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Second Amendment Sanctuaries: Defiance, Discretion, and Race

Nicholas J. Johnson

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Abstract

Second Amendment Sanctuaries deploy nonenforcement policies and strategies in defiance of firearms laws of superior jurisdictions. The scholarship so far has focused on whether Second Amendment Sanctuary policies are legally enforceable. This Article advances the scholarship beyond questions of de jure validity by examining the potential for practical, de facto efficacy of Second Amendment Sanctuary policies. This Article concludes that even where Second Amendment Sanctuaries have weak claims to formal validity, defiant public officials still have broad opportunities to implement Second Amendment Sanctuary policies through the exercise of enforcement discretion. The conclusion that enforcement discretion can effectuate sanctuary policies is tempered by the caution that using enforcement discretion in this way also invites the sort of racially biased implementation that has been common in the administration of firearms laws.

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I. INTRODUCTION

The Second Amendment Sanctuary (SAS) movement is a form of pushback by gun owners and their public representatives against federal and state firearms restrictions.[1] Grounded explicitly on the model of the immigration sanctuaries, Second Amendment Sanctuaries create an array of official commitments to resist firearms laws of superior jurisdictions.[2] Second Amendment Sanctuaries appear at both the state and local level.[3] State SAS policies are designed to defy federal gun laws.[4] Local SAS policies often purport to defy either federal gun laws, state gun laws, or both.[5]

The commentary so far has focused on the formal validity of Second Amendment Sanctuaries.[6] State and local SAS policies designed to defy federal gun laws exhibit strong de jure validity.[7] They rest solidly on the constitutional principle that state and local governments cannot be forced to implement federal law.[8] Enforcement by federal officials is still possible in these circumstances.[9] But the federal government cannot compel state and local

1. *See* Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. L. REV. 437, 440 (2020) ("Second Amendment Sanctuaries, or 'gun sanctuaries,' claim immunity from superior government enactments. . . .").

2. *See id.* at 440–41 (describing a range of local policy responses to state and federal gun control laws).

3. *See* Shelia Simon, *On Target? Assessing Gun Sanctuary Ordinances that Conflict with State Law*, 122 W. VA. L. REV. 817, 832 (2020) (describing the current debate over whether federal, state, or local governments ought to regulate firearms).

4. *See* Press Release, Governor Abbott Signs Second Amendment Legislation into Law, Off. of the Texas Governor Greg Abbott (June 17, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-second-amendment-legislation-into-law-2021#:~:text=House%20Bill%201927%20(Schaefer%2FSchwertner,new%20federal%20gun%20control%20regulations. ("House Bill 2622 . . . makes Texas a Second Amendment Sanctuary State by protecting Texans from new federal gun control regulations.").

5. *See* Fields, *supra* note 1, at 441 (emphasizing how local SAS policies "seek to resist outside lawmaking passively by simply refusing to enforce [such] laws").

6. *See generally* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187 (2015) (describing the validity of gun control in the wake of *Heller*).

7. *See* Steven P. Halbrook, *Virginia's Second Amendment Sanctuaries: Do They Have Legal Effect?*, 33 REGENT U. L. REV. 277, 291 (2020) (arguing that absent judicial resolution, local constitutional officers have an obligation not to enforce firearm laws of questionable constitutionality).

8. Fields, *supra* note 1, at 481 ("The United States Constitution grants to the federal government only those powers specifically enumerated to it, and even when the federal government acts within those powers, it may not compel a state or local government to enforce a federal law.").

9. *See* Simon, *supra* note 3, at 832 ("At the national level [there is] . . . but one set of rules, and one federal government to make, interpret, and enforce the laws.").

officials to enforce federal rules.[10] This Article will refer to policies that rest on these federal constitutional principles as *Constitutional Sanctuary* policies.[11]

Local SAS policies that purport to defy state law present a different situation.[12] The broad subordination of local governments to state power means that local policies purporting to defy state law have weak claims to de jure validity.[13] This article will refer to those local commitments to defy state law as *Discretion Sanctuary* policies.[14]

Most commentators have said that Discretion Sanctuary policies will not hold up in court. Some observers have moved quickly from that view to the conclusion that Discretion Sanctuaries are merely symbolic and inconsequential.[15] This Article challenges that conclusion.

This Article demonstrates that even though Discretion Sanctuary policies may lack formal validity, they might still achieve broad practical effect.[16] The

10. Fields, *supra* note 1, at 481 (emphasizing how the federal government cannot force state and local officials to enforce federal laws).

11. *See infra* Part III.

12. *See* Ric Su, *The Rise of Second Amendment Sanctuaries*, AM. CONST. SOC'Y: ISSUE BRIEFS, Mar. 2021, at 1, 18 (explaining how local government defiance of state law presents a unique challenge because the constitution does not "prohibit state commandeering of local governments").

13. *Id.* ("[L]ocal governments have thus far failed in challenging state anti-sanctuary laws, even while they have repeatedly succeeded in enjoining federal anti-sanctuary efforts.").

14. *See infra* Part III.

15. *See* Su, *supra* note 12, at 1 (asserting that Second Amendment Sanctuaries lack the power to nullify state laws and face various other legal and practical obstacles); Fields, *supra* note 1, at 437 (challenging the view of de jure invalidity with a three-part theoretical construct grounded on Home Rule provisions, sub-federal anti-commandeering, and substantive constitutional resistance on matters unsettled by the judiciary); Simon, *supra* note 3, at 817 (presenting a normative case rooted in agency for the validity of local sanctuary policies); Halbrook, *supra* note 7, at 291 (arguing that absent judicial resolution, local constitutional officers have an obligation not to enforce firearms laws of questionable constitutionality). Another rendition of the sort of argument presented by Halbrook appears in the Tazewell County Board of Supervisors' claim that authority "to order the militia to the localities" per the Virginia Constitution was a justification to defy state gun control measures. Jim Talbert, *Tazewell County Becomes Second Amendment Sanctuary, Adds Militia Ordinance During Widely Attended Meeting*, BRISTOL HERALD COURIER (Dec. 11, 2019), https://heraldcourier.com/ news/tazewell-county-becomes-second-amendment-sanctuary-adds-militia-ordinance-during-widely-attended-meeting/article_6a3d4e37-64f2-5365-9b71-7e4a694602e3.html. Similarly, the Sheriff of Culpepper County pledged to evade state gun bans by deputizing "thousands of our law-abiding citizens." *Virginia Sheriff: He'll Deputize Residents if Gun Laws Pass*, ABC NEWS (December 9, 2019, 10:53 AM), https://abcnews.go.com/US/wireStory/virginia-sheriff-hell-deputize-residents-gun-laws-pass-67604604. Rick Su presents a broad account of "Intrastate Federalism" that is potentially relevant to Second Amendment Sanctuary legitimacy. *See* Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191 (2016).

16. *See infra* Part IV.

tool for achieving that practical efficacy is the same sort of discretionary nonenforcement that state and local officials have deployed in opposition to marijuana restrictions, immigration laws, and quality-of-life regulations that fuel mass incarceration.[17]

But that is not the end of things. Although, discretionary nonenforcement has great potential to effectuate SAS policies, the decision-making promises to be complicated. This Article engages that complexity. It shows how discretionary nonenforcement is contingent on an array of variables. Some of those variables defy systematic analysis.[18] For example, different officials will have different interpretations of, and commitments to, various SAS policies.[19] Those idiosyncratic differences will affect discretionary nonenforcement decisions in unpredictable ways.[20]

However, other inputs are more structural and allow more systematic observations about the operation of discretionary nonenforcement as a tool for effectuating SAS policies.[21] This Article focuses on three structural inputs. Two of them tend to invite discretionary non-enforcement and one tends to discourage it. The first set of inputs surrounds the sorts of gun legislation that SAS policies tend to resist.[22] This Article will show how those laws present recurring invitations to implement SAS policies through discretionary nonenforcement.[23] The second set of inputs derives from resistance to laws regulating immigration, drug use, and petty crime.[24] Tactics and practices already deployed in those areas present transferable models for effectuating SAS policies through discretionary nonenforcement.[25] A final set of inputs surrounds the fact that many gun violations occur in combination with other criminal violations.[26] Those combination cases present a spectrum of recurring complications that tend to discourage discretionary nonenforcement and cut against de facto implementation of SAS policies.[27]

17. *See infra* Section V.E.
18. *See infra* Section V.E.
19. *See* Fields, *supra* note 1, at 439–40.
20. *See infra* Part V.
21. *See infra* Part V.
22. *See infra* Section V.A.
23. *See infra* Section V.A.
24. *See infra* Section V.E.
25. *See* Rick Su, *Two Sides of Sanctuary*, DUKE UNIV. SCH. OF L.: SECOND THOUGHTS (May 12, 2020), https://sites.law.duke.edu/secondthoughts/2020/05/12/the-two-sides-of-sanctuary/.
26. *See infra* note 136 and accompanying text.
27. *See infra* Section V.E.3.

This Article proceeds in five parts. Part II positions the Second Amendment Sanctuary movement as a form of "official defiance" that supplements the "private defiance" phenomenon that I have elaborated in prior work.[28] Part III describes the differences between Constitutional Sanctuaries and Discretion Sanctuaries. It shows why Constitutional Sanctuaries enjoy solid de jure validity and why Discretion Sanctuaries do not.[29]

Part IV argues that, regardless of their de jure validity, SAS policies can operate effectively in practice through discretionary nonenforcement. Part IV makes that case by showing how state and local nonenforcement decisions already have undercut a core provision of federal gun regulation.[30] That federal example introduces an important additional insight; it demonstrates how discretionary nonenforcement—which presents initially as a tool for implementing SAS policies in Discretion Sanctuaries—can also serve as an option for effectuating SAS policies in Constitutional Sanctuaries.[31] Part IV further posits that in some cases, officials who have the option of creating legally enforceable Constitutional Sanctuary policies will nonetheless opt for discretionary nonenforcement because it is less confrontational. Part IV projects that, because of its comparatively covert nature, discretionary nonenforcement might ultimately supplant formal SAS policies as the principal form of official resistance to gun laws.

Part V discusses three sets of inputs that will influence the use of discretionary nonenforcement to effectuate SAS policies. The first set of inputs surrounds the peculiar nature of the gun laws that Second Amendment Sanctuaries tend to resist.[32] Part V shows how these sorts of laws present a spectrum of more or less compelling invitations for discretionary nonenforcement.[33] The second set of inputs derives from experience with defiance of laws governing immigration, drug use, and petty crime.[34] Part V discusses how tactics and practices already deployed in those areas present transferable

28. *See* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 848–60 (2008) (arguing that the remainder problem and the defiance impulse are structural constraints on U.S. firearms policy).

29. *See* cases cited *infra* note 63 and accompanying text.

30. *See* Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 189–93 (2015) (detailing the effects of undercharging by local prosecutors).

31. *See id.*

32. *See infra* Section V.A.

33. *See infra* Section V.C.

34. *See infra* Section V.E.2.

models for effectuating SAS policies through discretionary nonenforcement.[35] The third set of inputs stems from the fact that many gun violations occur in combination with other criminal violations.[36] Part V shows how the complexities of these combination cases tend to discourage nonenforcement and undercut SAS policies. The discussion of combination cases in Part V ends by acknowledging the concern that hinging SAS policies on enforcement discretion also invites bias.[37]

Part VI examines the bias concern in detail and discusses the danger that discretionary nonenforcement will generate the sort of discrimination that has plagued the exercise of discretion surrounding firearms laws generally.

II. SECOND AMENDMENT SANCTUARIES AND DEFIANCE: THE PRIVATE TREND GOES PUBLIC

Second Amendment Sanctuaries track the private defiance phenomenon that occurred in response to the first generation of assault weapons legislation advanced in the 1990s.[38] The tie between private defiance and the SAS movement was illustrated vividly in 2019 when more than 20,000 protesters, many of them armed, rallied at the Virginia statehouse in opposition to a threatened ban on the AR-15 rifle and other semi-automatic firearms.[39] Those protests reflected sentiments that fueled a groundswell of official opposition to the proposed gun ban.[40] By January 2020, ninety-one of Virginia's ninety-five counties and many municipalities had declared themselves Second Amendment Sanctuaries.[41]

35. *See* Fields, *supra* note 1, at 480–89.

36. *See infra* Section V.E.

37. *See infra* Section V.E.3.

38. *See* James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control's Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 106 (1999) (illustrating the ineffectiveness of firearm registration requirements enacted in the 1990s).

39. Lois Beckett, *Virginia: Thousands of Armed Protestors Rally Against Gun Control Bills*, THE GUARDIAN (Jan. 20, 2020, 5:57 PM), https://www.theguardian.com/us-news/2020/jan/20/virginia-gun-rally-activists-richmond; *see also* Devin Dwyer, *In Virginia, '2nd Amendment Sanctuaries' and New Gun Laws Spur Talk of GOP Wave*, ABC NEWS (Mar. 3, 2020, 2:22 AM), https://abcnews.go.com/Politics/virginia-2nd-amendment-sanctuaries-gun-laws-spur-talk/story?id=69337337.

40. *See Virginia Democrats Join Republicans to Reject Assault Weapons Ban Bill*, THE GUARDIAN (Feb. 17, 2020, 10:52 AM), https://www.theguardian.com/us-news/2020/feb/17/virginia-assault-weapons-ban-bill-ralph-northam.

41. Justine Coleman, *Virginia Gun Control Fight Sparks Rush to Join 2nd Amendment Sanctuaries*

The SAS movement began in 2018, in Illinois, as a reaction by rural counties to gun legislation that urban state legislators were introducing following the shooting in Parkland, Florida.[42] Prompted by a resolution in Iroquois County that opposed proposed state legislation, the Effingham County Board went a step further, declaring that, "Effingham County shall become a 'sanctuary county' for all firearms unconstitutionally prohibited by the government of the State of Illinois, in that, Effingham County will prohibit its employees from enforcing the unconstitutional actions of the state government."[43] Soon, well over half of Illinois's 102 counties had passed SAS resolutions.[44]

Effingham County's invocation of the Constitution tracked the early sanctuary declarations of churches that stood on higher authority in defiance of federal immigration law.[45] Effingham County organizers acknowledged that they copied the immigration sanctuary strategy.[46]

The SAS movement has now expanded nationwide.[47] Across the country, by legislation, resolution, and public commitment, state and local governments, governors, sheriffs, prosecutors, and other officials have embraced SAS policies.[48] There are only twelve states that do not have at least one SAS jurisdiction, and, in some places, sanctuary jurisdictions cover most of the state.[49]

This official defiance of firearms laws in Second Amendment Sanctuaries

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Movement, THE HILL (Jan. 26, 2020, 7:37 PM), https://thehill.com/homenews/state-watch/479864-virginia-gun-control-fight-sparks-rush-to-join-2nd-amendment-sanctuaries. More than 130 cities and counties have passed some kind of ordinance or resolution opposing new gun laws. *See* Jeff Williamson, *List of Second Amendment Sanctuaries in Virginia and Where It's Being Discussed*, WSLS NEWS (Aug. 11, 2019, 12:03 AM), https://www.wsls.com/news/ local/2019/11/27/list-of-second-amendment-sanctuaries-in-virginia-and-where-its-being-discussed/.

42. Simon, *supra* note 3, at 821.

43. *Id.*

44. *See* Fields, *supra* note 1, at 455.

45. *See* HILARY CUNNINGHAM, GOD AND CAESAR AT THE RIO GRANDE xi (1995); s*ee also* United States v. Aguilar, 883 F.2d 662, 668–71 (9th Cir. 1989) (describing activities of Minister John Fife who openly declared to federal authorities that his church would not cease to extend sanctuary to undocumented people from Central America).

