

## ARTICLES

### THE BIPARTISAN SAFER COMMUNITIES ACT: DOCTRINAL AND POLICY PROBLEMS

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*In response to recent mass shootings, Congress passed the Bipartisan Safer Communities Act. The Act encouraged states to implement red-flag laws, adopted a more punitive approach to federal gun control, expanded the domestic violence misdemeanors that prohibit firearm possession, and implemented more stringent regulations on young adults purchasing firearms. Because of the difficulties in passing federal gun control laws, Congress hastily passed the Act after a small, bipartisan group of Senators agreed on its text. This stunted legislative process left the new law riddled with ambiguities and technical deficiencies. This Article explores the constitutional, doctrinal, and policy problems created by the Bipartisan Safer Communities Act.*

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INTRODUCTION

Although gun control has always proved difficult to pass in Congress, today gun control bills are among the hardest bills to pass into law. Gun control is divisive politically and socially.<sup>1</sup> Many people who favor gun rights are single-issue voters, and in close elections, candidates do not want to alienate them.<sup>2</sup> Congress is also malapportioned toward smaller states,<sup>3</sup> and these jurisdictions often do not support stricter gun laws.<sup>4</sup> And, if nothing else, getting sixty votes in the Senate to overcome a filibuster on this issue is extraordinarily difficult.

Despite these challenges, political moments occur when many Members of Congress desire to pass gun control. Some Members strongly believe that federal gun laws should be stronger and look for strategic moments to get stricter laws passed.<sup>5</sup> Others, including those who oppose gun control generally, feel extraordinary pressure to pass something, often in the wake of a mass shooting, an assassination, or another tragedy that receives national attention.<sup>6</sup>

This is what happened with the Bipartisan Safer Communities Act,<sup>7</sup> which was

1. PEW RSCH. CTR., AMID A SERIES OF MASS SHOOTINGS IN THE U.S., GUN POLICY REMAINS DEEPLY DIVISIVE 10 (2021), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2021/04/PP\\_2021.04.20\\_gun-policy\\_REPORT.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2021/04/PP_2021.04.20_gun-policy_REPORT.pdf) [<https://perma.cc/7NLQ-HPRU>].

2. U.S. CONST. art. I, § 3, cl. 1; R.J. Reinhart, *Gun Control Remains an Important Factor for U.S. Voters*, GALLUP (Oct. 23, 2017), <https://news.gallup.com/poll/220748/gun-control-remains-important-factor-voters.aspx> [<https://perma.cc/3BVS-CKYC>].

3. Ruoxi Li, *The Malapportionment of the US House of Representatives: 1940–2020*, 55 POL. SCI. & POL. 647 (2022).

4. PEW RSCH. CTR., *supra* note 1, at 10; TERRY L. SCHELL ET AL., STATE-LEVEL ESTIMATES OF HOUSEHOLD FIREARM OWNERSHIP (2020) (using data collected between 2007 and 2016).

5. See Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1533–34 (2014).

6. See, e.g., Julie Turkewitz & Alexander Burns, *Florida Republicans Face Mounting Pressure to Act on Gun Control*, N.Y. TIMES (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/us/florida-gun-control-republicans.html> [<https://web.archive.org/web/20230407131136/https://www.nytimes.com/2018/02/21/us/florida-gun-control-republicans.html>] (describing pressure in wake of Parkland mass shooting).

7. Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022) (to be codified in

passed in the wake of two horrible mass shootings. The first occurred at a supermarket in Buffalo, New York, where a white supremacist killed ten African-Americans in May 2022.<sup>8</sup> Ten days later, a gunman killed nineteen children and two teachers at Robb Elementary School in Uvalde, Texas.<sup>9</sup> Members of Congress faced enormous pressure to pass legislation to stem these mass shootings, but had no obvious way to overcome congressional deadlock—particularly the de facto sixty-vote threshold in the Senate.<sup>10</sup>

To overcome the gridlock, Senators tried a different way of legislating. A small, bipartisan group of Senators—including Republicans necessary to overcome a filibuster—met in secret and agreed on language amongst themselves.<sup>11</sup> Once the agreement was reached, the bill was jammed through Congress as quickly as possible.<sup>12</sup> The usual hearings were not held.<sup>13</sup> No committee marked up the bill.<sup>14</sup>

various titles of U.S.C.).

8. Justin Sondel & Mark Berman, *Buffalo Supermarket Shooting Suspect Pleads Guilty to Murder*, WASH. POST, <https://www.washingtonpost.com/nation/2022/11/28/gendron-buffalo-guilty-plea/> [https://web.archive.org/web/20230327071911/https://www.washingtonpost.com/nation/2022/11/28/gendron-buffalo-guilty-plea/] (Nov. 28, 2022, 5:57 PM).

9. *The Names: 19 Children, 2 Teachers Killed in Uvalde School*, AP NEWS (June 3, 2022), <https://apnews.com/article/uvalde-school-shooting-shootings-texas-education-a5b21cfcae8837e830ed2f9bb4bbc3c> [https://perma.cc/T4TF-URSU].

10. Farnoush Amiri, *Families of Uvalde, Buffalo Victims to Testify in Congress*, AP NEWS (June 3, 2022), <https://apnews.com/article/uvalde-school-shooting-buffalo-violence-shootings-8ac06a201317fe1db128c64d60869c44> [https://perma.cc/T7AC-NGAS].

11. Annie Karni & Emily Cochrane, *Leaving Wish Lists at the Door, Senators Found Consensus on Guns*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/politics/guns-bill-senate-negotiations.html> [https://web.archive.org/web/20221101225655/https://www.nytimes.com/2022/06/24/us/politics/guns-bill-senate-negotiations.html].

12. The Act began as Senate Bill 2938, which was introduced by Senator Marco Rubio on October 5, 2021, and would have renamed a U.S. Courthouse in Tallahassee, Florida. S. 2938, 117th Cong. (as introduced in Senate, Oct. 5, 2021). The Senate passed the bill without amendment by unanimous consent on December 9, 2021. *Id.* (as passed by Senate, Dec. 9, 2021); 167 CONG. REC. S9058 (daily ed. Dec. 9, 2021) (passing bill). The House amended the bill and passed it as amended on May 18, 2022. *See* S. 2938, 117th Cong. (as passed by House, May 18, 2022). On June 21, 2022, Senator Chuck Schumer proposed amendments to the bill that added the text of the Bipartisan Safer Communities Act to it and moved for cloture. 168 CONG. REC. S3028, S3034–43 (daily ed. June 21, 2022); *see also id.* at S3034–43 (text of amendments). Two days later, on June 23, 2022, the Senate invoked cloture and passed the bill with Senator Schumer’s amendments. *Id.* at S3104–05, S3143 (daily ed. June 23, 2022). The House passed the bill as amended by the Senate the next day, *id.* at H5895–903 (daily ed. June 24, 2022), and President Joe Biden signed it the day after, Remarks on Signing the Bipartisan Safer Communities Act and an Exchange With Reporters, 2022 DAILY COMP. PRES. DOC. 1 (June 25, 2022).

13. The Senate Environment and Public Works Committee considered Senate Bill 2938 at regular meeting before the Senate amended it to include gun safety legislation, *see Business Meeting: Meeting of the S. Comm. on Env’t & Pub. Works*, 117th Cong. (2022), but no hearings were held after that amendment was proposed, *see* sources cited *supra* note 12.

14. After he introduced the amendments to add the text of the Bipartisan Safer Communities Act to Senate Bill 2938, Senator Schumer moved to report the bill to the Senate Environment and Public Works Committee “with instructions to report back forthwith with an amendment.” 168 CONG. REC. at S3028 (daily ed. June 21, 2022); *see also* sources cited *supra* note 12.

Amendments on the floor were beaten back, lest they scuttle the deal.<sup>15</sup>

Broadly, the Act makes three categories of changes to the Gun Control Act. First, Congress changed the substantive federal criteria about who may receive or possess firearms. Congress expanded the federal prohibiting criteria to include those who committed prohibiting acts as a juvenile.<sup>16</sup> Congress also expanded the prohibition on possession of a firearm to those with misdemeanor crimes of violence against serious dating partners.<sup>17</sup>

Second, Congress changed the rules on transferring firearms. Young adults will now have enhanced background checks and a potentially longer waiting period while those background checks are performed.<sup>18</sup> Congress also modified the definition of what it means to be in the business of selling firearms (thus requiring a federal firearm license).<sup>19</sup> And Congress added new aggravated crimes for some forms of illegally transferring firearms.<sup>20</sup>

Third, Congress provided federal financial support for state adoption of red-flag laws, which temporarily bar individuals who may be a danger to themselves or others from possessing firearms.<sup>21</sup> Congress could not agree, however, on a new national red-flag law.<sup>22</sup>

At least that is what the Bipartisan Safer Communities Act purports to do. But the stunted legislative process by which Congress passed the Act predictably and unfortunately resulted in a law loaded with technical deficiencies, vagueness, and ambiguity.<sup>23</sup> Worse, the law cuts against the criminal-justice-reform agenda that many of its sponsors espouse.<sup>24</sup> By expanding the prohibiting factors to include juvenile conduct, the law makes it more difficult for those with juvenile indiscretions to reintegrate into society.<sup>25</sup> And by drastically increasing the penalty for unlawful possession of a firearm, the law will contribute to increased incarceration for regulatory crimes (the burden of which is disproportionately borne by minority populations) and exacerbate the sentencing disparities between those sentenced in state and federal courts.<sup>26</sup>

This Article examines the legal and policy problems with the Bipartisan Safer

15. See 168 CONG. REC. INDEX NO. VI, at H.B. 5 (daily ed. June 6 to July 1, 2022) (listing amendments); Karni & Cochrane, *supra* note 11.

16. See *infra* Section I.B.1.i.

17. See *infra* Section I.B.1.ii.

18. See *infra* Section I.B.2.i.

19. See *infra* Section I.B.2.ii.

20. See *infra* Section I.B.2.ii.

21. See *infra* Section I.B.2.iii.

22. See *infra* Section I.B.2.iii.

23. See *infra* Part III.

24. See *infra* Part III.

25. See *infra* Section III.A.

26. See *infra* Section III.B.

Communities Act. Part I gives the legislative background, both of the Gun Control Act of 1968 and the Bipartisan Safer Communities Act. Part II explains the myriad legal problems with the new law. Finally, Part III explains why this law is bad public policy.

## I. LEGISLATIVE BACKGROUND

### A. *The Gun Control Act*

The Gun Control Act<sup>27</sup> regulates firearms in two main ways.<sup>28</sup> First, the Act establishes substantive federal minimum criteria on the purchase and possession of firearms. The Act prohibits the possession of firearms by categories of individuals, including felons, fugitives, those addicted to drugs, and persons convicted of a misdemeanor crime of domestic violence.<sup>29</sup> The Act also prohibits the possession of handguns by minors<sup>30</sup> and the possession of machineguns.<sup>31</sup> The Armed Career Criminal Act of 1984 added substantially enhanced penalties for unlawful possession by certain recidivists.<sup>32</sup>

27. References to the Gun Control Act in this Article include not just the original Gun Control Act of 1968, § 102, Pub. L. No. 90-618, 82 Stat. 1213, 1214–26 (codified at 18 U.S.C. §§ 921–928 (2018) (amended 2022)). For simplicity, they also include title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 1201–1203, 82 Stat. 197, 236–37 (repealed 1986), and the subsequent acts that have been incorporated into the Gun Control Act.

The original Gun Control Act was enacted on October 22, 1968. *See* Gun Control Act of 1968 § 102. Four months previously, Congress had restricted handgun sales and firearm possession in titles IV and VII of the Omnibus Crime Control and Safe Streets Act of 1968, respectively. Omnibus Crime Control and Safe Streets Act of 1968 §§ 901–907 (title IV); *id.* §§ 1201–1203 (title VII) (repealed 1986); *see also infra* note 32 (discussing title VII). Title IV’s provisions never went into effect, being superseded by the Gun Control Act of 1968, which more comprehensively regulated all firearms. *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 83 (1999). Title VII’s provisions, although not technically part of the Gun Control Act, have long been treated as “the functional equivalent of a third subdivision of the [Gun Control Act].” *Id.* at 86; *see also id.* at 86 n.58 (explaining that title VII’s provision were “incorporated into a single act” and have been “routinely viewed as one piece of legislation by those implementing the law”). Most subsequent major federal gun control laws are incorporated acts of the Gun Control Act. *See, e.g.*, Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–924, 925A (2018) (amended 2022)); 34 U.S.C. §§ 40302, 40901 (2018) (amended 2022)).

28. On the regulatory structure of the Gun Control Act, see Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975). Additionally, the Gun Control Act regulates the importation of firearms. *Id.* The importation regulations are not relevant here.

29. 18 U.S.C. § 922(g) (2018). Some categories are not original to Omnibus Crime Control and Safe Streets Act of 1968, but resulted instead from later amendments to the Gun Control Act. *See, e.g.*, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009, 3009-372 (1996) (adding to the prohibiting criteria those convicted of misdemeanor crimes of domestic violence) (codified at 18 U.S.C. § 922(g)(9) (2018)).

30. 18 U.S.C. § 922(x) (2018).

