

2019

Gun Control and the Color of Law

Follow this and additional works at: <https://scholarship.law.umn.edu/lawineq>

 Part of the [Criminal Law Commons](#), [Law and Race Commons](#), and the [Second Amendment Commons](#)

Recommended Citation

Gun Control and the Color of Law, 37 *LAW & INEQ.* (2019).

Available at: <https://scholarship.law.umn.edu/lawineq/vol37/iss2/5>

Law & Inequality: A Journal of Theory and Practice is published by the
University of Minnesota Libraries Publishing.

GUN CONTROL AND THE COLOR OF THE LAW

Alicia L. Granse†

There is a world of difference between thirty million unarmed, submissive Black people and thirty million Black people armed with freedom and defense guns and the strategic methods of liberation.

– Huey P. Newton, June 20, 1967¹

Introduction:

In August of 2017, then-St. Paul, Minnesota mayoral candidate Melvin Carter’s home was burglarized. A lockbox containing two firearms he had inherited from his father, a retired St. Paul police officer, was stolen.² In response, the St. Paul Police Federation (a police union) wrote an open letter to the community asking the Black candidate a series of questions regarding his gun storage practices: where he had gotten the firearms, whether he had taken a gun safety course, and why he had waited to report the break-in.³ The letter was followed by a mailer from the Political Action Committee (PAC) Building a Better St. Paul—primarily funded by the St. Paul Police Federation—which claimed that “[o]ver 100 shots have been fired since August 15 when Melvin Carter’s guns went missing”—despite there being no allegation that Carter’s guns had, in fact, fired a single shot.⁴ The Carter campaign

†. J.D. Candidate 2019, University of Minnesota Law School.

1. Huey P. Newton, In Defense of Self-Defense, in *THE HUEY NEWTON READER* 137 (David Hilliard & Donald Weise eds., 2002).

2. See Melvin Carter, Opinion, *Melvin Carter: Feeling at Home in Our City Starts with Feeling Safe at Home*, PIONEER PRESS (Sept. 14, 2017), <https://www.twincities.com/2017/09/14/melvin-carter-feeling-at-home-in-our-city-starts-with-feeling-safe-at-home/>.

3. Frederick Melo, *Police Union Criticizes Carter over Gun Theft from His Home; Campaign Decries ‘Racist Attack’*, PIONEER PRESS (Oct. 24, 2017), <https://www.twincities.com/2017/10/24/police-union-blasts-mayoral-candidate-melvin-carter/>; Chao Xiong, *St. Paul Police Union, Melvin Carter Campaign Spar over Guns Stolen from His Home*, STAR TRIBUNE (Oct. 24, 2017, 10:42 PM), <http://www.startribune.com/st-paul-police-union-presses-mayoral-candidate-melvin-carter-on-stolen-guns-campaign-fires-back/452889993/>.

4. Nick Woltman, et al., *Coleman, Harris Call on Police Union Board Members to Resign Following Campaign Mailer*, PIONEER PRESS (Nov. 9, 2017, 9:48 AM), <http://www.twincities.com/2017/10/26/new-mailer-intensifies-st-paul-mayoral-race/>.

quickly denounced the letter and the mailing as racist,⁵ which created a maelstrom of commentary on social media and in online news articles.⁶ While some saw it as evidence that “[t]he Federation’s letter has achieved its objective, bringing out all the unconscious racial stereotypes of a black man with a gun . . . ,”⁷ others were unconvinced, commenting, “I don’t see how asking for the serial # and gun training is racist. I put this more in the category of political harassment and distraction.”⁸ Still others maligned Carter for his failure to take proper care of his weapons and declared that the incident made them less likely to vote for him.⁹

This incident represents yet another way society treats people of color—especially Black men—differently. While perhaps nowhere else in the world is the idea that one has the right to carry a gun for protection from violence so enshrined in the cultural ethos, that right does not extend to everyone. Instead, statutes criminalizing firearm possession help reinforce the social concept that White gun owners are heroes protecting their homes and their families,¹⁰ whereas Black gun owners are thugs, gangbangers, and super-predators.¹¹ The history of the Second Amendment, gun regulation,

5. The campaign spokesperson described the St. Paul Police Union’s comments as “repeated attacks on a family that has been victim to a crime demonstrat[ing] again the systemic racism built into police culture across America.” *Id.*

6. *Id.*

7. James Michael Hamilton, Comment to *Police Union Criticizes Carter over Gun Theft from His Home; Campaign Decries ‘Racist Attack’*, PIONEER PRESS (Oct. 24, 2017), <https://www.twincities.com/2017/10/24/police-union-blasts-mayoral-candidate-melvin-carter/>.

8. Raj Beekie, Comment to *Police Union Criticizes Carter over Gun Theft from His Home; Campaign Decries ‘Racist Attack’*, PIONEER PRESS (Oct. 24, 2017), <https://www.twincities.com/2017/10/24/police-union-blasts-mayoral-candidate-melvin-carter/>.

9. Carter was ultimately elected mayor with more than fifty percent of the vote in a field of at least five. *St. Paul Picks Carter for Mayor*, MPRNEWS (Nov. 7, 2017), <https://www.mprnews.org/story/2017/11/07/minnesota-local-elections-november-2017-vote>; Peter Callaghan, *Who’s Who in the St. Paul Mayor’s Race*, MINNPOST (Oct. 16, 2017), <https://www.minnpost.com/politics-policy/2017/10/whos-who-st-paul-mayors-race>.

10. DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 175 (2003) (“[T]he gun culture has a core constituency—white, rural males with conservative values, especially in the South.”).

11. See John Dilulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD (Nov. 27, 1995) (“We’re talking about kids who have absolutely no respect for human life and no sense of the future . . . the trouble will be greatest in black inner-city neighborhoods.”). For a discussion on “America’s two gun cultures,” see Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (describing the differences between white, rural gun culture and urban gun culture largely connected to people of color).

and the War on Drugs support that conclusion. Recent data showing that gun possession conviction rates for Black people in Minnesota are shockingly disproportionate to their percentage of the population—sometimes six times what would be their ‘fair share’¹²—provides strong evidence that the state’s law, and likely the many similar laws that have been enacted across the nation, are discriminatory in effect, if not in intent.

This may only get worse in the coming years: due to heightened public awareness of race-based police brutality resulting from projects such as the Washington Post’s police-involved shooting database,¹³ more and more Black Americans believe owning a firearm will protect them not only from ‘common criminals’ and racially-motivated mass shootings but from the police officers patrolling their streets.¹⁴ And it is undeniable that more Americans die from gun violence than anywhere else in the world, a large percentage of them Black.¹⁵ Both gun control and gun rights advocates agree that something must be done to reduce gun deaths—the question is what.¹⁶

12. See *infra*, Section III.

13. *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017> (database compiling data from police shootings); see Julie Tate et al., *How The Washington Post Is Examining Police Shootings in the United States*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-shootings-in-the-united-states/2016/07/07/d9c52238-43ad-11e6-8856-f26de2537a9d_story.html.

14. See, e.g., *Growing Public Support for Gun Rights*, PEW RESEARCH CTR. (Dec. 10, 2014) (“Currently, 54% of blacks say gun ownership does more to protect people than endanger personal safety, nearly double the percentage saying this in December 2012 (29%).”); Andrew Kirell, *Pistol-Packing Preacher Shows Changing Black Attitudes on Gun Control*, DAILY BEAST (Oct. 20, 2015), <https://www.thedailybeast.com/pistol-packing-preacher-shows-changing-black-attitudes-on-gun-control>; see also NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* 304–05 (2014) (discussing several studies on Black attitudes towards gun control that indicate Blacks favor measures like permits and registration and disfavor outright bans at higher levels than Whites, which “comports with the intuition that people who fear violence will want guns to protect themselves and also favor laws promising to keep guns from criminals . . .”).

15. *Gun Violence in America*, EVERYTOWN FOR GUN SAFETY (Apr. 4, 2019), <https://everytownresearch.org/gun-violence-america/> (citing *WISQARS Nonfatal Injury Reports*, CTR DISEASE CONTROL & PREVENTION, [HTTPS://WISQARS-VIZ.CDC.GOV:8006/](https://wisqars-viz.cdc.gov:8006/), (last visited May 12, 2019)).

16. One study suggests that gun control is contentious because those that do not own guns and those that do cannot agree on the cause of gun violence. Mark R. Joslyn & Donald P. Haider-Markel, *Gun Ownership and Self-Serving Attributions for Mass Shooting Tragedies*, 98 SOC. SCI. Q. 429, 429 (concluding that “firearm possession engenders self-serving attributions about the causes of gun violence and resists calls for policy changes after mass shootings”); Tania Lombrozo, *What Influences Attitudes Toward Gun Control Reform?*, COSMOS & CULTURE BLOG, NPR NEWS (Oct. 9, 2017),

There is a remarkable lack of reliable data on gun violence because gun rights groups have fought tooth and nail to prevent the establishment of a gun registry and to discourage federal funding for research into gun violence.¹⁷ Without that data, regulators have been unable to move to evidence-based solutions from the one thing gun control and gun rights groups have been able to compromise on: statutes criminalizing gun possession for various groups.¹⁸ While for many, this seems like a common-sense and fair solution, these statutes tend to do to minorities what the War on Drugs did best: namely, regulate and punish them differently than Whites.¹⁹ The solution, however, cannot be to do away with gun regulation altogether. The limited national data that does exist indicate that stricter gun control laws are effective at reducing gun deaths. States like Minnesota that rank lower on the *Guns and Ammo* list of best places for gun owners to live and states that have lower rates of gun ownership also tend to have lower rates of gun deaths of all types—although the inverse relationship is not perfect.²⁰ Indeed, a majority

<https://www.npr.org/sections/13.7/2017/10/09/556627468/what-influences-attitudes-toward-gun-reform?>

17. David E. Stark & Nigam H. Shah, *Funding and Publication of Research on Gun Violence and Other Leading Causes of Death*, 317 JAMA 84 (Jan. 3, 2017), <http://jamanetwork.com/journals/jama/fullarticle/2595514>; David S. Bernstein, *Americans Don't Really Understand Gun Violence*, ATLANTIC (Dec. 14, 2017), <https://www.theatlantic.com/politics/archive/2017/12/guns-nonfatal-shooting-newtown-las-vegas/548372/>; Lisa Marie Paine, *The Federal Government Knows Surprisingly Little About Gun Accidents*, ASSOC. PRESS (Oct. 14, 2016), <https://www.usatoday.com/story/news/2016/10/14/ap-usa-today-network-gun-accidents-research/91997406/> (“The National Rifle Association is not opposed to research that would encourage the safe and responsible use of firearms and reduce the number of firearm-related deaths. Safety has been at the core of the NRA mission since its inception, NRA spokeswoman Catherine Mortensen said. ‘However, firearm safety is not the goal of the advocates seeking CDC funding—gun control is.’”). See also Angela Jacqueline Tang, *Taking Aim at Tiahrt*, 50 WM. & MARY L. REV. 1787, 1808 (2009) (discussing the implications of the Tiahrt Amendment in impeding access to gun transaction data to civil litigants).