46. Simon, *supra* note 3, at 821; *see also* Daniel Trotta, *Defiant U.S. Sheriffs Push Gun Sanctuaries, Imitating Liberals on Immigration*, REUTERS (Mar. 4, 2019, 3:10 AM), https://www.reuters.com/article/us-usa-guns-sanctuary/defiant-us-sheriffs-push-gun-sanctuaries-imitating-liberals-on-immigration-idUSKCN1QL0ZC.

47. *See infra* note 67 and accompanying text.

48. *See* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 664–66 (1st ed. 2012).

49. *See id.* at 666.

presents a new layer of a longstanding phenomenon of private defiance that I examined in earlier work.[50] My 2009 article, *Imagining Gun Control in America*, examined the effect of private defiance on supply-side gun control theories and policies.[51] That analysis identified a powerful impulse of gun owners to defy gun bans and registration and examined how that defiance imposes practical boundaries on supply-side gun control legislation.[52] International experiments with gun prohibition and registration have confronted massive private defiance.[53] The International Small Arms Survey reports rates of defiance resulting in an average of "2.6 illegal guns for every legal one" in countries that have enacted registration or confiscation laws.[54] In many countries, the ratio is far higher.[55]

Fledgling experiments with supply controls in the United States have produced extraordinary rates of defiance.[56] Compliance with marginal gun and magazine bans in a handful of U.S. states and municipalities has been consistently in the single digits.[57] This defiance not only thwarts policies that depend

50. *See generally* Johnson, *supra* note 28, at 838 (noting that "people have real world incentives to defy gun bans"); Williamson, *supra* note 42 (reporting that more than 130 cities and counties in Virginia have passed some kind of ordinance or resolution opposing new gun laws).

51. *See* Johnson, *supra* note 28, at 839–40, 851.

52. *See id.* at 842, 848–51.

53. *See id.* at 853.

54. *See id.* This rate is pulled down by rare cases like Japan. *Id.* In nearly every other country, surveyed estimates of illegal guns were "a *multiple* of legal ones." *Id.* at 855 (emphasis in original).

55. *See id.* at 851–53.

56. *See id.*

57. *See* Nicholas J. Johnson, *Defiance, Concealed Carry, and Race*, 83 LAW & CONTEMP. PROBS. 159, 161–63 (2020) (discussing compliance in New Jersey, New York, Connecticut, and California). In 2013, Connecticut banned "semiautomatic rifles with at least one 'military' characteristic—like a pistol grip." *Id.* at 162. About 50,000 guns were registered. *Id.* "Estimates, drawn from national sales and manufacturing data, put the number of unregistered guns" at around 350,000. *Id.* "The law also required high capacity magazines to be 'declared.'" *Id.* About 37,000 magazines were declared. *Id.* "Connecticut's non-partisan office of legislative research concluded that there were about two million high capacity magazines in the state. . . ." *Id. See also* Alex Newman, *Connecticut Gun Owners Fail to Register; Officials Push "Amnesty*,*"* NEW AMERICAN (Jan. 27, 2014), https://www.thenewamerican.com/usnews/constitution/item/17491-connecticut-gun-owners-fail-to-register-officials-push-amnesty.

The current trend is consistent with the findings in James Jacobs's study of early state and municipal assault weapons bans. *See* Jacobs & Potter, *supra* note 38, at 106. Jacobs found that

> [t]hese laws failed miserably, primarily due to owner resistance. In Boston and Cleveland, the rate of compliance with the ban on assault rifles is estimated at 1%. In California, nearly 90% of . . . assault weapons owners did not register their weapons. Out of the 100,000–300,000 assault rifles estimated to be in private hands in New Jersey, 947 were registered, an additional 888 were rendered inoperable, and four were turned over to the

on restricting the gun supply, but it also confounds an array of gun control policies in more subtle ways.[58]

Official defiance through Second Amendment Sanctuary policies is an extension of this private defiance.[59] Reflecting the interests of their constituents, local governments and officials have committed to defy offending gun laws enacted by superior jurisdictions.[60] As discussed in Part IV, Second Amendment Sanctuaries generate broad synergies between official and private defiance.

III. SANCTUARY TYPES AND ATTENDANT LEGAL AND PRACTICAL ISSUES

This Article separates Second Amendment Sanctuaries into two types: *Constitutional Sanctuaries* and *Discretion Sanctuaries*. Constitutional Sanctuaries can be state *or* local and aim to defy federal law.[61] Discretion Sanctuaries are local and aim to defy state law.[62]

The Constitutional Sanctuary label reflects a grounding in the U.S. Supreme Court's Tenth Amendment, anti-commandeering jurisprudence and the history of states legitimately declining to enforce objectionable federal laws.[63] State legislation is not essential to create a Constitutional Sanctuary.[64]

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authorities.

Id.

58. *See generally* Johnson, *supra* note 28, at 884–85 (discussing, for example, how defiance impacts smart gun mandates).

59. *See generally infra* note 67 and accompanying text (discussing states that have passed legislation to become Second Amendment Sanctuaries).

60. *See generally infra* note 67 and accompanying text (discussing states that have passed legislation prohibiting state law enforcement officials from enforcing federal firearms law).

61. *See infra* note 67 and accompanying text (outlining different state statutes that defy federal firearms law).

62. *See infra* Part IV. This includes state legislation that effectively adopts provisions of federal law. *Id.*

63. *See, e.g.*, Printz v. United States, 521 U.S. 898, 928, 935 (1997) (finding that the federal government cannot use the states as instruments of federal governance by compelling state or local government officials to enforce federal laws); New York v. United States, 505 U.S. 144, 188 (1992) (holding that the federal government may not force states to establish regulations in furtherance of federal policy). State refusal to enforce federal law has a long pedigree. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. 539, 671, 673 (1842) (affirming that Pennsylvania had no obligation to assist in enforcement of the Fugitive Slave Act); *see also* Horace K. Houston, *Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law*, 77 NEW ENG. Q. 252, 265 (2004) (describing Vermont's decision to adopt a stricter law against aiding in the arrest or detention of fugitive slaves following the Supreme Court's decision in *Prigg*).

64. *See Printz*, 521 U.S. at 904 (illustrating an instance in which a local law enforcement official

Constitutional Sanctuaries can be established by either state or local officials.[65] Indeed, one of the Supreme Court's seminal anti-commandeering cases stems from litigation brought by a county sheriff who resisted enforcing the interim background check provisions of the federal Gun Control Act of 1968.[66]

Statewide Constitutional Sanctuaries already have been established by legislation and executive proclamation.[67] These sanctuary policies generally

refused to enforce federal law).

65. *See infra* note 67 and accompanying text.

66. *See Printz*, 521 U.S. at 904. State legislation forbidding state agents from assisting federal officials in the enforcement of federal immigration laws was upheld in *United States v. California*, 921 F.3d 865, 876, 894 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020). Forty-seven states have fully or partially relegalized marijuana. *See State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 18, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. As of 2021, the exceptions are Idaho, Kansas, and Nebraska. *Id.* These states forbid state and local officials from enforcing federal law against cannabis users who comply with state law. *See generally* TODD GARVEY, CONG. RSCH. SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 6–7 (2012) (discussing the Tenth Amendment and state immunity from compelled enforcement of federal laws).

67. *See generally* John Hill, *North to the Future of the Right to Bear Arms: Analyzing the Alaska Firearms Freedom Act and Applying Firearm Localism to Alaska*, 33 ALASKA L. REV. 125, 126 (2016) (discussing the Alaska Firearm Freedom Act passed by the Alaskan legislature in 2010). The counting here is complicated by the fact that some states have passed Firearms Freedom Act (FFA) legislation. *See id.* FFA legislation declares that any firearms made and retained in-state are beyond Congress's authority to regulate interstate commerce. *Id.* at 127. State FFA laws claim to nullify certain federal laws as applied to guns manufactured solely within the state. *See id.* at 126. The Montana Firearms Freedom Act was struck down in *Montana Shooting Sports Ass'n v. Holder* on federal preemption grounds. 727 F.3d 975, 982–83 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1335 (2014). However, some state FFA legislation also included separate nonenforcement commitments of the type validated in *Printz*. *See* Hill, *supra*, at 134, 136; *Printz*, 521 U.S. at 935. For example, Montana House Bill 258, enacted in 2021, prohibits state enforcement of federal bans on firearms, magazines, or ammunition. MONT. CODE ANN. § 45–8–368 (West 2021) (enacting Montana House Bill 258 into law). Also, some of the states that passed FFA legislation have now enacted SAS provisions. *See generally* Hill, *supra*, at 126 (examining Alaska's movement toward nullification of federal firearms law); Simon, *supra* note 3, at 819, 822–23 (mentioning states that have passed sanctuary ordinances). The counting of state sanctuary provisions here excludes state legislation that appears to rely solely on nullification principles. *See generally infra* Section V.E.2 (discussing prosecutorial nullification practices). However, it does include provisions that rest on state nonenforcement prerogatives, even where they appear before the formal birth of the SAS movement. *See generally infra* Part IV (analyzing various methods through which states sidestep or avoid enforcement of federal law).

Alaska provides a good example of the complication involved in counting state Constitutional Sanctuaries. *See generally* Hill, *supra*, at 126 (discussing Alaska's FFA). The amended Alaska statute was enacted in 2013, before the SAS term was coined. ALASKA STAT. § 44.99.500 (2013). The Alaska statute prohibits both the use of state resources for enforcement of any federal gun confiscation law and also declares that guns manufactured and possessed entirely within the state are not subject to federal restrictions. *Id.* The second provision is a form of nullification of the type struck down in *Montana Shooting Sports Ass'n*. *See id.*; *Mont. Shooting Sports Ass'n*, 727 F.3d at 982–83.

The Arizona Firearm Freedom Act (House Bill 2111) prohibits the state and all of its political subdivisions from assisting in the enforcement of federal firearm laws and regulations when they are inconsistent with state law. ARIZ. REV. STAT. ANN. § 1–272 (2021) (enacting House Bill 2111 into law). The Arizona law uses the label Firearms Freedom Act, but deploys the tool of nonenforcement rather than nullification, declaring the following:

> [T]his state and all political subdivisions of this state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with any act, law, treaty, order, rule or regulation of the United States government that is inconsistent with any law of this state regarding the regulations of firearms.

See id.

> The Idaho Firearm Accessories and Components Act provides the following:
> All Idaho government entities are prohibited from using any personnel, funds, or other resources to enforce, administer, or support the enforcement of any executive order, agency order, treaty, law, rule, or regulation of the United States government enacted or promulgated on or after the effective date of this act upon a firearm, firearm component, firearm accessory, or ammunition if contrary to the provisions of section 11, article I of the constitution of the state of Idaho.

IDAHO CODE § 18–3315B (2021).

Missouri's Second Amendment Preservation Act (House Bill 85) rejects the federal government's ability to regulate the manufacturing and ownership of firearms within Missouri's borders. *See* MO. ANN. STAT. § 1.410 (West 2021) (enacting House Bill 85 into law).

North Dakota House Bill 1383 prohibits state enforcement or assistance in the enforcement of federal firearms laws enacted after January 1, 2021, that are more restrictive than state law. N.D. CENT. CODE § 62.1–01–03.1 (2021) (enacting House Bill 1383 into law); *see also Burgum Designates North Dakota as a 'Second Amendment Sanctuary State,' Signs Bills Protecting Gun Rights*, N.D. OFF. OF THE GOVERNOR (Apr. 26, 2021, 12:50 PM), https://www.governor.nd.gov/news/burgum-designates-north-dakota-second-amendment-sanctuary-state-signs-bills-protecting-gun (detailing North Dakota's newly enacted SAS policies).

Oklahoma's Second Amendment Sanctuary State Act provides that "[a]ny federal, state, county or municipal act, law, executive order, administrative order, court order, rule, policy or regulation ordering the buy-back, confiscation or surrender of firearms, firearm accessories or ammunition from law-abiding citizens of this state" will be unlawful as "an infringement on the rights of citizens to keep and bear arms." OKLA. STAT. tit. 21, § 1289.24e (2021); *see also Governor Makes Oklahoma a Second Amendment Sanctuary State by Signing Senate Bill 631 into Law*, OKLA. SENATE (Apr. 27, 2021, 11:34 AM), https://oksenate.gov/press-releases/governor-makes-oklahoma-second-amendment-sanctuary-state-signing-senate-bill-631-law (reporting on Oklahoma being declared a SAS).

South Carolina House Resolution 3094, also known as the Open Carry with Training Act, provides that "[t]he state of South Carolina, and its political subdivisions, cannot be compelled" to enforce federal laws that regulate an individual's right to carry concealable weapons, whether carried openly or concealed. S.C. CODE ANN. § 23–31–250 (2021) (enacting House Resolution 3094 into law). The Attorney General must first evaluate any such law and issue a written opinion on its enforceability. *Id.*

The Tennessee Second Amendment Sanctuary Act (Senate Bill 1335) prohibits Tennessee or any of its subdivisions from enforcing any "law, treaty, executive order, rule, or regulation of the United States government" that violates the Second Amendment. TENN. CODE ANN. § 38-3-119 (2021) (enacting Senate Bill 1335 into law).

The Texas Second Amendment Sanctuary State Act (House Bill 2622) prohibits state assistance in enforcement of federal gun laws stricter than the laws of Texas. TEX. PENAL CODE ANN. § 1.10 (West 2021) (enacting House Bill 2622 into law).

declare that states will not assist in the enforcement of federal gun controls that conflict with the state's conception of the constitutionally protected right to arms.[68] As with similar commitments defying federal marijuana and immigration restrictions, these state sanctuary policies do not prevent enforcement by federal officials.[69]

The second type of sanctuary is the *Discretion Sanctuary*.[70] It involves local laws or declarations of sanctuary policies in defiance of state law or state

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The West Virginia Second Amendment Preservation and Anti-Federal Commandeering Act (House Bill 2694) prohibits federal commandeering of employees and agencies of the state for the purpose of enforcing federal firearms laws. W. VA. CODE ANN. § 61-7B-4 (enacting House Bill 2694 into law). It also prohibits police departments and officers from executing red flag laws and federal search warrants on firearms, accessories, or ammunition of law-abiding persons. W. VA. CODE ANN. § 61-7B-5 (LexisNexis 2021).

In May 2021, Nebraska declared sanctuary status by gubernatorial proclamation. *See* Brent BonFleur, *Ricketts Declares Nebraska a "Second Amendment Sanctuary State,"* KLKN (Apr. 14, 2021, 11:07 AM), https://www.klkntv.com/ricketts-declares-nebraska-a-second-amendment-sanctuary-state/.

68. *See supra* note 67 and accompanying text.

69. *See generally* Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 MCGEORGE L. REV. 109, 125–26 (detailing warnings issued by federal prosecutors that persons growing industrial quantities of marijuana, even if compliant under local ordinances, were subject to arrest). One of the longstanding controversies afflicting firearms policy is the basic disagreement about the thrust of the constitutional right to arms, and a view that garnered widespread early support was the claim that the Second Amendment guaranteed a state right, not an individual right. *See* Caroline L. Moran, *Under the Gun: Will States' One-Gun-Per-Month Laws Pass Constitutional Muster After* Heller *and* McDonald*?*, 38 SETON HALL LEGIS. J. 163, 166–70 (2014) (discussing the history of the collective right and individual right theories regarding Second Amendment jurisprudence). None of the justices in *Heller* advanced that view, but it has been glibly presented in a variety of lower federal court cases. *See id.* at 167 ("Prior to the decision handed down by the Supreme Court in *Heller*, the dominant view of the Second Amendment, and the one most widely accepted by lower courts, was the 'collective right' model, and it was not until recently that this view came under attack by advocates of the individual right theory.").