31. *Id.* § 922(o)(1). There is an exception for grandfathered weapons. *Id.* § 922(o)(2)(B).

32. Armed Career Criminal Act of 1984, Pub. L. No. 98-437, § 1802, 98 Stat. 2185, 2185 (repealed 1986). Section 1802 of the Armed Career Criminal Act amended title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which was repealed and replaced by substantially similar language in 1986. *See* Firearms

These federal substantive rules are backed by procedural rules designed to make them effective. For example, all individuals engaged in the business of manufacturing, importing, dealing, and repairing firearms must obtain federal firearms licenses.<sup>33</sup> Numerous requirements are imposed on these licensees; they must keep track of all firearms that they manufacture, import, acquire, and sell.<sup>34</sup> Retail dealers, thus, have records of initial retail firearm purchasers who must attest that they are not prohibited under law from receiving firearms.<sup>35</sup>

These procedural rules have expanded over time. Under the original Gun Control Act, there was no federally-controlled mechanism to determine the truth of a gun buyer's representation to a dealer that he was eligible to purchase a firearm.<sup>36</sup> In 1993, the Brady Handgun Violence Prevention Act added a requirement that licensed dealers initiate background checks before they transferred firearms to consumers.<sup>37</sup> Under the permanent provisions of the Brady Act, licensed dealers conduct these checks through the National Instant Criminal Background Check System, a computerized database containing a regularly-updated index of federal and state criminal history records.<sup>38</sup> The Brady Act did not specify the substantive criteria by which someone passes or fails the background check; that is controlled by other provisions of the Gun Control Act.<sup>39</sup> But these procedural provisions increased the enforceability of the Gun Control Act's substantive criteria on who may possess and receive firearms.

Second, the Gun Control Act provided federal assistance for state gun control regimes, primarily by segmenting the national firearms market into separate state markets.<sup>40</sup> This division prevents jurisdictional loopholes from developing that make

Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 456 (1986) (codified at 18 U.S.C. § 924(e) (2018)).

33. 18 U.S.C. § 922(a)(1) (2018).

34. *Id.* § 923(g); 27 C.F.R. §§ 478.121–478.134 (2022). Amendments to these provisions of the *Code of Federal Regulations* were enacted in 2022. Definition of “Frame or Receiver” and Identification of Firearms; Corrected, 87 Fed. Reg. 51249, 51250 (Aug. 22, 2022) (to be codified at 27 C.F.R. § 478.125); Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24743–47 (April 26, 2022) (to be codified at 27 C.F.R. § 478.125).

35. 27 C.F.R. § 478.124(c). The 2022 amendments to 27 C.F.R. § 478 did not affect this part of the regulation. See 87 Fed. Reg. at 24745.

36. Zimring, *supra* note 28, at 152–53.

37. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–41 (1993) (codified as amended at 18 U.S.C. § 922(s), (t) (2018) (amended 2022)).

38. *Id.* § 102(b) (codified at 18 U.S.C. § 922(t) (2018) (amended 2022)). Because the provisions for the National Instant Criminal Background Check System took some time to implement, Congress enacted a temporary provision requiring local law enforcement officers to verify the eligibility of handgun purchasers for transactions that occurred before the national database was active. *Id.* § 102(a)(1). This temporary provision was invalidated in *Printz v. United States*, 521 U.S. 898 (1997) under the anticommandeering doctrine. That constitutional problem became moot when the federal government began conducting the background checks under the National Instant Criminal Background Check System.

39. See 18 U.S.C. § 922 (b)(2), (d), (g), (n) (2018) (amended 2022).

40. Zimring, *supra* note 28, at 149.

state gun control laws difficult to enforce. Before the Gun Control Act, individuals could purchase firearms in any state subject to the law of that state.<sup>41</sup> Thus, if New York required a permit to purchase a handgun, individuals could evade the requirement by purchasing the firearm in an intrastate New Hampshire transaction.<sup>42</sup> The importation of the unlicensed pistol into New York was a crime, but it was difficult to detect and prevent. For jurisdictional reasons, New York law enforcement would have had difficulty investigating the New Hampshire gun dealer or preventing the out-of-state seller from making the sale.

Catalogue sales presented a related problem. Before the Gun Control Act, federal law did not prohibit or significantly restrict mail-order sales of firearms.<sup>43</sup> And state police agencies had no general law-enforcement authority in other states. Even if states theoretically could have exercised criminal jurisdiction over nonresident individuals who unlawfully shipped firearms into their borders,<sup>44</sup> the lack of investigative jurisdiction meant that states with strict gun laws had little practical recourse against dealers who made unlawful sales.

The Gun Control Act generally restricts the ability of individuals to obtain firearms in other states. With some exceptions, the Gun Control Act limits purchasers to buying firearms in their states of residence.<sup>45</sup> And only federal firearm licensees may generally engage in interstate commerce in firearms, so ordinary buyers generally cannot have firearms shipped to them from out-of-state sources.<sup>46</sup>

Prohibiting most interstate traffic in firearms reinforces state regulatory regimes. If, for example, a state requires a license to purchase a firearm, a retailer purchaser must have the permit for the sale to proceed. If the transaction were intrastate, a person who failed to obtain the permit and the person who made the sale would be subject to investigation and prosecution by local authorities. And if the transaction crossed state lines, both the person who acquired the gun out of state and the person making the transfer would face federal prosecution.

Here, again, federal law is strictly procedural, not substantive. These provisions do not set the criteria for firearms possession or the types of firearms that are permissible. They just channel firearm commerce into individual states so that each state's law can govern its residents.

With gun policy a divisive political issue, the Gun Control Act's dual approach

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41. See Federal Firearms Act of 1938, § 2, 15 U.S.C. § 902 (1964) (repealed 1968).

42. Zimring, *supra* note 28, at 141; see also 15 U.S.C. § 902 (1964) (repealed 1968) (prohibiting dealers from shipping firearms into states that require a license without verifying the purchaser's license, but not prohibiting intrastate sales to nonresidents).

43. See Zimring, *supra* note 28, at 141.

44. See generally WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 16.4(c) (4th ed. 2004) (discussing traditional bases of state jurisdiction, including out-of-state conduct causing illegal consequences within the prosecuting state).

45. 18 U.S.C. § 922(a)(3), (b)(3) (2018).

46. *Id.* § 922(a).

to firearms regulation offers a facially attractive compromise. Federal regulation sets the minimum policy on issues for which there is sufficient national support for substantive regulation. On topics for which there is no consensus, however, federal law enables states to tailor their own regulatory regimes by preventing individuals from going to other states to evade their requirements. Thus, for example, federal law bars the possession of firearms by convicted felons in all states<sup>47</sup> while leaving to individual states the more controversial decision of whether to require firearm licensing and registration.

From the criminal-law perspective, the substantive federal prohibitions on buying and receiving firearms have been much more significant than the state-aid provisions. The vast majority of criminal prosecutions under the Gun Control Act are for the possession of a firearm by a prohibited person (usually a felon) and its aggravated sibling, unlawful possession by a person subject to the Armed Career Criminal Act.

To give a comparative perspective, consider these numbers on the quantity of federal criminal prosecutions compiled by the Transactional Records Clearinghouse, broken down by the lead charge.<sup>48</sup> Between fiscal years 2008 and 2017, there were approximately 73,000 cases for which the primary crime was a violation of the Gun Control Act or the National Firearms Act, the latter of which regulates firearms deemed highly destructive, including machine guns.<sup>49</sup> Of these, about 54,000 were federal criminal prosecutions in which unlawful possession of a firearm by a felon was the lead charge and nearly 60,000 were prosecutions for possession by any prohibited person.<sup>50</sup>

Compare that with some unlawful trafficking offenses. During the same time period, there were about 1,500 cases brought primarily for manufacturing or selling firearms without a license.<sup>51</sup> Another approximately 1,300 cases were brought for making a false statement in connection with the sale of a gun or ammunition—the primary provision implicated by “straw purchase” sales.<sup>52</sup> And there were seventy-seven cases brought for unlawfully selling firearms across state lines.<sup>53</sup>

The relatively few prosecutions for interstate trafficking evidence that while the Gun Control Act’s dual approach to regulation may seem sensible in theory, in practice it has not worked as intended. Significant unlawful trafficking of firearms

47. *Id.* § 922(g)(1).

48. Transactional Recs. Access Clearinghouse, *Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRAC (Nov. 19, 2017), <https://trac.syr.edu/tracreports/crim/492/#:~:text=During%20FY%202017%2C%20a%20total,the%20previous%20five%2Dyear%20period> [<https://perma.cc/M2JA-X2VL>] [hereinafter Transactional Recs.].

49. *Id.*; National Firearms Act, 26 U.S.C. §§ 5801, 5802, 5811, 5822, 5841–5849, 5851–5854, 5861, 5871–5872 (2018).

50. Transactional Recs. Access Clearinghouse, *supra* note 48.

51. *Id.*

52. *Id.*

53. *Id.*

continues to occur from states with less strict gun laws to those with stricter ones.<sup>54</sup> Although gun control advocates are pursuing comprehensive state-level reforms, they also seek more substantive national policy, including bans on assault weapons and restrictions on magazine size. In their view, substantive federal policy remains preferable because it is not easily defeated by differences in state laws.<sup>55</sup>

When implementing national substantive policies remains politically infeasible, proposals for federal gun reform revert to a procedural or state-aid approach. For example, debates over a federal assault weapon ban and magazine-capacity restrictions have stalled.<sup>56</sup> Any such proposals are highly unlikely to garner sixty votes in the Senate. Given this reality, proposals for federal gun control reform often focus on procedural questions like imposing a new federal requirement for a background check for most non-retail firearm transfers, commonly referred to as *universal background checks*.<sup>57</sup>

### B. *Bipartisan Safer Communities Act*

Although sometimes hailed as the “first major gun control legislation in more than three decades,” the Bipartisan Safer Communities Act was anything but.<sup>58</sup> When it came to substantive national gun control policy, the Act mostly tweaked already existing requirements. The Act added some explicit provisions on juvenile-related disqualifiers and expanded the federal domestic violence gun ban. It also significantly strengthened maximum statutory penalties for violating certain Gun

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54. See, e.g., Nicholas Suplina et al., *Target on Trafficking: New York Crime Gun Analysis*, OFF. OF THE ATT’Y GEN. OF THE STATE OF N.Y., <https://targettrafficking.ag.ny.gov/trafficking-report.pdf> [<https://perma.cc/4EKL-AL3X>] (finding that seventy-four percent of crime guns that could be traced were from outside New York).

55. See, e.g., Brady Campaign to Prevent Gun Violence, *Assault Weapons Ban of 2021: H.R. 1808 & S. 736*, <https://s3.amazonaws.com/brady-static/AWB-2022-FactSheet-v2.pdf> [<https://perma.cc/TT6B-M39L>].

56. Sara Dorn, *Senate Lacks Votes to Pass Assault Weapons Ban, Sen. Murphy Says—As other Gun Bills Remain Stalled*, FORBES (Nov. 27, 2022, 2:51 PM), <https://www.forbes.com/sites/saradorn/2022/11/27/senate-lacks-votes-to-pass-assault-weapons-ban-sen-murphy-says-as-other-gun-bills-remain-stalled/?sh=249f7ff60444> [<https://perma.cc/C3NV-ANZ9>].

57. See, for example, the Safe Communities, Safe Schools Act of 2013, which proposed to require background checks for nearly all private gun sales (i.e., gun sales not involving a licensed dealer) in the wake of the shooting at Sandy Hook Elementary School in Newtown, Connecticut. S. 649, 117th Cong. (as introduced in Senate, Mar. 21, 2013). See generally Ashley Parker et al., *From Sandy Hook to Buffalo and Uvalde: Ten Years of Failure on Gun Control*, WASH. POST, <https://www.washingtonpost.com/politics/2022/05/22/guns-biden-democrats-buffalo/> [<https://web.archive.org/web/20230329100625/https://www.washingtonpost.com/politics/2022/05/22/guns-biden-democrats-buffalo/>] (May 24, 2022, 11:06 PM). A compromise amendment proposed by Senators Joe Manchin and Pat Toomey would have required background checks only for private sales brokered online or at gun shows. See 159 CONG. REC. S6213–18 (daily ed. Apr. 11, 2013) (text of Manchin–Toomey amendment). But the Manchin–Toomey amendment failed in the Senate, and the Senate never took up the original bill. *Id.* at S2739–40 (daily ed. Apr. 17, 2013).

58. Nick Erickson, *Sen. Murphy, former Rep. Hurd Discuss Gun Control in Bipartisan Conversation at GW*, GW TODAY (Sept. 29, 2022), <https://gwtoday.gwu.edu/sen-murphy-former-rep-hurd-discuss-gun-control-bipartisan-conversation-gw> [<https://perma.cc/T6NX-QR6T>].

