ASSESS USE OF WARNING NOTICES IN LIEU OF PROSECUTIONS, GAO-18-440 (Sept. 2018), <https://www.gao.gov/assets/700/694290.pdf>.

²² See *id.*

would become unable to buy or own guns (a good thing) but would not have to spend half their lives in jail (also a good thing).²³

Conversely, drugs are a primary reason we need gun control. Drug laws impose serious downsides, but highly addictive narcotics always present social problems, whether they are legal or illegal. Dependent users become desperate for the product, whether they are chemically dependent/addicted or psychologically dependent/addicted to recreational substance abuse. The product itself, per kilogram, is extremely valuable. The price per kilogram means that some people have enough incentive to steal it that they may resort to violence; traffickers of the commodity carry around so much cash (after a sale) or precious cargo that many will resort to lethal force (immediately) to defend it; and market rivals have so much at stake, and to gain, that they may resort to lethal force to protect or expand their customer base. Could we call this the Breaking Bad phenomenon? There is just too much at stake for all the parties involved in this market. Even if drugs were legal, this may not change—narcotics are a unique product, creating an inevitably unique market that will always be susceptible to violence. Even if we legalize narcotics, I believe they will continue to be the main source of concentrated gun violence in society.

The discussion proceeds as follows: Part II explains the *ex ante* and *ex post* consequences of the “drug user” prohibition clause in §922(g)(3), as well as the codified ATF regulations defining “drug user” for purposes of enforcement and a brief history of the legislative amendments that led to the current wording of the statute. In addition, Part II overviews the current consensus in the courts upholding the statute against constitutional challenges, including failed Second Amendment challenges. Part III delves into what is currently the most problematic issue with §922(g)(3)—its continuing applicability to medical marijuana users (and others) in states where such use is lawful. A confusing series of guidance documents from successive Attorneys General, and a high-profile outlier case from Oregon, have generated significant uncertainty in this area, though enforcement seems to continue targeting offenders who are in fact violent. Part IV opens a discussion of what is missing in this statutory and penal framework—the connection of chronic alcohol abuse with gun violence and gun suicide. A brief conclusion recaps the main themes of this Article and stakes out some strong policy positions.

II. INCORPORATION: UNLAWFUL USER OF OR ADDICTED TO ANY CONTROLLED SUBSTANCE

Section 922 of the Gun Control Act of 1968 prohibits certain persons from possessing or seeking to possess a firearm. Due to a series of amendments, one of the prohibitions currently refers to “section 102 of the Controlled Substances Act”

²³ For an excellent discussion of the excessively long prison sentences related to firearms offenses, see Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173 (2016). This author favors gun restrictions and permanent disarmament (subject to inspections or verification) as a sanction, but not the lengthy periods of incarceration that now apply to firearm violations.

to define a person who is an “unlawful user of or addicted to any controlled substance.”²⁴ Users of substances covered under the CSA, therefore, cannot purchase, own, use, or sell a firearm or ammunition. The prohibition has both ex ante and ex post applications.

A. *Ex Ante: Drug Users and NICS Background Checks*

From an ex ante perspective, firearm purchases from federally licensed dealers (FFLs) require background checks for most purchases,²⁵ and illegal drug use is one of the screening criteria for these background checks. The background check questionnaire (ATF Form 4473) asks the purchaser to check a box Yes/No whether they are a user of or addicted to an illegal drug; if the purchaser checks “Yes,” the FBI’s electronic background check system (NICS) will automatically deny the purchase. If the purchaser checks “No,” the NICS system will check the purchaser’s name against three federal databases for records of any of the nine prohibiting factors (felony convictions being by far the most common). If the individual is in one of the databases as a “drug user,” which is relatively unlikely, the system will deny the purchase. Note that in most states, private gun sales (not involving a licensed dealer) do not require background checks, meaning an individual who fails a background check with the licensed dealer might then seek out a private seller instead to obtain a gun on the secondary market, though this may involve additional inconvenience or expense (i.e., transaction costs) for the would-be purchaser.²⁶ Of course, it is also illegal for such a person to buy a gun from an unlicensed private seller, but without universal background checks, there is no way to prevent or screen such purchases. According to ATF, around 14, 208 individuals failed background checks in 2019 for

²⁴ See 18 U.S.C. § 922(d)(3), (g)(3), (s)(3)(B)(iii) (2018), In particular, 18 U.S.C. §922 (g)(3) provides “[i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) to . . . possess in or affecting commerce, any firearm”

²⁵ About fifteen states have background checks for concealed-carry permits extensive enough that ATF considers them duplicative of the purchaser background checks, so in these states, such permit holders are exempt from undergoing a background check when purchasing a firearm from an FFL. These states screen for records of illegal drug use as part of the criteria for the permit background check. In addition, the FBI, which operates the background check system, has a special procedure for obtaining a type of pre-clearance for future background checks that streamlines subsequent purchases and checks; this option is mostly for individuals who routinely fail background checks because they share the same name with a felon in their state—they can obtain an identification number from the FBI to avoid future confusion with other individuals who share a name or other identifying information.

²⁶ Note that twenty-one states and Washington DC have extended background check requirements to some or all private gun sales, which goes beyond what federal law requires, though only twelve states require background checks on all gun sales and transfers. See GIFFORDS L. CTR., UNIVERSAL BACKGROUND CHECKS, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/> (last visited Feb. 7, 2020).

this criterion, that is, being “drug users/addicts.”²⁷ This is a tiny number compared to several million purchasers who pass their background checks every year; but the raw number of denials for “drug user/addict” has been steadily increasing for many years:

- 14,208 in 2019 (13.7% of all 2019 denials)²⁸
- 13,597 in 2018 (13.6% of all 2018 denials)²⁹
- 12,710 in 2017 (12% of all 2017 denials)³⁰
- 11,278 in 2016 (9.3% of all 2016 denials)³¹
- 10,261 in 2015 (6.3% of all 2015 denials)³²
- 9,449 in 2014 (10.3% of all 2014 denials)³³
- 9,178 in 2013 (8.3% total denials of all years aggregate to date)³⁴

²⁷ Compare all-time totals on Dec 31, 2018 (147,460) and Dec 31, 2019 (161,668). SEE DEP’T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) SECTION 2018 OPERATIONS REPORT (2018), <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view> [hereinafter 2018 OPERATIONS REPORT]; see also FEDERAL DENIALS, *supra* note 2.

²⁸ See FEDERAL DENIALS, *supra* note 2.

²⁹ See 2018 OPERATIONS REPORT, *supra* note 27, at 18.

³⁰ See DEP’T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2017, at 16, <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view> (last visited Oct. 10, 2020) [hereinafter 2017 OPERATIONS REPORT].

³¹ See DEP’T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2016, at 19, <https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view> (last visited Oct. 10, 2020) [hereinafter 2016 OPERATIONS REPORT].

³² See DEP’T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2015, at 12, <https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf/view> (last visited Oct. 10, 2020) [hereinafter 2015 OPERATIONS REPORT].

³³ See DEP’T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2014, at 18, <https://www.fbi.gov/file-repository/2014-nics-ops-report-050115.pdf/view> (last visited Oct. 10, 2020) [hereinafter 2014 OPERATIONS REPORT].

³⁴ See FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2013, <https://archives.fbi.gov/archives/about-us/cjis/nics/reports/2013-operations-report> (last visited Oct. 10, 2020) [hereinafter 2013 OPERATIONS REPORT].

- 8,798 in 2012³⁵ (more difficult to estimate percentages for earlier years)
- 7,563 in 2011³⁶

Observe that even though the raw number of drug user NICS denials has increased every year, denials for drug users as a percentage of all NICS denials increased steadily during the Obama years, but seems to have leveled off under the Trump Administration at a little over 13.5%. The number of total background checks per year significantly increased during these years, so the raw numbers of denials have climbed commensurately. The increase in background checks is due partly to increased gun sales during the Obama years, and also the increase in concealed-carry permitting during this period (now available in every state), which increasingly involves NICS background checks for initial permitting and periodic renewals. For purposes of the present discussion, the Controlled Substances Act now results in more than 14,000 individuals per year failing firearm background checks for purchases or concealed-carry permits.³⁷

The steady increase in CSA-related denials is not, however, a result of an increasing number of users in the NICS system. Interestingly, the number of active records of “unlawful drug users/addicts” in the NICS databases has fluctuated counterintuitively over the same period, although in 2019 it surged to an all-time high:

- 2019 - 67,032 active records in NICS for "unlawful drug users/addicts"³⁸
- 2018 - 45,152 active records of drug users³⁹
- 2017 - 29,909 active records of drug users⁴⁰
- 2016 - 22,831 active records of drug users⁴¹
- 2015 - 23,211 active records of drug users⁴²

³⁵ See FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2012 (2012), <https://archives.fbi.gov/archives/about-us/cjis/nics/reports/2012-operations-report> (last visited Oct. 10 [hereinafter 2012 OPERATIONS REPORT]).

³⁶ See DEP’T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2011 (2011), <https://www.fbi.gov/file-repository/2011-nics-ops-report.pdf/view> (last visited Oct. 10, 2020) [hereinafter 2011 OPERATIONS REPORT].

³⁷ Some of the denials could be multiple denials for the same individuals—an individual might repeatedly fail background checks in a given year—but it seems unlikely that many individuals would continue trying to pass background checks with licensed dealers after failing the first time.

³⁸ See FED. BUREAU INVESTIGATION, *supra* note 4.

³⁹ See 2018 OPERATIONS REPORT, *supra* note 27, at 26.

⁴⁰ See 2017 OPERATIONS REPORT, *supra* note 30, at 27.

⁴¹ See 2016 OPERATIONS REPORT, *supra* note 31, at 26.

⁴² See 2015 OPERATIONS REPORT, *supra* note 32, at 17.

- 2014 - 24,281 active records of drug users⁴³
- 2013 - 33,909 active records of drug users⁴⁴
- 2012 - 18,174 active records of drug users⁴⁵
- 2011 - 14,930 active records of drug users⁴⁶
- 2010 - 2,092 active records of drug users⁴⁷

Observe that the number of drug users in the NICS databases *decreased* in 2015 and 2016, due to an effort at the end of the Obama Administration to clean up or clear out old or obsolete records of drug arrests that could no longer serve as indicia of current drug users under ATF regulations. The number of *denials* increased in these same years, despite the purging of active records—there were fewer listed drug users in the database to trigger a failed background check, but the number of background checks was increasing so rapidly in this period that it outpaced the reduction in active records. The remarkable increases in 2018 and 2019 correspond to the efforts under Attorney General William Barr and his predecessor to improve reporting between federal law enforcement agencies and from state law enforcement agencies to NICS.⁴⁸ Note, however, that the NICS denials for drug users, though continuing to rise, did not rise in proportion to the number of active records that would trigger such denials. In addition, even though the increase is due mostly to the huge increase in the number of background checks, it is noteworthy that the number of drug-related denials steadily increased even as more states legalized marijuana use to varying degrees.

⁴³ See 2014 OPERATIONS REPORT, *supra* note 33, at 26.

⁴⁴ See 2013 OPERATIONS REPORT, *supra* note 34.

⁴⁵ See 2012 OPERATIONS REPORT, *supra* note 35.

⁴⁶ See 2011 OPERATIONS REPORT, *supra* note 36.

⁴⁷ See DEP'T JUST. & FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2010, <https://www.fbi.gov/file-repository/2010-nics-ops-report-4-19-11-1.pdf/view> (last visited Oct 10, 2020).

⁴⁸ See GOGGINS & STRICKLAND, *supra* note 17.

B. *Ex Post Enforcement*

The prohibition has an *ex post* application as well. Even if an illegal drug user passes their background check, which they usually will do, or sidesteps the background check through a private unlicensed seller, it is still a felony for the drug user to possess a firearm. If the individual lied on their background check form and passed their background check despite being a drug user, because their name was not in the NICS system, they may face charges under both §922(g)(3) and the statute that forbids false statements on the background check form.⁴⁹ If the individual acquired the gun without a background check (i.e., private sellers, gift, loan, theft, or inheritance), they will face charges only under §922(g)(3), although many of these cases involve additional crimes that led the police to discover the gun, such as an assault, robbery, or a drug arrest. Charges under §922(g)(3) may compound with other charges, such as drug possession, felon-in-possession, violations of probation, and so forth.