The states' right view has generally been offered to rebuff individual rights claims and there has been minimal effort to develop its positive content. *See* Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's* Heller *Dissent*, 39 FORDHAM URB. L.J. 1503 (2012). In the context of this article, the states' right view of the Second Amendment would seem to be a firm foundation for states enacting sanctuary policies. *See id.* A state law protecting state citizens (militia as body of citizens) from a federal ban of the quintessential militia weapon (the civilian version of the standard military rifle) seems squarely within the exercise of a state right to arms to preserve its militia against federal abrogation through gun prohibition or disuse. *See id.*

Advocates of the states' rights view should appreciate that it seems to present a strong foundation for Second Amendment Sanctuary claims, which underscores that the efforts to resist the individual right still must contend with the fact that the Second Amendment establishes a right to arms that must rest somewhere. *See id.* The worry about political violence actually seems higher in the states' right context. *See id.*

70. *See* Fields, *supra* note 1, at 496.

adoption of federal law.[71] Discretion Sanctuaries have weak claims to de jure validity because local governments generally are subordinate to plenary state authority,[72] and there is no intrastate equivalent of federal anti-commandeering doctrine.[73]

Much of the commentary surrounding Discretion Sanctuaries dismisses them as merely symbolic and de jure invalid.[74] In Virginia, the Attorney General quickly opined that burgeoning local sanctuary policies there, "have no legal force."[75] Georgetown Law Professor, Mary McCord seconded this view,

71. *See id.* at 456 (noting that state resistance can take various forms, including symbolic protests).

72. For a good summary of the issues and doctrine surrounding state powers over local governments, see Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 83–87 (2018). John Dillon's seminal municipal law treatise presents local governments as having no powers other than those expressly delegated by their state. *See* JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 52–80 (5th ed. 1911); *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (noting that localities are "political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them"); Mount Pleasant v. Beckwith, 100 U.S. 514, 524–25 (1879) (finding that cities, towns, and counties "are the auxiliaries of the State in the important business of municipal rule"); GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 16–18 (2013) (discussing the limiting effect of state laws on municipal power and noting how municipal income is largely dependent on things municipalities do not control like the willingness of taxpayers to locate and do business within municipal boundaries); Su, *Intrastate Federalism*, *supra* note 16, at 215–16 ("[M]odern federalism cases are filled with instances in which localities assert federalism claims on behalf of the state. Seminal cases like *National League of Cities v. Usery*, *Garcia v. San Antonio Metropolitan Transit Authority*, and *Printz v. United States* were all instigated by localities. . . .").

73. *See* JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (Chicago, James Cockroft & Co. 1872) (describing the "Dillon Rule," which states that local governments possess only those powers specifically delegated to them by state law, or fairly implied from expressly granted powers); In re City of Central Falls, 468 B.R. 36, 75 (Bankr. D.R.I. 2012) ("Municipalities are creatures of state law and subject to the power of the State . . . to create, divide, and even abolish them."). Counties or municipalities and local officials generally are subordinated to plenary state authority, so local sanctuary policies in opposition to state law (or state-endorsed federal rules) will present very weak claims to de jure legitimacy. *See* DILLON, *supra*, at 112 n.1. Since the Nineteenth Century, the American theory has been that local governments are mere creatures of the state legislature and subject to plenary control by the legislature unless the constitution says otherwise. *See id.* at 113. Localities that are granted Home Rule by statute ostensibly have more autonomy; however, the "practical effect of Home Rule never lived up to its promise." *See* Su, *Intrastate Federalism*, *supra* note 16, at 235 (discussing the variety of ways that states circumvented and narrowed Home Rule, with the acquiescence of courts).

74. *See generally* Fields, *supra* note 1, at 437.

75. Gregory S. Schneider, *Virginia AG Herring: 'Second Amendment Sanctuary' Proclamations Have No Force*, WASH. POST (Dec. 20, 2019, 2:51 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-ag-herring-second-amendment-sanctuary-proclamations-have-no-force/2019/12/20/5f7adcb2-234b-11ea-a153-dce4b94e4249_story.html.

writing that Second Amendment Sanctuaries "will never hold up in court."[76] The Everytown gun control organization calls Second Amendment Sanctuaries "legally meaningless."[77] Noting the broad authority that states exercise over localities, the absence of an anti-commandeering shield against state governments, and the primacy of courts in deciding state constitutional questions, Shawn Fields prefaces his critique of Second Amendment Sanctuaries by cautioning that "a betting person might conclude that Second Amendment Sanctuaries are doomed to fail."[78]

These sorts of assessments prompt the question whether, conceding their tenuous de jure validity, Discretion Sanctuaries still might have practical, de facto effect. Part IV examines that question.

IV. DISCRETIONARY NONENFORCEMENT AS A TOOL FOR IMPLEMENTING SECOND AMENDMENT SANCTUARY POLICIES

As the gun issue boiled over in Virginia following the 2019 election, Powhatan County Sheriff, Brad Nunnally, shined a spotlight on the potential for discretionary nonenforcement to effectuate SAS policies.[79] "Discretion," he explained, "is the hallmark of law enforcement."[80]

> If the attorney [general's] office or the governor's office thinks they are going to remove discretion from my job, it is a mistake. This is how the system works. The public has input in their community into how they want to see their laws enforced. And we have the ability to react to that. I don't plan on changing that, whether it is a Second

76. Mary B. McCord, *Second Amendment 'Sanctuaries' Will Never Hold Up in Court*, WASH. POST (Jan. 8, 2020, 11:24 AM), https://www.washingtonpost.com/outlook/2020/01/08/second-amendment-sanctuaries-will-never-hold-up-court/.

77. *Documents Reveal Many Virginia Lawless Counties Admit Their 'Second Amendment Sanctuaries' Are Legally Meaningless; They Are Also Rooted in Discredited Legal Theories*, EVERYTOWN FOR GUN SAFETY: EVERYTOWN L. (Jan. 27, 2020), https://everytownlaw.org/documents-reveal-many-virginia-lawless-counties-admit-their-second-amendment-sanctuaries-are-legally-meaningless-they-are-also-rooted-in-discredited-legal-theories/.

78. Fields, *supra* note 1, at 444.

79. *See* Fields, *supra* note 1, at 496–97 ("Prosecutors and sheriffs wield enormous discretion in carrying out their duties, and some may use that discretion to decline to arrest or prosecute in the name of the Constitution."); *see also* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 407–08 ("The prosecutor carries out his charging function independent from the judiciary. A prosecutor cannot be compelled to bring charges, or to terminate them.").

80. *See* Fields, *supra* note 1, at 497.

> Amendment issue or whether it is anything else. . . . I will use every bit of discretion I have to resist any Second Amendment changes that are apparently unconstitutional on their face and I will certainly resist as much of it as I possibly can. I have no intention of going out and depriving people of a right. That is not going to change, whether it is this or anything else.[81]

Broadly speaking, Sheriff Nunnally is right. Discretion can be a powerful tool for effectuating SAS policies.[82] Indeed, the capacity of discretionary nonenforcement to thwart contested gun laws is well-demonstrated in practice.[83] State and local nonenforcement already has undercut one of the core provisions of federal gun regulation—the Lautenberg Amendment to the 1968 Gun Control Act.[84]

The Lautenberg Amendment added domestic violence misdemeanants to the list of persons (e.g., felons and illegal drug users) prohibited from possessing firearms.[85] It addressed the problem of domestic abusers evading felon-in-possession prohibitions because of prosecutors' treating domestic violence as a misdemeanor even though it would be considered a felony if committed between strangers.[86]

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81. Laura McFarland, *Constitutional Officers Address Logistics of Second Amendment Sanctuary Designation*, POWHATAN TODAY, (Jan. 6, 2020), https://richmond.com/news/local/central-virginia/powhatan/powhatan-today/constitutional-officers-address-logistics-of-second-amendment-sanctuary-designation/article_bfedeb2a-30a7-11ea-bfde-3b66878ad625.html. Culpeper County Sheriff Scott Jenkins said that if the state Assault Weapon ban passed, he would "swear in hundreds or even thousands of our citizens as deputy sheriffs, if need be, to allow them to possess weapons and push back on that overreach by our government." Joel Gunter, *Sanctuary Counties: Inside Virginia's Gun Rights Resistance*, BBC NEWS (Feb. 13, 2020), https://www.bbc.com/news/world-us-canada-51483541. Jenkins also articulated his recipe for general nonenforcement, explaining, "We have laws against spitting on a public surface or sidewalk . . . . I cannot recall an officer enforcing that in the time I've been working. . . . I guess if there are no other more important issues to focus on, maybe officers will focus on them." *Id.*

82. *See* Fields, *supra* note 1, at 497.

83. *See supra* note 81 and accompanying text.

84. *See* Kellie Desrochers, *Municipalities Are Not Kingdoms: Regulating Gun Ownership in Cases Involving Domestic Violence in Light of the* Pauler *Decision*, 28 B.U. PUB. INT. L.J. 277, 281 (2022) ("In 1968, Congress enacted the 'Lautenberg Amendment' to the 1968 Gun Control Act. The amendment prohibited gun possession for those convicted of a misdemeanor crime of domestic violence, an outstanding loophole that legislators sought to close whereby dangerous offenders would escape the penalty of surrendering their weapons by pleading to a lesser charge not covered by the specific wording of the Violence Against Women Act.").

85. 18 U.S.C. § 922(g). The list of prohibited persons includes felons, illegal drug users, and others deemed untrustworthy. *See id.*

86. *See* Desrochers, *supra* note 84, at 281.

According to one commentator, "the view that the Federal Lautenberg Amendment '*fails spectacularly*' is starting to become widespread."[87] Prosecutions for violation of the provision are a fraction of what proponents expected.[88] Tom Lininger argues that the Lautenberg Amendment has been "egregiously ineffective" because the "charging practices of local prosecutors have minimized the opportunities to apply the federal firearms disability for convicted abusers."[89] Lininger explains that "local prosecutors undercharge domestic violence—by sidestepping charges that would clearly signal the defendant's disability, or by consenting to charges that would likely result in expunction—[and thus] thwart the intent of Congress to disarm convicted batterers."[90] Prosecutors have candidly acknowledged crafting charges to evade the federal prohibition.[91]

Carolyn Ramsey has probed the reasons why police, prosecutors, and judges have exercised discretion to thwart the Lautenberg Amendment.[92] Ramsey posits that "[l]aw enforcers may . . . be motivated by resentment, or at least skepticism, toward such laws. . . . [And,] officers dislike the Lautenberg Amendment for a variety of reasons," including strong beliefs about the Second Amendment and sympathy for defendants who claim to need guns for work or hunting.[93]

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87. Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1329 (2017) (emphasis added); *see also* Lininger, *supra* note 30, at 177–82; Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 575 (2020).

88. Lininger, *supra* note 30, at 174 ("[T]he federal government has rarely enforced [the Lautenberg Amendment], prosecuting approximately thirty to seventy each year among hundreds of thousands of potentially eligible defendants.").

89. *Id.* at 173.

90. *Id.*

91. Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1461 (2005) (discussing the openly preferential treatment given by Florida state prosecutors to corrections officers accused of domestic violence because of the firearms ban). State and local gatekeepers have thwarted operation of the prohibition for a variety of reasons, including the perception that the prohibition constitutes federal overreach into state affairs and trenches on individual rights. *See also* Ramsey, *supra* note 87, at 1331 ("Prosecutors often charge defendants under generic assault or battery laws, instead of specialized statutes—that is, if they pursue the case at all.").

92. *See* Ramsey, *supra* note 87, at 1330–31 (discussing why law enforcers and judges might impede federal and state bans).

93. *See id.* at 1330–31. Survey data show both victims and abusers on a police force disagreeing with the provision due to fear that spouses would use the law to take advantage of their partners. *See* SUZANNE WALTON & MARK ZELIG, *"Whatever He Does, Don't Fight Back or You'll Lose Your Gun": Strategies Police Officer Victims Use to Cope with Spousal Abuse*, *in* DOMESTIC VIOLENCE BY POLICE OFFICERS 365, 366–67 (Donald C. Sheehan ed., 2000) (illustrating a firsthand account of an officer reluctant to defend herself against domestic abuse for fear she would lose her firearm.); *see also* Laura

The problem is particularly acute where defendants are police.[94] Not only do police defendants enjoy an insider's privilege, where prosecutors and judges exercise discretion in their favor, police are also far more likely to commit domestic violence.[95] "At least forty percent of police officer families experience domestic violence, in contrast to ten percent of families in the general population."[96]

The thwarting of the Lautenberg Amendment through discretionary nonenforcement supports an important subsidiary point.[97] Recall that the Supreme Court has affirmed the validity of state and local nonenforcement of federal law.[98] So yes, Constitutional Sanctuaries probably will hold up in court.[99] But, officials who have the option of creating Constitutional Sanctuaries might wisely choose a less confrontational form of resistance to federal gun laws.[100] Picking a fight with the federal government entails risks.[101] State

Lee Gildengorin, *Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims*, 67 HASTINGS L.J. 807, 828–29 (2016) (discussing the role of judges in evading federal firearm laws).

94. *See* Ramsey, *supra* note 87, at 1332–35 (criticizing the Lautenberg Amendment's prohibition against on-duty possession of firearms by police officers convicted of domestic violence misdemeanors because of the strong correlation between unemployment and domestic abuse, and because prosecutors and courts balk at ending the careers of law enforcement officers).

95. *See id.* at 1335 (describing the "professional courtesies" extended to police officers convicted of domestic violence); Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, ATLANTIC (Sept. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ ("Several studies have found that the romantic partners of police officers suffer domestic abuse at rates significantly higher than the general population."); Arlene Levinson, *When Law, Love Collide in Violence: Evidence Suggests that Spousal Abuse Among Police Officers is Not Uncommon and that Departments Often are Reluctant to Punish Offenders*, L.A. TIMES (July 6, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-jul-06-mn-10150-story.html ("Although numbers are hard to come by, two academic studies suggest that police officers are more likely to engage in domestic violence than members of the general public.").

96. Friedersdorf, *supra* note 95.

97. *See* Ramsey, *supra* note 87, at 1331 (observing that the firearms ban has elevated prosecutorial cost, leading prosecutors to negotiate deals that evade the ban).

98. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (finding that the federal government cannot use the states as instruments of federal governance by compelling state or local government officials to enforce federal laws).

99. *See id.*

100. *See, e.g.*, Massaro & Milczarek-Desai, *supra* note 72, at 88–89 (discussing state imperatives that impose harsh penalties for cities that declare sanctuary status against a federal immigration order).

101. *Id.* at 89–92 (describing Texas and Arizona statutes that penalize local jurisdictions that prohibit enforcement of federal immigration laws by denying state grants for offending jurisdictions and making local officials subject to misdemeanor convictions if they fail to cooperate with federal authorities).

and local governments might instead choose to minimize those risks by opting for informal, undeclared practices of nonenforcement to achieve SAS goals.[102] States have used this strategy in a variety of other contexts.[103]

Heather Gerken describes this sort of "low level intransigence," as "covert dissent."[104] Gerken's critique prompts the observation that strident public declarations of SAS policies might sometimes be a strategic mistake; open conflict with superior jurisdictions through bold declarations of sanctuary status might be risker than simply adopting a de facto policy of nonenforcement.[105]

Conflicts surrounding immigration sanctuaries illuminate the types of pressures that might raise a preference for the use of discretionary nonenforcement in lieu of formal, Constitutional Sanctuary policies.[106] In Arizona, for

102. *Id.* at 90 (describing Tucson's decision to term itself and "immigrant-friendly city" rather than a "sanctuary city" to avoid "[inflaming] passions").

103. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009) (describing various contexts in which states engage in "uncooperative federalism," refusing to act as cooperative servants in enforcing federal mandates).