Control Act provisions. But on the most significant and controversial policies, like implementing a national red-flag law or prohibiting the sale of semiautomatic rifles to those under twenty-one years old, Congress could not reach agreement, so the Act reverted to a procedural and state-aid approach.<sup>59</sup>

## 1. New Substantive Rules

### *i. Changes to Prohibited Transfer Crimes*

The Gun Control Act contains two comprehensive lists of persons for whom it is unlawful to receive or possess firearms. The first list, codified at 18 U.S.C. § 922(d), makes it “unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person” falls into one of a number prohibited categories.<sup>60</sup> The second list, codified at 18 U.S.C. § 922(g), makes it unlawful for any person who fits within one of the categories to *possess* a firearm that has ever moved in or affected interstate commerce.<sup>61</sup> The list of prohibited persons in each list is nearly identical, including, for example, individuals who have been convicted of crimes punishable by imprisonment for more than one year, are addicted to drugs, and are unlawfully present in the United States.<sup>62</sup>

The small variations in the two lists derive from different policy choices about who should be able to acquire firearms versus who may continue to possess them. For example, a person may not transfer a firearm to a person under indictment for a felony (but not yet convicted).<sup>63</sup> But a person under felony indictment may continue to possess firearms that he already owns until he is convicted.<sup>64</sup>

Strangely, the Bipartisan Safer Communities Act made changes to § 922(d) (the sale or transfer provision) without making corresponding changes to § 922(g) (the possession provision). It is now unlawful under § 922(d) to make a sale knowing the recipient falls into a prohibiting category for conduct that was done “*as a juvenile*.”<sup>65</sup> Section 922(g), however, was not amended to include this “as a juvenile” language.

Congress also created dissimilarities for those involuntarily committed to mental institutions. Congress added to § 922(d)(4) that a person is prohibited from

59. Stephanie Lai & Emily Cochrane, *Here’s What is in the Senate’s Gun Bill—and What was Left Out*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/us/politics/senate-gun-bill.html> [<https://web.archive.org/web/20230201002121/https://www.nytimes.com/2022/06/23/us/politics/senate-gun-bill.html/>].

60. 18 U.S.C. § 922(d) (2018) (amended 2022).

61. *Id.* § 922(g) (amended 2022); *see* Scarborough v. United States, 431 U.S. 563, 575 (1977) (interpreting the provision to apply to any former transportation of the firearm in interstate commerce).

62. § 922(d)(1), (3), (5)(A), (g)(1), (3), (5)(a).

63. § 922(d)(1); *see also* 18 U.S.C. § 922(n) (2018) (prohibiting shipment, transportation, and receipt of a firearm in interstate or foreign commerce by a person under felony indictment).

64. *See* § 922(g)(1).

65. Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12001(a)(1)(A)(i), 136 Stat. 1313, 1322 (2022) (emphasis added) (to be codified at 18 U.S.C. § 922(d)).

transferring a firearm if he “has been adjudicated as a mental defective” or “committed to any mental institution “*at 16 years of age or older.*”<sup>66</sup> Presumably, this authorized transfers to persons who had been committed to mental institutions while under sixteen years of age. But Congress never made the corresponding change in § 922(g), which regulates possession. Section 922(g) continues to read that it is unlawful for a person to possess a firearm if he “has been adjudicated as a mental defective” or “committed to a mental institution.”<sup>67</sup>

The Bipartisan Safer Communities Act also added two new prohibited transfer categories under § 922(d). First, it is now prohibited to transfer a firearm to a person who “intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense.”<sup>68</sup> Second, it is unlawful to sell a firearm to a person who “intends to sell or otherwise dispose of the firearm or ammunition” to a prohibited person.<sup>69</sup>

The Act also greatly increases the penalties for violations of both § 922(d)’s prohibited transfer rules and § 922(g)’s prohibited possession rules. Previously, both those crimes were felonies punishable by up to ten years in prison.<sup>70</sup> The new act, however, increases the statutory maximum to up to fifteen years.<sup>71</sup>

## ii. *Expanding the Domestic Violence Gun Ban*

In 1996, the Lautenberg Amendment prohibited the transfer of firearms to and possession of firearms by those convicted of a misdemeanor crime of domestic violence.<sup>72</sup> Congress defined the provision only to apply misdemeanor violent crimes committed by certain individuals:

[A] current or former spouse, parent, or guardian of the victim, . . . a person with whom the victim shares a child in common, . . . a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, . . . [and] a person similarly situated to a spouse, parent, or guardian of the victim.<sup>73</sup>

66. *Id.* § 12001(a)(1)(A)(ii) (emphasis added) (to be codified at 18 U.S.C. § 922(d)(4)).

67. *See* 18 U.S.C.A. § 922(g)(4) (Westlaw through Pub. L. No. 117-327).

68. Bipartisan Safer Communities Act § 12004(b)(3) (to be codified at 18 U.S.C. § 922(d)(10)).

69. *Id.* (to be codified at 18 U.S.C. § 922(d)(11)).

70. *See* 18 U.S.C. § 924(a)(2) (2018) (amended 2022).

71. Bipartisan Safer Communities Act § 12004(c) (to be codified at 18 U.S.C. § 924(a)(8)).

72. Senator Frank Lautenberg proposed the Lautenberg Amendment as an amendment to House Bill 3756, *see* 142 CONG. REC. 23119 (1996), an earlier version of the congressional appropriations act for 1997, *see* H.R. 3756, 104th Cong. (as passed by House, July 17, 1996), and its language was added to the bill that was enacted as the 1997 appropriations act, Consolidated Omnibus Appropriations Act, 1997, Pub. L. No. 104-208, § 101(f), sec. 658(b)(1)–(2), 110 Stat. 3009, 3009-372 (1996) (codified at 18 U.S.C. § 922(d)(8), (9) (2018)).

73. Consolidated Omnibus Appropriations Act, 1997 § 101(f), sec. 658(a) (codified at 18 U.S.C.

The theory behind the provision was that many serious cases of domestic violence were essentially felony cases that state law treated as misdemeanors or were pleaded down to misdemeanors by prosecutors.<sup>74</sup> Moreover, individuals are more likely to murder a spouse if they have a prior history of domestic violence.<sup>75</sup> But the limitation only to spouses and those similarly situated to spouses led to concerns about a “boyfriend loophole” for individuals who committed dating violence.<sup>76</sup>

The Bipartisan Safer Communities Act expands the prohibition to cover some people convicted of domestic violence against dating partners. The amendment applies the domestic-violence gun ban to an individual “who has a current or recent former dating relationship with the victim.”<sup>77</sup> The term “dating relationship” is then defined as “a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.”<sup>78</sup> The Act does not define a serious dating relationship, but provides three factors to evaluate whether a relationship qualifies: (1) “the length of the relationship”; (2) “the nature of the relationship”; and (3) “the frequency and type of interaction between the individuals involved in the relationship.”<sup>79</sup> The Act also disclaims that a “casual acquaintanceship or ordinary fraternization in a business or social context” qualifies.<sup>80</sup>

The misdemeanor gun ban applies differently to dating partners than it does to family members. First, unlike for family members, the ban is not retroactive for crimes committed before its effective date.<sup>81</sup> The Lautenberg Amendment was retroactive and did not exempt government employees acting within the scope of their duties.<sup>82</sup> Before 1996, many police officers had pleaded guilty to misdemeanor crimes of domestic violence, which would have allowed them to avoid felony convictions and keep their jobs.<sup>83</sup> These officers found themselves dismissed after the

§ 921(a)(33)(ii) (2018) (amended 2022)).

74. See Jessica A. Golden, Comment, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementation Flaws*, 29 *FORDHAM URB. L.J.* 427, 453–54 (2001); Jodi L. Nelson, Note, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 *N.D. L. REV.* 365, 377 n.96 (1999) (collecting legislative history sources).

75. *United States v. Skoien*, 614 F.3d 638, 642–44 (7th Cir. 2010) (en banc) (discussing studies).

76. See Annah K. Bender et al., *Guns and Intimate Partner Violence Among Adolescents: A Scoping Review*, 36 *J. FAM. VIOLENCE* 605, 612 (2021).

77. Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12005(a)(1)(B), 136 Stat. 1313, 1332 (2022) (to be codified at 18 U.S.C. § 921(a)(33)(A)(ii)).

78. *Id.* § 12005(a)(2) (to be codified at 18 U.S.C. § 921(a)(37)(A)).

79. *Id.* (to be codified at 18 U.S.C. § 921(a)(37)(B)).

80. *Id.* (to be codified at 18 U.S.C. § 921(a)(37)(C)).

81. *Id.* § 12005(b).

82. See *Fraternal Order of Police v. United States*, 173 F. 3d 898, 901 (D.C. Cir. 1999); 18 U.S.C. § 925(a)(1) (2018).

83. Although federal law exempts government employees in the performance of their duties from the prohibition on possessing firearms by felons, § 925(a)(1), it is common for law enforcement agencies to dismiss those with felony convictions, Kerri Fredheim, Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. § 922(g)(9)*, 19 *PACE L. REV.* 445, 499 (1999).

Lautenberg Amendment.<sup>84</sup> The dating partner ban avoids this problem.

Second, the ban is only permanent for recidivists. A person with a single conviction may regain his right to bear arms after five years have elapsed unless the person commits another crime of domestic violence, a crime of violence (whether domestic violence or otherwise), or another offense that disqualifies the person from possessing a firearm under § 922(g).<sup>85</sup>

## 2. New Procedural Rules

### *i. Regulating Juvenile Transfers of Firearms*

Unable to reach legislative agreement on whether to raise the minimum age for purchasing all or certain firearms from eighteen to twenty-one, Congress settled on amending the firearm-transfer procedures for that age group. Ordinarily, one who purchases a firearm from a licensed dealer is subject to a background check through the National Instant Criminal Background Check System.<sup>86</sup> The transaction may proceed once the system gives its approval or, if no approval is forthcoming, three business days have elapsed.<sup>87</sup> To implement the new provision regarding juvenile convictions, the Act created special provisions with respect to background checks for young adults who purchase firearms.

Now, the National Instant Criminal Background Check System will perform more thorough (and lengthier) background checks for young-adult transactions. Before allowing a firearm transfer to a young adult proceed, the system must, within three days, contact “the criminal history repository or juvenile justice information system . . . of the State in which the person resides,” “the appropriate State custodian of mental health adjudication records,” and “a local law enforcement agency of the jurisdiction in which the person resides.”<sup>88</sup> For young-adult transactions in which there is “a possibly disqualifying juvenile record,” the research period expands to ten days.<sup>89</sup>

It is not clear how this expanded check will work in practice. This might be done

84. See Roberto Suro & Philip P. Pan, *Law’s Omission Disarms Some Police*, WASH. POST (Dec. 27, 1996), <https://www.washingtonpost.com/archive/politics/1996/12/27/laws-omission-disarms-some-police/3c6a871b-8411-4813-8a42-887febbda72c/> [https://web.archive.org/web/20170828205227/https://www.washingtonpost.com/archive/politics/1996/12/27/laws-omission-disarms-some-police/3c6a871b-8411-4813-8a42-887febbda72c/].

85. Bipartisan Safer Communities Act § 12005(c)(2) (to be codified at 18 U.S.C. § 921(a)(33)(C)).

86. 18 U.S.C. § 922(t)(1), (3) (2018) (amended 2022); see also *supra* notes 36–42 and accompanying text (discussing establishment of the National Instant Criminal Background Check System).

87. § 922(t)(1)(B)(ii).

88. Bipartisan Safer Communities Act § 12001(a)(2) (to be codified at 34 U.S.C. § 40901(l)(1), (2)). The mental health provision is set to sunset in ten years. *Id.* § 12001(a)(3) (setting sunset date of September 30, 2032).

89. *Id.* § 12001(a)(2) (to be codified at 34 U.S.C. § 40901(l)(3)).

quickly through a computer check. Or young adults may find that they encounter delays at point of sale as a matter of course, leaving them with a de facto waiting period to purchase firearms.

It is also not clear what will happen if state authorities refuse to cooperate with the system. The Supreme Court has held that state and local law enforcement are not required to respond to federal inquiries for criminal background checks when a person seeks to purchase a firearm.<sup>90</sup> This leaves open the question of whether a firearm transaction will be approved if state and local law enforcement do not respond or if, instead, young adults will have to wait up to ten business days before taking receipt of their firearms.

## ii. *Trafficking in Firearms*

The new law also strengthens penalties for those who unlawfully sell firearms. The law adds two new sections to the Gun Control Act that will be codified at 18 U.S.C. §§ 932 and 933. The first new section, § 932, prohibits straw purchasing of firearms, making it unlawful for “any person to knowingly purchase, or conspire to purchase, any firearm in or otherwise affecting interstate or foreign commerce for, on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe such other person” is prohibited from possessing a firearm, intends to commit a felony, drug trafficking offense, or a federal crime of terrorism with the firearm.<sup>91</sup> The maximum penalty is fifteen years for ordinary offenses and twenty-five years if the crime involves drug trafficking or terrorism.<sup>92</sup> This provision will give prosecutors more tools to pursue those who illegally engage in the business of firearm sales.

The other new provision, 18 U.S.C. § 933, creates a new crime of trafficking in firearms. Section 933 makes it a fifteen-year felony to ship, receive, or transport a firearm in or affecting interstate or foreign commerce if the person knows that the recipient is a felon or that receipt of the firearm would constitute a felony.<sup>93</sup> The provision punishes both the shipper and the receiver.<sup>94</sup>

The Bipartisan Safer Communities Act also changes the definition of what constitutes being in the retail firearms business, an activity that requires a person to obtain a federal firearms license. The previous version of the Gun Control Act stated that a person was a dealer in firearms if he “devoted time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase of firearms.”<sup>95</sup> The new bill

90. *Printz v. United States*, 521 U.S. 898 (1997); *see also supra* note 38 (discussing *Printz*).