According to federal statistics, there are now around 200 prosecutions per year with this crime as the lead charge,⁵⁰ a small number compared to the felon-in-possession convictions, but still the third-highest subsection of §922(g) in terms of lead charge in federal prosecutions.⁵¹ Moreover, if a lawful gun owner at some point becomes an illegal drug user, at that point their gun ownership becomes a crime. Conversely, a drug user who stops using drugs can then lawfully own firearms—the drug use and gun ownership must be contemporaneous to violate the statute.

Pretrial issues can arise in cases brought under §922(g)(3), such as its applicability to lawful users of marijuana under state law.⁵² Defendants charged under the statute may seek a bill of particulars specifying the evidence that the accused is indeed a “drug user,” or challenges to the evidence (either its reliability or admissibility), or the sufficiency of the evidence for indictment.⁵³ Raising a defense that the “drug use” was a one-time occurrence has been effective in

⁴⁹ 18 U.S.C. §§ 922(a)(6) and 924(a)(2).

⁵⁰ See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), FEDERAL WEAPONS PROSECUTIONS CONTINUE TO CLIMB IN 2019 (June 5, 2019), <https://trac.syr.edu/tracreports/crim/560/>.

⁵¹ See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FEDERAL WEAPONS PROSECUTIONS RISE FOR THIRD CONSECUTIVE YEAR, <https://trac.syr.edu/tracreports/crim/492/> (Nov. 29, 2017) (see Table 2, Number of Federal Criminal Prosecutions by Lead Charge, FY 2008-2017). Note that based on comparisons of historical data and 2019 TRAC Reports, *supra* note 50 the number of prosecutions with § 922(g)(3) as the lead charge nearly doubled in 2019 compared to previous years.

⁵² See *Winbush*, *supra* note 14, at 4.

⁵³ See *id.*

defeating the charge,⁵⁴ but claiming selective enforcement of the law has not.⁵⁵ Second Amendment challenges to the statute have generally proved unsuccessful,⁵⁶ a point discussed in detail below. Defenses of self-defense (necessity of carrying a firearm due to threats),⁵⁷ entrapment by estoppel,⁵⁸ and duress⁵⁹ have also proved unsuccessful in defeating charges under §922(g)(3). Even law enforcement officers can face convictions under the statute, if they are unlawful drug users, despite the fact that their firearm possession was required by their employment in the police force.⁶⁰

C. Defining “Unlawful User or Addicted to Any Controlled Substance”

The 1997 Treasury Decision from the Bureau of Alcohol, Tobacco and Firearms (ATF), provided the following regulatory definition for purposes of enforcement:

A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled

⁵⁴ See, e.g., *United States v. Robles*, 129 Fed. Appx. 736 (3d Cir. 2005) (single occasion drug use insufficient for conviction under statute); *United States v. Augustin*, 376 F.3d 135 (3d Cir. 2004) (same).

⁵⁵ See *United States v. May*, 538 Fed. Appx. 465 (5th Cir. 2013) (selective prosecution defense rejected by court); see also *Winbush*, *supra* note 14, at 5.

⁵⁶ See *Winbush*, *supra* note 55.

⁵⁷ See *United States v. Eads*, 327 Fed. Appx. 671 (8th Cir. 2009) (per curiam).

⁵⁸ See *United States v. Fischer*, 253 Fed. Appx. 668 (9th Cir. 2007).

⁵⁹ See *United States v. Barnes*, 469 Fed. Appx. 733 (11th Cir. 2012) (per curiam).

⁶⁰ See *Gordon v. United States*, 2008 WL 4933989 (M.D. Ala. 2008) (unreported).

substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year.⁶¹

ATF subsequently promulgated and codified an expanded version of this definition, so that federal regulations now also include “persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year.”⁶² Thus, the prohibited class includes individuals who have been arrested but not convicted for unlawful possession of a controlled substance within the past five years, individuals who have failed a drug test in the past year, and individuals who use controlled substances (including prescription drugs) in a manner other than as prescribed. Importantly, the incorporation of the CSA does not require a prior criminal conviction related to controlled substances, but merely an ongoing violation of the CSA. Both the GCA and CSA include “immediate precursors” of controlled substances under their regulatory definitions.⁶³ Regular users of any of these controlled substances violate §922(g)(3) by possessing or seeking to possess a firearm. Note that the federal firearm disqualification applies even to medical marijuana users with a prescription in states that have legalized such use,⁶⁴ a subject discussed in more detail below.

Very recently, in *United States v. Tanco-Baez*,⁶⁵ the First Circuit adopted a more stringent standard on the prosecution to prove the judicially-created elements of “unlawful user.”⁶⁶ The Court held that an admission by a defendant to collateral facts that are not to an element of the crime, but rather necessary to proving them, such as a defendant’s “statement in his interview with the law enforcement agent about the length and nature of his drug use[,] must be corroborated if it is to be relied

⁶¹ T.D. ATF-391 *Definitions for the Categories of Persons Prohibited from Receiving Firearms* (Jun. 27, 1997), <https://www.atf.gov/file/84311/download>; see also 27 C.F.R. § 478.11 (2019).

⁶² 27 C.F.R. § 478.11 (2019).

⁶³ *Id.* (“A drug or other substance, or immediate precursor, as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802. The term includes, but is not limited to, marijuana, depressants, stimulants, and narcotic drugs. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in Subtitle E of the Internal Revenue Code of 1986, as amended.”). See also Controlled Substances Act, 21 U.S.C.A. § 802(23) (West 2019) (“The term ‘immediate precursor’ means a substance (A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance; (B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and (C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.”).

⁶⁴ Attorney General’s Open Letter to All Federal Firearms Licensees, *supra* note 9.

⁶⁵ 942 F.3d 7 (1st Cir. 2019).

⁶⁶ See *id.* at 15 (“To establish the ‘unlawful user’ element of this offense, the government must prove beyond a reasonable doubt that (1) the defendant used controlled substances regularly, (2) that the use took place over a long period of time, and (3) that the use was proximate to or contemporaneous with his possession of a firearm.”).

upon to support his conviction.”⁶⁷ An officer testified that the defendant in this particular case “admitted . . . in a post-arrest interview that he had gone into a vehicle to smoke marijuana that day, that he ‘smoked on a daily basis and that it had been a long time since he had started,’ and that he possessed the machinegun on the day of the events.”⁶⁸ Since the government did “not argue that there [was] any independent evidence in the record that in and of itself tends to establish that [the defendant] was a long-term drug user”⁶⁹ and failed to point to “the drugs found in [the defendant’s] shoe on the day of his arrest—as corroborative of his admission of his recent drug use,”⁷⁰ the court rejected the government’s claims that fortification of the defendant’s other admissions (for example, his recent drug use and other admissions) sufficiently corroborated “the nature and duration of his past drug use.”⁷¹ Holding that the government failed to establish that the defendant regularly used drugs over a long period of time, the court hedged that such a determination depends on the facts and circumstances of the individual case.⁷² Notwithstanding the disclaimer, the court’s requirement of independent corroborating evidence seems to place an additional burden on the prosecution’s case-in-chief under 18 U.S.C. §922(g)(3).

The true reach or impact of the “drug user” prohibition in the GCA is hard to quantify. The prohibition punishes direct violations, but may also serve as a proxy for other violations, or leverage as a potential additional charge during plea negotiations, or a means of increasing the sentence for other violations.⁷³ For

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 16.

⁷⁰ *Id.* The court noted that the law is unclear as to whether the government could even have argued this: “We note that the caselaw is not consistent in its treatment of whether such evidence can corroborate such an admission.” *Id.* at 22.

⁷¹ *Id.* at 23.

⁷² *Id.* at 25.

⁷³ It is important to distinguish the additional charge as a form of ad hoc sentence enhancement as well as the effect of the conviction on discretionary sentence enhancement based on the violation of §922(g) from gun-related factors in the federal sentencing guidelines. The latter are subject to the qualifications imposed in *United States v. Booker*, 543 U.S. 220, 244 (2005) (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”). The legal distinction, however, does not appear to affect federal prosecutors’ ability to convict on charges of violating §922(g)(3), because so many defendants admit to a history of drug use, even if they deny the instant drug charges. For example, on remand from the United States Supreme Court on the issue of the mandatory sentencing guidelines under *Booker*, the Eighth Circuit reaffirmed the sentence enhancement of a defendant convicted of conspiring to manufacture methamphetamine and “for being an unlawful user of controlled substances in possession of a firearm.” *United States v. Turnbull*, 414 F.3d 942, 943 (8th Cir. 2005). The Eight Circuit found in its first review ample support for the §922(g)(3) violation, including that the defendant had admitted to using meth for a year prior to the arrest, including “a ‘couple’ times” the week before his arrest. *Id.* at

example, defendants may plead guilty to violating §922(g)(3) after being arrested for both possession of marijuana and a firearm and confessing to regular use of the controlled substance.⁷⁴ Likewise, federal prosecutors can add §922(g)(3) charges to other firearms charges, resulting in longer sentences.⁷⁵ As a result, violations manifest not only as proxy charges, but also as additional charges that increase sentences for drug violations, particularly in drug trafficking and distribution offenses (which fall under a separate paragraph of §922(g)).⁷⁶ Guidance from the Department of Justice provides that prosecutors should include all relevant violations of § 922(g) as separate charges, in part because defendants commonly challenge their inclusion in these categories of excluded persons, thus charging the offense under multiple classes enhances the likelihood of preserving the conviction.⁷⁷ Convictions under the statute primarily affect felons in possession of

560. “He further admitted the methamphetamine found in a secret compartment in his vehicle was his . . . his driver's license was found in a coffee cup containing meth residue (suggesting very recent use), and his home contained numerous drug paraphernalia and photographs depicting him and others in drug-related activities.” *Id.* at 560–62.

⁷⁴ See *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (per curiam) (reviewing constitutional challenge where defendant pleaded guilty to violating § 922(g)(3) after being arrested for both possession of marijuana and carrying a loaded firearm, and confessed to smoking the controlled substance daily); Press Release, U.S. DEP’T OF JUSTICE, BUFFALO MAN PLEADS GUILTY TO USING A CONTROLLED SUBSTANCE WHILE POSSESSING A FIREARM (Jun. 25, 2019), <https://www.atf.gov/news/pr/buffalo-man-pleads-guilty-using-controlled-substance-while-possessing-firearm> (announcing defendant pleaded guilty to being a user of a controlled substance in possession of firearm after being arrested for possession of marijuana, possessing a firearm and admitting “he was and is an unlawful user of marijuana”).

⁷⁵ Press Release, U.S. DEP’T OF JUSTICE, CHRISTOPHER HASSON PLEADS GUILTY TO FEDERAL CHARGES OF ILLEGAL POSSESSION OF SILENCERS, POSSESSION OF FIREARMS BY AN ADDICT TO AND UNLAWFUL USER OF A CONTROLLED SUBSTANCE, AND POSSESSION OF A CONTROLLED SUBSTANCE (Oct. 3, 2019), <https://www.atf.gov/news/pr/christopher-hasson-pleads-guilty-federal-charges-illegal-possession-silencers-possession> (announcing guilty plea to two counts pertaining to unlawful possession of silencers, possession of a controlled substance, and violating § 922(g)(3) after defendant was arrested for ordering and personally taking Tramadol pills daily without a lawful prescription and knowing both that it was illegal and that he was addicted because “[d]uring the time of his use of Tramadol, Hasson also conducted Internet searches and visited websites that discussed addiction and Tramadol withdrawal”).

⁷⁶ Press Release, U.S. DEP’T OF JUSTICE, U.S. ATT’Y OFFICE FOR S.D. OF TEX., SYNTHETIC NARCOTICS AND FIREARMS CHARGES RESULT IN SIGNIFICANT PRISON SENTENCES (Jan. 11, 2018), <https://www.atf.gov/news/pr/synthetic-narcotics-and-firearms-charges-result-significant-prison-sentences> (announcing convictions of five defendants for conspiracy to possess with intent to distribute, three of which were likewise convicted of possession of firearm in violation of § 922(g): two were in “possession of a firearm in furtherance of a drug trafficking crime,” one “was also convicted of possession of a machine gun conversion device,” and one “admitted to possession of a firearm in furtherance of a drug trafficking crime and felon in possession of a firearm.”).