104. *See id.* at 1271–72. An impulse to avoid direct conflict with superior jurisdictions is consistent with the theme of private defiance that I elaborated on in *Imagining Gun Control*. *See* Johnson, *supra* note 28. An undeclared practice of defiance avoids frontal conflicts with a more powerful adversary and yet still might achieve the results of a formal SAS policy. *Id.*

105. *See* Bulman-Pozen & Gerken, *supra* note 103, at 1271–72 (describing different forms of uncooperative federalism appropriate to different circumstances reflecting strategic choice on the part of states). There are also indications of federal gun prohibitions on users of controlled substances (including marijuana) being thwarted. *See, e.g.*, Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2176 (2016) (arguing for the separation of drug offenses and gun possession in the field of criminal law concurrent with growing criticism of the drug war). Users of federally defined controlled substances are prohibited from purchasing or possessing firearms. 18 U.S.C. § 922 (g)(1). This prohibition applies to "unlawful [drug] users" and does not require a criminal conviction. *Id.* Various individuals fall within the standards that ATF and courts have used to define "drug user." *See* FBI CRIM. JUST. INFO. SERVS. DIV., INFORMATION AND EXAMPLES OF THE APPLICATION OF TITLE 18, UNITED STATES CODE, SECTION 922, SUBSECTION (G)(3): PERSONS WHO ARE UNLAWFUL USERS OF OR ADDICTED TO ANY CONTROLLED SUBSTANCE (2019) (outlining scenarios under which a person could be considered an unlawful drug user). One commentator concludes that there is "widespread underreporting" of these prohibited drug users to the National Instant Check System database. *See* Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 OHIO ST. J. CRIM. L. 211, 211, 214 (2020) ("[T]he NICS system has only a tiny fraction of the drug users in their system, as most of the drug courts, drug diversion programs, drug counselors, detox centers, methadone clinics, college and high school administrators (who suspend students for having drugs), and drug task forces do not bother reporting the individuals they are processing."). *See also* BECKEI GOGGINS & SHAUNA STRICKLAND, BUREAU OF JUST. STAT., 250782, STATE PROGRESS IN RECORD REPORTING FOR FIREARM-RELATED BACKGROUND CHECKS: UNLAWFUL DRUG USERS (2017) (noting that noncriminal records of unlawful drug use are often absent and thus unavailable for firearms-related background checks).

106. *See* Massaro & Milczarek-Desai, *supra* note 72, at 84–88 (presenting a summary of the issues

example, political pressures prompted the city of Tucson to recast policies that defied federal immigration law.[107] Tucson Mayor Regina Romero explained that the city will remain, "immigrant-friendly," but will not adopt the moniker "sanctuary city" because it "is being used to inflame passions on both sides."[108]

Tucson's tactical recasting of municipal policy sought to evade federal punishment of "sanctuary jurisdictions" by President Trump's 2017 Executive Order.[109] Toni Massaro and Shefali Desai report that, in the days after issuance of the Executive Order, "worries that the DHS Secretary conceivably could construe 'sanctuary jurisdiction' so capaciously that it would sweep up Tucson in its mandate caused officials to avoid using the term 'sanctuary.'"[110] Threat of reprisals by the Trump Administration also pushed the city of Denver to craft its de facto sanctuary policy by "studiously avoiding" the sanctuary label.[111]

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and doctrine surrounding state powers over local governments). John Dillon's seminal municipal law treatise presents local governments as having no powers other than those expressly delegated by their state. *See* DILLON, *supra* note 72, at 52–80; *see also*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (finding that localities are "political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted [sic] to them."); Mount Pleasant v. Beckwith, 100 U.S. 514, 524–25 (1879) (finding that cities, towns, and counties "are the auxiliaries of the State in the important business of municipal rule . . . ."); FRUG & BARRON, *supra* note 72, at 16–18 (discussing the limiting effect of state laws on municipal power and noting how municipal income is largely dependent on things municipalities do not control like the willingness of taxpayers to locate and do business within municipal boundaries).

107. *See* Massaro & Milczarek-Desai, *supra* note 72, at 91 (discussing the threat of losing state funds and other sanctions).

108. *Id.* at 90. In a predictable turn of the same political dynamic, in June 2021, the city of Tucson passed a resolution to ignore the Arizona Second Amendment Sanctuary law that the governor had signed in April. *See Tucson to Ignore Arizona's 'Second Amendment Sanctuary' Law*, AP NEWS (July 6, 2021), https://apnews.com/article/joe-biden-az-state-wire-arizona-tucson-gun-politics-f1521fa4e6c05a10f140abcdd8cf394a.

109. *See* Massaro & Milczarek-Desai, *supra* note 72, at 91; *see also* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

110. *See* Massaro & Milczarek-Desai, *supra* note 72, at 91.

111. Public Safety Enforcement Priorities Act, Bill No. 17–0940, DENVER CITY COUNCIL (2017), https://denver.legistar.com/LegislationDetail.aspx?ID=3128614&GUID=3A568876-8302-4856-AFA4-F505A637FFD9 (prohibiting city contracts related to enforcement of federal immigration laws). This did not dissuade the Trump Administration, which included Denver when it launched "Operation Safe City," targeting "sanctuary cities." *See* Chris Walker, *ICE Raids Target "Sanctuary Jurisdictions," Including Denver*, WESTWORD (Sept. 29, 2017, 10:07 AM), http://www.westword.com/news/ices-operation-safe-city-raids-in-denver-and-other-sanctuary-jurisdictions-9540309 ("Denver Mayor Michael Hancock was studiously avoiding [the term "sanctuary"]—choosing, instead, to call Denver a "welcoming city"). Texas provides another example. *See* S.B. 4 § 12.21, 85th Leg., Reg. Sess. (Tex. 2017). A 2017 law authorized extraordinary sanctions against local

The possibility of similar sorts of pressures deployed against Second Amendment Sanctuaries is an incentive for defiant jurisdictions to avoid formal SAS declarations and implement sanctuary polices through discretionary nonenforcement.[112] Compared to the direct public challenge presented by formal SAS legislation, discretionary nonenforcement can be relatively undetectable.[113]

However, formal SAS declarations will not always be strategically inferior.[114] Formal SAS policies do exhibit signaling advantages early on, where offending rules are just being proposed and debated.[115] In that context, SAS declarations communicate the threat of resistance to come, and may actually thwart the passage of contested legislation.[116] This was an apparent effect in Virginia.[117] While several gun control measures were passed by the new

governments and officials that adopted immigration sanctuary policies. *Id.* Among other things, the legislation prohibits local governments from adopting laws or policies that prohibit enforcement of federal or state immigration laws and denies state grants to defiant jurisdictions. *Id.* The law makes noncooperation by local officials and endorsement of noncooperation measures a misdemeanor. *Id.* Defiant local officials can be fined and removed from office. *Id. See generally* Zachary Price, *Reliance on Non-Enforcement*, 58 WM. & MARY L. REV. 937 (2017) (discussing whether constitutional due process principles protect reliance on federal officials' nonenforcement assurances).

112. *See, e.g.*, Massaro & Milczarek-Desai, *supra* note 72, at 89–91 (emphasizing the pressures deployed by the Texas and Arizona state legislatures against localities that enact policies in conflict with state law).

113. *See, e.g.*, Bulman-Pozen & Gerken, *supra* note 103, at 1271–72 (describing more "restrained" interstitial state contestation of federal policy as an alternative to explicit noncompliance or obstruction). Consider for contrast the difficulty of proving any policy affirmative conduct by frontline enforcement officers—conduct that commonly involves physical evidence and injured claimants. *See* Andrea Castillo & Paloma Esquivel, *California Police Got Hundreds of Calls About Abuse in Private ICE Detention Centers. Cases Were Rarely Prosecuted*, L.A. TIMES (Oct. 18, 2020, 8:00 AM), https://www.latimes.com/california/story/2020-10-18/california-police-immigration-detention-abuse (depicting a "system in which violence can be perpetuated against [ICE] detainees with impunity, both by other detainees and facility staff."). Now consider what it means to prove instances of improper nonenforcement of an ETB. *See* discussion *infra* Section V.D.

114. *Cf.* Bulman-Pozen & Gerken, *supra* note 103, at 1278–81 (explaining how states declared their refusal to participate in enforcing the Patriot Act, which helped to shape a national conversation, despite the Act's reauthorization).

115. *See, e.g.*, Gunter, *supra* note 81 (reporting how nearly two hundred Virginia municipalities passed Second Amendment Sanctuary resolutions after the state legislature proposed expanded gun control legislation).

116. *See id.*; *see also* Timothy Williams, *Virginia Legislature Turns Down Ban on Military-Style Weapons*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/17/us/Virginia-assault-weapons-legislature.html (noting how the defeat in the state senate of a ban on military-style rifles at least partially resulted from pressures presented by gun rights protests).

117. *See* Williams, *supra* note 116 (reporting on the defeat in the Virginia State Senate of a bill that would have banned military-style rifles in Virginia).

Democratic majority, the most controversial provision, a ban on semi-automatics currently owned by Virginians, stalled.[118]

The Virginia experience also illustrates how conflicts might progress after contested legislation actually passes and SAS officials must decide whether to actually implement their SAS policies.[119] Careful local strategists might well decide to abandon formal SAS policies in favor of less confrontational, de facto nonenforcement, cloaked as the good faith exercise of discretion.[120]

It is an open question whether discretionary nonenforcement will supplant formal SAS polices as the primary form of official resistance to contested gun laws.[121] SAS policies have garnered the attention so far.[122] But it may turn out that formal SAS declarations are a glittery distraction, and that the primary work of official defiance will occur, as in the case of the Lautenberg

118. *See id.* In what appeared to be a political setback for the legislation, in February 2020, the Virginia Senate Judiciary Committee deferred action on the House version of the AWB. *See* HB 961 Assault Firearms, Certain Firearm Magazines, etc.; Prohibiting Sale, Transport, etc.; Penalties., VA. LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB961 (last visited Dec. 20, 2021); *see generally* Gunter, *supra* note 81 (discussing the controversy surrounding the proposed Virginia gun control laws). The Brady gun control organization expressed disappointment over the vote. *See* Press Release, Brady Ctr. to Prevent Gun Violence, "We are Undeterred": Brady Expresses Disappointment in Virginia Senate Judiciary Committee Decision to Delay Action on Assault Weapons Ban Until 2021, (Feb. 17, 2020), https://www.bradyunited.org/press-releases/we-are-undeterred-brady-expresses-disappointment-in-virginia-senate-judiciary-committee-decision-to-delay-action-on-assault-weapons-ban-until-2021. Similar signaling advantages have occurred in the immigration context. *See* Liz Robbins, *'Sanctuary City' Mayors Vow to Defy Trump's Immigration Order*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/nyregion/outraged-mayors-vow-to-defy-trumps-immigration-order.html (describing American mayors' adverse reactions to President Trump's executive order threatening municipalities that did not cooperate with federal immigration officials); Vivian Yee & Rebecca R. Ruiz, *Sessions Narrows Trump's Order Against Sanctuary Cities*, N.Y. TIMES (May 22. 2017), https://www.nytimes.com/2017/05/22/us/politics/sanctuary-cities-jeff-sessions.html (reporting on the narrowed scope of President Trump's executive order after a federal judge temporarily blocked the Administration from cutting off funding to sanctuary cities).

119. *See* Gunter, *supra* note 81 (examining responses by local officials, including Culpepper County Sheriff Scott Jenkins, considering nonenforcement policies).

120. *See id.* ("We have laws against spitting on a public surface or sidewalk . . . . I cannot recall an officer enforcing that in the time I've been working . . . . I guess if there are no other more important issues to focus on, maybe officers will focus on [proposed new technology bans]."). Some of the same Virginia officials who threatened overt defiance also articulated residual strategies of discretionary nonenforcement. *See id.*

121. *See infra* Section V.D.1 (highlighting the challenges in measuring the comparative utility and tactical appeal of discretionary nonenforcement compared to formal SAS policies).

122. *See What Are So-Called "Second Amendment Sanctuaries?*," BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (2019), https://www.bradyunited.org/act/second-amendment-sanctuaries (noting the increased prevalence of SAS policies and debates about their efficacy).

Amendment, through discretionary nonenforcement.[123]

V. THE COMPLEXITIES OF DISCRETIONARY NONENFORCEMENT IN PRACTICE

The thwarting of the Lautenberg Amendment, discussed in Part III, demonstrates the utility of discretionary nonenforcement as a tool for effectuating SAS policies. But the details of how that tool might operate more broadly are complicated.[124] A primary complication is that discretionary nonenforcement decisions will be made by various officials (police, prosecutors, policymakers) who will have different interpretations of and different commitments to various SAS policies.[125] Those idiosyncratic differences will affect enforcement decisions in unpredictable ways.[126]

However, some inputs for thinking about discretionary nonenforcement as a tool for effectuating SAS policies are more structural and *do* provide a basis for making predictions and thinking systematically about policy.[127] This Part organizes those structural inputs into three sets. The first set of structural inputs surrounds the nature of the gun ban legislation that Second Amendment Sanctuaries tend to oppose.[128] Powhatan County Sheriff Brad Nunnally's fellow constitutional officer, prosecutor Dickie Cox,[129] summarized those laws

123. *See supra* Part III (discussing the official defiance by police, prosecutors, and judges exercising their discretion to thwart the Lautenberg Amendment). The ultimate practical impact of SAS policies is similarly contingent. *See* RAND CORPORATION, THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES (2d ed. 2020) (addressing the question of whether and how state and local efforts to thwart gun control will impact crime); JOHNSON ET AL., *supra* note 48, at 33–85 (discussing an array of studies examining the efficacy of various gun control policies); NAT'L RSCH. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (Charles F. Wellford et al. eds., The Nat'l Acads. Press 2005) (assessing the efficacy of existing gun control measures).

124. *See infra* Section V.D.1 (questioning the dynamic between discretionary nonenforcement and formal, officially defiant SAS policies).

125. *See* Gunter, *supra* note 81 (examining various responses to proposed SAS and gun control policies in Virginia).

126. *See infra* Section V.E (underscoring the varying interpretations and commitments of officials with respect to SAS policies).

127. *See* McFarland, *supra* note 81, at 1A, 9A (demonstrating the predictability of nonenforcement responses to particular gun control policies).

128. *See infra* Section V.A (outlining various types of nonenforcement responses around the United States).

129. *See Commonwealth's Attorney*, POWHATAN CNTY., http://www.powhatanva.gov/218/Commonwealths-Attorney (last visited Aug. 21, 2022). Cox holds the office of Commonwealth's Attorney. *See id.* These local prosecutors are elected to four-year terms by Virginia's counties and cities.

and how they have fueled the SAS movement:

> [T]o restrict what law-abiding citizens already have, to say you can't have a magazine that holds a certain number of cartridges, to say you can no longer possess this type of firearm, to allow the government to come in and take your property, is scary. And I don't think anybody wants that. . . . Are you going to come to my house? That is what people are scared of—the government coming to their house and taking that they have bought or accumulated as a law-abiding citizen in this country. We don't want to go down that road.[130]

This Part will show how the sorts of gun ban legislation that Cox describes present recurring characteristics that provide relatively predictable invitations and opportunities for defiance through discretionary nonenforcement.[131]

A second set of structural inputs derives from state and local resistance to laws governing immigration, drug use, and "quality of life" crimes.[132] Resistance tactics already deployed in those areas present predictable, transferable models for implementing SAS policies through discretionary nonenforcement.[133]

A third set of structural inputs surrounds the fact that that SAS policies are not really commitments of zero enforcement of gun laws.[134] Both explicitly and implicitly, SAS policies anticipate some degree of enforcement against people who commit other crimes in combination with contested gun

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See VA. CODE ANN. § 15.2–1626 (1997). Cox won election in 2019 with ninety-nine percent of the vote. *See 2019 November General: Official Results*, VA. DEP'T OF ELECTIONS (Nov. 18, 2019, 5:36 PM), https://results.elections.virginia.gov/vaelections/2019%20November%20General/Site/Locality/POWHATAN%20COUNTY/Commonwealth's%20Attorney%20(POWHATAN%20COUNTY).html.