18. See Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2192 (2016) (“[I]n a polarized political climate, there is occasionally a space for consensus gun control—criminal law.”). States have implemented a variety of firearms regulations, and until the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), “had done so with almost complete autonomy.” Michael B. de Leeuw et al., *Ready, Aim, Fire? District of Columbia v. Heller and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 142 (2009). The turn towards criminalization of possession is perhaps rooted in the common argument that guns don’t kill people, people kill people. Criminalization of possession reflects the attitude that responsibility for gun deaths lies not in the easy access to weapons, but fully in the hands of the possessor.

19. JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 71 (2017); Levin, *supra*, note 18, at 2195.

20. Compare Keith Wood, *Best States for Gun Owners* (2017), GUNS AND AMMO

of Americans support increased gun restrictions, although the intensity of that support and the vision for reform are heavily partisan issues.²¹ Nor is it practical to advocate for the abolition of private gun ownership in light of the sheer number of firearms in the United States²² and the Supreme Court's decision in *District of Columbia v. Heller*, which established a personal right to bear arms for traditional purposes, such as self-defense, under the Second Amendment.²³

This Note contends that if a right is granted to one class of citizens, the denial of that right and the subsequent negative consequences of that denial are at odds with the principal value expounded in the nation's founding documents, that all people are created equal.²⁴ As the emotional push and pull for gun regulation continues, states must be careful to construct gun regulations that do not further contribute to racial inequality and the mass incarceration of Black people. Part I of this Note discusses the history of the debate over gun control and the Second Amendment in the United States. Part II outlines the different perceptions society holds about Black and White gun owners. Part III uses the Minnesota statute regulating gun possession as an example of the consequences of 'colorblind' laws, analyzes the racial biases inherent in its construction, examines the disparate enforcement of

(Nov. 3, 2017), <http://www.gunsandammo.com/editorial/best-states-for-gun-owners-2017/247983>, with FIREARM MORTALITY BY STATE, 2016, CTR DISEASE CONTROL (Jan. 18, 2018), https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.html, and Heather Timmons, *Mapped: The US States with the Most Gun Owners—and Most Gun Deaths*, QUARTZ (July 24, 2015), <https://qz.com/437015/map-ped-the-us-states-with-the-most-gun-owners-and-most-gun-deaths>. See also Matthew Miller, Deborah Azrael, & David Hemenway, *Firearms and Violent Death in the United States*, in REDUCING GUN VIOLENCE IN AMERICA 3, 5–11 (Daniel W. Webster & Jon S. Vernick eds., 2013); Matthew Miller, Deborah Azrael, & David Hemenway, *State-Level Homicide Victimization Rates in the U.S. in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOC. SCI. MED. 656, 659 (2007) (“Compared to the states within the lowest quartile of firearm prevalence, states within the highest quartile had significantly higher firearm and overall homicide victimization rates: firearm homicide rates were 114% higher . . .”).

21. Danielle Kurtzleben, *Poll: Majorities of Both Parties Favor Increased Gun Restrictions*, NPR (Oct. 13, 2017), <https://www.npr.org/2017/10/13/557433452/poll-majorities-of-both-parties-favor-increased-gun-restrictions>.

22. See ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 10 (2011).

23. *Heller*, 554 U.S. at 592 (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”). The Second Amendment was then incorporated to the states in *McDonald v. Chicago*, 561 U.S. 742 (2010).

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

the statute, and argues that decriminalization of gun possession, the removal of certain redundant sections of the statute, and police reform are necessary to eliminate the disparate consequences for communities of color that contribute to the overall climate of inequality in Minnesota and the nation as a whole.

I. Background

Until quite recently, the Second Amendment was all but forgotten in the halls of jurisprudence, an infrequently litigated rule about the importance of militias rather than an individualized right to carry weapons.²⁵ States were free to regulate firearms as they saw fit, because the Second Amendment meant “no more than that [the right to bear arms] shall not be infringed by Congress.”²⁶ Many of these early state laws prevented Blacks from owning firearms entirely,²⁷ and prevented private ownership of weapons solely for self-defense for all races.²⁸ This unwillingness of both states and the Supreme Court to acknowledge an individual right to bear arms remained the norm up through the first half of the twentieth century.²⁹

Beginning in the 1960s and 70s, however, the Black Panther Party for Self-Defense and similar groups reframed the Second Amendment amidst public outcry over police brutality against Black people during the burgeoning civil rights movement.³⁰ Vicious police responses to lunch counter sit-ins and peaceful

25. In fact, a 1792 federal law mandated that “every able-bodied man between 18 and 45 was . . . enrolled in the militia, and required to arm and equip himself at his own expense.” Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 187 (1940); see *id.* at 186 (“[T]he Second Amendment, which purportedly guarantees the right to bear arms, is now substantially a dead letter in the face of police power necessities and a recession from the frontier conditions which required every citizen to go armed for his own defense.”).

26. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

27. Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608>.

28. See Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 L. & HIST. REV. 197, 199–200 (2007).

29. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).

30. See, e.g., MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 102 (1987); Cynthia Deitle Leonardatos, *California’s Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 996 (1999).

demonstrations fueled anger and the sense that the only way to “right the wrongs which have historically been perpetuated against Black people” was for Black Americans to defend themselves by force if necessary.³¹ On May 2, 1967, a group of Black Panthers arrived at the California state capitol building openly carrying .357 Magnums, 12-gauge shotguns, and .45-caliber pistols to protest the Mulford Act. The bill, proposed by Republican state assemblyman Don Mulford, prohibited the carrying of a loaded weapon in any California city.³² It was a direct response to the Black Panther practice of policing the police, and the Panthers saw it as the legislature’s attempt to keep “the Black people disarmed and powerless.”³³ Although the law at the time did not criminalize the carrying of weapons as long as they were not concealed, police confiscated the group’s guns and escorted them from the building.³⁴ Since the Panthers had broken no laws, they were neither arrested nor charged.³⁵ Instead, the California legislature rushed to strengthen the proposed legislation.³⁶ Then-Governor Ronald Reagan signed the Act into law after calling guns a “ridiculous way to solve problems that have to be solved among people of good will.”³⁷

Huey P. Newton and the Black Panthers’ assertion that the Second Amendment gave the people a right to bear arms against an oppressive and racist police force was not lost on the nation. The march on the state capitol and subsequent violent clashes between the Black Panthers and the police³⁸ spawned a backlash that prompted legislatures to enact new gun control regulations as they attempted to grapple with the new social unrest, skyrocketing crime rates, and what many perceived as a threat to White supremacy in the United States.³⁹ State after state passed new laws restricting

31. WINKLER, *supra* note 22, at 237.

32. Winkler, *supra* note 27.

33. *Id.*; *From the Pages of the Bee, 1967: Armed Black Panthers Invade Capitol*, SAC. BEE (May 4, 2017), <http://www.sacbee.com/news/local/history/article148667224.html>.

34. *From the Pages of the Bee*, *supra* note 33.

35. *Id.*

36. Winkler, *supra* note 27.

37. *Id.*

38. The Black Panthers were involved in multiple shoot-outs with the police during the late 1960s. Deitle Leonardatos, *supra* note 30, at 965–66 (1999). Huey P. Newton was eventually convicted of the murder of an Oakland police officer in 1973 (the conviction was later overturned). TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 348 (1993).

39. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* 68 (1998) (“Indeed, even in

access to firearms and criminalizing their possession.⁴⁰ At the time, the National Rifle Association (NRA) was a sports club, more concerned with teaching national guard members and boy scouts how to hunt and shoot than with advocating an individual right to bear arms.⁴¹ In fact, the NRA promoted gun control as part of its agenda during the 1920s and 30s.⁴² That changed as a hardline faction of the group rebelled against the organization's proposed transformation to a magazine and a suspension of any political activity.⁴³ The NRA was reborn as a full-blown anti-gun control organization after a coup at the annual convention in 1977.⁴⁴ Its position became that the Second Amendment was a personal right to bear arms at any time, and any legislation controlling that right was an unconstitutional infringement.⁴⁵

It was not until 2008 that the Supreme Court of the United States accepted that stance on the individualized right to bear arms in self-defense, holding a Washington, D.C. gun control statute

the 1960s much of the increased regulation of firearms stemmed from the fear generated by Black Panthers who openly carried guns.”); *see also* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 80 (1991) (“[A]nti-gun journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was ‘passed not to control guns but to control Blacks.’”).

40. LOTT, JR., *supra* note 39, at 49–54. Black politicians were not immune to the call for greater restrictions on gun possession. FORMAN, *supra* note 19, at 62–64. In fact, shortly after Washington, D.C.’s recently-elected, first majority-Black city council took power in 1975, it enacted one of the most stringent gun control statutes in the country, banning possession outright. *Id.* at 71. Even then, the ban’s lone opposition Douglas Moore believed that the restriction, in tandem with the criminalization of drug possession, would disproportionately affect people of color. *Id.*

41. Joel Achenbach et al., *How NRA’s True Believers Converted a Marksmanship Group into a Mighty Gun Lobby*, WASH. POST (Jan. 12, 2013), https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15_story.html; Michael S. Rosenwald, *The Forgotten NRA Leader Who Despised the ‘Promiscuous Toting of Guns’*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/10/05/the-forgotten-nra-leader-who-despised-the-promiscuous-toting-of-guns/?utm_term=.e8dfc51ef175.

42. The president of the club at the time, Karl T. Frederick, put forth a model gun control law, which had three basic elements. Winkler, *supra* note 27. (“The first required that no one carry a concealed handgun in public without a permit from the local police [and that] a permit would be granted only to a ‘suitable’ person with a ‘proper reason for carrying’ a firearm. Second, the law required gun dealers to report to law enforcement every sale of a handgun Finally, the law imposed a two-day waiting period on handgun sales.”).

43. Achenbach, *supra* note 41; Anders Walker, *Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law*, 38 FLA. ST. U. L. REV. 345, 362–63 (2011).

44. Achenbach, *supra* note 41.

45. Achenbach, *supra* note 41.

unconstitutional in the 5-4 decision *District of Columbia v. Heller*.⁴⁶ Many scholars and gun control activists continue to insist that this interpretation of the Second Amendment is at odds with its language and its history.⁴⁷ However, the *Heller* decision gave credence to the modern NRA's staunch position on the right to bear arms, thus locking the country in the stalemate that is the gun control debate today.

While many may believe that certain classes of people, including those convicted of domestic abuse and the mentally ill, should not possess guns,⁴⁸ criminalizing that possession may, like criminalizing drugs, do more harm than good.⁴⁹ The NAACP Legal Defense & Educational Fund, Inc. (LDF) argued in a *Heller* amicus brief that because people of color—particularly Black Americans—are disproportionately victims of handgun violence, legislation restricting handgun access benefits their communities.⁵⁰ The Congress of Racial Equality (CORE) argued instead that gun control laws are not only historically racially biased, but that “African Americans would be better served by measures that encourage private gun ownership by law-abiding citizens” because discriminatory motives and enforcement continue to this day.⁵¹

The War on Drugs and the war on guns both disproportionately affect people of color and work together to

46. 554 U.S. 570, 630 (2008). This was the same statute that had been enacted by the majority-Black city council in 1975. FORMAN, JR., *supra* note 19 (describing the vote in support of the Firearms Control Regulations Act of 1975).