⁷⁷ Memorandum from Asst. Att’y Gen. Robert S. Mueller, III, U.S. Dep’t of Justice, on Prosecutions Under 18 U.S.C. §922(g) (Nov. 3, 1992) as reprinted in Justice Manual: Criminal Resource Manual (CRM), at 1431, <https://www.justice.gov/jm/criminal-resource-manual-1431-department-memorandum-prosecutions-under-922g> (“It is appropriate to charge a defendant who has

a firearm,⁷⁸ and felons continue to comprise “[t]he top prohibiting category for individuals denied firearms purchases.”⁷⁹ Court opinions and government publications link habitual drug users with the same level of potential for violent crime as violent felons.⁸⁰

As mentioned above, § 922(g)(3) itself does not require drug-related convictions in order to violate the prohibition against firearm possession by a person who is “an unlawful user of or addicted to any controlled substance,” and this open-endedness has forced courts to address the scope and constitutionality of the provision. For example, the Seventh Circuit has observed that “unlike those who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user . . . could regain his right to possess a firearm simply by ending his drug abuse.”⁸¹ Of course, many “users” of controlled substances have their usage history highlighted during proceedings for felony drug possession charges.⁸²

multiple disqualifying factors with a separate count of unlawful weapons possession under §922(g) for each disqualifying status.”). *See also* U.S. DEP’T OF JUSTICE, JUSTICE MANUAL, 9-63.514 - Prosecutions Under 18 U.S.C. § 922(g), <https://www.justice.gov/jm/jm-9-63000-protection-public-order#9-63.514#9-63.514>.

⁷⁸ *Id.* “In most prosecutions under 18 U.S.C. § 922(g), the defendant is a previously convicted felon who is in possession of a firearm. However, a number of cases involve weapons possession by a defendant who simultaneously maintains more than one disqualifying status under § 922 (g).” *Id.*

⁷⁹ U.S. GEN. ACCOUNTING OFFICE, GAO-18-440, LAW ENFORCEMENT: FEW INDIVIDUALS DENIED FIREARMS PURCHASES ARE PROSECUTED AND ATF SHOULD ASSESS USE OF WARNING NOTICES IN LIEU OF PROSECTIONS, 73 (Sept. 2018).

⁸⁰ *See, e.g., Yancey*, 621 F.3d at 684 (“Keeping guns away from habitual drug abusers is analogous to disarming felons.”). This is not to suggest any categorical sentencing impacts like those at issue in *Johnson v. United States*, 135 S. Ct. 2551 (2015). This general perception warrants mention in reference to nonviolent medical marijuana use. In addition, given that many cases herein reflect convictions under 18 U.S.C. § 922(g)(3) corresponding with convictions for other unlawful conduct, the drug user status addresses possession before prosecutors obtain felony convictions (after conviction, § 922(g)(1) prohibits possession by convicted felons). In these cases, habitual drug users faced charges for violating § 922(g)(3) and conduct such as distributing illegal substances, an activity which the justice system perceives as inherently violent. *See* Press Release, U.S. DEP’T OF JUSTICE, U.S. ATT’Y OFFICE FOR S.D., SIOUX FALLS MAN SENTENCED FOR CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE (Aug. 13, 2019), <https://www.atf.gov/news/pr/sioux-falls-man-sentenced-conspiracy-distribute-controlled-substance> (“Drug trafficking is an inherently violent activity. Firearms are tools of the trade for drug dealers. It is common to find drug traffickers armed with guns in order to protect their illegal drug product and cash and enforce their illegal operations.”).

⁸¹ *Yancey*, 621 F.3d at 686.

⁸² *See, e.g., United States v. Oleson*, 310 F.3d 1085, 1090 (8th Cir. 2002) (“[T]he government presented an overwhelming amount of testimony that Oleson was in the business of selling methamphetamine.”); *United States v. Turnbull*, 349 F.3d at 560; *United States v. McIntosh*, 23 F.3d 1454, 1456–59 (8th Cir. 1994) (recounting the defendant’s most recent arrest record including that police arrested defendant for adult abuse, then fifteen days later, police executed a search warrant on

Across jurisdictions, courts consistently interpret the violation under §922(g)(3) as a separate and insular offense from being a felon-in-possession; and courts treat §922(g)(3) as limited durationally in its effect on a convicted person's ability to possess a gun.⁸³ A drug user or addict regains eligibility for gun ownership by not being arrested for possession of controlled substances in a period of one to five years, or for other drug-related offenses, and by not possessing drugs or using drugs in fact for a similar period.⁸⁴ In defining the scope of the statute, courts consistently scrutinize the regularity of drug use and the nexus between the drug use and firearm possession.⁸⁵ Prosecutors therefore must establish both the defendant's current status as a drug user by showing regularity of use as well as his contemporaneous gun possession. This regularity requirement eliminates the one-time user, but beyond that, the courts provide no absolute threshold to meet "user"

his apartment and seized guns, drugs, and paraphernalia, after which defendant "admitted he sold marijuana from his residence [and] he carried a gun when selling the drugs.").

⁸³ See *United States v. Emond*, No. 2:12-CR-00044-NT, 2012 WL 4964506, at *5 (D. Me. Oct. 17, 2012) ("[A]s other circuits have noted, unlike §922(g)'s prohibition of firearm possession by felons and those who have been committed because of mental illness, §922(g)(3)'s prohibition on firearm possession by unlawful drug users is a temporary restriction that lasts only as long as the person continues using drugs.").

⁸⁴ Cf. T.D. ATF-391, *supra* note 61 ("An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year.").

⁸⁵ See *United States v. Burchard*, 580 F.3d 341, 347 (6th Cir. 2009) (noting that "[t]he Third, Fourth, and Ninth Circuits have stated that there must be some regularity of drug use in addition to contemporaneousness to meet the statute's requirements."); *United States v. Kimbrough*, 319 F. Supp. 3d 912, 916 (M.D. Tenn. 2018) (quoting *Yancey*, 621 F.3d at 687 ("Even if there is some disagreement as to the exact nature and scope of the temporal proximity between drug use and possession of a firearm, '[e]very circuit to have considered the question has demanded that the habitual abuse be contemporaneous with the gun possession.")). Cf. *United States v. Herrera*, 313 F.3d 882, 885 (5th Cir. 2002) ("for a defendant to be 'unlawful user' for §922(g)(3) purposes, his 'drug use would have to be with regularity and over an extended period of time'. The Government reiterated this at en banc oral argument: 'We certainly wouldn't charge one-time use. It would have to be over a period of time.' Pursuant to our record-review, the record is *not* devoid of evidence that . . . [defendant] unlawfully used cocaine while possessing firearms."); *Turnbull*, 349 F.3d at 561–62 ("Although [defendant] contends the evidence was insufficient to show a temporal nexus between his drug use and his possession of guns, by his own admission he had been using methamphetamine for an extended period of time (one year), and had become high a couple times within the week of when firearms were found in his home From this evidence the jury could clearly infer a sufficient temporal nexus between regular drug use and [defendant's] possession of firearms.").

status.⁸⁶ The contemporaneous possession of the firearm merely requires reasonable overlap with a period of regular drug use.⁸⁷

A very recent case from Texas illustrates some benevolent collateral effects of the law. In November 2019, Texas law enforcement officers arrested Aiden Bruce-Umbaugh and an accomplice while they were driving a car.⁸⁸ A search of the vehicle produced “an AR-15 rifle, two AK-47 rifles, a Sig Sauer 9mm pistol, at least 1,500 rounds of ammunition, a small canister of marijuana, and approximately two grams of THC oil.”⁸⁹ Deputies pulled the vehicle over in a routine traffic stop and found it occupied by the driver and Bruce-Umbaugh.⁹⁰ In a state where marijuana is illegal, a drug sniffing canine alerted law enforcement to the criminal activity justifying the search of the vehicle.⁹¹ Bruce-Umbaugh admitted to owning the weapons found in the vehicle, possessing the marijuana, and smoking marijuana on a daily basis; he

⁸⁶ See *United States v. Burchard*, 580 F.3d 341, 346 (6th Cir. 2009) (“A one-time use of a controlled substance is not sufficient to be an unlawful user . . . [r]ather, the Defendant must have been engaged in the regular use.”); *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004) (“There was no evidence that Augustin had ever used drugs prior to the single use on June 28, or that he ever used drugs again. All the evidence disclosed was that Augustin used drugs on June 28 and possessed a firearm on June 29, roughly six hours later. That evidence was insufficient to support his conviction under 18 U.S.C. §922(g)(3).”).

⁸⁷ See *Burchard*, 580 F.3d at 346 (holding that defendant need not use “the controlled substance at the precise time he possessed the firearm” but rather it is sufficient where there is “a pattern of use or pattern of possession of a controlled substance that reasonably covers the time a firearm was possessed”); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir.1988), *cert. denied*, 489 U.S. 1084 (1989) (holding that the government need not prove the defendant used drugs “at the exact moment he purchased the firearms in question in order to be convicted as an ‘unlawful user’”).

⁸⁸ Note there is a discrepancy as to the spelling of his first name. Christine Clarridge, *Suspected neo-Nazi with ties to Washington state faces federal gun charge after arrest in Texas*, SEATTLE TIMES (Nov. 15, 2019 at 9:19 am Updated Nov. 15, 2019 at 10:16 am) (“While Washington state court records spell Bruce-Umbaugh’s first name ‘Aidan,’ Department of Justice records spell his first name ‘Aiden.’ The Seattle Times could not immediately resolve the discrepancy.”) <https://www.seattletimes.com/seattle-news/crime/neo-nazi-with-ties-to-washington-state-faces-federal-gun-charge-after-arrest-in-texas/>.

⁸⁹ Press Release, U.S. DEP’T OF JUSTICE, U.S. ATT’Y OFFICE FOR N.D. OF TEX., SUSPECTED NEO-NAZI CHARGED WITH GUN CRIME (Nov. 14, 2019), <https://www.justice.gov/usao-ndtx/pr/suspected-neo-nazi-charged-gun-crime>.

⁹⁰ The driver and passenger apparently appeared suspicious given their behavior which included possessing an exposed machete in the driver compartment of the vehicle, sporting “combat/tactical attire,” and avoiding eye contact with deputies. Asher Stockler, *Alleged Neo-Nazi Charged with Illegal Possession of Semi-Automatic Rifles, Thousands of Rounds of Ammunition*, NEWSWEEK (Nov. 15, 2019), available at <https://www.newsweek.com/aiden-bruce-umbaugh-neo-nazi-firearms-1472083>.

⁹¹ *Id.*

was therefore charged with violating § 922(g)(3) as an unlawful user of a controlled substance in possession of a firearm.⁹²

The back story of the arrestees is disturbing. The driver of the vehicle at the time of Bruce-Umbraugh's arrest heads, and is a self-admitted member of, a neo-Nazi organization which is described as "a terroristic national socialist organization that believes in using violence for 'apocalyptic, racial cleansing.'"⁹³ In September 2019, Seattle police had confiscated the driver's guns under the State's red-flag law;⁹⁴ prosecutors believe that he had "participated in recent firearm training and recruitment efforts at 'hate camps,' which . . . he helped organize" and was stockpiling "an alarming number of weapons," potentially for a "massacre."⁹⁵ The *Seattle Times* states that the driver in the vehicle with Bruce-Umbraugh was legally prohibited from possessing firearms.⁹⁶ Bruce-Umbraugh likewise identifies as a neo-Nazi and affiliates with the same neo-Nazi organization.⁹⁷ Since possessing a firearm in Texas and affiliating with individuals and organizations advocating for "race wars," generally are not crimes, the only laws between Bruce-Umbaugh and his weapons are 18 U.S.C. §922(g)(3) and federal or state drug possession charges (interestingly, it appears prosecutors only charged the unlawful firearm possession).⁹⁸ While Bruce-Umbaugh's attorney correctly states that "a citizen accused of a crime should be judged on his or her actions and the facts of the case, not upon alleged associations which should be protected by the First Amendment," the violation of 18 U.S.C. §922(g)(3) appears to be a rather open-and-shut case

⁹² See Clarridge, *supra* note 88 ("Federal prosecutors are committed to enforcing our nation's gun laws to keep communities safe," said U.S. Attorney Nealy Cox. "As a drug user, this defendant should never have been allowed to possess firearms."); see also *Suspected Neo-Nazi charged with gun crime in Texas* (Nov. 15, 2019) <https://apnews.com/bff1cca328104d37a4337081f90a5f6e>.

⁹³ Phil Helsel, *Guns seized from Washington man said to be neo-Nazi leader prepping for 'race war'* (last updated Oct. 19, 2019), <https://www.nbcnews.com/news/us-news/guns-seized-washington-man-said-be-neo-nazi-leader-prepping-n1068956>.

⁹⁴ Stockler, *supra* note 90.

⁹⁵ Helsel, *supra* note 91.

⁹⁶ Clarridge, *supra* note 88.