91. Bipartisan Safer Communities Act § 12004(a)(1) (to be codified at 18 U.S.C. § 932(b)).

92. *Id.* (to be codified at 18 U.S.C. § 932(c)).

93. *Id.* (to be codified at 18 U.S.C. § 933).

94. *Id.* (to be codified at 18 U.S.C. § 933(a)(1), (2)).

95. 18 U.S.C. § 921(a)(21)(C) (2018) (amended 2022).

removed “with the principal objective of livelihood and profit” and inserted in its place “to predominantly earn a profit.”<sup>96</sup>

### iii. *Red-Flag Laws*

This subsection discusses the new federal provisions for so-called “red-flag laws,” also called “extreme risk protection orders.” These are restraining orders that authorize police to seize a person’s firearms and prohibit him from acquiring new firearms.<sup>97</sup> The status is usually temporary; most orders expire unless renewed.<sup>98</sup> The goal is to prevent someone in crisis who may become suicidal or homicidal from possessing a firearm during the crisis.<sup>99</sup>

Red-flag laws have been adopted in several states.<sup>100</sup> Many Members of Congress wished to include a new federal red-flag law.<sup>101</sup> But as explained, gun groups remain opposed, and there were not sufficient votes to pass a federal law.<sup>102</sup> Unable to reach agreement, the Bipartisan Safer Communities Act instead expanded grants in support of “[s]tate crisis intervention court proceedings and related programs or initiatives” to include “extreme risk protection order programs.”<sup>103</sup>

The Act imposes many conditions to obtain the grants to support an extreme risk protection order program, including that there be some pre-deprivation and post-deprivation due process.<sup>104</sup> The provision requires certain procedural protections “at the appropriate phase,” including “notice, the right to an in-person hearing, an unbiased adjudicator, the right to know opposing evidence, the right to present evidence, and the right to confront adverse witnesses.”<sup>105</sup> The law requires “pre-deprivation and post-deprivation heightened evidentiary standards and proof which mean not less than the protections afforded to a similarly situated litigant in Federal court or promulgated by the State’s evidentiary body.”<sup>106</sup> Defendants must also have a right to a

96. Bipartisan Safer Communities Act § 12002(a) (to be codified at 18 U.S.C. § 921(21)(C)).

97. See, e.g., Caitlin M. Johnson, Note, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. ILL. L. REV. 1515, 1518 (2021); Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683, 688 (2019); *Fact Sheet: Extreme Risk Laws Save Lives*, EVERYTOWN RSCH. & POL’Y, <https://everytownresearch.org/report/extreme-risk-laws-save-lives/> [<https://perma.cc/8VJU-B2UF>] (Feb. 20, 2023).

98. Johnson, *supra* note 97, at 1528. A few states allow final orders to last indefinitely. *Id.*

99. *Id.* at 1521.

100. *Id.*

101. *Id.*; see also *id.* at 1525–26 (discussing proposed legislation).

102. Patrick Svitek, *Texas Is Unlikely to Adopt Key Provision of Bipartisan Gun Bill—A Red Flag Law to Take Guns Away from People Deemed Dangerous*, TEX. TRIBUNE (June 23, 2022, 5:00 AM), <https://www.texastribune.org/2022/06/23/texas-red-flag-law-bipartisan-gun-bill/> [<https://perma.cc/SU7M-V9ZB>].

103. See Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12003(a)(2), 136 Stat. 1313, 1325–26 (2022) (to be codified at 34 U.S.C. § 10152(a)(1)(I)).

104. See *id.* § 12003(a) (to be codified at 34 U.S.C. § 10152(a)(1)(I)(iv)).

105. *Id.* (to be codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(I)).

106. *Id.* (to be codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(III)).

lawyer.<sup>107</sup>

These provisions reflect the division in Congress. The law probably lacks provisions that gun owners wanted. The law does not require states to furnish counsel at no cost if the defendant cannot afford counsel. The law does not set a specific heightened standard for the plaintiff's burden of persuasion. And the law does not ban temporary *ex parte* orders to seize firearms. On the other hand, the law has some provisions that are concessions to those who favor expanded gun rights. The law does not require states to have red-flag laws to get crisis-intervention program grants.<sup>108</sup> And the law explicitly requires some due process protections that may be aimed at states that have (or are considering) particularly broad red-flag laws.<sup>109</sup>

## II. LEGAL QUESTIONS RAISED BY THE BIPARTISAN SAFER COMMUNITIES ACT

The Gun Control Act of 1968 resulted from years of legislative effort.<sup>110</sup> Congress held extensive hearings and listened to testimony on various gun control proposals.<sup>111</sup> Congressional committees marked up bills.<sup>112</sup> Major overhauls of the Act, including the Firearms Owners Protection Act,<sup>113</sup> went through a similar process.<sup>114</sup> The result is that the Gun Control Act (as it exists today) is a coherent system for regulating firearms at a national level, albeit one that is a policy compromise.

The Bipartisan Safer Communities Act, which passed without serious legislative deliberation,<sup>115</sup> is not coherent. Several provisions are unclear about what Congress tried to accomplish, including the addition of juvenile disqualifiers and the new definition of being engaged in the business of selling firearms. Other provisions create inconsistencies within the Gun Control Act. For example, Congress altered the provisions on who may *receive* a firearm without making corresponding amendments to

107. *Id.* (to be codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(II)).

108. For example, the Act also authorizes crisis-intervention program grants to support mental health courts, drug courts, and veterans courts. *See id.* (to be codified at 34 U.S.C. § 10152(a)(1)(I)(i)–(iii)).

109. *See* sources cited *supra* notes 104–07.

110. HARRY HOGAN, CONG. RSCH. SERV., EPX 0022, NATIONAL FIREARMS CONTROL: BRIEF SUMMARY OF EXISTING AND PROPOSED LEGISLATION 2–12 (1967); *see* Vizzard, *supra* note 27, at 80–86 (providing a history of the Act).

111. *See, e.g., Federal Firearms Act: Hearings on S. 1592, S. 14, S. 1180, and S. 1965 Before the Subcomm. to Investigate Juv. Delinq. of the S. Comm. on the Judiciary*, 89th Cong. (1965); *see also* Vizzard, *supra* note 27, at 81–82.

112. *See, e.g.,* H.R. REP. NO. 90-1577 (reporting House Bill 17735, the bill that became the Gun Control Act of 1968, with amendments); Vizzard, *supra* note 27, at 83.

113. Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 101–108, 100 Stat. 449, 449–60 (codified at 18 U.S.C. §§ 921–926A, 929 (2018) (amended 2022)).

114. *See, e.g., Legislation to Modify the 1968 Gun Control Act: Hearings on Legislation to Modify the 1968 Gun Control Act Before the House Comm. on the Judiciary Part 1*, 99th Cong. (1985); *Legislation to Modify the 1968 Gun Control Act: Hearings on Legislation to Modify the 1968 Gun Control Act Before the House Comm. on the Judiciary Part 2*, 99th Cong. (1985).

115. *See supra* note 12.

the analogous provisions on who may *possess* a firearm. Finally, some provisions are likely unconstitutionally vague, including the expanded definition of a misdemeanor crime of domestic violence. The result is a garbled law whose effect will not be known until the courts, the executive branch, and Congress clarify it.

#### A. *A New Federal Standard for Juvenile Convictions?*

Substantively, it is unclear what Congress intended to accomplish by adding the “as a juvenile” language to the list of prohibiting circumstances that bar an individual from purchasing a firearm. A memorandum circulated with the bill states that this provision “[c]larifies current law that a person is prohibited from purchasing a firearm if their juvenile record meets the existing criteria for a prohibited firearms purchaser under 18 U.S.C. § 922(d).”<sup>116</sup> But that is already the law; it is not in need of clarification. Individuals, for example, who are convicted of felonies or involuntarily committed to a mental institution cannot plead that the conviction or commitment happened before age eighteen as a defense.<sup>117</sup> So maybe the provision does nothing. But courts are loathe to construe a statute so that a statutory amendment has no substantive effect.

One area where there is no uniform federal standard is whether juvenile *adjudications* count as “convictions.” Some states treat adjudications in juvenile court as civil matters, while others treat them as criminal.<sup>118</sup> For what qualifies as a felony, the Gun Control Act provides that “[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”<sup>119</sup> Federal courts have understood this to mean that a juvenile adjudication counts as a felony conviction only when state law treats it as a criminal

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116. Memorandum from Senator Roy Blunt et al., U.S. Senate, to Members of the U.S. Senate, in Alanya Treene [hereinafter Senators’ Memo], *Bipartisan Safer Communities Act: Section-by-Section*, AXIOS, <https://s3.documentcloud.org/documents/22065359/bipartisan-safer-communities-act-section-by-section.pdf> [<https://perma.cc/DVW3-HDL8>]; see also Alanya Treene & Jacob Knutson, *Bipartisan Senate Group Releases Bill Text for Gun Safety Deal*, AXIOS, <https://www.axios.com/2022/06/21/gun-control-legislation-mass-shootings-senate> [<https://perma.cc/P2WU-CCWW>] (June 21, 2022) (discussing the Senators’ memorandum).

117. See *Keyes v. Lynch*, 195 F. Supp. 3d 702, 714–15 (M.D. Pa. 2016). Before the passage of the Bipartisan Safer Communities Act, § 922 prohibited the transfer of a firearm to, and the possession of a firearm by, any person “who has been adjudicated as a mental defective.” 18 U.S.C. § 922(d)(4), (g)(4) (2018) (amended 2022). In 2014, the ATF sought public comment on whether “adjudicated as a mental defective” under § 922 included adjudications that occurred while the person adjudicated defective was under the age of eighteen. Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution” (2010R-21P), 79 Fed. Reg. 774 (Jan. 7, 2014). Even if there were uncertainty on that single provision (which is doubtful, see *Keyes*, 195 F. Supp. 3d at 714–15), the Act’s amendment that only involuntary commitments above the age of sixteen years qualify remedies that problem, Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12001(a)(1)(A)(ii), 136 Stat. 1313, 1322 (2022) (to be codified at 18 U.S.C. § 922(d)(4)).

118. Compare *United States v. Walters*, 359 F.3d 340, 344–46 (4th Cir. 2004) (holding that juvenile adjudications are not criminal “convictions” under Virginia law), with *United States v. Mendez*, 765 F.3d 950, 953 (9th Cir. 2014) (holding that juvenile adjudications are “convictions” under Washington state law).

119. 18 U.S.C. § 921(a)(20) (2018).

conviction.<sup>120</sup>

The best interpretation is that the “including as a juvenile” language overturns this state-by-state approach and mandates a new federal standard under which all juvenile adjudications count as “convictions,” state law notwithstanding. Under this national standard, all juvenile felony adjudications that are findings of guilt will be disabling for possessing a firearm, regardless of whether the jurisdiction treats its juvenile justice proceedings as “civil” or “criminal.”

Admittedly, this is not the only reading. Because the “including as a juvenile” amendment to § 922(d) did not change the provision that what counts as a “conviction” depends on state law, individuals with juvenile adjudications treated as civil under state law may still argue that they have not been “convicted” of anything.

But this interpretation would drain the amendment of any substantive legal effect. Courts usually understand congressional statutory amendments to accomplish something.<sup>121</sup> While Congress sometimes clarifies preexisting law, here a pure clarificatory interpretation would be odd because there does not appear to be any controversy to clarify. Courts already treat juvenile felony convictions as disqualifying when they are deemed criminal convictions under state law.<sup>122</sup>

The national-standard understanding, moreover, is a better fit with the Gun Control Act’s definition that what constitutes a “conviction” is determined by state law.<sup>123</sup> At its core, this provision defers to state-law classifications for the myriad ways that state criminal justice systems dispose of criminal cases. States have various dispositions that do not fit neatly into “guilty” or “not guilty,” such as deferred adjudication and probation before judgment.<sup>124</sup> Under the Gun Control Act, whether these intermediate dispositions qualify as “convictions” is determined by state law.<sup>125</sup> This would also be true of any intermediate dispositions in the juvenile justice system. Thus, it can both be the case that, after the Bipartisan Safer Communities Act, a conviction in a state’s juvenile justice system will be deemed criminal (even if classified as “civil” under state law), and what dispositions qualify as convictions or

120. *E.g., Walters*, 359 F.3d at 343 (“The Government argues in response that a specific provision of the federal statute requires a determination of the status of a Virginia juvenile adjudication under Virginia law, and we agree.”); *Mendez*, 765 F.3d at 952 (“We must look instead to state law to determine whether [the defendant]’s 2007 juvenile adjudication may serve as the predicate for his prosecution under § 922(g)(1).”).

121. *See, e.g., Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 57–58 (2006); *Babbitt v. Sweet Home Chapter of Cmrys. for a Great Or.*, 515 U.S. 687, 704–08 (1995).

122. *See United States v. Lender*, 985 F.2d 151, 156 (4th Cir. 1993) (defendant convicted as a juvenile of a felony in adult court qualified as having committed a “crime punishable by more than one year” despite his infancy); *United States v. Banks*, 679 F.3d 505, 506 (6th Cir. 2012) (same); *United States v. Cure*, 996 F.2d 1136, 1139–40 (11th Cir. 1993) (same). For juvenile adjudications, see sources cited *supra* note 120.