47. See, e.g., George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of This New Right*, 40 RUTGERS L.J. 353, 354, 359 (2009) (calling the majority's opinion “self-contradictory” and specifically describing its analysis of the two clauses of the Amendment as an “abandonment of the right of states to have effective well-regulated militias”); Saul Cornell, *Guns Have Always Been Regulated*, ATLANTIC (Dec. 17, 2015), <https://www.theatlantic.com/politics/archive/2015/12/guns-have-always-been-regulated/420531/>.

48. Jennifer Mascia, *Eight States This Year Have Passed Gun Laws Meant to Protect Victims from Abusers*, TRACE (Oct. 11, 2017), <https://www.thetrace.org/rounds/rhode-island-eighth-state-year-enact-domestic-abuser-gun-laws/>; Carl Bialik, *Most Americans Agree with Obama that More Gun Buyers Should Get Background Checks*, FIVETHIRTYEIGHT (Jan. 5, 2016, 8:25 AM), <https://fivethirtyeight.com/features/most-americans-agree-with-obama-that-more-gun-buyers-should-get-background-checks/>.

49. de Leeuw et al., *supra* note 18, at 176–79.

50. See Brief for The NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (No. 07-290).

51. de Leeuw et al., *supra* note 18, at 135–36; Brief for Congress of Racial Equality (CORE) as Amicus Curiae Supporting Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (No. 07-290).

enforce systemic racism. The War on Drugs has been widely recognized as a failure.⁵² It has not managed to prevent drug use as promised.⁵³ Nor has it curbed violence associated with drug use; indeed, one could argue that criminalization has actually led to an increase in that violence due to the involvement of local and global criminal organizations.⁵⁴ What it has been successful at is contributing to the over-incarceration of minorities, especially Black men.⁵⁵ Convictions for many crimes prevent people from obtaining gun permits, which in turn increases the likelihood of subsequent convictions for gun possession without a permit. While a push to legalize or at least decriminalize drugs has gained momentum,⁵⁶ current efforts to eliminate gun violence and gun death in the United States still focus mainly on criminalization and outright bans. Many have even criticized the criminalization approach as “too white and too rich.”⁵⁷ Minnesota’s social dynamics and its gun control statute are a case in point for CORE, and demonstrate that even facially neutral gun control serves as racialized social control in a supposedly colorblind world. Protecting everyone from gun violence should not come at the expense of equal enforcement of the law.

52. GLOBAL COMMISSION ON DRUG POLICY, WAR ON DRUGS 2 (June 2011).

53. According to the Global Commission on Drugs, annual consumption of opiates has increased by 34.5%, cocaine by 27%, and cannabis by 8.5%. *Id.* at 4.

54. *Id.* at 15.

55. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 97–103 (2012) (describing the unequal incarceration rates of Blacks and Whites for drug crimes in the wake of the War on Drugs). Convictions for drug offenses are not solely responsible for this phenomenon; instead, a combination of the illicit drug trade, the cycle of poverty, and resulting violence, in tandem with racialized policing and the largely hidden effects of prosecutorial discretion may be to blame. See JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 5–7 (2017); German Lopez, *Why You Can't Blame Mass Incarceration on the War on Drugs*, VOX (May 30, 2017), <https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in>.

56. See, e.g., DRUG POLICY INITIATIVE, IT'S TIME FOR THE U.S. TO DECRIMINALIZE DRUG USE AND POSSESSION (July 2017), <http://www.drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession>; Ethan Nadelmann, *The U.S. Needs to Decriminalize Drug Possession Now*, ROLLING STONE (Nov. 26, 2018), <https://www.rollingstone.com/politics/politics-features/united-states-decriminalize-drug-possession-nadelmann-760001/> (last visited Feb. 2019).

57. See, e.g., Georgina Rannard, *Never Again: Is the Gun Control Movement Too White?*, BBC (Mar. 27, 2018), <http://www.bbc.com/news/blogs-trending-43541179> (pointing to Twitter comments calling gun violence protestors hypocritical for their lack of involvement in Black Lives Matter and racial justice movements, when more than 52% of murder victims are Black).

II. Self-Defense Is Not Colorblind

The same officers that criticized Mayor Carter for his gun ownership are not in favor of stronger gun control laws in general.⁵⁸ Days after the mass shooting on the Las Vegas Strip on October 1, 2017, and just two weeks before the letter and mailer were sent out, St. Paul Police Federation President Dave Titus (and Minneapolis Police Federation President Bob Kroll) stated they “do not see [stricter gun control laws] as viable solutions to reverse a spike in gun violence in their respective cities.”⁵⁹ These laws are not, Kroll said, “the solution for officers on the street, or the general public, because the bad guys will find new ways to get those weapons anyhow.”⁶⁰ Titus expounded, “[w]hat we need is to have everybody come together, come up with a plan to combat this problem, and then city government leaders have to make public safety a top priority again.”⁶¹

This episode drives home the point that in the United States, and in Minnesota in particular, there are two distinct groups of gun owners recognized by society: White hunters and homeowners who just want to protect their families, and Black, urban gang members and criminals. This dichotomy has been carefully constructed over the past fifty years in the aftermath of the Black Panther movement and the subsequent emphasis on law and order and the War on Drugs.⁶² Just as the Civil Rights era was making real strides at dismantling Jim Crow laws and other explicit race-based discrimination, Black communities were hit with an economic recession.⁶³ High-paying manufacturing jobs disappeared overseas and jobs requiring unskilled labor moved out to the suburbs, leaving whole urban pockets with high unemployment for Black men.⁶⁴ This coincided with a sharp increase in crime across the nation.⁶⁵ The 1968 Nixon presidential campaign famously exploited this crime wave in his “law and order” speech.⁶⁶ After carefully laying the

58. Jay Kolls, *Minneapolis, St. Paul Police Union Leaders on Gun Violence and Gun Control*, KSTP (Oct. 9, 2017), <http://kstp.com/news/twin-cities-police-federation-presidents-weigh-in-gun-violence-and-gun-control-regulations/4629885/>.

59. *Id.*

60. *Id.*

61. *Id.*

62. ALEXANDER, *supra* note 55, at 45–58 (discussing Richard Nixon’s strategy of using law and order rhetoric which pitted Whites and Blacks against each other).

63. *Id.* at 38–40, 50.

64. *Id.* at 50–51.

65. FORMAN JR., *supra* note 19, at 10.

66. Richard M. Nixon, Presidential Nomination Acceptance Speech at the

groundwork linking drugs to crime,⁶⁷ Nixon declared the so-called War on Drugs as a means to control those his campaign saw as political enemies to be exploited in the Southern Strategy: the anti-war Left and Blacks.⁶⁸ That attitude spread from the political sphere into popular culture, and throughout the 70s and 80s, Black men were increasingly depicted in the media as violent, drug-dealing criminals, despite equal, if not higher, rates of drug sales and possession by White Americans.⁶⁹

White gun owners, in contrast, are often depicted in the media as noble citizens determined to 1) protect their families and their property and 2) hunt and fish in the great American tradition.⁷⁰ The

Republican National Convention in Miami Beach, Florida (Aug. 8, 1968). Many news outlets pointed out the similarities in President Trump's own 2016 nomination speech. Michael Finnegan, *Trump Echoes Nixon 1968 on Law and Order, a Risky Bet in a More Racially Diverse Nation*, L.A. TIMES (July 21, 2017, 3:00 AM), <http://www.latimes.com/politics/la-na-pol-trump-nixon-race-20160721-snap-story.html>; Zachary Crockett, *Nixon's RNC Speech in 1968 Was Scary. Trump's Was Way Scarier.*, VOX (July 23, 2016, 2:38 PM), <https://www.vox.com/2016/7/22/12254622/trump-rnc-speech-richard-nixon>.

67. In a 1969 speech to Congress, Nixon declared that “[t]he habit of the narcotics addict is not only a danger to himself, but a threat to the community where he lives. Narcotics have been cited as a primary cause of the enormous increase in street crimes over the last decade.” Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs (July 14, 1969).

68. Nixon's public stance focused on students and the use of marijuana and hallucinogens. *Id.* (“Another estimate is that several million American college students have at least experimented with marihuana, hashish, LSD, amphetamines, or barbiturates. It is doubtful that an American parent can send a son or daughter to college today without exposing the young man or woman to drug abuse. Parents must also be concerned about the availability and use of such drugs in our high schools and junior high schools.”). In private, however, Nixon's motivation was to re-establish control over Blacks after the Civil Rights movement had destabilized the social, political, and economic dominance of Whites. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPERS (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> (quoting John Ehrlichman, Nixon's domestic-policy advisor: “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”). See also Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), <http://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/index.html>.

69. ALEXANDER, *supra* note 55, at 99, 105.

70. Even when White criminals appear in movies or TV shows, they are often romanticized and beloved in a way that Black criminals simply are not. Mafia movies and TV shows such as *The Godfather* and *The Sopranos* portray perpetrators of horrific acts of violence as conflicted heroes and fascinating cultural icons. Similar reverence for Black gang activity is difficult to find, as are romanticizations of other

gun rights lobby has devoted considerable resources to present these narratives both to its members and to society at large.⁷¹ Groups like the NRA and like-minded media outlets highlight incidents of “defensive gun use” in which armed citizens either shoot at or threaten ‘criminals’ with their guns to prevent or stop crime.⁷² The statistics presented as evidence of its widespread practice are controversial, and again, difficult to evaluate empirically without more funding dedicated to the study of gun violence.⁷³ The lists infrequently, if ever, include Black gun owners.⁷⁴ The NRA even went so far as to create a special division

racial minorities. See Maria Konnikova, *Why Do We Admire Mobsters?*, NEW YORKER (Sept. 16, 2015), <https://www.newyorker.com/science/maria-konnikova/why-do-we-admire-mobsters>. Exceptions such as *The Wire* and *Narcos* prove the rule.

71. See, e.g., Awr Hawkins, *Study: Concealed Permit Holders Among the Most Law-Abiding of Law-Abiding Citizens*, BREITBART (July 24, 2017), <http://www.breitbart.com/big-government/2017/07/24/study-concealed-permit-holders-law-abiding-law-abiding/>.