⁹⁷ Clarridge, *Suspected Neo-Nazi Charged With Gun Crime*, *supra* note 88 ("In jailhouse phone calls, Bruce-Umbaugh allegedly referenced his affiliation with 'the group' and discussed a photo taken of him and another AtomWaffen Division member at the Auschwitz concentration camp, prosecutors said at the detention hearing.").

⁹⁸ It appears that § 922 is unofficially part of the bulwark used against terrorist groups. Notably, prosecutors used § 922 as a lead charge in four or more domestic terrorism prosecutions from 2013 to 2017 although it is not listed as a predicate offense in 18 U.S.C. § 2339A, and prosecutors likewise used it to prosecute hate crime incidents from 2013 to 2017 although it is not included in the five federal hate crimes laws identified by the Justice Department. Figs 2 & 4. https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf Cf. *United States v. Hasson*, No. GJH-19-96, 2019 WL 4573424, at *8 (D. Md. Sept. 20, 2019).

where Bruce-Umbraugh admitted to regular unlawful use of a controlled substance over a long period of time.⁹⁹

D. Historical Note on the Statutory Amendments

The Gun Control Act of 1968 originally made it illegal for a person “who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug and Cosmetic Act)¹⁰⁰ or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)¹⁰¹” to possess a firearm.¹⁰² The current version of the law states that a person who “is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act[.]” is prohibited from possessing a firearm.¹⁰³

The Controlled Substances Act was passed on October 27, 1970 and became effective May 1, 1971.¹⁰⁴ The CSA repealed the sections in the GCA pertaining to the FDCA and the Internal Revenue Code.¹⁰⁵ Even so, § 922(g)(3) did not

⁹⁹ Stockler, *supra* note 90.

¹⁰⁰ “Depressant or stimulant drug [means] any drug which contains any quantity of (A) barbituric acid or any of the salts of barbituric acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under section 352(d) of this title as habit forming; (2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine, or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or (3) any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Secretary shall not designate under this paragraph, or under clause (C) of subparagraph (2), any substance that is now included, or is hereafter included, within the classifications stated in section 4731, and marihuana as defined in section 4761 of Title 26.” *Deyo v. United States*, 396 F.2d 595, 595 n.1 (1968). *Cf.* 21 U.S.C. § 802(9), definition of “depressant or stimulant substance.”

¹⁰¹ “The words ‘narcotic drugs’ as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: (1) Opium, isonipecaine, coca leaves, and opiate; (2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate; (3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).” 26 U.S.C. § 4731(a) (1958). *Cf.* 21 U.S.C. § 802(17), definition of “narcotic drug.”

¹⁰² 18 U.S.C § 922(g)(3) (1970), Pub. L. No. 90-618, § 922(h)(3), 82 Stat. 1221.

¹⁰³ 18 U.S.C. § 922(g)(3) (2019).

¹⁰⁴ *See* 18 U.S.C. § 801 *et seq.*; Pub. L. No. 91-513.

¹⁰⁵ Pub. L. No. 91-513. “Sections 201(v), 301(q), and 511 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(v), 331(q), 360(a) are repealed.” 84 Stat. 1281; “Subchapter A of chapter

incorporate the Controlled Substances Act until 1986 with the passage of the Firearm Owners Protection Act.¹⁰⁶ After the passage of the CSA—but before it was formally incorporated into the GCA—courts would look to definitions in the CSA to construe §922(g)(3).¹⁰⁷

There is sparse case law applying § 922(g)(3) between 1970 and 1986. It is possible that the lack of enforcement played a factor in delaying the amendment of the GCA—or perhaps it is the opposite: that the failure to incorporate the CSA into the GCA hindered enforcement of § 922(g)(3).

39 of the Internal Revenue Code of 1954 (relating to narcotic drugs and marihuana) is repealed.” 84 Stat. 1292.

¹⁰⁶ Pub. L. No. 99-308, § 102(6)(B), 100 Stat. 452 substituted “is an” for “who is an” and “any controlled substance (as defined in section 102 of the Controlled Substances Act (U.S.C. § 802));” for “marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954[.]”

¹⁰⁷ See *United States v. Ocegueda*, 564 F.2d 1363, 1364 n.3 (9th Cir. 1977) (referencing the law as it appears in the Federal Register—federally prohibited persons are listed in § 922(h)) (“Section 922(h)(3) refers to 26 U.S.C. § 4731(a) for a definition of “narcotic drug.” [Section 4731(a)] was repealed by Public Law 91-513, Title III, § 1101(b)(3)(A), October 27, 1970, 84 Stat. 1292. Public Law 91-153 [*sic*] enacted 21 U.S.C. § 802(16), which defines heroin as a narcotic drug, just as it was defined in 26 U.S.C. § 4731(a). *Section 922[g](3) therefore should be read to refer to 21 U.S.C. § 802(16).*”) (emphasis added). See also *United States v. Bivona*, 487 F.2d 443, 444 n.1 (2d Cir. 1973) (determining that acts occurring after the enactment, but before the effective date of the CSA were not governed by the CSA) (“We note that the statutory provisions charged in the indictment were repealed by §§ 1101(b)(3)(A) and (b)(4)(A) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292. The effective date of the 1970 Act was May 1, 1971. Since the events alleged here occurred in January 1971, the old statute governs prosecution and sentencing.”).

E. *Constitutionality of Federal Disarmament Under §922(g)(3)*

The Fourth,¹⁰⁸ Fifth,¹⁰⁹ Seventh,¹¹⁰ Eighth,¹¹¹ Ninth,¹¹² and Tenth Circuits¹¹³ have upheld the constitutionality of §922(g)(3) against Second Amendment challenges. Similarly, federal district courts routinely uphold the constitutionality of the statute against Second Amendment challenges.¹¹⁴

One recent Ninth Circuit case is illustrative. In *Wilson v. Lynch*,¹¹⁵ a state marijuana registry cardholder in Nevada brought a challenge to §922(g)(3) as violating her constitutional rights, but the court ruled she lacked standing to proceed with this claim.¹¹⁶ The plaintiff did not claim that she was an unlawful drug user or addict, or even that she owned a gun; in other words, she could not show that the statute had injured her in any way.¹¹⁷ There was also no evidence of imminent

¹⁰⁸ See *United States v. Yates*, 746 Fed. Appx. 162 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 616 (2018) (unreported) (per curiam); *United States v. Carter*, 750 F.3d 462 (4th Cir. 2014), *cert denied*, 574 U.S. 907 (2014).

¹⁰⁹ See *United States v. May*, 538 Fed. Appx. 465 (5th Cir. 2013); *United States v. Patterson*, 431 F.3d 832, 68 Fed. R. Evid. Serv. 1128 (5th Cir. 2005).

¹¹⁰ *United States v. Cook*, 914 F.3d 545 (7th Cir. 2019); *U.S. v. Thomas*, 426 Fed. Appx. 459 (7th Cir. 2011); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (per curiam).

¹¹¹ *United States v. Jacobson*, 406 Fed. Appx. 91 (8th Cir. 2011) (per curiam); *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010).

¹¹² *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011), for additional opinion, see 450 Fed. Appx. 633 (9th Cir. 2011).

¹¹³ *United States v. Richard*, 350 Fed. Appx. 252 (10th Cir. 2009).

¹¹⁴ See *United States v. Westley*, 2018 WL 1832912 (D. Conn. 2018); *United States v. Bruce*, 2016 WL 3580636 (D.S.D. 2016); *United States v. Matthews*, 2015 WL 2170380 (W.D. Mo. 2015); *Gibson v. Holder*, 2015 WL 5635125 (N.D. Fla. 2015), report and recommendation adopted, 2015 WL 5634596 (N.D. Fla. 2015); *United States v. Conrad*, 923 F. Supp. 2d 843 (W.D. Va. 2013); *Roberge v. United States*, 2013 WL 4052926 (E.D. Tenn. 2013); *Fausnaught v. United States*, 2013 WL 12333443 (M.D. Pa. 2013); *Nodine v. United States*, 2012 WL 4711882 (S.D. Ala. 2012), report and recommendation adopted, 2012 WL 4739949 (S.D. Ala. 2012); *United States v. Emond*, 2012 WL 4964506 (D. Me. 2012); *United States v. Korbe*, 2010 WL 2404394 (W.D. Pa. 2010); *United States v. Barrett*, 2010 WL 3767607 (W.D. Wis. 2010); *United States v. Hendrix*, 2010 WL 1372663 (W.D. Wis. 2010); *United States v. Stacy*, 2010 WL 4117276 (S.D. Cal. 2010); *United States v. Bumm*, 2009 WL 1073659 (S.D. W. Va. 2009); *Piscitello v. Bragg*, 2009 WL 536898 (W.D. Tex. 2009); *U.S. v. Lacy*, 2009 WL 3756987 (E.D. Wis. 2009); *United States v. Hendrix*, 2009 WL 3816970 (W.D. Wis. 2009); *United States v. Lyles*, 2009 WL 650182 (N.D. Cal. 2009); *United States v. Prince*, 2009 WL 1875709 (D. Kan. 2009), order rev'd on other grounds, 593 F.3d 1178 (10th Cir. 2010); *United States v. Chafin*, 2008 WL 4951028 (S.D. W. Va. 2008); *United States v. Dugan*, 2008 WL 11358024 (N.D. Cal. 2008).

¹¹⁵ 835 F.3d 1083, 1089 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1396 (2017).

¹¹⁶ See *id.*

¹¹⁷ See *Wilson*, 835 F.3d at 1090.

prosecution.¹¹⁸ The Ninth Circuit also held that § 922(g)(3) did not violate the Second Amendment;¹¹⁹ using a two-tiered intermediate scrutiny, the Court concluded that there was a substantial government interest in preventing gun violence, that research data and other evidence suggested a robust link between drug use and gun violence, and that federal lawmakers could reasonably presume that a registrant for legal marijuana usage was, in fact, likely to use marijuana.

Unrelated to the Second Amendment issues, a number of defendants have challenged § 922(g)(3) as being unconstitutionally vague.¹²⁰ The vagueness of the term “unlawful user” has been an ongoing point of contention for pro-gun advocates and marijuana legalization proponents.¹²¹ The current consensus in the federal courts is that the government must demonstrate a temporal nexus between the drug use and the firearm possession in order to demonstrate a violation, in which case there is no as-is vagueness of constitutional import.¹²² An illustrative case is *United*

¹¹⁸ See *id.* at 1090.

¹¹⁹ See *Wilson*, 835 F.3d at 1091-95.

¹²⁰ See, e.g., *United States v. Moss*, 2019 WL 3215960 at *2-*4 (D.Conn. July 17, 2019)(rejecting vagueness challenge); see also Robert Batey, *Vagueness and the Construction of Criminal Statutes: Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 72 n. 339 (1997)(discussing *United States v. Reed*, 924 F. Supp. 1052 (D. Kan. 1996), rev'd, 114 F.3d 1067 (10th Cir. 1997), an early case discussing the vagueness issues in § 922(g)(3)).

¹²¹ See Ira P. Robbins, *Guns N' Ganja*, 51 U.C. DAVIS L. REV. 1783, 1803 (2018). Unfortunately, legislative history does not provide clarity as to the meaning of an “unlawful user” except as a means to “keep firearms out of the hands of ‘presumptively risky people.’” *Id.* (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111 n.6 (1983)). Interestingly, Robbins notes in her article that the Gun Control Act did not originally mention marijuana until 1968 when it widened the scope to encompass “unlawful user or addicted to marijuana” and later replaced marijuana ambiguously with “unlawful user of or addicted to any controlled substance.” *Id.* n.85. The lack of clarity among the lower courts forced the judiciary to create a test that “confined their focus on two factors: (1) the regularity of the drug use, and (2) the contemporaneous possession of the drug and firearm.” *Id.* at 1805 (citing *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004)). However, this test resulted in the following downfalls:

While the test seeks to define unlawful user, it fails to expressly include unlawful use in its analysis; courts solely focus on the “judicially created temporal nexus” between gun possession and drug use. By conflating an element of the analysis with the analysis itself, courts omit the integral factor of unlawful use. Therefore, the test is more aptly characterized as (1) the unlawful possession or use of a drug, pursuant to the CSA; (2) the regularity of the drug use; and (3) the contemporaneous possession of the drug and a firearm.

Id.