123. § 921(a)(20).

124. *See Margaret Colgate Love, Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT’G REP. 6 (2009).

125. *See United States v. Clarke*, 780 F.3d 1131, 1132 (11th Cir. 2015) (per curiam), *certifying question to* 184 So. 3d 1107 (Fla. 2016).

findings of guilt will be determined by state law. This approach does not make the definition of “conviction” surplusage.

*B. Different Criteria for Receiving Firearms than for Possessing Them*

Strangely, the Bipartisan Safer Communities Act amends § 922(d)’s rules regarding the purchase of firearms without making corresponding changes to the possession rules in § 922(g). One amendment makes § 922(d)’s list of persons prohibited from receiving firearms broader than § 922(g)’s list of those prohibited from possessing firearms. A second amendment narrows a prohibiting criterion for receiving a firearm without narrowing the analogous prohibiting criterion for possessing a firearm. The Act’s inability to harmonize the rules on receiving and prohibiting firearms will necessitate clarification.

1. Addition of “as a Juvenile” to § 922(d) Only

The most significant change is that the list of persons prohibited from receiving firearms in § 922(d) now includes disqualifying conduct that occurs “as a juvenile,” while the “as a juvenile” language was not added to § 922(g)’s prohibition on the transfer of firearms by prohibited individuals.<sup>126</sup>

The effect of this omission is unclear. On a strict textual reading (and courts are moving in a textualist direction<sup>127</sup>), it may now be possible that some individuals are prohibited from receiving firearms for conduct as a juvenile, but are not prohibited from possessing or manufacturing their own firearms. When Congress includes language in one part of a statute but omits it in another, courts often deem the difference intentional.<sup>128</sup> Perhaps courts will view Congress as having altered who may receive a firearm, while less strictly regulating who may possess one.

The democratization of manufacturing has increased the practical space between “receiving” a firearm and “possessing” one. When the Gun Control Act was originally passed, manufacturing a firearm (at least not a crude one) took substantial skill.<sup>129</sup> Most individuals would not have had the technical knowledge to possess a firearm without receiving one that had been manufactured. Today, however, individuals can purchase machines and kits with which they can easily make firearms at home. Although the Biden administration has tried to restrict access to such “ghost

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126. See *supra* notes 35–36 and accompanying text.

127. See Diarmuid F. O’Scannlain, *We Are All Textualists Now: The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 306 (2017).

128. See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (explaining that “[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (alterations in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

129. James B. Jacobs & Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 LAW & CONTEMP. PROBS. 129, 137–40 (2017).

guns,”<sup>130</sup> its new rules have not stemmed the proliferation of such weapons.<sup>131</sup> Now that it has become easy to manufacture a firearm at home, the legal distinction between receiving a previously made firearm and possessing a firearm has more practical importance. If the rules on receiving firearms are stricter than the rules on possessing firearms, this may fuel demand in “ghost guns” among persons allowed to “possess” but not “receive.”

Alternatively, § 922(g) could be construed to include the “as a juvenile” language placed in § 922(d).<sup>132</sup> This could conceivably occur under one of two theories. First, the “as a juvenile” language in § 922(d) might be viewed as a clarification of already existing law. If that is true, then it could be argued that § 922(g) includes—and has always included—juvenile conduct within its scope. Under that interpretation, the “as a juvenile” amendment makes no change to preexisting law.

This construction, however, runs into the problems previously discussed. It would mean that the “as a juvenile” language did not make any real change to the Gun Control Act. This would result in the strange situation of having an amendment purport to clarify a statutory provision on which there is presently no legal dispute about its application.

Second, the discrepancy between § 922(d) and (g) might be viewed as a drafting mistake. Courts often dispense with literalness when a literal reading produces absurd or bizarre results.<sup>133</sup> Courts could view as absurd the idea that Congress intended juvenile felons to be able to possess firearms but not to purchase them. If so, they might construe § 922(g) to include conduct that occurred when the person was a juvenile.

But the discrepancy here does not actually produce absurd results. There are

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130. “Ghost guns” are partially finished firearm components. By completing much of the manufacturing process, sellers of these products make it easy for consumers to finish manufacturing the firearm. But because they are not complete firearms yet, they have largely fallen outside the federal regulatory framework. See Glenn Thrush, *‘Ghost Guns’: Firearm Kits Bought Online Fuel Epidemic of Violence*, N.Y. TIMES, <https://www.nytimes.com/2021/11/14/us/ghost-guns-homemade-firearms.html> [<https://web.archive.org/web/20230416041004/https://www.nytimes.com/2021/11/14/us/ghost-guns-homemade-firearms.html>] (Jan. 26, 2022). The Department of Justice has finalized new rules designed to make more unfinished frames and receivers qualify as “firearms” under the Gun Control Act, see 18 U.S.C. § 921(a)(3) (2018), under the theory that they can be readily restored to firing condition, Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24727, 24747 (Apr. 26, 2022) (to be codified at 27 C.F.R. § 479.11).

131. Glenn Thrush, *New Federal Rule Has Done Little to Stem Spread of ‘Ghost Guns’*, N.Y. TIMES (Dec. 15, 2022), <https://www.nytimes.com/2022/12/15/us/politics/ghost-guns-biden.html> [<https://web.archive.org/web/20230404030012/https://www.nytimes.com/2022/12/15/us/politics/ghost-guns-biden.html>]. The Biden Administration has issued further guidance to try to make its previous rule more effective. Glenn Thrush, *A.T.F. Moves to Close ‘Ghost Guns’ Loophole in Federal Rule*, N.Y. TIMES (Dec. 27, 2022), <https://www.nytimes.com/2022/12/27/us/politics/ghost-guns-atf-rule.html> [<https://web.archive.org/web/20230307015502/https://www.nytimes.com/2022/12/27/us/politics/ghost-guns-atf-rule.html>].

132. Cf. *King v. Burwell*, 576 U.S. 473, 492–95 (2015) (construing “an Exchange established by the State” to include federal exchanges to make the statute operate in the way Congress intended).

133. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509–511 (1989); see also *id.* at 527–28 (Scalia, J., concurring in the judgment).

times when Congress has barred someone from receiving additional firearms but has not prohibited them from possessing firearms. For example, federal law does not permit persons under indictment for a felony to acquire additional firearms before their cases are finalized, but Congress does not require a person to divest himself of the firearms that he already owns.<sup>134</sup> Here, although the omission of “as a juvenile” from § 922(g) was probably a drafting mistake, it is possible that Congress wanted individuals newly disqualified because of juvenile convictions not to acquire new firearms but did not want to divest such individuals of firearms they already own.

This would not be the first time that Congress has enacted a prohibiting factor less broadly than it probably intended. In 1998, Congress prohibited nonimmigrant aliens present in the United States on a visa from possessing a firearm unless they fell within certain exceptions (for example, possession of a hunting license).<sup>135</sup> The amendment was designed to prevent nonimmigrant aliens from purchasing firearms, and it was implemented after a tourist-visa holder opened fire in the Empire State Building.<sup>136</sup> Yet, the amendment was poorly drafted. Many nonimmigrant aliens visit the United States without a visa if they are citizens of a country that falls within the Visa Waiver Program.<sup>137</sup>

For over a decade, the ATF interpreted the nonimmigrant visa prohibition to cover all nonimmigrant aliens, including those present without a visa.<sup>138</sup> But in 2011, the Department of Justice’s Office of Legal Counsel determined that this interpretation violated the plain text of the amendment, which applied only to persons issued a nonimmigrant visa.<sup>139</sup> The Bureau ultimately abandoned its expansive, non-textual interpretation of the 1998 amendment.

A similar textual approach should prevail here. A non-textual approach, based on Congress’s presumed intent, is fraught with peril. If the judiciary reads “as a juvenile” language into § 922(g), it will result in the judiciary substantively expanding the scope of a felony. The current trend in federal criminal law is to leave the definition of crimes exclusively to the legislature.<sup>140</sup> Having the judiciary expand

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134. 18 U.S.C. § 922(n) (2018).

135. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, § 101(b), sec. 121(1), (4), 112 Stat. 2681, 2681–71 (1998) (codified at 18 U.S.C. § 922(g)(5)(B), (y) (2018)).

136. Robert D. McFadden, *Shots Send Empire State Crowd Fleeing*, N.Y. TIMES, Feb. 24, 1997, at A1; Blaine Harden, *Shooter Bought Gun by Using New Florida ID*, WASH. POST (Feb. 25, 1997), <https://www.washingtonpost.com/archive/politics/1997/02/25/shooter-bought-gun-by-using-new-florida-id/8bfb87f6-da54-4422-960c-3ad4bf5dc433/> [https://web.archive.org/web/20210418065459/https://www.washingtonpost.com/archive/politics/1997/02/25/shooter-bought-gun-by-using-new-florida-id/8bfb87f6-da54-4422-960c-3ad4bf5dc433/].

137. See *Firearms Disabilities of Nonimmigrant Aliens Under the Gun Control Act*, 35 Op. O.L.C. 171, 177 (2011).

138. *Id.* at 171.

139. *Id.* at 171, 180.

140. See *United States v. Bass*, 404 U.S. 336, 348 (1971); see also *Firearms Disabilities of Nonimmigrant Aliens under the Gun Control Act*, 35 Op. O.L.C. at 177 (refusing to interpret the firearms prohibition applying to aliens admitted to the United States on a nonimmigrant visa to apply to nonimmigrant aliens who are present pursuant to the Visa Waiver Program).

the definition of crimes beyond their plain text based on legislative intent would undermine the fair-notice and reliance interests that come with having statutory criminal law.

## 2. Mental Health Adjudications Before Age Sixteen

The confusion over the amendments to § 922(d) is compounded because Congress made the opposite error for involuntary mental health commitments. The memorandum circulated with the bill claimed that this provision “[i]mproves current law so that mental health adjudication records for persons under 16 years old do not disqualify them from purchasing a firearm.”<sup>141</sup> But Congress never amended § 922(g), which continues to read that it is unlawful for a person to possess a firearm if he “has been adjudicated as a mental defective or who has been committed to a mental institution.”<sup>142</sup> This provision applies to adjudications under age sixteen.<sup>143</sup> So under a literal reading of the Gun Control Act, a person may now transfer a firearm to a person who may not lawfully possess firearms.

Again, there is the question of whether courts will claim that Congress’s amendment to § 922(d)(4) was also meant to apply to § 922(g)(4). This time, however, courts would be acting to narrow the scope of a federal criminal provision, which does not raise the same judicial power concerns that would come with *expanding* the juvenile-transfer prohibition to § 922(g).<sup>144</sup> If Congress intended a person to be able to receive a firearm, it necessarily follows that Congress intended the person to possess it.<sup>145</sup>

### C. *Expanding the Domestic Violence Gun Ban*

The expansion of the misdemeanor domestic-violence gun ban is both vague and ambiguous. The definition of “dating relationship” is borderline useless, while the recidivist provision has a critical ambiguity that the executive branch or the courts will have to resolve.

#### 1. Definition of “Dating Relationship”

Although all laws have a zone of ambiguity, Act’s the definition of “dating

141. Senators’ Memo, *supra* note 116.

142. 18 U.S.C.A. § 922(g)(4) (Westlaw through Pub. L. No. 117-327).

143. *See, e.g.,* United States v. Lender, 985 F.2d 151, 156 (4th Cir. 1993) (discussing definition of “crime punishable by imprisonment for a term exceeding one year” in the context of the Armed Career Criminal Act); Keyes v. Lynch, 195 F. Supp. 3d 702, 714–15 (M.D. Pa. 2016) (discussing juvenile involuntary commitments).

144. *See Bass*, 404 U.S. at 347–49 (discussing the rule of lenity).

145. Although *receiving* a firearm implies *possessing* one, “owning” a firearm does not imply possession. Federal law, for example, permits juveniles to take title to handguns by inheritance, but not to take possession of them until they reach the age of eighteen. *See* 18 U.S.C. § 922(x)(3)(C) (2018).

relationship” is hopelessly vague. The Act defines a serious dating relationship based on three factors: (1) “the length of the relationship”; (2) “the nature of the relationship”; and (3) “the frequency and type of interaction between the individuals involved in the relationship.”<sup>146</sup> But, as Justice Thomas has explained, although a “multifactor test may aid in identifying relevant facts for analysis,” it also “leaves courts adrift once those facts have been identified.”<sup>147</sup> The expanded definition of domestic violence contains no effective guidance about where the line is between a serious relationship and a not serious relationship. A week of dating? A month? A year? Nor does it explain the relationship between physical intimacy and length of time. Does a week of dating qualify if it includes intercourse? How about a year if there is little or no physical intimacy?

The lack of a proper definition will cause serious problems. Without clear rules, it is impossible for most who are potentially affected to know whether they fall within the prohibition or not. Consequently, there is a strong argument that the provision is unconstitutionally vague.<sup>148</sup>

But even if it is not vague, courts may limit the provision only to those relationships that undoubtedly fall within its scope. Justice Thomas has argued that courts should not invalidate statutes for vagueness. When faced with a vague statute, he contends that courts should apply the statute only where conduct clearly falls within the statute and, based on the rule of lenity, leave the rest of it unenforced.<sup>149</sup> Even here, however, it will be difficult to discern the dividing line between serious and nonserious relationships beyond peradventure.