72. See, e.g., Awr Hawkins, *Top 25 Defensive Gun Uses of 2017*, BREITBART (Dec. 30, 2018), <http://www.breitbart.com/big-government/2017/12/30/top-25-defensive-gun-uses-of-2017/>; Awr Hawkins, *Researcher Reaffirms: At Least 760,000 Defensive Gun Uses a Year*, BREITBART (Feb. 19, 2015), <http://www.breitbart.com/big-government/2015/02/19/researcher-reaffirms-at-least-760000-defensive-gun-uses-a-year/>; Astrid Galvan, *Arizona Man Who Saved DPS Trooper: ‘I Had To Help’*, FOX 10 (Jan. 25, 2017), <http://www.fox10phoenix.com/news/arizona-news/man-who-saved-trooper-its-hard-to-think-about-that-day>.

73. See Evan Defilippis & Devin Hughes, *The Myth Behind Defensive Gun Ownership*, POLITICO (Jan. 14, 2015), <https://www.politico.com/magazine/story/2015/01/defensive-gun-ownership-myth-114262#.VOeLrvnF-Sq> (explaining how gun owners believe the “myth” that “millions of gun owners successfully use their firearms to defend themselves and their families from criminals” despite surveys that have been “repudiated”). See also, VIOLENCE POLICY CENTER, FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE (May 2017), <http://www.vpc.org/studies/justifiable17.pdf> (analyzing data from the FBI and the National Crime Victimization Survey Data and finding that “for the three-year period 2013 through 2015, the NCVS estimates that there were 16,492,600 victims of attempted or completed violent crime. During this same *three-year period*, only 175,700 of the self-protective behaviors involved a firearm.”). Compare David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430 (1997) (refuting the statistics in a study published previously in the same journal by Gary Kleck and Marc Gertz by examining the study’s extreme over-estimation bias); with Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995) (claiming that defensive gun use is substantially more common than criminal gun use). But see M.V. Hood III & Grant W. Neeley, *Packin’ in the Hood?: Examining Assumptions of Concealed-Handgun Research*, 81 SOC. SCI. Q. 523 (2000) (finding that permit holders are “overwhelmingly white males resid[ing] in areas with little violent crime” and “areas with high violent crime rates are the least likely” to have high rates of concealed-hand-gun permits).

74. Of the twenty-five defensive uses of firearms put forth by Breitbart, none of the owners were described as Black. Hawkins, *supra* note 72. In an interesting twist,

called NRA Country that produced music and interview videos with country musicians to “celebrate the lifestyle.”⁷⁵ Not a single artist connected with the organization is Black.⁷⁶ This is not to say that the gun control lobby is at its core a racist organization. People who are most motivated by fear also tend to distrust outgroups, or ‘others,’ and the NRA’s strategy has played on that distrust. Now, Whites “expressing the highest degree of concern about crime also tend to oppose racial reform,” and though rural Whites are the least likely to be victims of crime they are more punitive than other groups.⁷⁷

It is impossible to ignore how perceptions of Black Americans as violent criminals, the War on Drugs, and the gun narrative have led to unequal enforcement and prosecution of gun possession statutes across the nation and particularly in Minnesota. Recent studies have demonstrated that Minnesota Nice⁷⁸ does not extend to minority populations, and that disparities between Blacks and Whites in Minnesota are some of the highest in the nation.⁷⁹ Black

Fordham law professor Nicholas Johnson, who is Black, cites some of these same defensive gun use statistics and incidences in his argument for encouraging more Black people to carry firearms. JOHNSON, *supra* note 14, at 314.

75. According to the website, “NRA Country is a lifestyle and a bond between the country music community and hard-working Americans everywhere. It’s powered by pride, freedom, love of country, respect for the military, and the responsibilities of protecting the great American life.” *Featured Artist Drew Baldrige*, NRA COUNTRY (Jan. 19, 2018), <https://web.archive.org/web/20180305023743/https://www.nracountry.com/featured/drewbaldrige>. At the bottom of the homepage, a link that says, “[t]o further defend your freedom, click HERE,” takes the user to the membership enrollment page of the NRA itself. *Home*, NRA COUNTRY (Jan. 25, 2018), <https://web.archive.org/web/20180125122343/https://www.nracountry.com/>. NRA Country has since changed its website, and no longer links to the membership page.

76. As of the writing of this Note in December 2017. See *Featured Artist Campaign*, NRA COUNTRY (Jan. 20, 2018), <https://www.nracountry.com/>; <https://web.archive.org/web/20180304235321/https://www.nracountry.com/artists>. NRA Country has since removed its Featured Artist campaign. Jonathan Bernstein, *NRA Country Erases Country Music Artists from Its Website*, ROLLING STONE (Mar. 19, 2018), <https://www.rollingstone.com/music/music-country/nra-country-erases-county-music-artists-from-its-website-203469/> (reporting that NRA Country unveiled a new website, sans Featured Artist Campaign, just over a month after the February 14, 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida).

77. ALEXANDER, *supra* note 55, at 54.

78. Minnesotans pride themselves on their reputation for being nice, polite, and averse to conflict. Jerilyn Veldof & Corey Bonnema, *Minnesota Nice? It’s Like Ice*, STAR TRIB. (July 11, 2014), <http://www.startribune.com/minnesota-nice-it-s-like-ice/266823811/> (“We wave our fellow drivers through four-way stops; we help dig our neighbors out of the snow even when the wind chill is minus 40, and we tend to be exceedingly polite.”).

79. Jessica Nickrand, *Minneapolis’s White Lie*, ATLANTIC (Feb. 21, 2015), <https://www.theatlantic.com/business/archive/2015/02/minneapolis-white-lie/3857>

Minnesotans make up 31% of the currently incarcerated and only 5% of the state's population, while White Minnesotans are 47% of the prison population and 83% of the state's population.⁸⁰ This disparity begins with the targeting of predominantly Black neighborhoods for street-level policing and pretextual stops of Black motorists.⁸¹ These police encounters lead to higher rates of convictions of Black Minnesotans despite similar levels of criminality in the White population.⁸² Once a person is convicted for certain crimes in Minnesota they are automatically denied the right to possess a firearm.⁸³ The stereotype of Blacks as criminals is a self-perpetuating cycle that is only helped along by Minnesota's gun control statutory scheme.

III: Minnesota's Gun Regulations as a Means of Racialized Social Control

The tension between the desire to regulate gun ownership and the disparate effects of those regulations on Black people is clearly visible in Minnesota. The state has some of the most glaring general disparities between White people and minorities, including large

02/; Jeff Guo, *If Minneapolis Is So Great, Why Is It So Bad for African Americans?*, WASH. POST (Feb. 17, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/02/17/if-minneapolis-is-so-great-why-is-it-so-bad-for-black-people/?utm_term=.e9a08056a7ee; Michael B. Sauter, *Black and White Inequality in All 50 States*, WALL ST. J. (Aug. 18, 2017), <http://247wallst.com/special-report/2017/08/18/black-and-white-inequality-in-all-50-states-2/11/>; *Disparities Overview*, MNCOMPASS (Feb. 24, 2018), <http://www.mncompass.org/disparities/overview>.

80. Minnesota Profile, PRISON POLICY INITIATIVE (Feb. 24, 2018), <https://www.prisonpolicy.org/profiles/MN.html>.

81. *See, e.g.*, David Montgomery, *Data Dive: Racial Disparities in Minnesota Traffic Stops*, PIONEER PRESS (July 8, 2016, 5:46 PM), <http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-traffic-stops/> (citing statistics that show Black drivers are stopped by police 214% more often than expected for their share of the driving population, and Latinx drivers 95% more often, while White drivers are stopped 13% less often than expected).

82. Ctr. for Behavioral Health Statistics & Quality, Substance Abuse & Mental Health Servs. Admin., U.S. Dep't. of Health & Human Servs. & RTI Int'l., RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES, Table 1.29A – Illicit Drug Use in Lifetime among Persons Aged 12 or Older, by Age Group and Demographic Characteristics: Percentages, 2015 and 2016 (Feb. 24, 2018), <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.htm#tab1-29A> (comparing rates of illicit drug use by race); Saki Knafo, *When It Comes to Illegal Drug Use, White America Does the Crime, Black America Gets the Time*, HUFFPOST (Sept. 17, 2013), https://www.huffingtonpost.com/2013/09/17/racial-disparity-drug-use_n_3941346.html (reporting that Black Americans are more likely to go to prison for drug offenses than White Americans despite the fact that White Americans are more likely to have used most types of illegal drugs).

83. MINN. STAT. § 624.713 (2018).

gaps in educational achievement, employment statistics, and poverty rates,⁸⁴ while also being a state proud of its progressive views. These differences are reflected in Minnesota's gun regulation statutory scheme, some sections of which were likely deliberately included to target Black gun owners, and some sections of which purport to be color-blind. Unequal rates of enforcement of all sections of the scheme has resulted in convictions for Black people exponentially higher than for White people.⁸⁵ These differing conviction rates are particularly stark in the seven-county Twin City metropolitan area.⁸⁶ In the metro, Black people accounted for 60.32% of convictions for prohibited person in possession under Minn. Stat. § 624.713, 49.3% of convictions for possession of a weapon without a permit under Minn. Stat. § 624.714, and 43.48% of convictions for possessing a rifle or shotgun in a public place under Minn. Stat. § 624.7181.⁸⁷ The most recent data show that Black people make up only 9.75% of the metro's population.⁸⁸ White urban residents, on the other hand, are 78.56% of the population, and accounted for only 16.85%, 26.75%, and 19.13%, of convictions under the same statutes.⁸⁹ This conviction data is complicated by the fact that it does not sort race by ethnicity or allow for being more specific about what "multiracial" means to an individual.⁹⁰ Latinx, who might 'present' as White or Black, may not also identify themselves as such but instead consider Hispanic their race, and a multiracial person may more closely identify with White, Black, or Asian but not be able to specify themselves as such.⁹¹ It is thus also impossible to determine how many Whites convicted 'present' as

84. See Cody Nelson, *Minnesota 2nd Worst State for Racial Inequality*, MPR NEWS (Aug. 23, 2017) <https://blogs.mprnews.org/newscut/2017/08/report-minnesota-2nd-worst-state-for-racial-inequality/>; Sauter, *supra* note 79.

85. See Table 1. Conviction rates were provided to author by the Minnesota Judicial Branch. The author compared this data to population data from the U.S. Census Bureau (on file with author).

86. Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington counties. <https://mn.gov/admin/demography/news/media-releases/?id=36-250801>.

87. See Table 2. Data provided by the Minnesota Judicial Branch (on file with author).

88. Table 2.

89. See Table 2. Data provided by the Minnesota Judicial Branch (on file with author).

90. The Minnesota Judicial Branch data center only collects self-reported race and ethnicity on convictions. See email from Ellen Bendewald to Alicia Granse, Jan. 22, 2019 (on file with author).

91. KIM PARKER, ET AL., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 8 (Pew Research Center 2015), <http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/>.

Latinx. Disparate treatment of Whites and people of color could, in fact, be higher.