130. McFarland, *supra* note 81, at 9A. Cox and Nunnally are the frontline officers charged with law enforcement in Powhatan City and County. *See id.* The SAS policy they were discussing resulted from a decision by the Powhatan Board of Supervisors. *See id.*

131. *See infra* Section V.A (outlining various legislative gun restrictions and their respective responses from local officials).

132. *See infra* Section V.E (detailing official defiance in the nonenforcement decisions made by policymakers, prosecutors, and police with respect to drug and quality of life crimes).

133. *See infra* note 319 and accompanying text (analyzing SAS policy enforcement in the immigration context).

134. *See infra* Section V.E.3.b (characterizing SAS policies as commitments to protect law-abiding gun owners).

laws.[135] In this respect, SAS policies track immigration and drug nonenforcement policies that also enforce contested laws that are broken in combination with other serious crimes.[136] Given that a great deal of gun law enforcement occurs in combination with other crimes,[137] it is fair to expect that SAS nonenforcement often will be contingent along a spectrum of combination cases.[138] It is also fair to expect that many of the recurring complexities of combination cases will cut in favor of enforcement and against discretionary implementation of SAS policies.[139] This Part will consider how the three sets of structural inputs affect discretionary nonenforcement in various contexts.[140]

135. *See infra* Section V.E.3 (defining combination cases as instances where gun violations occur in concert with other infractions). Missouri and Oklahoma, for example, explicitly limit the protections of their SAS statutes to law-abiding citizens. *See* Second Amendment Preservation Act, H.R. 85, 101st Gen. Assemb., Reg. Sess. (Mo. 2021); Second Amendment Sanctuary State Act, OKLA. STAT. tit. 21, § 1289.24e (2021). This presumably means persons who have not committed any crime besides violation of contested gun laws. *See* MO. REV. STAT. § 1.480 (2021); Second Amendment Sanctuary Act, tit. 21, § 1289.24e(E)(3). Commonwealth Attorney Dickie Cox demonstrated the implicit limits on the Powhatan County SAS policy through his description of the variety of gun laws that he and his constituents support—such as prohibitions on possession by felons and new tighter restrictions on individuals convicted of domestic violence misdemeanors. *See* McFarland, *supra* note 81, at 9A.

136. Shaila Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html. Baltimore police overwhelmingly oppose chief prosecutor Marilyn Mosby's marijuana nonenforcement policies. *See id.* Mosby's policy creates an explicit exception for drug possession cases that also involve gun possession. *See id.* Given broad police opposition to the policy as a general matter, one can expect police/prosecutor conflict about enforcement in other troublesome combination cases involving other weapons or violence. *See id.* SAS nonenforcement decisions will likely shift on a similar fulcrum (with the notable difference of companion drug violations possibly tipping the decision-making toward enforcement of otherwise insulated gun violations). *See id.*

137. *See infra* Section V.E (illustrating the challenges inherent in combination cases).

138. *See infra* Section V.E.3 (highlighting the contingent nature of decision-making in combination cases). These combination cases evoke Heather Gerken's observation that those who "dissent by deciding . . . no longer enjoy the luxury of the critic: inaction. They must figure out how to put their ideas into practice . . . and . . . live with the consequences." Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1777–78 (2005).

139. *See infra* Section V.E.3.b (discussing the range of inferences related to enforcement decisions in light of SAS policies).

140. *See* discussion *infra* Sections V.A–V.E (demonstrating the complications of discretionary nonenforcement decisions by various officials). The analysis presented in this Part may also be relevant at various levels of decision-making. *See* discussion *infra* Sections V.C–V.D (analyzing discretionary nonenforcement in both private and official defiance). For example, it might inform the range of plausible decisions where officials are split in their commitment to SAS policy or where individual officials are personally torn in their commitment to the policy in a particular case. *See* discussion *infra* Section V.D (illustrating the decision-making behind discretionary nonenforcement by policymakers, prosecutors, and police). It might also well-inform the public debate as defiant officials tout their SAS policies to the electorate, joust politically with locals who oppose SAS policies, and navigate tensions

The discussion in this Part proceeds in five Sections. Section A introduces the Esoteric Technology Ban as the primary type of legislation that has sparked SAS policies and provides an example from California. Section A presents the Esoteric Technology Ban as a core prompt for SAS policies and shows its vulnerabilities to discretionary nonenforcement. Section B presents the Supreme Court's jurisprudence surrounding enforcement of the 1968 Gun Control Act. Section B shows how the sorts of proof that the Court has demanded for Gun Control Act prosecutions might support discretionary nonenforcement and influence decision-making in cases where relevant officials are in conflict or are on the fence about enforcement. Section C critiques of some recurring characteristics of Esoteric Technology Bans that invite discretionary nonenforcement along a spectrum of more or less compelling cases. Section D deploys themes from immigration scholarship to show how official defiance and discretionary nonenforcement of gun laws can feed perceptions of illegitimacy that fuel a cycle of private and public defiance of gun

with superior jurisdictions whose gun laws they contest. *See* discussion *infra* Section V.D (analyzing the enactment of the New York SAFE Act as an illustration of the procedural effects in official and private defiance).

This Article will not pursue every iteration of who will deploy what critique when, or the various "procedural" issues that will affect that deployment. For example, this article will draw lessons from existing episodes of discretionary nonenforcement that raise questions like the relevance of federal precedent to different types of nonenforcement by state and local actors. *See* discussion *infra* Section V.E (illustrating the engagement of policymakers, prosecutors, and police in discretionary nonenforcement). Sections A and B, for instance, introduce the Esoteric Technology Ban (through a state law example) and show how the Supreme Court's interpretation of the federal Gun Control Act creates opportunities for discretionary nonenforcement of such laws. *See* discussion *infra* Sections V.A–B (highlighting the mechanisms that allow for discretionary nonenforcement). The innocence doctrine discussed in Section B is technically limited to the Gun Control Act of 1968 and grounded on the absence of an explicit *mens rea* standard in the statute. *See* discussion *infra* Section V.B (analyzing the existence of the *mens rea* element in Supreme Court jurisprudence). The questions surrounding the impact of this federal precedent on local or state nonenforcement strategies turn on multiple contingent factors. *See infra* notes 214–215, 220 (addressing the standards established by the Supreme Court under the GCA). States or localities might raise the federal precedent in addition to or in lieu of a de jure policy of nonenforcement on Tenth Amendment grounds. *See* sources cited *supra* note 63 (illustrating Supreme Court jurisprudence on Tenth Amendment grounds in creating Constitutional Sanctuaries). Also, where a contested state law formally incorporates, or state policy effectively adopts the GCA, the federal precedent becomes more relevant and perhaps controlling. *See infra* text accompanying note 244 (highlighting the considerations made by police and prosecutors toward local SAS policy in contemplating nonenforcement). And if the contested law is some future cooperative federalism initiative, where the state consents to the role of enforcing a federal ETB that supplements the GCA, the GCA innocence jurisprudence might be controlling in a conflict between local and state governments. *See infra* notes 231–32 and accompanying text (illustrating the dynamic between gun regulation and the GCA innocence jurisprudence in multiple contexts). Part VI discusses the possibility that this sort of decision might involve favoritism and bias.

restrictions. Section E considers the transferability of nonenforcement strategies deployed against federal immigration and drug laws. Section E also offers detailed treatment of how discretionary nonenforcement is complicated and often discouraged in combination cases.

A. Esoteric Technology Bans Invite Discretionary Nonenforcement: An Example from California

One of the primary opportunities for de facto implementation of sanctuary policies through discretionary nonenforcement is rooted in the characteristics of the laws that Second Amendment Sanctuaries tend to resist.[141] The primary sort of legislation that has fueled the SAS movement is the Esoteric Technology Ban (ETB).[142]

ETBs have both prospective and residual functions. Prospectively, they ban manufacture and retail sale of particular guns and accessories.[143] This prospective function of ETBs is highly effective because new guns are manufactured and sold by a relatively small number of easily identified and closely regulated entities.[144]

The residual function of ETBs—restricting or banning guns or accessories already in the hands of private citizens—has been far less effective and raises a host of problems.[145] One problem is political.[146] ETBs have fueled

141. *See* Fields, *supra* note 1, at 454 (illustrating how during the Obama Administration, four states resisted new accessories bans by declaring certain firearms and accessories "exempt from federal regulation under the Ninth and Tenth Amendments").

142. *See id.* at 440. Other restrictions have accompanied these proposals; for example, red flag laws also have prompted opposition. *See, e.g.*, Fields, *supra* note 1, at 440–41 (discussing Colorado sanctuaries' opposition to red flag and confiscation proposals).

143. *See generally* Allen Rostron, *Style, Substance, and the Right to Keep and Bear Assault Weapons*, 40 CAMPBELL L. REV. 301, 309 (2018) (explaining how recent legislation classifies "assault weapons" in part "based on a weapon's parts or features").

144. *See* Michael Siegel, *Analysis: How Firearm Manufacturers Influence American Gun Culture, in 6 Charts*, PBS (May 31, 2022, 4:30 PM), https://www.pbs.org/newshour/nation/analysis-how-firearm-manufacturers-influence-american-gun-culture-in-6-charts (showing how "only a small number of gun-makers dominate the [U.S.] market," with over seventy percent of pistols currently produced by only five manufacturers).

145. *See* Johnson, *supra* note 28, at 846 (describing how new guns that are privately manufactured by individuals serve as a long-standing, practical impediment to the efficacy of ETBs). For a deeper analysis of the "remainder problem," see *id.* (examining how the identification of current holders of newly designated firearms contraband constitutes an aspect of the "remainder problem").

146. *See also* Johnson, *supra* note 28, at 849 (arguing that "our political system is rooted in distrust of the government, and [that] some people will view resistance to gun confiscation as a natural extension of this healthy distrust").

the fears and ire of gun owners and sparked the rise of Second Amendment Sanctuaries as opponents anticipate seizures of long-held, previously legal property.[147] Another problem impeding the residual function of ETBs is that they exhibit a recurring set of characteristics that invite private defiance and discretionary nonenforcement.[148]

The model ETB starts with a nominal ban on particular versions of "bad gun" technology.[149] The existing private inventory is either grandfathered or required to be removed from the jurisdiction.[150] Often, these bans prompt mechanical workarounds that produce compliant versions of essentially the same guns.[151] In many cases regulators respond by banning the innovation (while often grandfathering the existing ones), and that cycle might repeat several times.[152] The result is a complex set of technical and timing distinctions that separate legal guns from very similar or functionally identical contraband.[153]

The top cohort of gun enthusiasts, whose ingenuity helps fuel this cycle, might understand most of the distinctions between legal guns and ETB contraband.[154] However, for casual holders and downstream, "subsequent

147. *See* Halbrook, *supra* note 7, at 283 (describing Virginians' vigorous reaction to "draconian bills" that criminalized items "major portions of the population [believed] to be innocuous and constitutionally protected").

148. *See generally* Tal Kopan, *Why Even the Gun Laws that Exist Don't Always Get Enforced*, CNN (Jan. 9, 2016, 1:01 PM), https://www.cnn.com/2016/01/09/politics/obama-executive-orders-gun-control-enforcement-gap (explaining how complex standards in recent gun control legislation disincentivize prosecutors and law enforcement officers from actually enforcing the legislation).

149. *See, e.g.*, *Naperville City Council Passes Ban on Commercial Sales of Assault Rifles*, CBS CHICAGO (Aug. 17, 2022, 6:03 AM), https://www.nbcchicago.com/news/local/naperville-city-council-passes-ban-on-commercial-sales-of-assault-rifles/2916896/ (illustrating a newly passed ordinance in Naperville, Illinois, which effectively serves as a blanket ban on the local sale of "assault-style" weapons).

150. *See infra* text accompanying notes 246–69 for discussion of federal restrictions codified in 18 U.S.C. § 922(r).

151. *See, e.g.*, *Featureless Grip*, JUGGERNAUT TACTICAL, https://jtactical.com/products/featureless-grip (last visited Sep. 13, 2022) (displaying a rear grip accessory for an AR-15, described as "the most aggressive CA compliant grip yet," which is specifically designed to sidestep California vertical grip restrictions).

152. *See generally* Matt Drange, *Despite Ban, Thousands of Assault Weapons Remain Legal in California*, REVEAL (Mar. 13, 2015), https://revealnews.org/article/despite-ban-thousands-of-assault-weapons-remain-legal-in-california/ (emphasizing the vast number of existing guns potentially exempt from California's Assault Weapons Control Act).

153. *See id.*

154. *See* Scott Gara, *What Makes a Rifle California Compliant?*, GUNS.COM (Oct. 15, 2020), https://www.guns.com/news/what-makes-a-long-gun-california-compliant (explaining the myriad of requirements owners must satisfy for an AR-15 to comply with technical restrictions in California).

holders" of banned technologies (who have ordinary knowledge of firearms), ETBs present a series of identification and compliance issues that fuel solid claims of innocence by violators.[155] Those claims invite nonenforcement by defiant government officials and influence associated controversies.[156] Subsections One and Two below explain the lineage of the ETB legislative form and present an example from California.

1. Esoteric Technology Bans: Background

Most current ETBs are versions of the "bad gun formula" that I described and critiqued nearly three decades ago.[157] The first major iteration, the 1994 Federal Assault Weapon Ban, was almost nonsensical in its distinction between good guns and bad guns.[158] It elided the core functioning of the guns and focused instead on things that only affected appearance——e.g., bayonet lugs, flash suppressors, pistol grips, and adjustable stocks.[159]

I have described elsewhere how politicians craving votes of both the gun control constituency and gun owners produce legislation that tries to signal a commitment to gun control along with assurance to gun owners of an intent to ban only a small category of unusually dangerous guns.[160] This political strategy has met stiff resistance from gun owners because, in order to be effective, these gun bans also require (eventually) banning the much larger class of effective substitutes.[161] Nonetheless, lawmakers continue to advance ETBs that purport to distinguish "bad guns" from functionally identical or very similar "good guns," by focusing on stylistic factors (thus the focus on *military-*

155. *See id.*

156. *See generally* Fields, *supra* note 1, at 469–74 (discussing "partisan preemption" with respect to SAS enforcement). For example, policymakers, prosecutors, and police in various combinations might disagree about whether a particular gun infraction is within the scope of the local SAS policy or about the comparative strength of the gun infraction in a vexing combination case. *See id.* The argument that enforcement seems at odds with the Supreme Court's GCA innocence jurisprudence would be a relevant and perhaps dispositive element in resolving such disagreements. *See id.*

157. *See* Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s, Richard Aborn*, 22 FORDHAM URB. L.J. 441, 441 (1995); *see also* JOHNSON ET AL., *supra* note 48, at 1149–52.

158. *See* 18 U.S.C. § 921 (1994).

159. *See id.*

160. *See* Nicholas Johnson, *The Progressive Gun-Control Charade*, WALL ST. J. (Oct. 25, 2015), https://www.wsj.com/articles/the-progressive-gun-control-charade-1445806103.

161. *See id.*

style guns) that have little to nothing to do with the guns' core lethality.[162]

The impulse for the bad gun theme can be traced to the gun control lobby strategy summarized in a 1998 memorandum by Josh Sugarmann of the Violence Policy Center.[163] Sugarmann lamented that the public and media had lost interest in the handgun ban crusade.[164] He urged gun control advocates to introduce a "new topic in what has become to the press and public an 'old' debate."[165] The new focus, he argued, should be assault weapons.[166]

> Assault weapons—just like armor piercing bullets, machine guns and plastic firearms—are a new topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.[167]

By pressing the bad gun formula aggressively and reacting to enthusiasts' responses and workarounds, several jurisdictions have constructed intricate ETBs that leave many holders, and especially subsequent holders of contraband technology, with solid claims of innocence and fuel a spectrum of discretionary nonenforcement decisions by defiant public officials.[168] The next subsection provides an example of this from California.