¹²² See, e.g., *Id.*; *United States v. Cook*, 914 F.3d 545, 549–55 (7th Cir. 2019), *cert. granted, judgment vacated*, ___ U.S. ___ (2019) (remanding for reconsideration in light of the Supreme Court’s decision in *Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191 (2019); *United States v. Bramer*, 832 F.3d 908 (8th Cir. 2016) (per curiam); *U.S. v. Purdy*, 264 F.3d 809 (9th Cir. 2001) (rejected the defendant’s vagueness challenge); *United States v. Blackard*, 2020 WL 353239 (W.D. Missouri Jan. 21, 2020), *United States v. Stupka*, 2019 WL 6000374 (N.D. Iowa Oct. 10, 2019); *United States v. Kimbrough*, 319 F. Supp. 3d 912 (M.D. Tenn. 2018) (§ 922(g)(3) not facially void for vagueness); *United States v. Holmes*, 2016 WL 54918 (E.D. Wis. 2016) (unreported) (noting that courts have added

States v. Bramer,¹²³ in which the Eighth Circuit ruled that the term “unlawful user” was not unconstitutionally vague as applied to the defendant’s conduct of using marijuana while possessing a firearm.¹²⁴ A facial challenge to the constitutionality of the statute requires the defendant to provide evidence that the term was “vague as applied to his particular conduct.”¹²⁵ While the court acknowledges that the defendant need not prove vagueness in all applications, the defendant failed to meet his burden of proof with respect to the present circumstance.¹²⁶ Moreover, the defendant’s admission of “knowingly possessing firearms while being an unlawful user of marijuana,” was dispositive for denying the defendant’s challenge.¹²⁷

III. LEGAL MARIJUANA & GUN POSSESSION

A. ATF Guidance Documents and Enforcement

In September 2011, the Bureau of Alcohol, Tobacco, Firearms, and Explosives released an Open Letter to All Federal Firearms Licensees¹²⁸ (FFL’s) providing guidance as to the intent of 18 U.S.C. § 922(g)(3) and its interaction with state laws that legalize marijuana in some way. In particular, the guidance document reminds FFL’s that the Controlled Substances Act lists marijuana as a Schedule I controlled substance “and there are no exceptions in Federal law for . . . medicinal purposes, even if such use is sanctioned by State law,” the use of marijuana qualifies an individual under federal law as an “unlawful user” for purposes of 18 U.S.C. §922(g)(3).¹²⁹ Since 1996, at least thirty-three states and the District of Columbia have legalized medical marijuana.¹³⁰ The essential features of the 2011 Open Letter remained in the related “Cole Memorandum”¹³¹ regarding marijuana dispensaries, though the Cole Memorandum did not focus on firearm enforcement.

a temporal element; every circuit to have considered the question has required drug use contemporaneous with the firearm possession); *U.S. v. Matthews*, 2015 WL 2170380 (W.D. Mo. 2015) (unreported) (court rejected vagueness challenge brought before trial).

¹²³ 832 F.3d 908 (8th Cir. 2016) (per curiam).

¹²⁴ *See id.* at 909–910.

¹²⁵ *Id.* at 909.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Open Letter to All Federal Firearms Licensees, *supra* note 9.

¹²⁹ *Id.*

¹³⁰ *See State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Oct. 16, 2019) <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

¹³¹ *See* Memorandum from Deputy Att’y Gen. James M. Cole, U.S. Dep’t of Justice, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/>

In January 2018, the Department of Justice (DOJ) issued the “Sessions Memorandum,” a policy announcement rescinding all previous guidance regarding prosecutions in medical marijuana states, deferring instead to nebulous “well-established general principles” which included considerations such as “the deterrent effect of criminal prosecution.”¹³² This superseded prior DOJ policy which focused prosecutions, in relevant part, in “[p]reventing violence and the use of firearms in the cultivation and distributions of marijuana” and deferring to state and local law enforcement for activity beyond the stated scope of DOJ priorities.¹³³ The rescission created uncertainty for relevant parties, and it is unclear how the shift in DOJ directives after the 2018 memorandum has impacted federal prosecutions of gun possession prosecutions under §922(g)(3) in states with medical marijuana and legalized marijuana, however 2017 statistics indicate that the number of prosecutions under §922(g) generally had already begun to increase following a decline in the period from 2013 to 2015 (the timeframe after the Cole memorandum through the end of the sitting administration).¹³⁴ Given the growing recalcitrance among some big city prosecutors to charge for mere possession of marijuana without aggravating factors indicating dealing, the federal prosecutors’ directives appear to be going in a different direction than at least some state prosecutors in areas having the highest incident rates.¹³⁵

William P. Barr became Attorney General in 2019, and announced that he supports “the prosecutorial priorities” that were put in place by the Sessions Memorandum—which included an emphasis on “violent crime, drugs, immigration,

resources/3052013829132756857467.pdf (also available <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>).

¹³² Memorandum from Att’y Gen. Jefferson B. Sessions, III, U.S. Dep’t of Justice, on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> (also available <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>).

¹³³ See Cole Memorandum, *supra* note 131, also available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹³⁴ U.S. SENT’G COMM’N, QUICK FACTS ON FELON IN POSSESSION OF A FIREARM, (2018) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf.

¹³⁵ Shaila Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html> (“[I]ncreasingly, another argument is creeping in: letting marijuana cases go actually makes communities safer, by shifting the focus to stopping violence and untangling a legacy of racial discrimination, allowing the seeds of trust to germinate in neighborhoods where a chief complaint of police officers is that no one will help them solve crimes.”). See also Fair & Just Prosecution, *21 Principles for the 21st Century Prosecutor*, at 9, 11 (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf.

and national security.”¹³⁶ The DOJ appears to have turned more of its attention to the prosecution of firearms offenses.¹³⁷ On November 8, 2019, Barr announced the launch of Project Guardian.¹³⁸ This program’s objective is to reduce violent crime and enforce federal firearms laws across the country.¹³⁹ Project Guardian calls on federal prosecutors to work with state and local authorities to strengthen their firearms prosecution strategy.¹⁴⁰ This involves ensuring effective operation of NICS and improving information-sharing by ATF when a prohibited individual attempts to purchase a firearm and is denied by the NICS.¹⁴¹ Federal prosecutors and law enforcement coordinate with state, local, and tribal law enforcement and prosecutors to consider potential federal prosecution for new cases involving suspects arrested while in possession of a firearm, who use a firearm to commit violent crimes and drug trafficking, or who commit violent crimes for criminal organizations.¹⁴²

The next month, AG Barr also launched Operation Relentless Pursuit, a program to provide federal resources to state and local law enforcement in an effort to reduce violent crime in “designated high impact areas.”¹⁴³ At least \$71 million in federal grant funding will go toward increasing the number of federal law enforcement officers in seven urban centers with high rates of violent crime: Albuquerque, Baltimore, Cleveland, Detroit, Kansas City, Memphis, and Milwaukee.¹⁴⁴ The goal of Operation Relentless Pursuit, like Project Guardian, is a reduction in gun violence—and drug trafficking often begets gun violence. The DEA will utilize this targeted surge of resources to enhance its ability to make these cities

¹³⁶ Statement of William P. Barr, United States Attorney’s Conference. <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-opening-remarks-us-attorneys-conference>.

¹³⁷ Statement of William P. Barr, Attorney General, before the U. S. Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, FY 2020 Budget Request, April 10, 2019, <https://www.appropriations.senate.gov/imo/media/doc/04.10.19--Barr%20Testimony.pdf>. Prosecutions under § 922(g) are at an all-time high. Convictions under § 922(g) have risen every year since 2015. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

¹³⁸ Attorney General William P. Barr, *Memorandum to All United States Attorneys, All Heads of Department Components, and All Law Enforcement Agencies: Project Guardian* (Nov. 8, 2019).

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See* DEPT. OF JUSTICE, ANNOUNCEMENT OF OPERATION RELENTLESS PURSUIT, <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-relentless-pursuit> (Dec. 18, 2019).

¹⁴⁴ *See id.* Detroit is the only city on this list that is in a state where recreational marijuana is legal.

safer by working with state and local partners to pursue the worst offenders.¹⁴⁵ Note, however, that marijuana does not receive specific mention.¹⁴⁶

In twenty-two states, ATF allows licensed firearm dealers to accept a state concealed pistol license in lieu of a federal background check, because those states have concealed-carry permit requirements at least as stringent as the federal background check requirements.¹⁴⁷ Michigan was one of these states from 2006 until the end of 2019, but the state legalized recreational marijuana sales starting in December 2019; on March 3, 2020, the Acting Director of ATF issued a Public Safety Advisory to all licensed firearm dealers in Michigan, effectively revoking this substitution in Michigan.¹⁴⁸ All licensed gun dealers in Michigan must now conduct NICS background checks for all firearm sales, even if the purchaser has a valid concealed-carry permit.

B. Gun Permits & Licenses for Lawful Marijuana Users

Four months before the 2011 ATF Open Letter, Oregon's highest court, sitting en banc, decided *Willis v. Winters*,¹⁴⁹ which consolidated several cases regarding the State's firearm licensing statute and its interaction with 18 U.S.C. § 922(g)(3). The court held that the federal prohibition on firearm possession "by persons who, under federal law, are 'unlawful user[s] of a controlled substance,'" does not preempt the state's licensing statute.¹⁵⁰ The Oregon Medical Marijuana Act authorizes medical marijuana use and requires registration of such authorized users.¹⁵¹ Additionally, the Oregon code makes it unlawful to carry a concealed weapon on one's person or in one's car,¹⁵² except that §166.260(1)(i) provides that such unlawful prohibition shall not apply to licensed persons.¹⁵³ Oregon has a "shall issue" regime for

¹⁴⁵ DOJ Press Release (Dec. 18, 2019), available at <https://www.dea.gov/press-releases/2019/12/18/attorney-general-william-p-barr-announces-launch-operation-relentless>. Those arrested for simple marijuana possession are unlikely to fall in the category of "worst offenders of gun violence," the intended target of the Operation.

¹⁴⁶ Fentanyl and methamphetamine receive specific mention in the announcement.

¹⁴⁷ See ATF, *Permanent Brady Chart*, <https://www.atf.gov/rules-and-regulations/permanent-brady-permit-chart> (updated March 3, 2020).

¹⁴⁸ Bureau of Alcohol, Tobacco, Firearms and Explosives, *Public Safety Advisory to All Michigan Federal Firearms Licensees*, March 3, 2020, available at <https://www.atf.gov/firearms/docs/open-letter/public-advisory-all-michigan-ffls-03-03-20/download>.

¹⁴⁹ See *Willis v. Winters*, 253 P.3d 1058 (Ore. 2011).

¹⁵⁰ *Id.* at 1060.

¹⁵¹ *Id.*

¹⁵² *Id.* See also OR. REV. STAT. § 166.250(1)(a), (b) (2017).

¹⁵³ *Willis*, 253 P.3d at 1060. Note that the opinion cites to OR. REV. STAT. § 166.260(1)(h) which, seems to be a typo or scrivener's error – the provision the court references is in § 166.260(1)(i).

concealed handgun licenses: “the sheriff . . . *shall* issue . . . a concealed handgun license” to persons that meet a provided list of standards.¹⁵⁴ Several sheriffs denied concealed-carry license (CHL) applications and renewals submitted by medical marijuana registrants, despite their full compliance with the state’s statutory standards for licensing, on the premise that § 922(g)(3) preempted the state’s licensing statute, therefore issuance of a license under the circumstances violated § 922(a)(6) and § 922(t)(3).¹⁵⁵ The court held that under Oregon’s statute, sheriffs are duty-bound “to issue CHLs to qualified applicants, without regard to the applicant’s use of medical marijuana.”¹⁵⁶ Because the licensing statute proscribes the concealment of firearms and “is not directly concerned with the *possession* of firearms,” it does not interfere with the full enforcement of the federal statute.¹⁵⁷

It is possible that the sheriffs in this case could themselves enforce section 922(g)(3) of the federal Gun Control Act against medical marijuana users who possess guns in violation of federal law. The federal act makes such possession illegal; the sheriffs generally are authorized to enforce federal as well as state law, and no state law prohibits the sheriffs from taking such enforcement actions. But it appears that the sheriffs *also* wish to enforce the federal policy of keeping guns out of the hands of marijuana users by using the state licensing mechanism to deny CHLs to medical marijuana users. The problem that the sheriffs have encountered is that Congress has not enacted a law requiring license denial as a means of enforcing the policy that underlies the federal law, and the state has adopted a licensing statute that manifests a policy decision *not* to use its gun licensing mechanism for that purpose: state law *requires* sheriffs to issue concealed gun licenses without regard to whether the applicants use medical marijuana.¹⁵⁸

In other words, the sheriffs cannot deny concealed handgun licenses to medical marijuana registrants, but they are free to arrest those registrants if they do, in fact, possess a handgun. Federal law does not mandate the use of state gun licensing schemes in enforcing § 922(g)(3), nor, the court held, could Congress do so without commandeering “the policy-making and enforcement apparatus of the states.”¹⁵⁹ This decision remains good law in Oregon.