Table 1 All-State 2015-2017			
Statute of Conviction	Convictions	Conviction %	Population %⁹²
Minn. Stat. § 624.713: Certain Persons Not to Possess Firearms			
	1396 (total)		
American Indian	77	5.52	1.00
Asian or Pacific Islander	37	2.65	5.00
Black	575	41.19	6.33
Hispanic, any race	73	5.52	5.33
Multiracial	43	5.23	2.00
Other	12	3.08	N/A
White	473	33.88	84.67
Not Available	106	7.59	N/A
Minn. Stat. § 624.714: Carrying of Weapons Without Permit			
	765 (total)		
American Indian	20	2.61	1.00
Asian or Pacific Islander	24	3.14	5.00
Black	280	36.60	6.33
Hispanic, any race	39	5.10	N/A
Multiracial	25	3.27	2.00
Other	9	1.18	N/A
White	294	38.43	84.67
Not Available	74	9.67	N/A
Minn. Stat. § 624.7181: Rifles and Shotguns in Public Places			
	144 (total)		
American Indian	6	4.17	1.00
Asian or Pacific Islander	9	6.25	5.00
Black	56	38.89	6.33
Hispanic, any race	8	5.56	5.33
Multiracial	12	8.33	2.00

92. These population figures are an average for Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington counties for 2015-2017. ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE ALONE OR IN COMBINATION, AND HISPANIC ORIGIN FOR THE UNITED STATES, STATES, AND COUNTIES: APRIL 1, 2010 TO JULY 1, 2017, Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington counties, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited May 30, 2019).

Other	4	2.78	N/A
White	33	22.92	84.67
Not Available	11	7.64	N/A

Table 2 Urban 2015-2017			
Statute of Conviction	Convictions	Conviction %	Population %
Minn. Stat. § 624.713: Certain Persons Not to Possess Firearms			
	819 (total)		
American Indian	20	2.44	0.91
Asian or Pacific Islander	30	3.66	7.81
Black	494	60.32	9.75
Hispanic, any race	40	4.88	6.30
Multiracial	22	2.69	2.96
Other	5	0.61	N/A
White	138	16.85	78.56
Not Available	70	8.55	N/A
Minn. Stat. § 624.714: Carrying of Weapons Without Permit			
	501 (total)		
American Indian	8	1.60	0.91
Asian or Pacific Islander	20	3.99	7.81
Black	247	49.30	9.75
Hispanic, any race	26	5.19	6.30
Multiracial	19	3.79	2.96
Other	4	0.80	N/A
White	134	26.75	78.56
Not Available	43	8.58	N/A
Minn. Stat. § 624.7181: Rifles And Shotguns in Public Places			
	115 (total)		
American Indian	4	3.48	0.91
Asian or Pacific Islander	8	6.96	7.81
Black	50	43.48	9.75
Hispanic, any race	8	6.96	6.30
Multiracial	9	7.83	2.96
Other	4	3.48	N/A
White	22	19.13	78.56
Not Available	10	8.70	N/A

There is no data, however, to suggest that people of color are more likely to carry guns than are White people.⁹³ Instead, that simple possession is a crime means that minorities, especially Black men, are more likely to be stopped, arrested, charged, and convicted under the statutory scheme. Selective enforcement of drug laws,⁹⁴ higher rates of criminal convictions of all kinds for minorities,⁹⁵ and the increased likelihood of being stopped by police in the first place⁹⁶ create an environment in which people of color do not enjoy the same protections under the Second Amendment as do Whites, both in Minnesota and likely in the country as a whole.

A. *Racial Bias Within the Statutory Scheme*

In 2003, the Minnesota legislature enacted a wide-ranging statute regulating the possession, sale, and manufacture of firearms in the state.⁹⁷ By and large, the legislation “made it easier for most applicants to obtain weapons permits, and allowed persons with permits to carry them (concealed or openly) in most public and private places unless the property owner posts a sign forbidding weapons.”⁹⁸ It also created a class of “certain persons not to possess

93. KIM PARKER, ET AL., AMERICA’S COMPLEX RELATIONSHIP WITH GUNS: THE DEMOGRAPHICS OF GUN OWNERSHIP, 8 PEW RESEARCH CT’R (2017), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> (“And while 36% of whites report that they are gun owners, about a quarter of blacks (24%) and 15% of Hispanics say they own a gun. White men are especially likely to be gun owners: About half (48%) say they own a gun, compared with about a quarter of white women and nonwhite men (24% each) and 16% of nonwhite women.”).

94. Press Release, ACLU of Minn., Black People Found to Be 7.81 Times More Likely to Be Arrested for Marijuana Possession than White People, Despite Equal Usage Rates (June 4, 2013), <https://www.aclu-mn.org/en/press-releases/minnesota-b-lack-people-found-be-781-times-more-likely-be-arrested-marijuana>; ACLU, *The War on Marijuana in Black and White* 18 (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> [hereinafter *The War on Marijuana*].

95. Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91(3) PRISON J. (SUPP.) 87S, 88S (“If current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 of every 6 Latino males, compared to 1 in 17 White males.”), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Addressing-Racial-Disparities-in-Incarceration.pdf>; see also Thomas P. Bonczar, U.S. DEPT. JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 5 (Aug. 2003).

96. See, e.g., Montgomery, *supra* note 81 (citing statistics that show Black drivers are stopped by police 214% more often than expected for their share of the driving population, and Latinx drivers 95% more often, while Whites are stopped 13% less often than expected).

97. Henry W. McCarr & Jack S. Nordby, *Minnesota Practice—Criminal Law and Procedure* § 58:1 (4th ed. 2016).

98. *Id.*

firearms.”⁹⁹ While Minnesota Statute sections 624.711–717 are a far cry from the overtly racist antebellum practice of explicitly prohibiting both free and enslaved Black Americans from owning or carrying firearms,¹⁰⁰ their disparate impact on communities of color is no less tangible.

Guns and Ammo, a firearm magazine, ranks Minnesota number forty-one on their list of best places to live with a firearm.¹⁰¹ The site references Minnesota’s status as a “shall issue” concealed- and open-carry permit state,¹⁰² its firearms preemption law,¹⁰³ and its strong hunting tradition as positives, while lamenting the limitation of certain types of firearms to antique versions.¹⁰⁴ For a state that has a long tradition of hunting,¹⁰⁵ this number may seem low,¹⁰⁶ but “Minnesota is probably the spot in this list where gun owners can live without unreasonable interference from the state.”¹⁰⁷

Minnesota Statute sections 624.711–715 are facially neutral—nowhere does the scheme specifically legislate criminal consequences for Black people only or forbid them from possessing firearms.¹⁰⁸ The letter of the law, however, is not representative of its spirit. Several sections of the statutory scheme use seemingly

99. Individuals convicted of crimes of violence, controlled substance offenses, the mentally ill, and minors are all prohibited from possessing a firearm. MINN. STAT. § 624.713 (2018).

100. Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to Be Applied to the White Population*”: *Firearms Regulation and Racial Disparity—the Redeemed South’s Legacy to A National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1307–08 (1995) (exploring the connections between racial conflict and the evolution of the right to bear arms in American constitutionalism).

101. Each state is “ranked numerically in five categories: Right-To-Carry (RTC), access to ‘Black Rifles’ (i.e., firearms possessing a tactical appearance), the presence and strength of a Castle Doctrine law, subjects relating to the National Firearms Act (NFA) and a catchall Miscellaneous column.” Wood, *supra* note 20.

102. In Minnesota and other “shall-issue” states, sheriffs must grant permits to those who meet the statutory criteria—there is no discretion. *See id.*

103. Firearms preemption laws prohibit cities or counties from enacting gun regulation contrary to state law. *Id.*

104. *Id.*

105. *See, e.g.,* Tony Kennedy, *By Tradition, Start of Deer Hunting and the Rut Coincide*, STAR TRIB. (Nov. 1, 2017), <http://www.startribune.com/by-tradition-start-of-deer-hunting-and-the-rut-coincide/454363713/> (“[H]arvesting deer during the rut is as cherished in Minnesota as fishing for walleyes is in mid-May.”); Wood, *supra* note 20.

106. Interestingly, other places that rank low on this list are similarly situated with Minnesota in terms of progressive social traditions. Washington, D.C., for example, is the lowest area ranked on the list. Wood, *supra* note 20.

107. Wood, *supra* note 20.

108. *See* MINN. STAT. §§ 624.711 – 624.715 (2018).

neutral language that specifically targets Black people and other minorities. The statute's declaration of policy, the outdated and misguided prohibition of "Saturday night specials,"¹⁰⁹ and the inclusion of controlled substances violators¹¹⁰ and those appearing in the gang database¹¹¹ in the list of persons prohibited from possession¹¹² all serve to control firearm possession by Blacks rather than Whites in Minnesota.

1. Statutory Purpose

The Minnesota gun control statutory scheme's declaration of policy reads:

It is not the intent of the legislature to regulate shotguns, rifles and other longguns of the type commonly used for hunting and not defined as pistols or semiautomatic military-style assault weapons, or to place costs of administration upon those citizens who wish to possess or carry pistols or semiautomatic military-style assault weapons lawfully, or to confiscate or otherwise restrict the use of pistols or semiautomatic military-style assault weapons by law-abiding citizens.¹¹³

This statement of purpose perfectly illustrates the problem with gun control legislation today—the use of fear of a criminal element to regulate Black people and other minorities without explicitly doing so. The careful positioning of the NRA as a group of "law-abiding citizens" provides a veil of legitimacy to gun possession by White people in opposition to their 'criminal' Black counterparts.¹¹⁴ By explicitly decriminalizing possession of weapons for hunting and other 'lawful' pursuits,¹¹⁵ the legislature reinforces the divide between White 'traditional' gun owners and Black urban gun owners. The refusal of the legislature to restrict the use of pistols and semi-automatic military-style assault weapons by law-abiding citizens is in telling contrast to the ban of another type of weapon: the Saturday night special.

109. *See infra* section II(A)(2).

110. MINN. STAT. § 624.713 Subd. 1(10)(iii) (2018).

111. § 624.713 Subd. 1(11).

112. § 624.713 Subd. 3(a).

113. MINN. STAT. § 624.711 (2018).

114. MINN. STAT. § 624.711; *see* Hawkins, *supra* notes 71–72 (discussing the "law-abiding" nature of firearm permit holders and NRA members); *see also* Defilippis & Hughes, *supra* note 73 (reporting how Wayne LaPierre of the NRA railed after the Sandy Hook shooting saying, "[t]he only thing that stops a bad guy with a gun, is a good guy with a gun.>").

115. MINN. STAT. § 624.711 (2018). This author is uncertain what lawful use of a semi-automatic military-style assault rifle might entail.