2. California's Bullet-Button Ban Exemplifies the ETB Type and Adds Texture

This subsection has two aims. First, it provides a classic example of the ETB type through a discussion of California's attempts to identify and ban "assault weapons." Second, it reveals an important variation of discretionary

162. *See* Nicholas Johnson, *The Saturday Night Special*, LAW AND LIBERTY (May 12, 2013), https://lawliberty.org/the-saturday-night-special/; E. Gregory Wallace, *"Assault Weapon" Myths*, 43 S. ILL. U. L.J. 193, 200 (2018).

163. *See* Josh Sugarmann, *Assault Weapons and Accessories in America*, VIOLENCE POL'Y CTR. (1998), https://vpc.org/publications/assault-weapons-and-accessories-in-america/.

164. *See id.*

165. *Id.*

166. *See id.*

167. *Id.*

168. *See* JOHNSON ET AL., *supra* note 48, at 1149–53.

nonenforcement—that is, discretionary nonenforcement through refusal to create special, ad hoc solutions to the enforcement knots that plague ETBs.

California legislators started by creating definitions of banned guns that were mechanically easy to work around.[169] Those mechanical innovations generated legislative reactions and those reactions elicited new waves of technical workarounds and new enforcement knots.[170] Each cycle of this dynamic produced more complex definitions and demanded a higher level of expertise to navigate.[171]

The California bullet-button ban provides a good illustration.[172] The bullet-button is a mechanical innovation, developed in response to California's ban on particular semiautomatic rifles that have detachable magazines (i.e., the removable ammunition feeding device).[173] Presumably hoping to slow reloading, California restricted guns that could accept "detachable box magazines," legislatively defined as magazines that could be removed from the gun without the aid of a tool.[174] The typical detachable magazine can be removed from the gun by a finger press on the gun's magazine release button.[175]
In response to the ban on guns with traditional magazine release buttons, and guided by the statutory language, gun enthusiasts developed a mechanism that only allowed removal of the magazine from the AR-15 rifle by using a tool—i.e., the tip of a bullet.[176] And for a period of time, these bullet-button

169. *See* David B. Kopel, *We Should Be More Skeptical About Gun* Control, *in* GUNS: CONCEAL AND CARRY 136, 136–81 (Anne Cunningham ed., 2018). California's first assault weapon restrictions enacted in 1989 elided technical distinctions. *See id.* Rather, the restrictions were created by legislative staffers who thumbed through a picture book of guns and decided which guns looked bad. *See id.* The result was an "incoherent" law which among other things outlawed certain firearms that do not exist since the staffers just copied the typographical errors from the book or associated the model by one manufacturer with another manufacturer whose name happened to appear on the same page. *See id.*

170. *See id.*

171. *See id.*

172. *See* CAL. PENAL CODE § 30900(b) (Deering 2017).

173. *See id.*; *see also* Website Homepage, BULLET BUTTON, https://www.bulletbutton.com (last visited Dec. 8, 2021) (website and online shop containing information on California compliant firearm tools).

174. *See* CAL. CODE REGS. tit. 11, § 5471 (West 2022).

175. For a detailed illustration of the magazine release, see Rusty Guns, *How to Remove Replace Magazine Release Button on an AR15 Rifle*, YOUTUBE (Feb. 7, 2018), https://www.youtube.com/watch?v=UhLa5yNWJxE.

176. Damon Arthur, *Workarounds of New California Gun Laws Already in Play*, REC. SEARCHLIGHT (Dec. 24, 2017, 10:44 AM), https://www.redding.com/story/news/2017/12/22/workarounds-new-california-gun-laws-already-play/971864001 ("They can pass all the laws they want, and I can guarantee you we are going to find a way around them.").

modifications permitted California gun owners to continue possessing AR-15 rifles that could be loaded in more or less traditional fashion—the only difference being the need to use a bullet tip rather than one's finger to operate the magazine release button.[177] California then amended the law to ban the bullet-button, but grandfathered existing bullet-button guns so long as they were registered by June 30, 2018.[178]

But it turns out that the bullet-button was not actually banned.[179] The law defined prohibited guns as a combination of features, including the bullet-button.[180] This menu of features could be adjusted as well.[181] So, if a traditional AR-15 rifle was configured to remove the pistol grip and other prohibited characteristics (through other mechanical innovations) guns with the bullet-button could be legally possessed in California without registration.[182] One California gun organization attempted to explain the difference between legal and contraband guns with an intricate twenty-eight-cell flow chart.[183]

Jennifer Carlson provides a rare insider's perspective on the enforcement difficulties presented by the California law.[184] Carlson interviewed a variety of California police chiefs, who spoke on the condition of anonymity, about the challenges of enforcing the state's gun laws and revealed ad hoc police adaptations necessary to implement the law.[185]

One chief recounted how the complexity of the law has prompted some

177. *See* BoonDoggle, *California Bullet Button Secret*, YOUTUBE (Jan. 1, 2012), https://www.youtube.com/watch?v=SOLNvk1FVGo (discussing another innovation that supplemented the bullet-button).

178. CAL. PENAL CODE § 30900(b) (Deering 2011) ("Any person who, from January 1, 2001, to December 31, 2016, inclusive, lawfully possessed an assault weapon that does not have a fixed magazine . . . including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool, shall register the firearm before July 1, 2018."); CAL. PENAL CODE § 30515 (Deering 2020) (defining "assault weapon" under California law).

179. *See* Jim, *2019 Featureless AR-15 Rifles: All You Need to Know!*, CALIGUNNER, https://caligunner.com/california-compliant-featureless-rifle (last visited Aug. 26, 2022) [hereinafter *Featureless AR-15 Rifles*] (discussing how to maintain a legal bullet-button assault weapon).

180. *Id.*; PENAL § 30515 (defining "assault weapon" under California law).

181. *See Featureless AR-15 Rifles*, *supra* note 179 (discussing how features can be modified or omitted to create a legal assault weapon).

182. *Id*. (describing the manner in which a pistol grip and shoulder stock of a rifle can allow an owner to avoid registration through configurations that technically constitute legal, "featureless" rifles).

183. CalGuns Shooting Sports Association, *California Centerfire, Semi-Auto Rifle Identification*, CALGUNS.NET, 1–2, https://www.calguns.net/caawid/flowchart.pdf (last visited Aug. 26, 2022).

184. JENNIFER CARLSON, POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE (2020).

185. *Id.* at 110–17.

officers, especially at the entry level, to rely on "cheat sheets" to identify violations of the law.[186] Others "arrest people and then do the research—and then release or charge on the arrest. . . . It's like you need to be a specialist to regurgitate the law."[187] Another chief complained that it "practically [requires] a law degree to understand the 115-plus pages on ARs [assault weapons]."[188] Another admitted that some officers engage in ad hoc nonenforcement when dealing with armed "good guys," like the rancher who does not realize his gun or magazine is now illegal, explaining, "[Y]ou have officers who see [high capacity magazines], and they might not bother enforcing it."[189]

Carlson reports that these sorts of issues have fueled a growing divide between police and anti-gun lawmakers, who are also increasingly hostile to law enforcement.[190] This tension has produced a subclass of "gun populism" that Carlson calls "anti-elitism"—where police align politically with armed good guys against anti-gun legislators.[191] California police chiefs expressed apprehension about lawmakers' competence in the subject matter.[192] One chief castigated progressive legislators as "counterfeit experts" who have created a regime of complex, contradictory laws that saddle police with an "enforcement nightmare."[193]

The sorts of problems that the California police chiefs complained about fueled a federal civil rights suit in *Haynie v. Harris*, where the plaintiffs alleged that the government's failure to update its Assault Weapon Identification Guide was contributing to wrongful arrests.[194] The state was under a statutory duty to provide training and material to ensure compliance with California's gun laws.[195] When *Haynie* was filed, the guide was ten years out of date, and the plaintiffs had experienced arrests based on misidentified guns.[196] The case resulted in a concession by the Attorney General's office

186. *Id.* at 112.
187. *Id.*
188. *Id.*
189. *Id.*
190. *See id.* at 111.
191. *Id.*
192. *Id.*
193. *Id.* at 111–12.
194. Haynie v. Harris, No. C 10-01255 SI, 2014 U.S. Dist. LEXIS 28293, at *2 (N.D. Cal. Mar. 4, 2014).
195. CAL. PENAL CODE § 31115 (Deering 2021).
196. Haynie v. Harris, No. C 10-01255 SI, 2014 U.S. Dist. LEXIS 28293, at *1–2 (N.D. Cal. Mar. 4, 2014).

that AR-15 rifles equipped with bullet-buttons actually were legal under California law.[197] The challenged arrests were likely caused by police officers relying on visual inspection from the outdated guide.[198] California ultimately banned the bullet-button but grandfathered existing bullet-button guns so long as they were registered by June 30, 2018.[199]

In subsequent litigation charging that the registration system failed to function properly, a federal court required California to re-open registration of bullet-button rifles, but only for rifles possessed within a particular window of time.[200] The California Department of Justice website includes a thirty-five-page "Frequently Asked Questions" section that attempts to illuminate the multitude of issues surrounding possession and use of bullet-button and other assault weapons.[201] One California gun organization demonstrates the next turn in the cycle with a description of five "California compliant" products that satisfy the bullet-button prohibition but still allow reloading with virtually the same speed.[202]

California's assault weapon legislation is an archetype of the sort of ETB that generates complex categories of contraband and prompts a range of intentional and innocent violations that create a spectrum of opportunities for discretionary nonenforcement.[203] The California bullet-button saga also

197. *See* Haynie v. Harris, 658 F. App'x. 834, 837 (9th Cir. 2016).

198. *Id.* at 836–37. As of August 2022, the California Department of Justice, Bureau of Firearms, still had neglected to update its Assault Weapons Identification Guide, though there is a notice that it is currently under revision. *See Assault Weapons Identification Guide*, OFF. OF THE ATT'Y GEN., CAL. DEP'T OF JUST. (2001), https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/aws-guide.pdf.

199. CAL. PENAL CODE § 30900(b) (Deering 2017) (*declared unconstitutional* by Sharp v. Becerra, No. 2:18-CV-02317 (E.D. Cal. Mar. 29, 2021)).

200. *See Bullet-Button Assault-Weapon Registration System,* CAL. DEP'T OF JUST., https://oag.ca.gov/firearms/bullet-button-assault-weapon (last visited Aug. 26, 2022); Stipulated Injunction & Consent Decree at 3–5, *Sharp*, No. 2:18-CV-02317.

201. *Frequently Asked Questions: Assault Weapons and .50 BMG*, CAL. DEP'T OF JUST., https://oag.ca.gov/firearms/regagunfaqs#16b (last visited Aug. 26, 2022).

202. *See Bullet Button*, CAL. CARRY, https://www.californiacarry.org/bullet-button.html (last visited Aug. 26, 2022). The legislation to ban the bullet-button has prompted at least five new technical workarounds, which are described on the California Carry website. *Id*. These mechanisms exploit the new definition of detachable magazines—namely, as magazines that can be removed without disassembling the gun. *Id*. These new workarounds allow removal and replacement of the AR-15 magazine through a quick separation of the upper receiver from the lower receiver—which evidently satisfies the requirement of magazine removal only through disassembly. *Id*.; *see* CAL. CODE REGS. tit. 11, §§ 5477(b)–(c) (2021); *see also* Arthur, *supra* note 176 (discussing California's gun laws and workarounds utilized by assault rifle owners).

203. CAL. PENAL CODE § 30515 (Deering 2019) (defining "assault weapon" under California law). *See, e.g.*, CARLSON, *supra* note 184, at 110–17 (illustrating the many ways new assault rifle legislation

illuminates the possibility of discretionary nonenforcement through refusal to create ad hoc fixes of flawed legislation.

In the standard scenario, the prompt for discretionary nonenforcement will be public SAS policy that endorses overt refusal to cooperate with targeted gun control laws.[204] The California example demonstrates something different.[205] It shows how discretionary nonenforcement might unfold more subtly, through the lack of special effort necessary to implement ETB legislation.[206] Note the spectrum of discretionary ad hoc responses that officers developed in response to the difficulties embedded in the byzantine California legislation—cheat sheets, arresting on gun charges, charging, then releasing based on post-arrest research, and not attempting to enforce the law.[207]

This suggests how discretionary nonenforcement decisions might shift as a function of the practical difficulties of ETB enforcement.[208] As enforcement knots demand more special effort, the option of nonenforcement becomes more appealing.[209]

As discussed below, these observations are not limited to California. ETBs in general present recurring enforcement puzzles that invite discretionary nonenforcement.[210] The next Section shows how those nonenforcement decisions might be impacted by the Supreme Court's Gun Control Act

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has prompted different types of nonenforcement).

204. *See* Brianna Provenzano, *What Happens if Sheriffs Refuse to Enforce State Gun-Control Laws?*, PAC. STANDARD (Mar. 13, 2019), https://psmag.com/social-justice/what-happens-if-sheriffs-refuse-to-enforce-state-gun-control-laws (summarizing SAS policies in New Mexico and other states that demonstrate a refusal to cooperate with new gun control legislation); Su, *supra* note 13 ("In just the past year, more than 400 local governments—mostly counties—have adopted resolutions declaring themselves 'Second Amendment sanctuaries.' Through these resolutions, these Second Amendment sanctuaries are expressing support for gun rights. They are attacking proposed gun control legislation.").

205. *See* CARLSON, *supra* note 184 (discussing nonenforcement through failure to implement consistently new gun control legislation).

206. *See id.*

207. *See id.* at 110–17. The examples discussed by Jennifer Carlson all occurred before any California jurisdictions declared themselves as Second Amendment Sanctuaries. *See also* Erika I. Ritchie, *California City Declares Itself a 2nd Amendment Freedom City*, E. BAY TIMES (Jun. 3, 2021, 5:27 A.M.), https://www.eastbaytimes.com/2021/06/03/san-clemente-councilman-gets-support-to-declare-city-as-2nd-amendment-freedom-city/ (reporting passage of an ordinance by the City of San Clemente making it the first Orange County and the Second California SAS).

208. *See* CARLSON, *supra* note 184, at 112 (describing California gun laws as "an enforcement nightmare").

209. *See id.* at 112.

210. *See id.*, at 108–09 (discussing gun populism as a concept and how that has blurred the line between police and armed citizens).

enforcement jurisprudence.

B. The Supreme Court's Gun Control Act Jurisprudence Facilitates Discretionary Nonenforcement

This Section will show how the Supreme Court's jurisprudence surrounding federal firearms regulation supports discretionary nonenforcement of ETBs and innocence claims by individual refuseniks.[211] This jurisprudence becomes especially relevant as first-generation refuseniks die off and leave a legacy of contraband in the hands of a new class of holders.[212] Many of these

211. *See infra* Section V.B. The innocence jurisprudence is relevant in the context of enforcement of federal firearms legislation (by either state or federal officials). Staples v. United States., 511 U.S. 602, 615 (1994) (interpreting the law's intention as not to punish well-intentioned citizens). In the case of independent state gun legislation, lawmakers might respond to the issues raised in this Part by writing anti-factual presumptions of knowledge and culpability into the law. *See, e.g.*, N.Y. PENAL LAW § 265.03(3) (McKinney 2006) (providing an example of gun legislation making intent a requirement for criminalization). New York, for example, criminalizes unlicensed possession of a loaded firearm outside of the home or possession of a loaded firearm anywhere with the intent to use it unlawfully. PENAL §§ 265.03(3), 265.03(1)(b). Possession of a loaded gun is a "violent felony" and is punished more severely than possession of an unloaded gun, which is New York considers a "nonviolent" felony. *Compare* PENAL § 265.03 (classifying criminal possession of a loaded firearm as a class C felony), *with* PENAL § 265.01–b(1) (classifying criminal possession of a firearm as a class E felony). By legislative fiat, New York considers a firearm "loaded" if a person possesses it "at the same time" they possess ammunition, regardless of whether the firearm is, in fact, loaded. PENAL § 265.00(15); People v. Gordian, 952 N.Y.S.2d 46, 47 (N.Y. App. Div. 2012) (holding that it is "legally irrelevant" whether cartridges are in a firearm at the time of the arrest).