¹⁵⁴ *Id.* at 1060–61; OR. REV. STAT. §§ 166.291, 166.292 (2017).

¹⁵⁵ *Willis*, 253 P.3d at 1062, 1067. The sheriffs asserted that issuing licenses to registered medicinal marijuana users specifically violated 18 U.S.C. § 922(a)(6) which prohibits lying on a firearm background check form or deceiving a licensed gun dealer during a sale.

¹⁵⁶ *Id.* at 1068.

¹⁵⁷ *Id.* at 1066.

¹⁵⁸ *See id.*

¹⁵⁹ *Id.* The court also held that of the three preemption scenarios established by the U.S. Supreme Court, “[o]nly the third type of preemption—preemption implied from an actual conflict—is relevant in the present case. That is so because the Gun Control Act of 1968 (the federal statute at issue) expressly renounces any Congressional intent to preempt state law unless the law is in “direct and positive” conflict with the Act. 18 U.S.C. § 927. *Id.* at 1063. Because the “clear and manifest purpose

The case is remarkable for two reasons: (1) it provides a potential road map to other state legislatures about how they can liberalize marijuana laws and the licensing for handgun carrying to avoid licensing federally defined “unlawful users”¹⁶⁰ and (2) it gives rise to serious concerns about the realities of enforcement and efficiency in states with permissive gun laws (and generally) because although the court’s interpretation of 18 U.S.C. §922(a)(6) and (t)(3) is perhaps legally accurate, it disregarded the sheriffs’ assertion regarding the realities of gun sellers and ignored the tacit concerns of law enforcement officers regarding enforcement and efficiency frustrated by issuing licenses.

The *Willis* decision garnered attention from both marijuana advocates and pro-gun advocates, but other cases since then have been trending in the other direction, and the federal classification of marijuana as a Schedule I drug under the Controlled Substances Act continues to give concern to the courts and create confusion for firearm owners seeking to lawfully use medical marijuana in the thirty-three states¹⁶¹ that have legalized its use. For a recent example, in *Bradley v. United States*,¹⁶² a gunowner wanted to register for Ohio’s medical marijuana program and claimed that §922(g)(3) prevented him from doing so, thereby violating his Second Amendment rights, as well as the Equal Protection clause. Bradley was diagnosed with post-traumatic stress disorder (PTSD) but was barred by federal law from participating in Ohio’s medical marijuana program because he was in possession of a firearm.¹⁶³

of Congress” expressed in 18 U.S.C. § 927 was to limit federal preemption to state law “in ‘direct and positive’ conflict with the Act,” and under §922(g)(3), the “purpose is to make [firearm possession] a crime for all marijuana users,” the prohibition on concealed carry does not “stand as an obstacle” to the Gun Control Act of 1968 and thus is not preempted by it. *Id.* at 1062–65. In particular, 18 U.S.C. § 927 provides that “[n]o provision . . . shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.” 18 U.S.C.A. § 927 (2019).

¹⁶⁰ Although the courts of other permissive gun licensing states might not similarly construe their own statutes. The Oregon Supreme Court affirmed the lower court’s decision but, in paraphrasing the Court of Appeals holding, the high court seemed to vindicate and implicate preemption issues in one breath: “Oregon’s concealed handgun licensing statute is *not* preempted by federal law, because it does not affirmatively authorize what the federal statute prohibits—*i.e.*, possession of firearms by unlawful drug users—but, instead, merely exempts licensees from state criminal liability for the possession of a concealed handgun.” *Willis*, 253 P.3d at 1062–63 (2011).

¹⁶¹ See Jeremy Berke and Sky Gould, *Legal Marijuana Just Went on Sale in Illinois. Here Are All the States Where Cannabis is Legal*, BUSINESS INSIDER (Jan. 1, 2020) <https://www.businessinsider.com/legal-marijuana-states-2018-1>. Currently, eleven states have legalized recreational marijuana use for adults over the age of 21 and thirty-three states have legalized medical marijuana. The federal government appears to be moving in the same direction as President Donald Trump legalized hemp, an ingredient of cannabis-infused products. *Id.*

¹⁶² 402 F.Supp.3d 398 (N.D. Ohio, Aug. 14, 2019).

¹⁶³ See *id.* at 400.

The court rejected his claims, in part because he faced no imminent threat of prosecution (lacked standing) and partly because his Second Amendment claim was implausible. The court cited numerous cases from other district and circuit courts consistently holding that §922(g)(3) did not violate the Second Amendment,¹⁶⁴ including situations where marijuana consumption would have been legal under state law, yet the courts affirmed “the constitutionality of §922(g)(3) under the Second Amendment”¹⁶⁵ in that context.

The Sixth Circuit reached the same conclusion in *United States v. Bellamy*,¹⁶⁶ holding that §922(g)(3) applied even if defendant held a state-issued medical marijuana card. At the same time, *Bellamy* did not include a Second Amendment claim, but was decided on statutory and preemption grounds.

C. Medical Marijuana Registries and NICS

Although HIPAA does not explicitly protect medical marijuana registries, it would be possible to argue against NICS reporting of medical marijuana users because there is no express provision for it, in contrast to the express regulatory provision that provides for the disclosure for mental health concerns, permitting reporting of “protected health information for purposes of reporting to the National Instant Criminal Background Check System the identity of an individual who is prohibited from possessing a firearm under 18 U.S.C. 922(g)(4).”¹⁶⁷ Under the language of the law, HIPAA’s privacy rule only applies to the electronic transmission of health information by a “covered entity.”¹⁶⁸ State registries do not appear to qualify as a “covered entity,”¹⁶⁹ although HIPAA’s privacy rule may

¹⁶⁴ See *id.* at 403–05.

¹⁶⁵ *Id.* at 404 (quoting *United States v. Carter*, 750 F.3d 462, 470 (4th Cir. 2014)). For another example of courts going the opposite direction from the Oregon court, see *Gibson v. Holder*, 2015 WL 5635125 at *12 (N.D. Fla. Aug. 8, 2015) (rejecting a Second Amendment challenge to § 922(g)(3) by medical marijuana cardholder).

¹⁶⁶ 682 Fed.Appx. 447 (6th Cir. 2017).

¹⁶⁷ 45 C.F.R. § 164.512 (k)(7). For an excellent discussion, see Stephanie E. Pearl, *HIPAA: Caught in the Cross Fire*, 64 DUKE L.J. 559 (2014) (discussing proposed HHS rule “that would grant an exception to HIPAA’s privacy protection to allow the reporting of relevant mental-health records to NICS.”).

¹⁶⁸ 45 C.F.R. § 160.103 (2014).

¹⁶⁹ That is, “(1) A health plan, (2) A healthcare clearinghouse, (3) A healthcare provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” *Id.* “Healthcare provider” includes physicians, nurses, pharmacists, hospitals, and clinics if such person or entity “furnishes, bills, or is paid for health care in the normal course of business.” *Id.*

protect doctors who prescribe medical marijuana in such states.¹⁷⁰ Consistent with the fact that federal law criminalizes the use of marijuana, a Schedule I controlled substance, HIPAA remains silent on protections for (federally illegal) medical marijuana usage. Perhaps the best argument is that federal law does not protect practices that are illegal under federal law.

The real issue with medical marijuana registry reporting to the NICS database lies in the state laws promulgated to allow medical marijuana.¹⁷¹ State privacy protections for medical marijuana registrants create reporting gaps with NICS for verifying conflicts with 922(g)(3) and results in what Ohio dubbed “the honor system” in gun acquisition by marijuana registrants.¹⁷² While some registrants facially challenge the law to no avail,¹⁷³ those who purchase a firearm despite their status as a federally unlawful user likely face no consequences without additional aggravating factors to incentivize their prosecution.¹⁷⁴ As ATF explained in the Federal Register:

“A number of commenters expressed concern about the disclosure of personal information to NICS by States and Federal agencies. Commenters also expressed doubt that agencies can retrieve relevant data based upon the definitions in this regulation It is recognized, however, that any disclosure of information to NICS must comply with all applicable Federal and State privacy laws.”¹⁷⁵

Given the increase in emphasis on NICS reporting, and the increase in numbers of active records for drug users, one could infer that more medical care providers are beginning to provide names to NICS.

¹⁷⁰ See Rita M. Marcoux, et al. *Medical Marijuana and Related Legal Aspects*, 38 PHARM. & THERAPEUTICS 612 (Oct. 2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3875249/pdf/ptj3810612.pdf>.

¹⁷¹ GOGGINS & STRICKLAND, *supra* note 17 (“[T]he problem lies in a direct conflict between a state statute that explicitly prohibits the sharing of data about those licensed for use of medical marijuana with any other agency, state or federal.”).

¹⁷² Josh Sweigart, *How Will Ohio Know Gun Owners Don't Use Medical Pot? The Honor System*, DAYTON DAILY NEWS (Feb. 5, 2018) <https://www.daytondailynews.com/news/state--regional-govt--politics/how-will-ohio-know-gun-owners-don-use-medical-pot-the-honor-system/l3cJ2kYisnc0xKc2ZjMNZM/amp.html>.

¹⁷³ See *Bradley v. United States*, No. 1:19 CV 284, 2019 WL 3818661, at *3 (N.D. Ohio Aug. 14, 2019) (holding the gun owner lacked standing to challenge the constitutionality of 18 U.S.C. § 922(g)(3) where he had not registered for medical marijuana use for fear of violating the firearm possession statute).

¹⁷⁴ At least this is true in the case of delayed denials in firearm acquisitions. “USAOs generally do not accept and prosecute denial cases that do not involve aggravating circumstances.” U.S. GEN. ACCOUNTING OFFICE, GAO-18-440, LAW ENFORCEMENT: FEW INDIVIDUALS DENIED FIREARMS PURCHASES ARE PROSECUTED AND ATF SHOULD ASSESS USE OF WARNING NOTICES IN LIEU OF PROSECUTIONS, at 21 (2018). State denial prosecutions likewise are “generally based on aggravating circumstances in addition to criminal records.” *Id.* at 30.

¹⁷⁵ T.D. ATF-391, *supra* note 61.

IV. ALCOHOL: THE MISSING PIECE OF THIS PUZZLE

Many of the policy reasons for prohibiting users of illegal drugs from owning firearms would seem to apply equally, if not more, to alcohol abuse, but federal law ignores alcohol abuse in its list of prohibiting factors in §922(g).¹⁷⁶ Alcohol is not a controlled substance, of course, so the illegality of using the latter distinguishes it from the former, especially from a political standpoint. In addition, due to the illegality of controlled substances, illegal drug users may be more likely than alcohol users to interact regularly with violent street gangs, or at least violent dealers, and removing guns from one side of the transaction can lower the risk of disagreements escalating into shootings. Even so, several prominent experts on firearm policy advocate for adding alcohol abusers to the list of federally prohibited persons, and some states have done this in one form or another.¹⁷⁷ Suicides make up roughly two-thirds of the gun fatalities of every year,¹⁷⁸ and these gun deaths disproportionately involve either a history of alcohol abuse, alcohol abuse at the time of the self-inflicted gunshot wound, or both. Interestingly, empirical studies also indicate that firearm owners are more likely to abuse alcohol or become alcoholics.¹⁷⁹

Alcohol-related gun violence is more lethal than car crashes, according to one recent study.¹⁸⁰ Furthermore, alcohol-drinkers can even impact non-alcohol drinkers living in the same home by increasing the likelihood of homicide.¹⁸¹ We lack a federal regulation even against the use or purchase of firearms while intoxicated.¹⁸² States must bear the responsibility of implementing laws to “close a glaring gap in federal law that makes it easier for guns to fall into the wrong hands.”¹⁸³

¹⁷⁶ See Katherine A. Vittes, et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership*, in REDUCING GUN VIOLENCE IN AMERICA 68–70 (Daniel W. Webster ed., Johns Hopkins University Press, 2013) (noting that empirical research suggests alcohol abusers are just as strongly associated with perpetrating or suffering gun violence as drug users).

¹⁷⁷ See, e.g., Garen J. Wintemute, *Broadening Denial Criteria for the Purchase and Possession of Firearms: Need, Feasibility, and Effectiveness*, in REDUCING GUN VIOLENCE IN AMERICA 82–88 (Daniel W. Webster ed., Johns Hopkins University Press, 2013) (surveying other sources and studies).