2. Saturday Night Specials and the Rhetoric of Fear

Minnesota Statute section 624.716 expressly prohibits the sale by a federally licensed firearms dealer and the assembly or manufacture of a “Saturday night special.”¹¹⁶ According to the statute, a pistol is a Saturday night special if it contains “material having a melting point (liquidus) of less than 1,000 degrees Fahrenheit, . . . any material having an ultimate tensile strength of less than 55,000 pounds per square inch, or . . . any powdered metal having a density of less than 7.5 grams per cubic centimeter.”¹¹⁷ In common parlance, however, a Saturday night special is defined as a cheap, easily-concealed handgun.¹¹⁸ This section of the statute ostensibly exists because critics contend that such cheaply-made weapons have no legitimate purpose.¹¹⁹ Such firearms, according to their critics, cannot be used for hunting or self-defense.¹²⁰ They are used instead to “unleash[] a reign of terror throughout the United States.”¹²¹ “Infamous crimes” involving Saturday night specials, such as Robert Kennedy’s assassination and the attempted assassination of President Reagan, are cited to emphasize the criminal nature of such weapons.¹²² Many gun control advocates have asserted that banning these cheaply-made weapons reduces gun violence by making firearms more difficult to obtain.¹²³ They cite a Maryland study that showed a statistically significant decrease in homicides after a 1990 ban on Saturday night specials went into effect.¹²⁴ However, the same statistically significant decrease in homicide had begun to happen all over the nation at the same time even in states that did not ban the pistols,¹²⁵ making it

116. MINN. STAT. § 624.716 (2018).

117. MINN. STAT. § 624.712.4 (2018).

118. *Saturday night special*, MERRIAM-WEBSTER DICTIONARY (Jan. 20, 2018), <https://www.merriam-webster.com/dictionary/Saturday%20night%20special>.

119. Philip Cook, *The Saturday Night Special: An Assessment of Alternative Definitions from a Policy Perspective*, 72 J. CRIM. L. & CRIMINOLOGY 1735, 1735 (1981).

120. T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 766–67 (1995).

121. Eva H. Shine, *The Junk Gun Predicament: Answers Do Exist*, 30 ARIZ. ST. L.J. 1183, 1183 (1998).

122. *Id.*

123. Funk, *supra* note 120.

124. Daniel W. Webster, Jon S. Vernick & Lisa M. Hepburn; *Effects of Maryland’s Law Banning “Saturday Night Special” Handguns on Homicides*, 155 AMER. J. EPIDEMIOLOGY 406, 406–12 (2002).

125. ALEXIA D. COOPER & ERICA L. SMITH, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008, BUREAU OF JUSTICE STATISTICS (Nov. 16, 2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

unlikely the ban had been the sole cause, if even *one* cause, of the decrease.

In addition to the tenuous link between crime and cheaply-made pistols, what is truly problematic about the term is its racist background. The term's origins have not been definitively determined, but sources have linked it to references to "n****r-town Saturday night."¹²⁶ The first popular media use of the term is often credited to a New York Times article about the "cheap, small-caliber 'Saturday night specials' that are a favorite of holdup men."¹²⁷ These pistols are not by their very cheapness criminal, but that cheapness does make them more attractive both to poorer individuals carrying them for self-defense and would-be criminals.¹²⁸ Because Black Americans have higher rates of poverty¹²⁹ and are more likely to live in "high crime areas,"¹³⁰ they may naturally turn to these more affordable guns for self-defense. This would seem to belie the critics' claims that there are no legitimate purposes for these pistols—unless providing those in high crime areas and thus most in danger with self-defense is not a legitimate purpose.

Though enforcement of this section's effective prohibition of possession and the outright ban of manufacture and sale of "Saturday night specials" has largely disappeared, its inclusion in such a prominent fashion is one more indicator of how the Minnesota legislature has covertly empowered the system to

126. Brief for CORE as Amicus Curiae Supporting Appellee at 19–20, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), 1999 WL 33607597 ("It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence - the reference is to 'n****r-town Saturday night.'") (quoting Barry Bruce-Briggs, *The Great American Gun War*, 45 PUBLIC INTEREST, Fall 1976, at 37; JOHNSON, *supra* note 14, at 293.

127. Fred Graham, *Handgun Imports Held Up*, N.Y. TIMES (Aug. 17, 1968).

128. Brief for CORE as Amicus Curiae Supporting Appellee at 21–22, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), 1999 WL 33607597 ("That effect is doubly discriminatory because the poor, and especially the black poor, are the primary victims of crime and in many areas lack the necessary police protection.").

129. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, POVERTY STATUS IN THE PAST 12 MONTHS (Jan. 20, 2018), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_S1701&prodType=table; U.S. CENSUS BUREAU, POVERTY STATUS IN THE PAST 12 MONTHS, MINNESOTA (Jan. 20, 2018), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

130. OFFICE OF POLICY DEVELOPMENT & RESEARCH, U.S. DEPT. HOUSING & URBAN DEV., NEIGHBORHOODS AND VIOLENT CRIME, SUMMER 2016 (2016), <https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html>.

prevent Black people from owning firearms.¹³¹ Moreover, whether to press charges depends largely upon the discretion of county and city attorney's offices,¹³² thus leaving room for future prosecution under the statute. Acting to remove this portion of the statute would not only protect those who wish to carry such pistols from prosecution but would also signal a commitment to equality under the law.

3. Prohibited Persons Categories

Another problematic aspect of the Minnesota gun control scheme is its list of persons prohibited from possessing a firearm. This list includes those who have been convicted of, or adjudicated delinquent of a crime of violence,¹³³ anyone convicted of a gross misdemeanor controlled substance crime, those "committed by a judicial determination for treatment for the habitual use of a controlled substance or marijuana,"¹³⁴ anyone convicted of a crime punishable by a year or more in prison, a fugitive, "an unlawful user of any controlled substance as defined in chapter 152," or anyone dishonorably discharged from the armed forces of the United States.¹³⁵ "Aliens" and those who have renounced their citizenship are also prohibited from possessing a firearm.¹³⁶

Within the section defining prohibited persons, there are several references to "controlled substance" crimes under Chapter 152 of the Minnesota Statutes.¹³⁷ As discussed above, this has the potential to seriously affect Blacks disproportionately to Whites. The first place the statute connects controlled substance crimes to gun possession is § 624.713.1(2), which prohibits those convicted of crimes of violence from possessing a firearm.¹³⁸ As gun control advocates often state that their objective is to prevent violent

131. Brief for CORE as Amicus Curiae Supporting Appellee at 21, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), 1999 WL 33607597 ("The obvious effect of gun-prohibitions is to deny law-abiding citizens access to firearms for the defense of themselves and their families.").

132. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Std 3-1.2(a) (AM. BAR ASS'N 2015). A jurisdiction's prosecutor has the "power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." *Prosecutorial Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

133. MINN. STAT. § 624.713.1(2).

134. § 624.713.1(4).

135. § 624.713.1(10).

136. § 624.713.1.

137. See, e.g., MINN. STAT. § 624.713.

138. § 624.713.1(2).

individuals from obtaining weapons,¹³⁹ this may seem like a common-sense provision to the law. However, the statute includes felony controlled substance crime as a “crime of violence,” in addition to murder, assault domestic assault, robbery, and kidnapping.¹⁴⁰ Although some might argue that use of controlled substances is linked inextricably to street crime,¹⁴¹ it is unclear whether the correlative connection between firearms and controlled substance possession is enough to warrant its inclusion as a crime of violence. The plain meaning of violence is “the use of physical force so as to injure, abuse, damage, or destroy.”¹⁴² Mere possession, sale, and manufacture of a drug, however, can hardly be described as the use of physical force to injure, abuse, damage, or destroy. If that were true, millions of violent crimes would be happening in drug warehouses and pharmacies across the country every day.¹⁴³ Instead, the link between violence and controlled substance use and sale is based on the ‘violent, Black male drug dealer’ stereotype promoted for (at least) the last fifty years.¹⁴⁴

The statute next prohibits those convicted of misdemeanor and gross misdemeanor controlled substance crime from possessing a firearm or ammunition for three years.¹⁴⁵ In other words, a conviction for having two joints in the glove compartment of a car would prevent a person from exercising their right to bear arms for

139. See, e.g., Evan DeFilippis & Devin Hughes, *Three Common-Sense Gun Policies that Would Save Lives*, WASH. POST (Oct. 15, 2015), https://www.washingtonpost.com/opinions/three-common-sense-gun-policies-that-would-save-lives/2015/10/15/3fd8cb80-735f-11e5-9cbb-790369643cf9_story.html?utm_term=.725cbdb1a2b7 (advocating background checks and denial of firearms to violent misdemeanants). But see GIFFORDS LAW CENTER, INVESTING IN INTERVENTION: THE CRITICAL ROLE OF STATE-LEVEL SUPPORT IN BREAKING THE CYCLE OF URBAN GUN VIOLENCE 14 (Dec. 18, 2017), <http://lawcenter.giffords.org/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/> (analyzing three state programs that have had success in reducing violence and emphasizing that background checks and permit to carry are not effective on their own).

140. MINN. STAT. § 624.712.5.

141. Nixon, *supra* note 66; Joseph Tanfani & Evan Halper, *Sessions Restores Tough Drug War Policies that Trigger Mandatory Minimum Sentences*, L.A. TIMES (May 12, 2017) (describing Sessions’ linking of drug trafficking to increased homicide rates in some cities).

142. *Violence*, MERRIAM-WEBSTER DICTIONARY (Jan. 20, 2018), <https://www.merriam-webster.com/dictionary/violence>.

143. The pharmaceutical industry does \$333 billion in annual sales in the United States. INT’L TRADE ADMIN., U.S. DEP’T OF COMMERCE, 2016 TOP MARKETS REPORT PHARMACEUTICALS 4. Would a trip to CVS be considered an act of violence?

144. ALEXANDER, *supra* note 55, at 51–54.

145. MINN. STAT. § 624.713 subd. 1(4).

three years.¹⁴⁶ It is not all that difficult to imagine that any number of White Minnesotans carry that amount with them on a hunting trip.¹⁴⁷ However, those hunters will likely never be prosecuted for such a small amount, if they are even found with it in the first place.¹⁴⁸ Once again, because Whites are far less likely to be prosecuted for marijuana and other controlled substances crimes,¹⁴⁹ they are far less likely to be placed on the list of ineligible persons.

The same subdivision similarly makes ineligible those who have been “committed by a judicial determination for treatment for the habitual use of a controlled substance or marijuana” until their rights have been restored.¹⁵⁰ Under Subdivision 5, those who have been “committed to a treatment facility . . . by a judicial determination that the person is chemically dependent”¹⁵¹ are also ineligible. Those prohibited under this provision, however, are not ineligible *once they have completed treatment* or had their civil rights restored.¹⁵² Further, their “[p]roperty rights may not be abated but access may be restricted by the courts.”¹⁵³ Since both groups have been ordered committed to chemical dependency treatment by a judicial determination, both groups should have the same consequences—especially in light of the fact that one of the elements of “chemically dependent persons” is that their behavior

146. MINN. STAT. § 152.027.3; *What Does One Gram of Cannabis Look Like? A Visual Guide to Cannabis Quantities*, LEAFLY (Nov. 18, 2014), <https://www.leafly.com/news/cannabis-101/visual-guide-to-cannabis-quantities>.