The state political dynamic in the different states should produce a broad variation in the ability of the legislature to deploy such anti-factual presumptions, or otherwise resolve by fiat, the sorts of enforcement issues raised in Part III. In Virginia, for example, there is a strong local sanctuary movement and passing restrictive legislation is a challenge. *See* Jeff Williamson, *List of Second Amendment Sanctuaries in Virginia and Where It's Being Discussed*, WSLS NEWS (Aug. 11, 2020, 12:03 AM), https://www.wsls.com/news/local/2019/11/27/list-of-second-amendment-sanctuaries-in-virginia-and-where-its-being-discussed/ (listing local second amendment sanctuaries in Virginia). Passing aggressively anti-factual presumptions should be harder there than in New York. *Compare id.*, *with* RICHARD A. GREENBERG ET AL., 6A N.Y. PRAC., CRIM. L. (4th ed. 2021) (New York criminal practice series, stating in section 33:1 that the most voluminous Penal Law article is Article 265, which regulates the sale, possession, and use of firearms and other dangerous weapons).

212. *See* Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 930, 945 (S.D. Ill. 2014). The subsequent holder scenario is multifaceted. *See generally* Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms* 1, 6 exhibit 5, NAT'L INST. JUST. (1997), https://www.ojp.gov/pdffiles/165476.pdf (finding that nineteen percent of the 251 guns in the nationwide survey sample were acquired as gifts). Nothing in the regulatory sphere allows precise tracking of the volume and timing of subsequent transfers. Meghan Keneally, *13 Questions About Guns in the United States and the Surprising Answers*, ABC NEWS (Mar. 2, 2018, 4:12 AM), https://abcnews.go.com/US/guns-/story?id=53388007 (discussing how there are no federal requirements for private sellers to collect data from customers). However, in litigation over an attempt by

subsequent holders will be truly ignorant about whether their newly acquired guns and accessories are legal, and most of them will be able to construct strong claims of ignorance.[213] Decisions to arrest or prosecute these subsequent holders will be discouraged by the standards that the Supreme Court has established for prosecutions of knowing violations under the primary federal gun control law, the 1968 Gun Control Act (GCA).[214]

Most subsequent holders of ETB contraband will have stronger claims of innocence than the Supreme Court credited in *Staples v. United States*.[215] There, the Court overturned the defendant's conviction for possession of an AR-15 semiautomatic rifle that, unbeknownst to him, had worn down or been modified to fire more than one round per trigger pull and therefore became a machine gun in violation of the 1934 National Firearms Act.[216] Rejecting the government's argument that the GCA had dispensed with a traditional *mens rea* element, the Court articulated the subsequent holder issue that drives the analysis here:[217]

> [I]n the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or

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the city of Chicago to ban gifts of firearms, the court did consider evidence showing that one subsequent holder scenario—the gifting of firearms—is a non-trivial source of lawfully acquired guns. *See Illinois Ass'n of Firearms Retailers*, 961 F. Supp. 2d at 945; *see also* David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 J. AM. MED. ASS'N 707, 708–09, 711 tbl. 2 (2005) (showing that fifteen percent of 480 randomly selected control firearms from Washington, Oregon, and Missouri were acquired as gifts).

213. *See generally Illinois Ass'n of Firearms Retailers*, 961 F. Supp. 2d at 945 (discussing instances where people receive guns as gifts).

214. 18 U.S.C. § 922; *see also* Bryan v. United States, 524 U.S. 186, 192, 200 (1998) (holding that the term "willfully" in the Gun Control Act requires a defendant to have actual knowledge that their conduct was illegal). These standards would directly govern future federal ETBs—e.g., renewal of the 1994 AWB—enacted as amendments to the GCA. 18 U.S.C. § 921 (1994). They also might serve as practical guidance and persuasive authority for nonenforcement decisions of a variety of officials committed to sanctuary policies. *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 79 (1999) ("For three decades, the Gun Control Act of 1968 (GCA) has formed the legal core of national gun policy in the United States").

215. *See Staples*, 511 U.S. at 600, 611–12 (1994).

216. *Id.* at 605 ("[W]e must construe the statute in light of the background rules of common law.") (citing United States v. Balint, 258 U.S. 250 (1922)). Traditionally, scienter was a necessary element in every crime. *See also* United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978) (recognizing that the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence).

217. *Staples*, 511 U.S. at 608–14 (comparing guns to several other objects for which the government determined the necessity of *mens rea*).

> basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.
>
> We concur with the Fifth Circuit's conclusion on this point: 'It is unthinkable to us that Congress intended to subject such law abiding, well-intentioned citizens to a possible ten-year term of imprisonment if . . . what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon."[218]

The Court also explained how a different result might occur for certain crimes deemed public welfare offenses.[219] In an earlier case, *United States v. Freed*,[220] the Court upheld the conviction of a defendant who was prosecuted for possession of hand grenades.[221] The *Freed* decision concluded that, as long as a defendant knows he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation and must determine at his peril whether his conduct is illegal.[222]

The Court rejected the *Freed* approach on the facts of *Staples*.[223] The majority rejected the government's contention that "one would hardly be surprised to learn that [owning a gun] is not an innocent act."[224] "That proposition," the Court found, "is simply not supported by common experience."[225]

The Court highlighted that Staples believed he was in possession of a lawful, commonly owned rifle—possession of which put him in the company

218. *Id*. at 615; *see also* Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019). In *Rehaif*, the Supreme Court reversed the conviction of a foreign student with an expired visa who went to a gun range, thereby violating the GCA prohibition on gun possession by illegal aliens. *Id*. at 2200. Rehaif requested an instruction that the government prove he knew his immigration status was "without authorization." *Id.* at 2194. The Court reversed the trial judge's determination that the government was not required to prove that Rehaif knew his immigration status was illegal. *Id.* at 2191, 2200.

219. *Staples*, 511 U.S. at 606.

220. 401 U.S. 601 (1971).

221. *Id.* at 605, 609. The NFA allows possession of "destructive devices." 26 U.S.C. § 5845(f). *See also Firearms - Guides - Importation & Verification of Firearms - National Firearms Act Definitions - Destructive Device*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Apr. 26, 2018), https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-national-firearms-act-definitions-1.

222. *Freed*, 401 U.S. at 605, 609.

223. *Compare Freed*, 401 U.S. at 605, 609, *with Staples*, 511 U.S. at 615.

224. *Freed*, 401 U.S. at 609,

225. *Staples*, 511 U.S. at 610.

of the "[r]oughly 50 percent of American homes [that] contain at least one firearm."[226] The Court emphasized that "in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to [heightened] regulation any more than would buying a car."[227] Contrast the grenade in *Freed.*[228] Purchasing one anywhere is virtually impossible.[229]

Both *Staples* and *Freed* involved potential violations of the 1934 National Firearms Act (NFA), which imposes stringent rules on the possession of a narrow class of guns, including machine guns and other exotic items that were targeted as "gangster weapons" when the legislation was enacted in 1934.[230] The difference is that *Staples* involved what appeared to be a common semi-automatic firearm regulated under the less stringent 1968 GCA (which regulates the ordinary firearms that make up more than ninety-nine percent of the private gun inventory).[231] *Freed*, on the other hand, involved a grenade, which has no GCA counterpart and thus prompted a different set of expectations about regulations than those attached to ordinary firearms.[232]

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226. *Id.* at 613–14.

227. *Id.*

228. *See id*. at 601 ("In contrast to . . . the possession of hand grenades considered in *Freed*, private ownership of guns in this country has enjoyed a long tradition of being entirely lawful conduct").

229. *Freed*, 401 U.S. at 609.

230. *See id.* at 605, 609; *Staples*, 511 U.S. at 615; 26 U.S.C. § 5861 (outlining prohibited acts under the National Firearms Act). For a more detailed discussion of the NFA including its grounding on the taxing power versus the commerce power, see Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms*, 70 HASTINGS L.J 717, 752 (2019).

231. *See Staples*, 511 U.S. at 600. The number of common firearms governed by the GCA likely exceeds 400 million. *See* JOHNSON ET AL., *supra* note 48, at 8–14. In 2021, the ATF reported 741,146 NFA registered machine guns. *See Annual Statistical Update 2021: Alcohol, Tobacco, Firearms and Explosives: Firearms Commerce in the United States*, Exhibit 8, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (showing the number of NFA weapons), https://www.atf.gov/firearms/docs/report/2021-firearms-commerce-report/download (last visited Aug. 27, 2022).

232. *Staples,* 511 U.S. at 611–12 ("[T]hat an item is 'dangerous' in some general sense does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence. Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in *Freed*. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify [dispensing with] . . . knowledge of a weapon's characteristics.").

In a variety of ways, the ETBs that spark SAS policies create contraband from items that are far more common than the gun at issue in *Staples*.[233] The gun in *Staples* was ultimately determined to straddle the line between a common semiautomatic firearm regulated under the 1968 GCA and a machine gun regulated under the 1934 NFA.[234]

In contrast, the assault weapons restrictions at the core of most ETBs attempt to create a new class of contraband by banning common semiautomatic guns that are governed exclusively by the 1968 GCA.[235] The volume of this new class of potential contraband is vast.[236] The AR-15 at the center of the assault weapon controversy has been the most popular rifle type in America for several years running.[237] In 2020, there were approximately twenty million AR-15 type rifles in private hands.[238] Also, for decades, the United States government has sold other semiautomatic rifles like the M1 Garand (a true military rifle that is ballistically more lethal than the AR-15) to private citizens by the United States government through the Civilian Marksmanship Program.[239] So, while heavy regulation of machine guns is longstanding, "assault weapon" bans at the heart of ETBs are not. Rather, they create a new class of contraband from common semiautomatic firearms that many buyers will literally have purchased through ordinary transactions at Walmart.[240]

Other types of ETB contraband send even weaker signals of illegality than

233. *See id*. at 603.

234. *See id*. at 602–03. *See also* Gun Control Act, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Jan. 23, 2020), https://www.atf.gov/rules-and-regulations/gun-control-act; National Firearms Act, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Apr. 7, 2020), https://www.atf.gov/rules-and-regulations/national-firearms-act.

235. *See* Gun Control Act of 1968, 18 U.S.C.A. § 921(a) (West 2022) (specifying expanded firearm restrictions); *see also* Vizzard, *supra* note 214 (discussing the Gun Control Act of 1968 in detail).

236. *See* sources cited *supra* note 235.

237. JOHNSON ET AL., *supra* note 48, at 1152.

238. *See* Matthew Loh, *America Has 20 Million AR-15 Style Rifles in Circulation, and More Guns Than People in the Country*, BUS. INSIDER (May 29, 2022, 11:40 PM), https://www.businessinsider.com/us-20-million-ar-15-style-rifles-in-circulation-2022-5 (discussing the prevalence of AR-15 type rifles in the United States).

239. *M1 Garand*, CIVILIAN MARKSMANSHIP PROGRAM, https://thecmp.org/sales-and-service/m1-garand/ (last visited Aug. 28, 2022). The AR-15 is commonly used in a popular category of this government-sponsored rifle competition. *See* Homepage, CIVILIAN MARKSMANSHIP PROGRAM, https://thecmp.org/ (last visited Aug. 28, 2022).

240. George Zornick, *How Walmart Helped Make the Newtown Shooter's AR-15 the Most Popular Assault Weapon in America*, THE NATION (Dec. 19, 2012), https://www.thenation.com/article/archive/how-walmart-helped-make-newtown-shooters-ar-15-most-popular-assault-weapon-america/; Aaron Smith & Cristina Alesci, *Walmart to Stop Selling AR-15s and Similar Guns*, CNN (Aug. 26, 2015), https://money.cnn.com/2015/08/26/news/companies/walmart-ar-15-guns/index.html.

common semiautomatic rifles.[241] Ammunition magazines, for example, are not even firearms and, until recently, have never been regulated.[242] Signals of illegality are weaker still for obscure types of contraband like bullet-button mechanisms because they are very difficult for most people to even identify and are generally unregulated.

The Court's GCA jurisprudence will facilitate innocence claims by subsequent holders of many types of ETB contraband and thus broadly support discretionary nonenforcement.[243] It would almost certainly govern any new federal ETBs and could easily inform enforcement decisions surrounding state ETBs, where enforcement officials might use *Staples* as a benchmark for addressing difficult cases.[244]

C. The Political and Structural Demands of ETBs Create Repeating Discernment Issues that Invite Discretionary Nonenforcement and Encourage Private Defiance

This Section will show how ETBs generate a series of recurring problems that invite discretionary nonenforcement. These problems are rooted in several common aspects of ETB legislation. Some of these are timing or sourcing filters—where the same item is either legal or illegal depending on when or where it was made, sold, or possessed. Other problematic filters hinge on characteristics that require testing to discern or distinctions that conflict with

241. *See* discussion *supra* Section C.2 (detailing California's flawed method of attempting to identify and ban assault weapons by highlighting the bullet button ban).

242. *See* discussion *supra* Section C.2.a (expanding on magazine bans); *see also* D.C. CODE ANN. § 7-2506.01(b) (West 2013) (setting forth Washington D.C.'s legal magazine capacity limit of ten rounds); CONN. GEN. STAT. ANN. § 53-202w(1) (West 2013) (setting forth Connecticut's legal magazine capacity limit of ten rounds); COLO. REV. STAT. ANN. § 18-12-301 (West 2013) (setting forth Colorado's legal magazine capacity limit of fifteen rounds); David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849 (2015) (illustrating the recent uptick in magazine restrictions).

243. *See generally* discussion of the complexities of discretionary nonenforcement *supra* Part V. One question that SAS police and prosecutors might face is whether a gun offense is so core to the local SAS policy that nonenforcement is proper, even in a combination case that involves a serious non-gun infraction. *See generally supra* Part V. Decision-makers might consider it quite relevant that enforcement of the gun infraction would raise issues similar to those that the Supreme Court addressed in *Staples* (even though the gun infraction involved some state regulation and not the federal GCA). *See generally* 511 U.S. 600 (1994).

244. *See generally id. Staples* was grounded on congressional silence about a *mens rea* element. *Id.* Congress certainly has the power to enact a new federal ETB that dispenses with the *mens rea* element. *Id.*

the broad themes of federal gun regulation. This Section will discuss how these things create discernment puzzles that invite discretionary nonenforcement.

Subsection One discusses a current federal ETB that is filled with discernment puzzles that invite nonenforcement. Subsection Two presents a series of generic discernment problems that consistently invite nonenforcement of ETBs and demonstrates a range of similar vulnerabilities surrounding an ETB imbedded in a proposed federal rule.

1. The First Federal Assault Weapons Ban Creates Timing and Sourcing Puzzles that Invite Nonenforcement

Section 922(r) of the GCA is the first and most enduring federal assault weapon restriction.[245] It dates to 1989, when, a demented racist used an imported semiautomatic rifle styled like an AK-47 machine gun to murder children playing at the Cleveland Elementary schoolyard in Stockton, California.[246] In response to public outcry, President George H. W. Bush took executive action to ban the importation of "assault rifles"—a category of "bad guns" carved out of the general class of semiautomatic rifles.[247] This executive action was later codified as 18 U.S.C. § 922(r).[248] This legislative attempt to distinguish between good and bad semiautomatic rifles pressed the boundaries of logic and defied functional distinctions.[249]

Pre-ban guns remained legal under Section 922(r).[250] Also, banned guns could still be imported and sold, so long as the "military-style" characteristics were removed.[251] This required removal of bayonet lugs, removal of flash suppressors, and replacement of separate pistol grips and shoulder stocks with a one-piece shoulder stock bored with a thumbhole.[252]

245. 18 U.S.C. § 922(r).