¹⁷⁸ See *Gun Violence Statistics*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/facts/gun-violence-statistics> (last visited Oct. 10, 2020).

¹⁷⁹ See Vittes, et al., *supra* note 176, at 69 (surveying studies on this point).

¹⁸⁰ Lisa Dunn, *Alcohol Misuse and Gun Violence: What We Know*, GUNS & AMERICA (Dec. 2017) <https://gunsandamerica.org/story/19/12/17/relationship-between-alcohol-gun-violence/>.

¹⁸¹ *Id.*

¹⁸² *Id.* See also Brendan G. Carr, et al., *A Review of Legislation Restricting the Intersection of Firearms and Alcohol in the U.S.*, 125 PUB. HEALTH REP. 674 (2010).

¹⁸³ See *Firearm Prohibitions*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people/> (last visited Oct 10, 2020).

A. Policy Considerations with Alcohol & Guns

Research confirms that “heavily consuming alcohol can lower inhibitions, increase confidence, and potentially release violent inclinations.”¹⁸⁴ The majority of domestic violence homicides occur while the abuser is intoxicated, and approximately 60% of these homicides used a firearm.¹⁸⁵ Firearm ownership imposes a high level of responsibility on the owner requiring concentration and stability; alcohol impedes the owner’s mental capacity by blocking higher brain functions.¹⁸⁶ Not only does alcohol spark aggression towards others but “individuals may place themselves at risk of firearm injury by consuming alcohol.”¹⁸⁷

1. Prejudice Towards Other Groups

Some research suggests that alcohol intoxication causes heightened or agitated racial animus.¹⁸⁸ An interesting recent study involved participants who, after drinking provided alcoholic or non-alcoholic beverages (the latter being the control), were tasked with shooting a target person in a computer simulation based on whether the target held a gun or not.¹⁸⁹ The targets chosen depicted ten Middle Eastern and White faces holding a gun, a beverage, or nothing.¹⁹⁰ At the end of the test, the participants were asked to rate the target faces on a scale of zero, very unpleasant, to one hundred, very pleasant.¹⁹¹

The results revealed disturbing conclusions, “participants who consumed alcohol showed a greater bias to shoot Middle Eastern targets” compared to the

¹⁸⁴ Charles Branas, *Alcohol & Firearms: Research, Gaps in Knowledge, and Possible Interventions*, INST. MED. 1, 7, <https://www.nap.edu/resource/21814/Alcohol-Firearms.pdf> (last visited Oct 10, 2020). Moreover, intoxicated individuals may “overreact to perceived threats and instigate violent situations due to alcohol-impaired judgement of verbal and nonverbal social cues.” *Id.*

¹⁸⁵ See Lisa Dunn, *Alcohol Misuse And Gun Violence: What We Know*, GUNS & AMERICA (Dec. 2017) <https://gunsandamerica.org/story/19/12/17/relationship-between-alcohol-gun-violence/> (last visited Oct. 10, 2020). See also, Garen Wintemute, et al., *Alcohol, Drug and Other Prior Crimes and Risk of Arrest in Handgun Purchasers: Protocol for a Controlled Observational Study*, 22 INJ. PREV. 302 (2016) (“Firearm ownership itself may be associated with alcohol abuse, including binge drinking and heavy drinking [and] linked to homicide and suicide risk when firearms are in the home, such studies are not restricted to firearm owners and do not assess risk for committing interpersonal violence.”).

¹⁸⁶ Manoel E. S. Modelli & Stephane Mota Lourenco, *Alcohol Influence in Violent Deaths*, J. FORENSIC RES. 1, 2 (2016).

In our country, in the city of Rio de Janeiro, the study concluded that there was a positive correlation between episodes of aggression, falls, victims of firearm projectile, hanging, drowning, and the values of blood concentration of alcohol, although prevalence of these corresponds to 23% of all circumstances. In Rio Grande do Sul, in Porto Alegre, survey of 1585 victims of violent death, 53.3% had blood alcohol content above 6 mg/dl. *Id.* at 3.

¹⁸⁷ Branas, *supra* note 184, at 9. Alcohol consumption increases the likelihood that the consumer will harm themselves either intentionally or unintentionally, “over one-third of gun suicides involve

placebo counterparts.¹⁹² Thus, alcohol when combined with possession of firearms not only increases aggression but creates significantly more prejudice towards Middle Eastern targets.¹⁹³

2. Police Discretion When Granting Licenses to Chronic Alcohol Abusers

The majority of states do not grant police discretion on whether to issue a concealed-carry firearm license;¹⁹⁴ in these “shall-issue” states, applicants that satisfy applicable statutory requirements automatically receive a concealed-carry firearm license.¹⁹⁵ Such states should adopt laws or regulations that expressly prohibit firearm licensing (i.e., concealed-carry permits) for individuals convicted of alcohol-related crimes.¹⁹⁶ In “may-issue” states, in contrast, local police chiefs have discretionary authority to deny firearm licenses or permits based on known drug or alcohol abuse.¹⁹⁷ Given the strong correlation between alcohol abuse and suicide and homicide,¹⁹⁸ police chiefs in “may-issue” states are more likely to deny

alcohol.” *Id.* at 7. Individuals seeking to end their life using a gun will often times seek alcohol to prepare themselves “in anticipation of a painful or violent end.” Alcohol lessens any doubts they may have about killing themselves, thus, facilitating the suicide. *Id.*

¹⁸⁸ Timothy P. Schofield, et al., *Alcohol Consumption Increases Bias to Shoot at Middle Eastern but Not White Targets*, 20 GROUP PROCESSES & INTERGROUP REL. 202, 202 (2017). This phenomenon may explain what took place during the 1980 Scottish Cup when violent riots erupted between the opposing soccer team.

¹⁸⁹ *Id.* 205–06.

¹⁹⁰ *Id.* at 207.

¹⁹¹ *Id.*

¹⁹² *Id.* at 209.

¹⁹³ *Id.* at 211 (“When an individual is under the influence of alcohol, they need not be provoked to elicit hostility: simply being a member of a group that individuals are prejudiced toward may be sufficient to become a victim of aggression.”).

¹⁹⁴ See *Which States Are Likely to Issue Gun Permits and Which Are Not*, HG.ORG, <https://www.hg.org/legal-articles/which-states-are-likely-to-issue-gun-permits-and-which-are-not-31130> (last visited Oct 10, 2020). States without discretionary practices are also known as “shall-issue” states, where, states that permit police discretion are known as “may-issue” states. Typically, “may-issue” states require a showing of a specific circumstance that is necessary for concealed gun ownership. *Id.*

¹⁹⁵ See David Hemenway & James G. Hicks, *‘May issue’ Gun Carrying Laws and Police Discretion: Some Evidence from Massachusetts*, 36 J. OF PUB. HEALTH POL’Y 324, 324–25 (2015).

¹⁹⁶ See Michael Siegel & Claire Boine, *What Are the Most Effective Policies in Reducing Gun Homicides?* ROCKEFELLER INST. GOV’T 1, 12 (2019).

¹⁹⁷ See Hemenway & Hicks, *supra* note 195, at 328–29.

¹⁹⁸ See Vittes, et al., *supra* note 176, at 68 (surveying studies on this point).

the license. The denial of concealed-carry licenses to applicants with a history of alcohol abuse is likely to reduce the impact of gun violence in “may-issue” states.¹⁹⁹ These denials are justifiable because heavy drinkers are more likely to engage in “firearm assault compared with non-drinkers.”²⁰⁰ In fact, approximately one-third of firearm fatalities involve consuming alcohol before the incident.²⁰¹

Research suggests police discretion under “may-issue” permitting regimes can have a large impact on reducing homicides—larger than many other gun-control policies, such as regulating types of firearm, restricting locations for firearm use, and requiring “good cause” for obtaining a gun license or carrying permit.²⁰² It makes sense to deny firearm licenses to people who are at high risk for violence.²⁰³

3. California Gun Violence Legislation

California lawmakers adopted a Gun Violence Restraining Order (GVRO), which allows the court to swiftly respond to instances when imminent violence exists by immediately intervening and revoking gun privileges to address the gap caused by “many individuals who are at high and imminent risk for violence to themselves and others [but] do not meet any existing criteria for prohibiting access to firearms” by monitoring risky behavior after lawful possession and removing the firearms from high-risk individuals.²⁰⁴ Evidence of imminent violence may involve consumption of “controlled substances or alcohol or ongoing abuse of controlled substances or alcohol” found in police reports, records of convictions or offenses.²⁰⁵ Once a GVRO is issued, law enforcement will require that the firearms “be surrendered to a law enforcement agency or transferred (by sale or temporary

¹⁹⁹ See Hemenway & Hicks, *supra* note 195, at 328.

²⁰⁰ See Robert A. Tessler, et al., *State-Level Beer Excise Tax and Firearm Homicide in Adolescents and Young Adults*, 56 AM. J. PREV. MED. 708–09 (May 2019).

²⁰¹ *Id.* at 708.

²⁰² Siegel & Boine, *supra* note 196, at 2.

²⁰³ *Id.* at 12.

²⁰⁴ Hannah S. Laqueur & Garen J. Wintemute, *Identifying High-Risk Firearm Owners to Prevent Mass Violence*, CRIMINOLOGY & PUB. POL’Y 109, 110 (2019).

[A]most no attention has been given to enforcing existing restrictions on ownership among those who become prohibited persons after a legal firearm purchase. This gap is important to fill not only because prohibiting events are general indicators of risk, but also because transitions to prohibited person status occur as the result of events associated with increased risk for violence in the near future.

Id. at 110.

²⁰⁵ *Id.* at 114.

safekeeping) to a licensed firearm retailer within 24 hours of the service of the order.²⁰⁶

In addition to restraining orders, California implemented its unique Armed and Prohibited Persons System (APPS), which is a community-wide effort to identify “newly prohibited persons among legal firearm owners and for recovering those firearms.”²⁰⁷ Reports are submitted to the DOJ that may trigger firearm prohibition such as “criminal convictions, domestic violence restraining orders, certain psychiatric hospitalization, and the like.”²⁰⁸ Afterwards, the reports are reviewed by the DOJ for further assessment and possible intervention to mandate the relinquishment of firearms.²⁰⁹ In sum, “[t]he value of these laws . . . is that they may be effective in identifying individuals who, despite passing a background check, later become high-risk gun owners because of behavior that indicates a threat to themselves or others.”²¹⁰

4. Youth, Alcohol, and Firearm Assault

Adolescents are four times more likely than adults to be the victim of a firearm homicide, if they misuse alcohol.²¹¹ This can be explained because alcohol-using adolescents are more likely to possess firearms compared to those who abstain from drinking alcohol.²¹² Although some states have responded to this phenomenon by increasing the price of alcohol,²¹³ other states have responded by implementing firearm policies targeting youth access to guns.²¹⁴

Studies have found that a Florida child access prevention (CAP) law decreased unintentional gun deaths among those 14 years or younger.²¹⁵ However, there was no relation between state laws banning possession of firearms by minors and

²⁰⁶ *Id.* Unfortunately, the restraining order program is only temporary and the population overall lacks awareness of the program.

²⁰⁷ *Id.* at 116.

²⁰⁸ *Id.* at 117.

²⁰⁹ *Id.* at 118.

²¹⁰ Siegel & Boine, *supra* note 196 at 12.

²¹¹ Tessler et al., *supra* note 200 at 709. Since beer is common among adolescents, a study revealed that an excise tax imposed on beer was correlated with decreased “firearm homicides among individuals aged 15–34 years.” *Id.* at 712. As a result, the study found that adolescents are price-sensitive, which in turn, prevents violence and traffic accidents. *Id.* at 713.

²¹² *Id.* at 709 (“[F]irearm ownership on college campuses has been associated with risky and aggressive alcohol-related behaviors.”).

²¹³ *Id.* at 712.

²¹⁴ Siegel & Boine, *supra* note 196 at 12–22.

²¹⁵ *Id.* at 22.

unintentional firearm deaths outside of Florida²¹⁶ While this study proved to be uncertain, several studies have since proven the effect on unintentional firearm deaths among children under 14 years old.²¹⁷ For example, a study examining state safe storage gun laws found a reduction in accidental firearm deaths among children.²¹⁸ Together with several other studies, there is sufficient evidence to conclude that laws restricting firearm access to children will prevent unintentional firearm injuries and deaths among children.²¹⁹

²¹⁶ *Id.*

²¹⁷ *Effects of Child-Access Prevention Laws on Unintentional Injuries and Deaths*, RAND CORP., (Mar. 2, 2018) <https://www.rand.org/research/gun-policy/analysis/child-access-prevention/unintentional-injuries.html>.