147. See Brandon Friederich, *Why Smoking Pot Could Make You a Better Hunter and Fisherman*, MAXIM (Oct. 28, 2016), <https://www.maxim.com/news/pot-improves-night-vision-2016-10>; Mo Castandi, *Cannabis May Enhance Night Vision*, GUARDIAN (Oct. 27, 2016), <https://www.theguardian.com/science/neurophilosophy/2016/oct/27/cannabis-many-enhance-night-vision>.

148. Approximately 4.5% of all traffic stops analyzed in a 2003 Council on Crime and Justice study “ended with an arrest, but about 8% of black and Latino drivers were arrested, while just 3.5 percent of white drivers were arrested . . . [B]lack drivers were less likely to get a warning (47.5 percent)” than white drivers (53.5 percent). Montgomery, *supra* note 81.

149. ACLU-MINN., *supra* note 94; *The War on Marijuana*, *supra* note 94, at 18.

150. MINN. STAT. § 624.713.1(4).

151. § 624.713.1(5). “Chemically dependent person” means any person (a) determined as being incapable of self-management or management of personal affairs by reason of the habitual and excessive use of alcohol, drugs, or other mind-altering substances; and (b) whose recent conduct as a result of habitual and excessive use of alcohol, drugs, or other mind-altering substances poses a substantial likelihood of physical harm to self or others as demonstrated by (i) a recent attempt or threat to physically harm self or others, (ii) evidence of recent serious physical problems, or (iii) a failure to obtain necessary food, clothing, shelter, or medical care.” MINN. STAT. § 253B.02.2.

152. MINN. STAT. § 624.713.1(5).

153. § 624.713.1(5).

has resulted in a recent threat of harm to self or others. Why then, are those specifically linked to controlled substances under Minn. Stat. § 152 subject to abatement of property rights and not given back their firearms after they have completed treatment?

When viewed in the context of the overwhelming disparity in drug arrests and convictions of Blacks over Whites despite equal rates of possession, use, manufacture, and sale,¹⁵⁴ the emphasis on controlled substance crime functions not as a means to protect the population but as a method of racialized social control. Under the current version of Minn. Stat. § 624.713, Black people are far more likely to lose their right to possess firearms than their White counterparts. The prohibition on “possessing, receiving, shipping, or transporting firearms and ammunition for persons convicted or adjudicated delinquent of a crime of violence” is automatic and for life.¹⁵⁵ Any person convicted of a crime of violence then found in possession of a firearm may be convicted of a felony and sentenced to up to fifteen years in prison or fined up to \$30,000.¹⁵⁶ A person in possession of a firearm or ammunition who has previously been convicted for a misdemeanor controlled substances crime is subject to misdemeanor charges.¹⁵⁷ These charges have the potential to set in motion a series of collateral consequences¹⁵⁸ that invite more convictions rather than fewer. Inclusion of controlled substances offenses on the list of “crimes of violence” is both inaccurate and a means of perpetuating the over-incarceration of Black people in Minnesota and in this country as a whole.

154. Compare MINN. DEPT. CORRECTIONS, ADULT PRISON POPULATION SUMMARY AS OF 01/01/2018 (Feb. 24, 2018), https://mn.gov/doc/assets/Minnesota%20Department%20of%20Corrections%20Adult%20Prison%20Population%20Summary%201-1-2018_tem1089-323881.pdf (indicating that Whites (5,233) make up 52.5%, Blacks (3,469) 34.8%, American Indians (966) 9.7%, Asians (256) 2.6%, and Unknown/Other (39) 0.4% of the population) with MINNESOTA, US CENSUS BUREAU, FACT FINDER <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (showing that Whites are 85.3%, Blacks 5.2%, American Indians 1.1%, Asians 4%, and Unknown/Other 1.9% of the population); 2016 NATIONAL SURVEY ON DRUG USE, *supra* note 82 (comparing rates of illicit drug use by race); Knafo, *supra* note 82.

155. MINN. STAT. § 624.713.1(13).

156. MINN. STAT. § 624.713.2(b).

157. MINN. STAT. § 624.713.2(c).

158. While it is nearly impossible to calculate an exact number of so-called collateral consequences of incarceration, according to the Justice Center, there are 586 collateral consequences enshrined in Minnesota statute. See MINNESOTA, JUSTICE CENTER (Feb. 21, 2018), <https://niccc.csgjusticecenter.org/search/?jurisdiction=2>. Some of these consequences include loss of public housing benefits, access to nutritional assistance, the ability to vote, and the opportunity to hold a variety of jobs. *Id.*

4. The ‘Colorblind’ Permitting Process Is Anything But:

Minnesota became a “shall issue” state as part of the 2003 comprehensive gun control reform, which gun rights advocates laud as a positive.¹⁵⁹ In theory, a “shall issue” policy removes discretion from the decision to grant a permit and removes implicit bias from the equation.¹⁶⁰ According to the statute:

a sheriff *must* issue a permit to an applicant if the person: (1) has training in the safe use of a pistol; (2) is at least 21 years old and a citizen or a permanent resident of the United States; (3) completes an application for a permit; (4) is not prohibited from possessing a firearm.¹⁶¹

However, the statute also provides several exceptions to the list of those who shall be granted a permit: those convicted of violating orders for protection, assault, domestic assault, and stalking; those prohibited from possessing a firearm in Minn. Stat. § 624.713 as discussed above; anyone accused of crimes against a person; and anyone listed in the criminal gang investigative data system under Minn. Stat. § 299C.091.¹⁶²

The last exception is very troublesome for the purposes of this Note, as gang databases have come under fire as arbitrary, racially discriminatory, and over- and under-inclusive.¹⁶³ The statute at issue provides for the entry of a person into the gang investigative data system if the individual is fourteen years of age or older, has been convicted of a gross misdemeanor or felony, and the agency has documented that the individual has met at least three of the criteria or identifying characteristics of gang membership developed by the Minnesota Violent Crime Coordinating Council.¹⁶⁴

The nine-point list developed by the Council includes admitting to gang membership, being arrested with a gang member,

159. Wood, *supra* note 20.

160. Concealed Carry, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (Jan. 20, 2018), <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/>; *L.A. County Issues Carry Licenses to the Well-Connected, Skirts Own Policies*, NRA (Dec. 22, 2017), <https://www.nraila.org/articles/20171222/la-county-issues-carry-licenses-to-the-well-connected-skirts-own-policies>.

161. MINN. STAT. § 624.714.2(b) (emphasis added).

162. MINN. STAT. §§ 624.714.2(b)1–5.

163. Uzodima F. Aba-Onu et al., *Evaluation of Gang Databases in Minnesota & Recommendations for Change*, 19 INFO. & COMM. TECH. L. 223, 223 (2010); Charles Hallman, *Gang List Criticized as Racial Profiling*, TC DAILY PLANET (Aug. 6, 2009), <https://www.tcdailyplanet.net/gang-list-criticized-racial-profiling/>; Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers into Instant Felons*, INTERCEPT (Dec. 5, 2018), <https://theintercept.com/2018/12/05/nypd-gang-database/>.

164. MINN. STAT. § 299C.091.2.

displaying a gang tattoo/brand, wearing clothing intended to identify with a gang, appearing in a photo with a gang member, appearing on a gang roster, being identified as a gang member by a reliable source, being regularly observed with a gang member in furtherance of gang activity, and producing gang-specific writing or graffiti.¹⁶⁵ Many of these criteria could be said not to identify gang members but to link Black American style with criminality.¹⁶⁶ Some have pointed out that Whites who fit the gang criteria are often not added to the list.¹⁶⁷ As of 2009, when the last data was available, Black Minnesotans represented 54% of those listed in the Gang Pointer File and 42.4% of those listed in GangNet, while 13% were Hispanic, and 18.6% were Asian.¹⁶⁸ Only 18.5% were White.¹⁶⁹

Though the current list is a product of reform after extensive community criticism for being highly subjective, it remains largely unchanged from its original form.¹⁷⁰ The Violent Crimes Coordinating Council is currently conducting another review of gang criteria,¹⁷¹ but it is unclear whether that review will produce

165. VIOLENT CRIMES COORDINATING COUNCIL, MINNESOTA 9-POINT GANG CRITERIA (2012), <https://dps.mn.gov/divisions/ojp/Documents/Appendix%20-%20Gang%20Criteria.pdf> [hereinafter MINNESOTA 9-POINT]; COMMUNITY JUSTICE PROJECT: EVALUATION OF GANG DATABASES, *supra* note 163, at 70.

166. Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 210 (2015) (“The broad criteria for inclusion in gang databases, and the discretion afforded to law enforcement in deciding whom to include, make it difficult for young people living in gang-heavy communities to avoid qualifying criteria.”). In *The New Jim Crow*, Michelle Alexander discusses the seeming contradiction in the embracing of “gangsta culture” by the Black community as an act of defiance against a society that expects Black youth to be criminals. She writes, “[w]e condemn their baggy pants (a fashion trend that mimics prison-issue pants) and the music that glorifies a life many feel they cannot avoid. When we are done shaming them, we throw up our hands and then turn our backs as they are carted off to jail.” ALEXANDER, *supra* note 55, at 169–72.

167. Carimah Townes, *How Is This Man Not a Gang Member?*, SLATE (June 5, 2017), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/06/how_the_portland_police_s_racist_gang_database_missed_white_supremacist.html; Will Rakee, *Portland Police Are Purging Their Gang Database Because There Aren't Enough White Gangs*, DAILY CALLER (Sept. 10, 2017), <http://dailycaller.com/2017/09/10/portland-police-are-purging-their-gang-database-because-there-arent-enough-white-gangs/>.

168. Sheila Regan *Labeled for Life: Minnesota's Gang Databases Need Reform*, TC DAILY PLANET (Nov. 30, 2009), <https://www.tcdailyplanet.net/labeled-life-minnesotas-gang-databases-need-reform/>.

169. *Id.*

170. *Compare* MINNESOTA 9-POINT, *supra* note 165 with *Aba-Onu*, *supra* note 163, at 4.

171. MINN. DEP'T OF PUB. SAFETY, *Violent Crime Coordinating Council Report to the Legislature 2* (2017), <https://www.leg.state.mn.us/docs/2017/mandated/170285.pdf>.

substantive change. As of October 1, 2016, there remained 275 people in the Gang Pointer File.¹⁷² The continued use of the gang database as a reason to deny gun permits is questionable not only for its potential for subjective and highly racialized criteria, but also because it is redundant. If the goal of the permitting process is to prevent violent criminals from possessing firearms, the statute already does so by establishing the list of crimes that make a person ineligible. Choice of wardrobe, together with an old tattoo and a badly-timed selfie should not land an individual on a criminal database that has consequences involving a constitutional right.¹⁷³

B. Unreasonable Articulable Suspicion

The effects of implicit and explicit bias in discretionary enforcement contribute to the disparate effects of gun regulations everywhere, particularly in Minnesota, where two cases from the state supreme court grant law enforcement essentially unlimited freedom to stop anyone they suspect is carrying a gun and require that a permit be shown on the spot. The death of Philando Castile at the hands of St. Anthony police officer Jeronimo Yanez in July of 2016 brought national attention, if only briefly, to that reality. That a Black driver, licensed to carry a firearm, pulled over for a broken taillight, was shot by a police officer for attempting to comply with the law was discomfiting,¹⁷⁴ especially for those who may have thought inequality was a thing of the past. The incident sparked questions about what it means to be a Black gun owner in Minnesota and the United States,¹⁷⁵ where even if a person of color manages to obtain a permit, the potential for discrimination and even death hardly disappears. Indeed, enforcement of gun regulations, just like for any other crime, is highly discretionary—police choose who to stop, who to shoot, and when to arrest; prosecutors choose when to charge.