The lack of a proper definition could make it difficult to prosecute attempted unlawful purchases. To convict someone of making a false statement when attempting to acquire a firearm (for example, lying on the Firearm Transaction Record, ATF Form 4473, when asked about disqualifying conditions), a person must knowingly make a false statement in connection with purchasing a firearm.<sup>150</sup> Because the definition of dating relationship is so vague, a person may read this definition and believe in good faith that he is not prohibited.

There may also be considerable administrability problems with expanding

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146. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(a)(2), 136 Stat. 1313, 1332 (2022) (to be codified at 18 U.S.C. § 921(a)(37)(B)).

147. *Dietz v. Bouldin*, 579 U.S. 40, 57 (2016) (Thomas, J., dissenting).

148. *Cf. Johnson v. United States*, 576 U.S. 591, 597 (2015).

149. *See id.* at 615–16 (Thomas, J., concurring) (arguing that courts should just apply vague statutes in core cases that plainly fall within their text).

150. *See* 18 U.S.C. § 922(a)(6) (2018) (prohibiting knowing false statements in connection with the purchase of firearms and ammunition); *id.* § 924(a)(1)(A) (prohibiting knowing false statements of information that federal firearm licensees must collect and keep records); *United States v. Hester*, 880 F.2d 799, 802–03 (4th Cir. 1989) (interpreting “knowingly” to include both actual knowledge and willful blindness); *see also* BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, ATF FORM 4473, FIREARMS TRANSACTION RECORD (Dec. 2022), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> [<https://perma.cc/HU92-F86Q>].

misdemeanor crimes of domestic violence to dating partners. Suppose the National Instant Criminal Background Check System discovers that a potential applicant has been convicted of assault or battery. What is the instant check examiner supposed to do? A court proceeding—especially a brief plea bargain—may not detail whether the victim was in a relationship with the defendant. Even if it does, it may not describe that relationship in detail. How is an examiner supposed to determine whether the person is qualified to purchase the firearm or not? The result may be that anyone convicted of assault or battery may face delays in purchasing firearms.

Problems remain even when examiners have access to all the information. The definition of serious dating relationship is vague, yet examiners will still have to make a legal determination whether this relationship falls within the ban. It is not clear how examiners will apply the factors and whether they will do so consistently.

Ultimately, this ambiguity will need to be resolved. Congress is unlikely to do it. Maybe the courts will as they decide cases. Or maybe these factors will receive more attention from the ATF in administrative rulemaking. At some point, Congress, courts, or the ATF will have to convert these vague and malleable factors into firmer rules.

## 2. Recidivists Who Commit New Crimes After Five Years

The new Act is also ambiguous about recidivists. The law provides that firearm rights are restored “in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship” after “5 years have elapsed from the later of the judgment of conviction or the completion of the person’s custodial or supervisory sentence, if any, and the person has not subsequently been convicted” of another crime of violence.<sup>151</sup> At that point, the National Instant Criminal Background Check System “shall be updated to reflect the status of the person.”<sup>152</sup>

But what happens if the person commits a misdemeanor crime of violence after six years? For example, the person has a bar fight against another (unknown) patron and is convicted of battery. Is he now barred for life from possessing a firearm? Or did the restoration of his firearm rights after five years return him to the status quo ante position where an offense for misdemeanor (non-domestic) violence will not disqualify him? The language is capable of either interpretation.

Perhaps here, even the modern weaker version of the rule of lenity will counsel in favor of returning a person to the status quo ante position. This is a felony criminal statute. Where language in a criminal statute is capable of two interpretations that are equally plausible, courts resolve the ambiguity in the defendant’s favor.<sup>153</sup>

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151. Bipartisan Safer Communities Act § 12005(c)(2) (to be codified at 18 U.S.C. § 921(a)(33)(C)).

152. *Id.*

153. *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016).

Moreover, the Act requires that the National Instant Criminal Background Check System remove the prohibition after five years, without any corresponding language to reimpose the ban for any subsequent crime of violence. This also suggests that Congress may have intended to wipe the slate clean after five years.

#### D. *New Crimes for Straw Purchases and Trafficking in Firearms*

The new statutory crimes for engaging in straw purchasing and illegal trafficking of firearms provide a simpler means to prosecute accomplices to crime. These new provisions will allow the government to prosecute a firearm transferor who has reasonable cause to believe that the transferee intends to commit a crime with the firearm he is transferring. Ordinarily, to convict someone as an accomplice, the government must prove either specific intent to facilitate the commission of the offense or (more arguably) knowledge that a person is assisting the principal to commit the offense.<sup>154</sup> Thus, the mens rea standard for these new crimes is lower and easier to prove than the mens rea for accomplice liability.<sup>155</sup>

It is unclear how § 932 will affect the straw purchasing rules. Currently, straw purchasers are prosecuted under the Gun Control Act for making material false statements in connection with the sale of a firearm.<sup>156</sup> Usually, the false statement is answering “yes” to the question on the Firearm Transaction Record asking whether the person is the actual buyer of the firearm.<sup>157</sup> In *Abramski v. United States*, the Supreme Court held that, to sustain a conviction under the false statement provision, the government did not need to prove that the intended recipient of the firearm was prohibited from possessing firearms.<sup>158</sup>

This new section, however, explicitly requires that the intended recipient be prohibited from possessing firearms. The relationship between this new crime and the crime of making a false statement when purchasing a firearm is uncertain. Perhaps courts will find § 932 to be an aggravated form of straw purchasing and the false-statement provision to be essentially a lesser included offense. Under this theory, prosecutors now have two crimes they could bring for essentially the same offense.

Alternatively, courts might interpret § 932 to be Congress’s statement on the criminalization of straw purchases. Where a specific and a general statute govern the same subject, courts often understand that “the specific governs the general,” particularly when “Congress has enacted a comprehensive scheme and has deliberately

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154. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05(B)(2), at 449–50 (8th ed. 2018) (explaining that the precise mens rea for accomplice liability is doctrinally uncertain). For the federal accomplice statute, see 18 U.S.C. § 2 (2018).

155. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537–39 (2001) (explaining how legislatures draft criminal laws to benefit prosecutors).

156. See sources cited *supra* note 150.

157. *Abramski v. United States*, 573 U.S. 169, 173–74 (2014); see also sources cited *supra* note 50.

158. *Abramski*, 573 U.S. at 189.

targeted specific problems with specific solutions.”<sup>159</sup> This prevents “the superfluity of a specific provision” from being “swallowed by the general one.”<sup>160</sup> Given that Congress explicitly required that a recipient be prohibited from receiving firearms, maybe courts will view this as an intent to narrow the offense, and thus, abrogate *Abramski*. That is, Congress’s creation of a specific straw-purchasing offense would control over the modern straw-purchasing doctrine, which is just an application of the generic criminalization of making false statements in connection with purchasing firearms.

The first interpretation—that prosecutors can bring either charge—will likely prevail in the courts. The two statutes do not literally conflict, so both provisions can be given legal effect.<sup>161</sup> Moreover, substantial policy reasons weigh in favor of prohibiting straw purchasing, even on behalf of those eligible to possess firearms. Except for some highly destructive weapons covered by the National Firearms Act,<sup>162</sup> the federal government has no national registration of firearms.<sup>163</sup> Federal law only requires that licensed manufacturers, importers, and dealers record the firearms that they make, import, and transfer.<sup>164</sup> These business records may be inspected by the ATF in connection with a criminal investigation.<sup>165</sup> Consequently, when the federal government wants to investigate how a firearm ended up at a crime scene, it can only trace the possession of a firearm from the manufacturer through the initial retail sale by the licensed dealer using these business records.<sup>166</sup> Subsequent private sales are not registered. Because federal investigators reach a dead-end in their ability to trace firearms at their initial retail sale, the straw purchase of firearms, even to a lawful recipient, obstructs the ability to trace firearms used in crimes.<sup>167</sup> Consequently, courts may be loathe to understand the new straw purchase provision as abrogating *Abramski*.

Finally, there may be some confusion regarding the use of the word “felony” in

159. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (first quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), and then quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

160. *Id.*

161. See ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 183–88 (2012) (treating the canon as applying when there is a conflict between a general provision and a specific provision). *But see RadLax Gateway Hotel*, 566 U.S. at 645 (explaining that literal contradiction is not required for the general/specific canon).

162. See National Firearms Act, 26 U.S.C. §§ 5801, 5802, 5811, 5822, 5841–5849, 5851–5854, 5861, 5871–5872 (2018).

163. See 18 U.S.C. § 926(a)(3) (2018).

164. See *supra* notes 33–35 and accompanying text.

165. 18 U.S.C. § 923(g)(1)(B)(i) (2018).

166. *National Tracing Center (NTC): Fact Sheet*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Apr. 2023), <https://www.atf.gov/resource-center/docs/undefined/ntc-fact-sheet-april-2023/download> [https://perma.cc/5XFX-MVLL]; Brian Freskos, *How a Gun Trace Works*, THE TRACE, <https://www.thetrace.org/2016/07/how-a-gun-trace-works-atf-ffl/> [https://perma.cc/P7ZA-229L] (Sept. 23, 2020).

167. See *Abramski v. United States*, 573 U.S. 169, 182–83 (2014).

both provisions. Felony is defined as “any offense under Federal or State law punishable by imprisonment for a term exceeding 1 year.”<sup>168</sup> Again, the provision was inartfully drafted. Presumably, under § 921(a)(20), a “crime punishable by imprisonment for a term exceeding one year” does not include state misdemeanor offenses punishable by more than two years.<sup>169</sup> But the definition in § 932(a)(3) does not explicitly cross-reference § 921 and the language (“any offense under Federal or State law”) is slightly different from § 921’s use of the word “crime.” So it is possible that courts will understand these provisions to include state misdemeanor crimes punishable by imprisonment of not more than two years.

### *E. Redefining “Engaged in the Business”*

The Bipartisan Safer Communities Act amended the definition of being “engaged in the business” of dealing firearms, substituting the language “with the principal objective of livelihood and profit” with “to predominantly earn a profit.”<sup>170</sup> On the surface, this seems like Congress is playing word games. A person acts with the “principal objective” of earning a profit if he seeks “to predominantly earn a profit.” The two are virtually synonymous. But Congress eliminated “livelihood” from the definition. Arguably, therefore, Congress slightly loosened the qualifying legal standard by eliminating any requirement that a person’s profit motive also contribute to his livelihood.<sup>171</sup>

With this provision, Congress was likely confirming that a person can unlawfully deal in firearms any time that he acts with a motive of profiting from firearm sales, even if such sales are occasional. Individuals who have engaged in occasional sales of firearms have posed a problem for ATF. On the one hand, individuals may legitimately engage in occasional private sales for nonpecuniary reasons, such as to alter or liquidate a firearm collection.<sup>172</sup> On the other hand, those who engage in occasional sales as a business (even as a part-time business) are supposed to have a federal firearm license.<sup>173</sup> Because of political pressure and because occasional sales are not inherently unlawful, ATF has been timid in prosecuting unlawful sales by those who only occasionally sell firearms for profit.<sup>174</sup> This section may be understood to

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168. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(a)(1), sec. 932(a)(3), 136 Stat. 1313, 1326–27 (2022) (to be codified at 18 U.S.C. § 932(a)(3)); *id.* sec. 933(a)(1) (incorporating the definition from § 932) (to be codified at 18 U.S.C. § 933(a)(1)).

169. 18 U.S.C. § 921(a)(20) (2018).

170. Bipartisan Safer Communities Act § 12002(1) (to be codified at 18 U.S.C. § 921(a)(21)(C)).

171. JOHNATHAN H. DUFF, CONG. RSCH. SERV., R47310, BIPARTISAN SAFER COMMUNITIES ACT (P.L. 117-159): SECTION-BY-SECTION SUMMARY 17 (2022), <https://crsreports.congress.gov/product/pdf/R/R47310> [<https://perma.cc/JWW7-EX6S>].

172. *Id.* § 12002(3) (to be codified at 18 U.S.C. § 921(a)(22)).

173. See 27 C.F.R. § 478.11 (2022) (definition of “dealer”).

174. Ali Watkins, *When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html> [<https://web.archive.org/web/20>

confirm what has previously been the law: individuals who resell firearms for profit are required to obtain Federal Firearms Licenses, even if their sales are occasional. Congress may be signaling to the ATF that it needs to take a stronger hand in enforcing this provision against those engaged in occasional, but still unlawful, sales.

### III. POLICY PROBLEMS

The Bipartisan Safer Community Act’s most significant provisions are not just legally problematic; they are also bad policy. Some provisions will make it difficult for those who commit youthful indiscretions to reintegrate in society. Others will increase sentencing disparities among those charged in federal court versus state courts. For both sets of provisions, the Act will likely expand racial and socio-economic disparities in the administration of criminal justice. Finally, the Act’s effort to promote red-flag laws will likely not have a significant influence on gun crime.