²¹⁸ *Id.*

²¹⁹ *Id.*

5. *State v. Weber*

Ohio, for example, prohibits firearm carrying for alcohol users: “No person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance,” which apparently applies even if the firearm is unloaded.²²⁰ *State v. Weber*²²¹ was a 2019 case involving a Second Amendment challenge to this statute by a defendant charged with using weapons while intoxicated; Weber challenged the law as being unconstitutional when applied to the facts of his case.²²² Weber’s wife had reported a domestic dispute to the police, alleging Weber was intoxicated and in possession of a gun,²²³ though there was no proof that Weber was intending to use the gun to perpetrate a crime, but only that he was severely intoxicated.²²⁴

In court, Weber claimed that the statute forces citizens like him to choose between their constitutional right to keep arms at home,²²⁵ to defend himself and his family against potential (hypothetical) criminal attacks, and alcohol use. The premise of Weber’s constitutionality argument lies under the castle doctrine.²²⁶ The court rejected this argument because Weber had not, in fact, faced a situation that required him to defend his family.²²⁷

Then, invoking the famous disclaimer in *Heller* that the Second Amendment is not an unlimited right,²²⁸ the court concluded that the State has a strong and compelling interest to prevent gun violence, which is closely related to alcohol

²²⁰ OHIO REV. CODE ANN. § 2923.15 (West). The Ohio General Assembly explained the reasoning by the statute as follows:

The rationale for the offense is that carrying or using firearms or dangerous ordnance without having complete control of one's faculties presents a danger as great as driving while intoxicated. In part, the section is also designed as a tool to permit law enforcement officers to step in and prevent the commission of more serious crimes, as well as tragic accidents. There is no exception to the prohibition--law enforcement officers, demolition experts, sportsmen, and others must all be sober at the time they carry or use firearms or dangerous ordnance.

²²¹ 2019-Ohio-916, 132 N.E.3d 1140 (Ohio Ct. App), *appeal not allowed*, 156 Ohio St.3d 1452, 2019-Ohio-2780, 125 N.E.3d 941 (Ohio 2019).

²²² *See id.*

²²³ *Id.* at 1143.

²²⁴ *Id.* There was strong evidence of Weber’s inebriation such as his “eyes were bloodshot and glassy, his speech was slurred, he was unsteady on his feet, and an odor of an alcoholic beverage was detected on his person.” *Id.* at 1145. In fact, Weber even admitted to being drunk to the officers himself, several times. *Id.*

²²⁵ *Id.* at 1146.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

abuse.²²⁹ The statute was sufficiently tailored to serve the significant government interest of guarding public safety, and it left open ample opportunities to bear and keep arms.²³⁰

B. *Constitutionality of Federal Disarmament for Alcohol Abuse Under §922(g)(1)*

Another way that states fill the gap in federal firearm policy regarding alcohol is to adopt statutes that make repeated alcohol-related offenses (typically DUI or DWI arrests and/or convictions) a felony, which then triggers a felony report to the NICS database, or a state counterpart. The most frequently-applied federal firearm disqualifier, both in terms of gun purchase denials (failed background checks) and prosecutions, is 18 U.S.C. §922(g)(1), which prohibits firearm possession by prohibited persons who have been convicted of a crime punishable by over one year in prison.²³¹ Some states, such as Pennsylvania, impose a penalty of up to five years imprisonment for multiple convictions of driving under the influence (DUI) at the highest blood alcohol content (BAC); thus, exposing convicted persons to the possibility of federal disarmament under §922(g)(1).²³²

In *Holloway v. Attorney General*,²³³ the Third Circuit upheld the statute's validity against a Second Amendment challenge, concluding that a DUI is considered a "serious crime."²³⁴ Holloway had two DUI convictions. The first charge, in 2002, was eventually dismissed under an accelerated rehabilitation

²²⁹ *Id.* at 1148.

²³⁰ *Id.* at 1147. The statute is far from being overly burdensome because the limitation is only temporary while the individual is inebriated. After the person recovers, they are able to possess and use a firearm lawfully. This argument is supported by the United States Court of Appeals for the Seventh Circuit, which stated:

[U]nlike those who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user like Yancey could regain his right to possess a firearm simply by ending his drug abuse. In that sense, the restriction in [the statute] is far less onerous than those affecting felons and the mentally ill. The prohibition in [the statute] bars only those persons who are *current* drug users from possessing a firearm.

United States v. Yancey, 621 F.3d 681, 686–687 (7th Cir. 2010).

²³¹ 18 U.S.C.A. § 922(g)(1) (West).

²³² See 18 PA. STAT. AND CONS. STAT. ANN. § 1104; 75 PA. STAT. AND CONS. STAT. ANN. §§ 3802(c), 3803(b)(4).

²³³ 948 F.3d 164 (3d Cir. 2020).

²³⁴ *Id.* at 168. Although most circuits have taken a very different approach, the Third Circuit's earlier decision in *Binderup v. Att'y General United States*, 836 F.3d 336, 349 (3d Cir. 2016) provided a framework for examining Second Amendment challenges by holding that only "persons who have committed serious crimes forfeit the [Second Amendment] right to possess firearms much the way they 'forfeit other civil liberties, including fundamental constitutional rights.'" *Id.* at 341. In sum, the challenger must establish "that he poses no greater threat of future violent criminal activity than the average law-abiding citizen." *Id.*

program. For the second charge, in 2005, he entered a guilty plea for violating the Pennsylvania statute. Eleven years later, Holloway failed a background check for purchasing a firearm because he was disqualified under § 922(g)(1). The Third Circuit acknowledged that there is no bright line rule for determining whether the offense reaches the “serious crime” threshold but analyzed several factors such as the legislature’s intent and the degree of punishment.²³⁵ The court began its analysis by citing a definition from Black’s Law Dictionary for “serious,” which states that it is “dangerous; potentially resulting in death or other severe consequences.”²³⁶ The Supreme Court on several occasions has described drunk driving as a “potentially deadly crime.”²³⁷ Moreover, national highway safety programs require states to advance initiatives to “reduce injuries and deaths resulting from persons driving motor vehicles while impaired by alcohol.”²³⁸ Note that this decision is consistent in result but different in methodology from some other recent federal district court decisions analyzing disarmament under the same Pennsylvania statute.²³⁹

Part of what makes the *Holloway* case significant is that the Third Circuit had previously broken from other federal circuit courts, in *Binderup v. Attorney General*,²⁴⁰ in holding that the felon prohibition *did* violate the Second Amendment, at least as applied in the case, because the felony itself had been a nonviolent crime that received a lenient sentence. *Binderup* receives frequent mention in discussions about the Second Amendment and the felon disarmament, due to its unique place among circuit court decisions on this topic. It is unclear whether *Holloway* signals a change in direction for the Third Circuit, or if it merely narrows the applicability of the approach in *Binderup*.

²³⁵ *Holloway*, 948 F.3d 173–75.

²³⁶ *Id.* at 173–74

²³⁷ *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of writ of certiorari); *see also* *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2541 (2019) (Sotomayor, J. dissenting); *Begay v. United States*, 553 U.S. 137, 141 (2008); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016) (describing drunk drivers as “dangerous offenders”).

²³⁸ *Holloway*, 948 F.3d at 174.

²³⁹ *See, e.g., Williams v. Barr*, 379 F. Supp.3d 360, 380 (E.D. Pa. 2019) (“While we find that § 922(g)(1) burdens Williams’ Second Amendment rights because his disqualifying conviction was not ‘serious,’ [t]he law is constitutional as applied because the Government has satisfied its burden of intermediate scrutiny.”).

²⁴⁰ *Binderup*, 836 F.3d 336, 352–53 (3d Cir. 2016).

V. CONCLUSION

In the fifty years since the enactment of the Controlled Substances Act, it has led to the growth of mass incarceration, served as a continuous drain on judicial resources, and has become a tangled web of criminal procedural rules and rights crafted largely in response to drug enforcement efforts. At the same time, an often-overlooked effect of the CSA has been its ambiguous role in our regulatory regime for firearms. The smaller but most direct role is the incorporation of the CSA into the Gun Control Act itself, in § 922(g)(3), making violators of the CSA “prohibited persons,” that is, legally ineligible to own or use a gun. In this capacity, the CSA screens several thousand would-be purchasers each year from buying guns, due to failed background checks, and subjects hundreds of individuals to arrest and prosecution for firearm possession, usually in conjunction with, or in lieu of, other drug-related charges. The larger but less direct role is through another section of the Gun Control Act, § 922(g)(1), which prohibits convicted felons from possessing firearms. This felon-disarmament provision has screened more than five times as many would-be purchasers from buying over the last two decades as § 922(g)(3); in fact, felon-based denials outnumber all other denial reasons combined, including mental illness, fugitives from justice, immigration violations, and dishonorable discharge from the military.²⁴¹ The connection of these denials to the CSA is the disproportionate number of felonies that are drug-related. Of greater significance are the thousands of arrests and convictions every year for felons found in possession of a firearm, leading to their reincarceration for lengthy terms. In addition, the presence of a firearm during an illegal drug transaction can result in lengthy sentencing enhancements and a higher gradation for the charges. We could impose firearm forfeiture—and even include periodic peaceful inspections of these individuals to search for newly-acquired weapons—without imposing lengthy prison sentences. Gun control does not require mass incarceration, it merely requires gun removal.

The lengthy imprisonment of tens of thousands of individuals for gun-related charges, or gun-related sentencing factors, has significant negative societal effects, and these effects fall disproportionately on poor minority communities. At the same time, the screening effects that the CSA provides through the background check system, directly through §922(g)(3) and indirectly through §922(g)(1), have become, functionally speaking, our society’s primary mechanism of gun control, the primary means of restraining, even a little, the number of guns entering the stream of commerce and ending up on our streets. Gun deaths have reached epidemic proportions, according to public health experts, even as overall crime rates have fallen to historic lows in most of the country—in 2017, gun deaths surpassed the number of automobile fatalities for the first time²⁴², and the numbers have held in

²⁴¹ See 2018 OPERATIONS REPORT, *supra* note 27, at 17.

²⁴² See *Underlying Cause of Death, 1999–2017 Results*, CTR. DISEASE CONTROL & PREVENTION (Dec. 2018),

the two years since.²⁴³ Guns as a leading cause of death for Americans (the number one cause of death for certain segments of the population) have become the new normal. Gun sales in the last ten years have also been at historic highs, with millions of new firearms pouring through the primary retail market, and from there to the black market, every year. We need to do *more* to stem the tide of the oversupply of firearms, and for better or worse, right now the CSA is playing a central role in this.

There is also a channeling effect to the CSA's role in gun control: whatever baleful limits the CSA-GCA connection is placing on the gun supply and gun trafficking is also disproportionately helping vulnerable, poor, high-crime communities, where gun violence concentrates. Even if drug users are not inherently prone to violence, and even if convicted drug felons, upon release, are not violent—in fact, drug users and felons may be at higher risk of being *victims* of violence than perpetrators—their social networks are disproportionately likely to include individuals involved in criminal or violent activities. Disarming a drug user or felon means their gun is not available for a violence-prone relative, roommate, acquaintance, or neighbor to borrow, buy, or steal. From the standpoint of protecting our vulnerable communities, the disarmament of felons and those with a history of drug arrests plays a vital role in reducing the stock and supply of guns used in crimes and suicides. This reduction in the gun supply in high-crime communities—and the reduction in gun violence that it would produce—can be achieved with firearm forfeiture and background checks (denial of purchases) without prison penalties.

<https://wonder.cdc.gov/controller/datarequest/D76.jsessionid=AFBBEDFAB60D1BEC3001BDDCE9E80A2C>.

²⁴³ See Daniel Nass, *Gun Deaths Again Neared 40,000 in 2018, Latest CDC Data Shows*, THE TRACE Feb. 12, 2020, <https://www.thetrace.org/2020/02/gun-deaths-suicide-cdc-data-2018/> (“The number of gun deaths in America held steady in 2018, following three straight years of significant increases, according to new data from the Centers for Disease Control and Prevention.”); Heath Druzin, *Firearm Deaths Hold Steady After Record-Setting 2017*, KCUR (NPR in Kansas City), January 30, 2020, <https://www.kcur.org/government/2020-01-30/firearm-deaths-hold-steady-after-record-setting-2017> (same).