172. *Id.* at 7.

173. One study of Oakland youth described a fifteen-year-old who was not in a gang being added to a gang database after being attacked by gang members on his front porch. Lapp, *supra* note 166, at 210. “Because the attackers were gang members, detectives assumed that the victim was as well, and registered him as an active gang member.” *Id.*

174. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017, 10:14am), <http://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html>.

175. Avi Selk, *Gun Owners Are Outraged by the Philando Castile Case. The NRA Is Silent.*, WASH. POST NATION (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/18/some-gun-owners-are-disturbed-by-the-philando-castile-verdict-the-nra-is-silent/?utm_term=.b15a3dd53064.

Section 624.714 makes it a gross misdemeanor to carry, hold, or possess a pistol in a public place without a permit.¹⁷⁶ Subsequent incidents of possession result in felony charges.¹⁷⁷ Courts have interpreted this to mean that having a permit is an exception, or defense, to the crime, and that lack of a permit is not an element that must be proved by the state beyond a reasonable doubt.¹⁷⁸ In *State v. Paige*, the Minnesota Supreme Court reasoned that a defendant has the immediate opportunity to present a permit to avoid prosecution and that “[t]here is nothing inherently unfair in requiring persons charged under the statute to present their permits.”¹⁷⁹ Since the statute is intended to “prevent the possession of firearms in places where they are most likely to cause harm in the wrong hands, i.e., in public places where their discharge may injure or kill intended or unintended victims,” the only exception can be “persons who have demonstrated a need or purpose for carrying firearms and have shown their responsibility to the police in obtaining a permit.”¹⁸⁰ While the court called the statute a “general prohibition,”¹⁸¹ it actually invites more discriminatory practices because of its ‘colorblind’ approach. Refusing to acknowledge the reality that Black people are already more likely to be stopped by police due to implicit bias and the stereotype of Black men as dangerous criminals, as this decision does, only exacerbates the problem.

The Minnesota Supreme Court went a step further in *State v. Timberlake*, to hold that a police officer who has reasonable articulable suspicion¹⁸² that an individual has a firearm in a public place may stop and investigate.¹⁸³ In that case, officers stopped and

176. MINN. STAT. § 624.714.1(a).

177. § 624.714.1(a).

178. *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977).

179. *Id.*

180. *Id.*

181. *Id.*

182. The reasonable articulable suspicion standard allows police to conduct so-called *Terry* stops, or investigative searches and seizures based on a lower evidentiary standard than probable cause. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Under the *Terry* standard, police must reasonably suspect that a person is a threat to officer safety or that they are committing a crime. *Id.* The New York City Police Department’s highly criticized “stop and frisk” program arose out of an extreme interpretation of this standard. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (holding the stop and frisk policy violated both the Fourth and Fourteenth Amendments).

183. *State v. Timberlake*, 744 N.W.2d 390, 397 (Minn. 2008). The reasonable articulable suspicion standard is “not high.” *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). Police “must be able to articulate more than an inchoate and

searched Timberlake based on a 911 call from an identified citizen who had seen a gun fall out of a Black male's car at a gas station.¹⁸⁴ The Black male was not alleged to have made any threatening gestures or engaged in any criminal activity.¹⁸⁵ He was a Black male with a gun, and both the citizen informant and the police officers believed the mere possession of a gun by a Black person was "more than an inchoate and unparticularized suspicion 'hunch' fear criminal activity."¹⁸⁶ The court agreed.¹⁸⁷ This begs the question whether that same citizen would have called the police to report a White male with a gun under the same circumstances or if police would have responded in the same way. Based on what studies say about implicit bias in civilians and in policing,¹⁸⁸ that seems—at best—unlikely. The data show that Blacks are searched more often than Whites because of concerns for officer safety, but are less likely to be found with contraband of any kind.¹⁸⁹ This indicates that an officer's reasonable articulable suspicion is often, in fact, unreasonable. Discretion to investigate anyone based on what is essentially a hunch by another name becomes an unhappy intrusion on the constitutional rights to be free from unreasonable search, to bear arms, and to equal protection under the law.¹⁹⁰ The precedent set by this case law must be either overruled in the courts or the legislature must act to set a higher standard. Police officers should

unparticularized suspicion or 'hunch' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (internal citations omitted). The standard is met when an officer "observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *In re G.M.*, 560 N.W.2d 687, 691 (Minn. 1997).

184. *Timberlake*, 744 N.W.2d at 392.

185. *Id.*

186. *Id.*

187. *Id.*

188. For more information on implicit bias in general, see Keith Payne, Laura Niemi, & John M. Doris, *How to Think About "Implicit Bias"*, SCI. AM. (Mar. 27, 2018), <https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/>. For a discussion on how implicit bias affects policing, see THE NAT'L INITIATIVE FOR BUILDING COMMUNITY TRUST & JUST., IMPLICIT BIAS, <https://trustandjustice.org/resources/intervention/implicit-bias> (last visited May 12, 2019).

189. *Montgomery*, *supra* note 81.

190. The U.S. and the Minnesota Constitutions provide the right to be free from unreasonable search and seizure. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. That right has been eroded at both the federal and state level since the beginning of the War on Drugs. ALEXANDER, *supra* note 55, at 61; *see also* Steven W. Watkins, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. Rev. 99 (1996); Jon E. Lemole, *From Katz to Greenwood: Abandonment Gets Recycled from the Trash Pile—Can Our Garbage Be Saved from the Court's Rummage Hands?*, 41 Case W. Res. L. Rev. 581, 581 (1991).

instead have to establish reasonable articulable suspicion that an individual is carrying a pistol *without a permit* to stop and search someone. This suspicion must be based not solely on their interactions with the individual in question, but upon concrete facts either from a reliable source or from a police registry of those unable to carry a firearm.

This mandate must also come with extensive reform to the state's system of policing. Implicit bias training, the demilitarization of urban police forces, and a better emphasis on community policing¹⁹¹ would be an excellent start to mitigating the effects of Minnesota's faulty and racialized perceptions of gun owners.¹⁹² These reforms and a thoughtful overhaul of the statute are necessary to ensure equal enforcement of gun regulations against Black and White Americans.

Conclusion

Over the past 30 years, few issues have sparked such outrage and yet such little concrete action as the gun control debate. Understandably so—the United States has a gun violence problem.¹⁹³ Americans are ten times more likely to be killed by guns than people in other developed countries, and there are more

191. Though the many variations of police reform is a topic best addressed in another article, these are examples of some of the most widely-advocated proposals, and would likely be highly effective in reducing disparate impacts in gun possession-related offenses. See e.g., Michele Jawando & Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, CTR. AMER. PROGRESS (Dec. 18, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/CriminalJustice-brief.pdf> (offering “four ideas to reform the criminal justice system, including improved police training; data collection and accountability; repairing the fractured relationship between police and community; and, in instances where lives are taken, the promise of a diligent, independent, and thorough investigation and prosecution, when appropriate.”); S.E. Smith, *7 Ideas for Serious Police Reform*, CARE2.COM (Nov. 26, 2014), <https://www.care2.com/causes/7-ideas-for-serious-police-reform.html>.

192. This is especially true in an era in which the erosion of the Exclusionary Rule has left police departments and prosecutor's offices little impetus to respect rights of citizens to be free from unreasonable searches and seizures. Some have even suggested that the exclusion of evidence as a result of violations of the Fourth Amendment will become the exception, rather than the rule. See Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 178 (2009) (“The Court's decision in *Herring*, authored only two years after *Hudson*, has cast doubt again on the future vitality of the exclusionary rule.”).

193. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 AM. J. MED. 266, 266–273 (2016).

firearms per capita than anywhere else in the world.¹⁹⁴ Mass shootings at schools, movie theaters, and night clubs have left an indelible mark on the nation's collective conscience and caused many to call for a ban on all guns.¹⁹⁵ If, however, political will to make change does exist, legislators must be more careful in constructing regulations so they do not contribute to further inequality between White and Black Americans. States like Minnesota may take several steps to reform existing statutory schemes to prevent disparate treatment of minorities. Removing the bar on the sale and manufacture of Saturday night specials would allow those without the means to purchase a more expensive model the ability to do so legally. Eliminating controlled substances offenses from the list of violent crimes would similarly bring down a barrier that is more likely to have prevented Blacks from obtaining a permit for a firearm than Whites. Abolishing the provision preventing those appearing on the gang database from obtaining a permit is necessary to undo the prejudice that comes from linking Black style to criminality. Lastly, establishing a higher standard of investigation for gun possession and instituting state- and country-wide police reforms are essential to eliminating bias in the highly discretionary world of police-citizen interaction.

Without these reforms, Black Americans and other minorities will continue to be over-policed, over-searched, over-prosecuted, and over-incarcerated for exercising their Second Amendment rights as (newly) granted by the Supreme Court. It may not be easy to convince legislators to pass laws that people could perceive as putting more guns in the hands of criminals. Fortunately, as the country as a whole has begun to recognize the effects that drug crime enforcement and mass incarceration generally have had on the Black population, and even conservatives push for sentencing

194. Robert Preidt, *How U.S. Gun Deaths Compare to Other Countries*, HEALTHDAY (Feb. 3, 2016), <https://www.cbsnews.com/news/how-u-s-gun-deaths-compare-to-other-countries/>.

195. It remains to be seen if the momentum generated by the student activists in Never Again, the group formed in the wake of the February 14, 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida is sufficient to make this a reality. Ayanna Alexander, *Gun Control Groups Seek to Harness Parkland Momentum for Midterms*, POLITICO (Mar. 24, 2018), <https://www.politico.com/story/2018/03/24/gun-control-groups-parkland-midterms-444456> ("National organizations say they have seen their membership and mailing lists skyrocket by double-digit percentages since the shooting."). Even former Supreme Court Justice Stevens has recently advocated the repeal of the Second Amendment altogether. John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

reforms and decriminalization,¹⁹⁶ this may become easier. But what will make these reforms politically difficult is exactly what makes them necessary—to eliminate one more instance of the racialized social control of Black people through ‘colorblind’ legislation.

196. See, e.g., Casey Given, *Conservative Sentencing Reform: Politically Savvy, Morally Right*, AM. CONSERVATIVE (Apr. 29, 2014), <http://www.theamericanconservative.com/2014/04/29/conservative-sentencing-reform-politically-savvy-morally-right/>.