#### A. *Juvenile Indiscretions, Mental Health, and Second-Class Citizenship*

One of the most pernicious facets of this Act is that it imposes severe collateral consequences for juvenile misconduct. By adding “including as a juvenile” to § 922(d)’s prohibition on the transfer of firearms and ammunition to individuals who meet certain criteria,<sup>175</sup> the Act expands the categories of individuals to whom it is unlawful to sell a gun or ammunition. The law thus permanently banishes individuals who do a wrong act or suffer a mental health crisis as a juvenile to be second-class citizens for the remainder of their lives.

The most serious effect of the juvenile expansion concerns the felony provision. Federal law prohibits the receipt of firearms by a person convicted of any crime punishable by more than one year in prison.<sup>176</sup> To determine whether a crime is “punishable” by more than one year in prison, courts look only to the statutory maximum of the offense; they do not look to the actual sentence imposed.<sup>177</sup> Compounding this problem, legislatures are incentivized to enact harsher criminal laws, and thus they frequently raise the statutory maximum penalty for crimes.<sup>178</sup> And accomplice liability often ensnares minor participants.<sup>179</sup>

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230409064549/<https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html>]; Scott Glover, *Unlicensed Dealers Provide a Flow of Weapons to Those Who Shouldn’t Have Them, CNN Investigation Finds*, CNN, <https://www.cnn.com/2019/03/25/us/unlicensed-gun-dealers-law-invs/index.html> [<https://perma.cc/WS7X-A3NZ>] (Mar. 25, 2019, 8:39 AM).

175. Bipartisan Safer Communities Act § 12001(a)(1)(A)(i) (to be codified at 18 U.S.C. § 922(d)).

176. 18 U.S.C. § 922(g)(1) (2018).

177. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983); *Schrader v. Holder*, 704 F.3d 980, 985 (D.C. Cir. 2013); 27 C.F.R. § 478.11 (2022) (defining “crime punishable by imprisonment for a term exceeding 1 year”).

178. See Stuntz, *supra* note 155, at 509–10.

179. Alex Kaiserman, *Against Accomplice Liability*, in 4 OXFORD STUDIES IN PHILOSOPHY OF LAW 124,

The result is that the modern definition of felony is extraordinarily broad and incongruent with the traditional felony-misdemeanor distinction. Many felonies today were misdemeanors at common law.<sup>180</sup> Other statutory felonies have no common-law analogue.<sup>181</sup> Many are regulatory offenses, and some may include relatively minor drug offenses.<sup>182</sup> Except for some business offenses, the felon ban includes virtually all nonviolent felonies.<sup>183</sup> While the word “felony” may connote a great crime, many of today’s felonies are misdemeanors in all but name and are often punished like misdemeanors despite theoretical statutory maximum sentences that could exceed one year of imprisonment.<sup>184</sup>

Thus, minors may find themselves with felony convictions for a wide range of juvenile behavior, including joyriding in a car,<sup>185</sup> hacking a computer,<sup>186</sup> making a threat,<sup>187</sup> or becoming involved in drugs.<sup>188</sup> These juveniles, once convicted, will face a lifetime prohibition on receiving a firearm. And this prohibition extends to nonviolent felonies, no matter how much time has passed since conviction. A person who hacks a computer at age fourteen will not be allowed to possess a firearm at fifty years old, even if he has otherwise led a law-abiding life.

The impact of the Act will be exacerbated if, as this Article suggests, the correct interpretation of the “including as a juvenile” language is that it encompasses all juvenile adjudications. Approximately ninety-nine percent of juvenile cases do not get transferred to adult court.<sup>189</sup> But if all juvenile cases are swept up by the new law, this will not matter; anyone adjudicated delinquent will face a lifetime ban on receiving firearms. Moreover, the Act would override state laws on the possession of firearms by those adjudicated delinquent, some of which are more nuanced and rational. Pennsylvania law, for example, subjects juveniles convicted of violent felonies (such

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127 (2021).

180. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 14 (1985).

181. *See, e.g., id.*

182. *See, e.g.*, *Wilson v. State*, 584 So. 2d 147, 149 (Fla. Dist. Ct. App. 1991) (Altenbernd, J., concurring in part and dissenting in part) (“[F]our of the felonies, including this case, are relatively minor drug offenses.”).

183. 18 U.S.C. § 921(a)(20) (2018); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 695 (2009).

184. For a glaring example of this, see Kelly McLaughlin, *The Full List of Everyone Who's Been Sentenced in the College Admissions Scandal So Far*, INSIDER, <https://www.insider.com/college-admissions-scandal-full-list-people-sentenced-2019-9> [<https://perma.cc/QJ63-XUY8>] (Dec. 17, 2021, 10:00 AM) (listing sentences for those convicted of fraud in relation to college admissions, virtually all of which were less than one year although they involved guilty pleas to felonies).

185. *See, e.g.*, VA. CODE ANN. § 18.2-102 (2022).

186. 18 U.S.C. § 1030 (2018 & Supp. III 2022).

187. *See, e.g.*, 18 PA. STAT. AND CONST. STAT. ANN. § 2706 (West 2022). Note that “misdemeanors of the first degree” in Pennsylvania are deemed felonies for purposes of the federal Gun Control Act because they are punishable by more than two years in prison. *See id.* § 1104(1).

188. *See, e.g.*, 21 U.S.C. § 841 (2018) (amended 2022).

189. Janet C. Hoefel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 65 (2013).

as murder and rape) to a lifetime gun ban, while those who commit other crimes may regain their rights after reaching age thirty.<sup>190</sup>

Similar problems will befall minors with mental health crises. The federal-law prohibitions for mental health are antiquated. Federal law prohibits the possession of a firearm by anyone “adjudicated as a mental defective” or “committed to a mental institution.”<sup>191</sup> There is no requirement that the mental health commitment relate to violence or the propensity for violence; commitments for eating disorders or drug abuse are just as disqualifying as those for psychosis accompanied with violent tendencies.<sup>192</sup>

Even though the Act purports to exempt some young juveniles with mental health records,<sup>193</sup> in practice the Act will likely lead to stronger enforcement against those with involuntary commitments after age fifteen. Prior to the Act, all mental health commitments were disqualifying regardless of age.<sup>194</sup> Yet, these provisions received spotty enforcement, as states frequently did not report mental health commitments to the National Instant Criminal Background Check System.<sup>195</sup> Although the Act now exempts mental health commitments before age sixteen, it also strengthens the enforcement of the prohibition for those ages sixteen to eighteen.<sup>196</sup> Like those who joyride in a car or hack a computer, a teenager with an isolated mental health crisis will find himself or herself barred from receiving a firearm regardless of how much time has passed and their propensity to commit an act of violence.

The harms caused by such collateral consequences are significant. Individuals who cannot possess firearms cannot gain employment in many fields. Those with qualifying juvenile conduct may find themselves shut out of law enforcement, the military, security, investigations, and the firearms and hunting industries.<sup>197</sup> Such

190. *Se* 18 PA. STAT. AND CONST. STAT. ANN. § 6105(a)–(b) (West 2022).

191. 18 U.S.C. § 922(d)(4), (g)(4) (2018) (amended 2022).

192. Laura E. Johnson, *Mental Health History is History: A Lifetime Ban on Gun Possession Due to History of Involuntary Commitment Violates the Second Amendment*, 100 N.C. L. REV. 919, 941–42 (2022); 27 C.F.R. § 478.11 (2022) (defining “committed to a mental institution” includes for drug use).

193. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12001(a)(1)(A)(ii), 136 Stat. 1313, 1322 (2022) (to be codified at 18 U.S.C. § 922(d)(4)).

194. *See* *Keyes v. Lynch*, 195 F. Supp. 3d 702, 714–15 (M.D. Pa. 2016).

195. *See Background Checks: Mental Health Record Reporting*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/mental-health-reporting/> [https://perma.cc/6PR2-BQUT].

196. *See* Bipartisan Safer Communities Act § 12001(a)(2) (requiring the National Instant Criminal Background Check System to contact “the appropriate State custodian of mental health adjudication records” for transfers of firearms to those under age twenty-one) (to be codified at 34 U.S.C. § 40901(l)(1)(B)).

197. Federal law permits the possession of firearms for official governmental purposes by those who are otherwise prohibited by law from possessing a firearm (except for those convicted of misdemeanor crimes of domestic violence). 18 U.S.C. § 925(a)(1) (2018). But this exception only applies to governmental employers, not private employers. *Id.* Law enforcement agencies, moreover, often track federal law requirements for possessing a firearm, despite the federal law exception. *See, e.g.,* Fredheim, *supra* note 83, at 499; *Hiring Process*, N.Y. CITY POLICE DEPT., <https://www.nyc.gov/site/nypd/careers/police-officers/po-hiring.page> [https://perma.cc/4KSQ-9YAR].

individuals also will not be able to possess a firearm for personal protection or sporting purposes.

These harms are also unlikely to fall evenly across racial and socioeconomic lines. Other things equal, minority youths are more likely to be referred for criminal prosecution and convicted.<sup>198</sup> The felon disqualification, moreover, only applies to those who are “convicted.”<sup>199</sup> Wealthier parents can hire sophisticated legal counsel who may be more adept at plea bargaining to avoid technical convictions (such as by negotiating deferred adjudications).<sup>200</sup> Even if when convicted, wealthier individuals can hire lawyers to expunge their convictions after the fact.<sup>201</sup> And those who are more politically connected will have disproportionate access to executive clemency.<sup>202</sup> The revised gun ban will likely be felt disproportionately by poor youths and people of color.

The same is true for the mental health disqualification. The primary criterion for the mental health prohibition is whether the person was *involuntarily* committed or adjudicated mentally “defective.”<sup>203</sup> Federal law is structured so that involuntary commitments of individuals without violent tendencies trigger a lifetime ban, while voluntarily commitments of extremely violent individuals do not.<sup>204</sup> The ATF, for example, has specifically recognized that involuntary commitments for drug treatment trigger the federal prohibition.<sup>205</sup> All this will exacerbate the socioeconomic disparities. Wealthier parents will have access to voluntary outpatient and inpatient treatment that poorer parents will lack.<sup>206</sup> They will also have access to more legal resources to challenge and appeal attempted involuntary commitments. As a result, wealthier parents have more ways to seek non-disqualifying mental health treatment for their children.

Senator Christopher Murphy, one of the Act’s primary advocates, recognized that the Act would likely cause racial and socioeconomic disparities. He wrote a

198. JOSH ROVNER, THE SENT’G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 5–6 (2019), <https://www.sentencingproject.org/app/uploads/2022/08/Racial-Disparities-in-Youth-Incarceration-Persist.pdf> [<https://perma.cc/7THZ-Y3JM>].

199. 18 U.S.C. §§ 921(a)(20)(B), 922(g)(1) (2018).

200. Love, *supra* note 124, at 6–7.

201. See Maura Ewing, *Want to Clear Your Record? It’ll Cost you \$450*, THE MARSHALL PROJECT (May 31, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450> [<https://perma.cc/WJ8V-H7H4>].

202. See Nicholas M. Pace et al., *Statistical Analysis of Presidential Pardons*, at xvi–xvii tbl.S2 (RAND Corp., Working Paper No. WR-1309-DOJ, 2021), <https://www.ojp.gov/pdffiles1/bjs/grants/300116.pdf> [<https://perma.cc/4TRU-HBRD>] (noting that white convicts were more likely to receive pardons than black convicts, and those with character references from government or law enforcement officials were more likely to receive pardons than those who used family and friends as character references).

203. See 27 C.F.R. § 478.11 (2022).

204. 18 U.S.C. § 922(g)(4) (2018); 27 C.F.R. § 478.11.

205. See 27 C.F.R. § 478.11 (definition of “committed to a mental institution” includes for drug use).

206. Emily Hamovitch et al., *Who is Accessing Family Mental Health Programs? Demographic Differences Before and After System Reform*, 85 CHILD & YOUTH SERVS. REV. 239 (2018).

letter to the ATF asking how the Bureau plans to implement the law to prevent such disparities from happening.<sup>207</sup>

But none of the disparities discussed in this Section are fixable through executive action. Except for the rare federal prosecution of a juvenile, virtually all the disqualifying events will take place at a state or local level and be prosecuted by officials outside any federal supervision.<sup>208</sup> The ATF cannot make the possession of firearms lawful through executive action where Congress has unambiguously made receipt or possession unlawful. As a result, federal agencies are powerless to prevent the potential racial and socioeconomic disparities discussed in this Section.

### *B. Increasing Statutory Maximum Penalties for Prohibited Possessors*

The Act increases the maximum penalty for violations of § 922(d) (prohibiting unlawful receipt) and § 922(g) (prohibiting unlawful possession) from ten years to fifteen years.<sup>209</sup> That a Democratic-majority Congress raised the statutory maximum for these offenses is surprising. In recent years, progressives have railed against regulatory gun offenses because the crimes are not violent and minorities face disproportionate punishment.<sup>210</sup> A recent report from the U.S. Sentencing Commission showed that the majority of all federal firearm convictions were against black defendants.<sup>211</sup> Yet, Democrats in Congress increased the maximum penalties with no real dissent.

From a criminal enforcement perspective, the increase in the maximum sentence from ten years to fifteen years in prison may have the most dramatic effect of any provision in the Act. As the numbers in Section I.A demonstrate, federal prosecutors lean heavily toward bringing prohibited-person cases. In practice, federal gun laws act as a complementary auxiliary to state laws.<sup>212</sup> Both state and federal laws

207. Letter to from Christopher S. Murphy, Sen., U.S. Senate, to Steven Dettelbach, Director, U.S. Bureau of Alcohol, Tobacco, Firearms, & Explosives 2 (Sept. 12, 2022), [https://www.murphy.senate.gov/imo/media/doc/atf\\_letter\\_re\\_basca\\_implementation.pdf](https://www.murphy.senate.gov/imo/media/doc/atf_letter_re_basca_implementation.pdf) [<https://perma.cc/T6NX-QR6T>] (“I would appreciate an update on the Bureau’s plans to use these new and expanded criminal penalties to prevent gun violence and illegal gun sales while preventing a disparate impact on historically marginalized communities.”).

208. See CHARLES DOYLE, CONG. RSCH. SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 4–5 (2018) (noting that juvenile prosecutions are usually handled by state juvenile delinquency systems even when the offense involves federal rather than state law).

209. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c)(2), 136 Stat. 1313, 1329 (2022) (to be codified at 18 U.S.C. § 924(a)(8)).

210. See Conor Friedersdorf, *The Anti-gun Laws That Make Progressives Uneasy*, THE ATLANTIC (Feb. 10, 2022), <https://www.theatlantic.com/ideas/archive/2022/02/blue-americas-new-gun-control-debate/622035/> [<https://web.archive.org/web/20230216181121/https://www.theatlantic.com/ideas/archive/2022/02/blue-americas-new-gun-control-debate/622035/>].

211. MATTHEW J. IACONETTI ET AL., U.S. SENT’G COMM’N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE? 10 (2022), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714\\_Firearms.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf) [<https://perma.cc/7G6V-RHPR>].

212. See *supra* notes 48–53 and accompanying text; Erin C. Blondel, *The Structure of Criminal Federalism*,

generally restrict the possession of firearms by prohibited persons. But for comparable offenses, federal sentences tend to be much harsher than their state counterparts. Federal prosecutors allow states to handle most weapons offenses, but act as a harsher backstop where state law proves too lenient in individual cases. Prosecutors divert particularly dangerous armed felons to the federal system, where they face longer terms of imprisonment.<sup>213</sup>

It is not difficult to understand why prosecutors prefer unlawful possession charges. These cases are cheap and easy to bring.<sup>214</sup> Sufficient evidence (possession of the gun) is usually found on a defendant's person or in his vehicle or home. In many cases, the most significant legal issues will be whether a search was lawfully conducted and, if not, whether the evidence must be suppressed.

By contrast, interstate trafficking prosecutions require much more investigation. If an illegally trafficked weapon is discovered by police, federal agents must investigate how the weapon was diverted from lawful channels. From manufacturing and sales records, federal agents can trace the gun's path from the manufacturer to the dealer to the first retail customer.<sup>215</sup> From there, however, federal law imposes no record keeping requirements on private sales and transfers.<sup>216</sup>

Determining how the weapon reached its ultimate destination can require painstaking investigation. There can also be serious burden-of-proof questions. These may include whether the seller acted with the requisite *mens rea*<sup>217</sup> and whether the seller was liquidating part of his private collection—which is generally lawful under federal law—or engaging in sales to make a profit—which is unlawful, unless the person is licensed as a dealer.<sup>218</sup>

The future impact of increasing the statutory maximum is difficult to determine. In June 2022, the U.S. Sentencing Commission issued a report looking at sentencing for all firearm offenses (not just possession by prohibited persons). Nevertheless, the report is instructive because of the ubiquity of prohibited person offenses compared with other federal gun offenses. The Sentencing Commission found that approximately half of convicted defendants received a sentence within the range of the U.S. Sentencing Guidelines.<sup>219</sup> On average, gun defendants were sentenced to forty-two

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98 NOTRE DAME L. REV. 1037 (2023).

213. See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 374–75 (2001).

214. See Stuntz, *supra* note 155, at 516 & n.50, 537–38, 551 (explaining how possession offenses are easier for prosecutors to prove compared with traditional crimes).

215. See *supra* notes 33–35, 164, 166 and accompanying text.

216. See *supra* notes 163–67 and accompanying text.

217. See 18 U.S.C. § 924(a)(1)(D) (2018) (setting a default *mens rea* of "willfully" for violations of the Gun Control Act).

218. See 18 U.S.C. § 921(21)(C) (2018), amended by Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12002(1), 136 Stat. 1313, 1324 (2022); 18 U.S.C. § 922(a)(1) (2018).

219. IACONETTI ET AL., *supra* note 211, at 15.

months in prison.<sup>220</sup> Another 23.5% percent received sentences of five to ten years.<sup>221</sup> Only 3.4% received sentences greater than ten years.<sup>222</sup> The Sentencing Commission found that, for gun defendants, the guidelines “ha[ve] a strong anchoring effect.”<sup>223</sup>

Given this, the Sentencing Commission, more than Congress or individual judges, will determine the likely impact of increasing the statutory maximum for prohibited person offenses. At this time, it is not known how the Sentencing Commission will respond. Will the Commission take the cue from Congress and raise the presumptive Guideline range for all gun offenses? If it does, raising the statutory maximum will likely translate into an increase in actual sentences. But if the Commission maintains the current range, then the increase in the statutory maximum will likely have little effect, except in a narrow range of aggravated cases warranting sentences above ten years.

An increase in de facto federal firearm sentences could significantly change the status quo. An increase in sentences gives federal prosecutors more leverage in plea bargaining.<sup>224</sup> It also increases the leverage of state prosecutors, who can use the threat of transferring cases to federal court to extract pleas.<sup>225</sup>

The new Act may also exacerbate racial disparities in sentencing. Most defendants who face federal firearm charges are black. Prosecutors will effectively determine their sentences by whether these offenders are prosecuted in state or federal court. Harsher federal sentences will mean an increase in disparity between those prosecuted federally and those prosecuted in state court. The racial and socioeconomic implications of this disparity will depend on who federal prosecutors select for federal prosecution. Unlike the disparities discussed in the previous section, these disparities are within the power of federal officials to mitigate because federal officials have near-absolute discretion on the decision to bring federal firearm charges.<sup>226</sup>

Ironically, increasing the sentences for unlawful possession charges may also decrease the importance of the new crimes against firearm trafficking. Because both crimes are now punishable by up to fifteen years, prosecutors will likely prefer to bring unlawful possession charges, which are easier to prove than unlawful trafficking charges.<sup>227</sup> The unlawful trafficking charge may have its primary relevance only

220. *Id.* at 14.

221. *Id.* at 15 tbl.6.

222. *Id.*

223. *Id.* at 17.

224. See Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 462–64 (2009).

225. See Kevin A. McDonald, *Felon in Possession Sentencing Under the Federal Guidelines, Considering State Sentences*, 36 SETON HALL LEGIS. J. 106, 124 (2011).

226. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 12, 24–25 (2009).

227. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(a)(1), sec. 933(a)(1), 136 Stat. 1313, 1327 (2022) (requiring that the seller “knows or has reasonable cause to believe that the use, carrying, or

when the person doing the trafficking is lawfully allowed to possess firearms.

*C. Support for Red-Flag Laws Will Not Likely Have Much Effect*

Although Congress could not agree on establishing a federal “red-flag” law, the new Act provides funding for states to establish such programs.<sup>228</sup> In principle, red-flag laws have much to commend. Unlike most gun control prohibiting factors, the status is temporary and risk-related. A person involuntarily committed to a mental institution loses his firearm rights for life, unless the rights are restored.<sup>229</sup> This can be quite harsh. The mental health episodes leading to involuntary commitment may be transitory. They may not even involve a proclivity for violence.<sup>230</sup> Yet, the resulting firearm ban is indefinite. Red-flag laws, in contrast, are a limited prohibition, targeted against those likely to become violent or suicidal. They last only for the emergency, after which point a person’s rights are restored.<sup>231</sup> So it is much better tailored than most common gun-prohibiting factors.<sup>232</sup>

Despite their theoretical advantages, red-flag laws have serious implementation problems. The most serious problem is that no one—not even mental health professionals who study violence—can accurately predict who will become violent.<sup>233</sup> Those who are mentally ill are more likely to be victims of crime than to perpetrate it.<sup>234</sup> So judges are put in the impossible position of predicting future violent behavior. Faced with this, judges are more likely to err on the side of disarmament. The costs to a judge of erroneously allowing a person to retain his firearms which he then uses criminally is likely to be much higher than the cost of erroneously depriving someone of his firearm rights.

Another problem is the fear that disgruntled partners will weaponize these

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possession of a firearm by the recipient would constitute a felony”) (to be codified at 18 U.S.C. § 933(a)(1)).

228. *Id.* § 12003(a) (to be codified at 34 U.S.C. § 10152(a)(1)).

229. 18 U.S.C. § 922(g)(5) (2018).

230. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 8–11 (2019), <https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf> [<https://perma.cc/EBG3-G242>].

231. See Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683, 691–92 (2019).

232. Laura E. Johnson, *Mental Health History is History: A Lifetime Ban on Gun Possession Due to History of Involuntary Commitment Violates the Second Amendment*, 100 N.C. L. REV. 919, 943 (2022) (“Ultimately, [red-flag] laws are more effective at targeting individuals who are currently danger risks because family and friends are much better at identifying at-risk individuals than merely someone’s record of previous involuntary commitment.”).

233. Jeffrey S. Janofsky et al., *Psychiatrists’ Accuracy in Predicting Violent Behavior on an Inpatient Unit*, 39 HOSP. & CMTY. PSYCHIATRY 1090, 1091–93 (1988).

234. Sarah E. Desmarais et al., *Community Violence Perpetration and Victimization Among Adults with Mental Illness*, 104 AM. J. PUB. HEALTH 2342, 2346–47 (2014).

orders.<sup>235</sup> They might do this to seek revenge against a current or former spouse or to gain leverage over divorce or custody proceedings. For this reason, gun groups routinely oppose these laws and push for amendments that criminalize false statements made in connection with applying for these orders.

When it comes to using red-flag laws, law enforcement officers frequently do not file cases, even in situations in which their use would be warranted.<sup>236</sup> In several high-profile shootings, law enforcement officers in states with red-flag laws had notice that the perpetrators were potentially violent, and yet, did not pursue court orders preventing these individuals from possessing firearms.<sup>237</sup> In many jurisdictions, law enforcement officers are unaware of these laws or refuse to utilize them because of policy objections.<sup>238</sup>

The Bipartisan Safer Communities Act does nothing to overcome these implementation problems. The Act authorizes some grants in support of states that have red-flag laws, but it also authorizes grants for states that lack them. The Act's vague due process requirements for states with red-flag laws to be eligible for federal grants may incentivize states with weak procedural protections to adopt (slightly) more robust protections for defendants. Beyond this, however, the Act's tepid support of state red-flag laws will likely have little effect on street crime, suicides, or mass shootings. Congress's inability to agree on a national red-flag law will largely leave their adoption, implementation, and effectiveness to the states.

## CONCLUSION

Since 1994, the federal gun control debate has been largely in a stalemate. The Bipartisan Safer Communities Act reflects that lack of consensus. Its provisions are modest. For the Gun Control Act more broadly, the law raises more questions than it answers.

The Bipartisan Safer Communities Act has some significant provisions. It gives powerful new enforcement tools to prosecutors, including increasing the potential maximum sentence for felons in possession and creating new gun trafficking crimes.

235. Matt Vasilogambros, *Red Flag Laws Spur Debate Over Due Process*, PEW (Sept. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process> [https://perma.cc/BU5E-VFB9].

236. Matt Vasilogambros, *States Want to Make It Easier to Use Red Flag Laws*, STATELINE, <https://stateline.org/2022/06/27/states-want-to-make-it-easier-to-use-red-flag-laws/> (June 27, 2022, 12:00 AM).

237. *Id.* (discussing failure to use red-flag law to prevent the Buffalo, New York, shooter from purchasing a gun, despite the shooter having made previous threats); Jack Healy et al., *Could the Colorado Shooting Have Been Prevented?*, N.Y. TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/us/colorado-shooting-red-flag-law.html> [https://web.archive.org/web/20230213081329/https://www.nytimes.com/2022/11/23/us/colorado-shooting-red-flag-law.html] (describing how the Colorado red-flag law, which was implemented in 2019, was not used in the case of the Club Q shooting suspect, despite his previous arrest the year before for having made a bomb threat).

238. Vasilogambros, *supra* note 235.

It remains to be seen whether federal prosecutors utilize these provisions and whether new theoretical maximum sentences will translate to more punishment for gun violators in the average case.

But the Act also has serious technical deficiencies. Although Congress altered the criteria for who may receive firearms, Congress failed to amend the analogous provisions governing the possession of firearms. The result is that some people may lawfully possess firearms who cannot lawfully receive them, while others may lawfully receive firearms that are unlawful for them to possess. Congress expanded the prohibition for misdemeanor crimes of domestic violence with a vague definition of “dating relationship.” And the provisions governing the transfer of firearms to young adults may prove difficult to implement because of research required to complete a background check. Fixing these problems will require careful attention in subsequent legislation, administrative rulemaking, and caselaw.