246. *See* Gustavo Arellano, *Column: A Deranged White Man Aiming His Bullets at Asians: The Urgent Lesson of 1989 Stockton Massacre*, L.A. TIMES (Mar. 20, 2021, 1:17 PM), https://www.latimes.com/california/story/2021-03-20/stockton-school-shooting-atlanta.

247. *See generally* Johnson, *Shots Across No Man's Land*, *supra* note 157, at 441–43 (detailing the bad gun formula).

248. *See* 18 U.S.C. § 922(r).

249. *See* Johnson, *Shots Across No Man's Land*, *supra* note 157, at 441–43 (detailing the dysfunctions within the bad gun formula).

250. *See* 18 U.S.C. § 922(r).

251. *Id.*; *see supra* note 162 and accompanying text (commenting on how lawmakers advance ETBs by focusing on "military-style" characteristics).

252. JOHNSON ET AL., *supra* note 48, at 1199.

Importantly, the executive order and subsequent legislation did not apply to domestic firearms or domestic firearm parts.[253] It remained lawful to change imported guns back to their original appearance, but only so long as one utilized the right number and combination of domestic parts.[254] There was no requirement in the law and no market practice of marking or recording the origin of various domestic pieces of metal and wood necessary to change a gun back to its original style.[255] So today, identifying contraband under Section 922(r) requires (1) knowing when and in what configuration a particular gun was imported, (2) determining whether it was modified back to its original (banned) appearance, and (3) determining the origin of the components used in the modification.[256]

Except for people who knowingly converted guns from compliant form back to the original (banned) configuration using foreign parts, it is virtually impossible for anyone to determine whether their gun is Section 922(r) contraband.[257] Virtually every current holder will have strong claims of innocence in any arrest or prosecution for possession or use of Section 922(r) contraband.[258] And official non-enforcers of this or similar legislation will have sound justifications for their decisions.[259]

Section 922(r) is further complicated by, and interrelated with, the expired 1994 Assault Weapon Ban (AWB).[260] The 1994 AWB also used military-style features to define prohibited "bad guns."[261]- But unlike Section 922(r), the 1994 AWB applies to domestic manufactured guns.[262] For ten years, sales

253. *See* 18 U.S.C. § 922(r).

254. *See id.*

255. *See id.*

256. *Id.*

257. *See* David Higginbotham, *Understanding Import Laws: 922[R]*, GUNS.COM (Nov. 3, 2012, 6:00 PM), https://www.guns.com/news/2012/11/03/understanding-import-laws-922r (detailing the practical challenges in interpreting Section 922(r)).

258. *See id.*

259. *See supra* notes 184–193 and accompanying text (commenting on difficulties officers face while attempting to identify contraband under cryptic gun laws).

260. Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. §§ 921(a)(30)–(31), 922(v)–(w), 923(i), 924(c)(l) (2000) (repealed 2004) (referred to as the 1994 Assault Weapon Ban (AWB)).

261. *E.g.*, JEFFREY A. ROTH & CHRISTOPHER S. KOPER, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994-96 1 (U.S. Dept. of Just., Off. of Just. Programs, Nat'l Inst. of Just. 1999), https://www.ojp.gov/pdffiles1/173405.pdf (characterizing the 1994 AWB as a prohibition of "the manufacture, sale, and possession of specific makes and models of military-style semiautomatic firearms and other semiautomatics with multiple military-style features").

262. *See id.* at 1–2 (noting the novel domestic nature of the 1994 AWB).

of new guns in prohibited configurations were banned.[263] When the 1994 ban expired in 2004, guns in previously banned configurations flooded the market in response to pent-up demand.[264] Many new manufacturers entered the market, and the AR-15 became the best-selling rifle type in the United States for several years running.[265]

This new infusion of guns greatly increased the difficulty of identifying Section 922(r) contraband and mooted any policy utility that Section 922(r) might have had.[266] Manufacturers now could make and sell "assault rifles" in the standard configuration with all of the "military-style" features (e.g., bayonet lugs, flash suppressors, and pistol grips) that were banned in 1994.[267] Guns made legal by expiration of the 1994 ban and those still illegal under Section 922(r) are literally indistinguishable.[268]

The enforcement problems that afflict Section 922(r) make it an easy case for discretionary nonenforcement. Similarly structured statutes will be

263. CHRISTOPHER S. KOPER, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACT ON GUN MARKETS AND GUN VIOLENCE, 1994-2003 1 (U.S. Dept. of Just., Off. of Just. Programs, Nat'l Inst. of Just. 2004), https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf.

264. *See, e.g.*, Arindrajit Dube et al., *Cross-Border Spillover: US. Gun Laws and Violence in Mexico*, 107 AM. POL. SCI. REV. 397, 401 (2013) (explaining that there "was approximately a 15% increase in combined gun sales in AZ, TX, and NM" following the expiration of the AWB in 2004, compared to a mere 5% rise in sales in California, where state law still banned assault weapons after the AWB expired).

265. *See* JOHNSON ET AL., *supra* note 48, at 1152; *see generally* Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control,* 71 BROOK. L. REV. 715, 782 (2005).

266. *See* Sara Swann, *Politifact: The History of the AR-15, and How it Became a Symbol of American Gun Culture*, AUSTIN AM. STATESMAN (July 1, 2022, 8:00 AM), https://www.statesman.com/story/news/politics/politifact/2022/07/01/politifact-history-ar-15-symbol-american-gun-culture/7776827001/ (illustrating the massive surge in sales of the AR-15 in 2004 following the sunset of the AWB).

267. *See generally* CALIGUNNER, *supra* note 179 (describing a multitude of compliant options for gun configurations).

268. *See id.* (discussing the impossibility of distinguishing certain compliant firearms from contraband with respect to modifications). There *are* theoretical resolutions to this sort of timing puzzle. *See* JAMES B. JACOBS & ZOE FUHR, THE TOUGHEST GUN CONTROL LAW IN THE NATION: THE UNFULFILLED PROMISE OF NEW YORK'S SAFE ACT 60–61 (2019). Some state ETBs have addressed the problem by requiring registration of grandfathered guns and prohibiting their transfer within the state. *Id.* This is the approach of the New York SAFE Act, whose design anticipates that, at some point, grandfathered guns (no longer transferable to New York residents) would be removed from the state. *Id.* As discussed in Section D.1 below, there appears to have been massive defiance of the SAFE Act registration requirement encouraged by official commitments of nonenforcement. *See* discussion *infra* Section V.D.1. Another response was the creation of a new "New York compliant" version of banned semiautomatic rifles that permitted new buyers who did not benefit from grandfathering to own guns that are "functionally equivalent" to banned assault weapons. *See* JACOBS & FUHR, *supra*, at 61.

similarly vulnerable. The broad lesson is that the framing and structure of ETBs often demand extra enforcement effort. Nonenforcement might result from endless combinations of official defiance plus the lack of special effort necessary to deal with problems inherent in the legislation. Different law enforcers will undertake different amounts of ad hoc problem solving. Officials with wavering commitments to SAS policies might be more inclined to do extra work. For officials who embrace SAS policies, the difficulties of discerning ETB violations are an engraved invitation for nonenforcement.

2. Some Common Discernment Issues Presented by ETBs: Magazine Bans, Statutory Guns that Don't Shoot, Innocuous Evil Accoutrements, and an Example from Pending Federal Executive Action

The invitations for discretionary nonenforcement that surround Section 922(r) and the California legislation discussed above are not unique.[269] Indeed, the invitations for discretionary nonenforcement seem endemic to ETBs.[270] At least three factors fuel the problem.[271] First, gun regulation is highly politicized.[272] Passing gun laws requires compromises that undercut efficacy.[273]

Second, gun legislation attempts to regulate items with concrete, physical characteristics that often are not compatible with the narratives that fuel ETB legislation.[274] For example, the attempt to carve out a subcategory of *bad*

269. *See generally* Amanda Milkovits, *A '2A Sanctuary Town' in Rhode Island Declares it Won't Comply With New Gun Law*, BOSTON GLOBE (July 20, 2022, 9:59 AM), https://www.bostonglobe.com/2022/07/20/metro/2a-sanctuary-town-rhode-island-declares-it-wont-comply-with-new-gun-law/ (demonstrating local reluctance to enforce a "high-capacity" magazine ban in Burrillville, Rhode Island).

270. *See id.*

271. *See, e.g.*, JACOBS & FUHR, *supra* note 268, at 61.

272. *See, e.g.*, JOHNSON ET AL., *supra* note 48, at 783 (describing the political fallout from the 1994 AWB); JACOBS & FUHR, *supra* note 268, at 61 (portraying the "intense opposition" sparked by New York gun laws).

273. JACOBS & FUHR, *supra* note 268, at 61. *See, e.g.*, ROTH & KOPER, *supra* note 261, at 1–2 (explaining how the 1994 AWB had to "balance . . . competing policy goals" after being "[d]ebated in a politically charged environment"); Meenakshi Balakrishna & Kenneth C. Wilbur, *Do Firearm Markets Comply with Firearm Restrictions? How the Massachusetts Assault Weapons Ban Enforcement Notice Changed Registered Firearm Sales*, 19 J. EMPIRICAL LEGAL STUD. 60, 66 (2022) (discussing the "political compromise" made in the definition of "semiautomatic assault weapons" chosen for the 1994 AWB).

274. *See* Kelly, *infra* note 284, at 347, 348 (detailing the characteristics of banned configurations).

semiautomatic guns (based on their military-style appearance) from the general class of semiautomatics rests on distinctions that defy the physical characteristics and function of semiautomatic firearms as a class.[275] However, anti-technical distinctions that contradict the actual functioning of semiautomatics are a core component to the ETB form.[276]

Finally, new gun laws are not drafted on a blank slate.[277] They supplement a body of existing legislative and regulatory determinations.[278] This backdrop means that new ETB legislation may be incompatible with rules that are already in place and that will invite different grades of discretionary nonenforcement.[279]

Subparts a, b, c, and d below provide more detailed examples and analysis of these problems and suggest their potential impact on the spectrum of discretionary nonenforcement decisions.

a. Magazine Bans and Discernment

Ammunition magazine bans are a common component of ETB legislation.[280] This Subsection will show how magazine bans present a variety of discernment problems that invite discretionary nonenforcement and private defiance.

Ammunition magazines for semiautomatic firearms are spring-loaded boxes that hold and feed successive rounds of ammunition into the chamber of the gun.[281] Magazine capacity of semiautomatic firearms has been the focus of both federal and state assault weapon laws and a variety of proposed

275. *See, e.g.*, Wallace, *supra* note 162, at 197–98 (clarifying the physical characteristics and function of semiautomatic firearms versus those of machine guns).

276. *See id.* (describing the conflation of semiautomatics and machine guns by referring to them as "bullet-hoses" while disregarding their actual physical functionality and relative capabilities).

277. *See generally* JOHNSON ET AL., *supra* note 48, at 667–738. The primary federal firearms law, the Gun Control Act of 1968, has been amended numerous times by legislation that builds on its basic framework. *See id.*

278. *See supra* note 169 and accompanying text.

279. *See, e.g.*, JACOBS & FUHR, *supra* note 268, at 60 (exemplifying the enforcement inconsistencies caused by the changing policy backdrop of gun regulation, since in New York under the SAFE Act, new owners of guns with certain military-style features may be subject to a prison term, whereas existing registered owners are legal gun possessors).

280. *E.g.*, CAL. PENAL CODE § 32310 (West 2016) (banning high-capacity magazines in California).

281. *See* NICHOLAS J. JOHNSON ET AL., *Chapter 15: In-Depth Explanation of Firearms and Ammunition*, *in* FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 401, 411 (2012), http://firearmsregulation.com/www/FRRP_2012_Ch15.pdf (providing images of detachable box magazines).

restrictions.[282] The now expired 1994 AWB prospectively banned magazines with a capacity of more than ten rounds.[283] Existing magazines were grandfathered and remained legal to possess and sell.[284]

Several states also have banned ammunition magazines with a capacity of more than ten rounds, along with varying provisions for grandfathering or reducing the capacity of existing magazines.[285] Reported compliance with these bans has been very low.[286] For example, reporting suggests that zero magazines have been surrendered in response to New Jersey's 2018 ban.[287]

As the contraband created by private defiance transitions to subsequent holders, a spectrum of enforcement issues will challenge the viability of magazine bans.[288] Identification of contraband magazines poses an array of problems that give subsequent holders stronger claims of innocence than were sustained in *Staples* and thus invite nonenforcement by defiant public officials.[289]

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282. *See e.g.,* JACOBS & FUHR, *supra* note 268, at 69 (describing the history of magazine bans).

283. *See* ROTH & KOPER, *supra* note 261, at 1 (explaining that the AWB outlawed most "large capacity" ammunition magazines "capable of holding more than ten rounds of ammunition").

284. *See generally* Meagan Kelly, *How Can You Ban What Doesn't Exist? Redefining the "Assault Weapon,"* 12 DREXEL L. REV. 331 (2020) (discussing the 1994 Assault Weapon Ban).

285. JOHNSON ET AL., *supra* note 48, at 78. By 2021, nine states plus the District of Columbia had placed restrictions on ammunition magazines. *See Magazine Capacity Laws by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/magazine-capacity-laws-by-state (last visited Sep. 14, 2022).

286. *See, e.g.*, Jacob Sullum, *Gun Owners Don't Seem Eager to Comply With New Jersey's New Magazine Ban*, REASON (Dec. 20, 2018, 3:05 PM), https://reason.com/blog/2018/12/20/new-jerseys-gun-owners-do-not-seem-eager.

287. *Id.* In December of 2018, New Jersey banned all ammunition magazines with a capacity of more than ten rounds. *Id.* Current owners were required to either "surrender them to police, render them inoperable, modify them so they cannot hold more than ten rounds, or sell them to authorized owners." *Id.* Estimates extrapolated from sales records of common firearms that come with higher capacity magazines put the number owned prior to the ban at around two million. *Id.* Reporting suggests that zero magazines have been surrendered. *Id.*

288. *Id.*; *see also* Christopher S. Koper & Jeffrey A. Roth, *The Impact of the 1994 Federal Assault Weapons Ban on Gun Violence Outcomes: An Assessment of Multiple Outcome Measures and Some Lessons for Policy Evaluation*, 17 J. QUANTITATIVE CRIMINOLOGY 33, 67 (2001). After the expiration of the 1994 AWB, a study mandated by the expired legislation concluded that the 1994 ban was focused in large part on irrelevant variables that made the banned guns look like military guns (e.g., bayonet lugs and flash suppressors). *Id.* The study pointed out that it was in fact plausible to distinguish between different types of semiautomatics by focusing on the ability to accept a detachable box magazine. *Id.* at 35; *see also* Daniel Webster et al., *Evidence Concerning the Regulation of Firearms Design, Sale and Carrying on Fatal Mass Shootings in the United States*, 19 CRIMINOLOGY & PUB. POL'Y 171, 188 (2020) (finding that bans on large capacity magazines are associated with reductions in fatal mass shootings).

289. *See generally* Staples v. United States, 511 U.S. 600 (1994) (holding that knowledge of fully automatic capacity is required to obtain a conviction for possession of a machine gun).

Recall that the defendant in *Staples* knew that he was in possession of a gun and actually had fired it.[290] By comparison, subsequent holders of contraband magazines will have plausible claims that they did not even know the object was even gun related.[291] Many students in my Firearms Law seminars over the years have failed to identify images of ammunition feeding devices. Many readers of this article will be unable to independently identify the ammunition clip for the M1 Garand battle rifle as gun related.[292] And that is only the first obstacle.

Like the gun in *Staples*, whether a magazine is contraband will be a function of its internal configuration.[293] Magazine capacity can be reduced by internal modifications.[294] Magazine bans typically allow noncompliant magazines to be converted to reduced capacity.[295]

Some magazines are marked with the number of rounds they hold.[296] Many are not.[297] Even for those that are marked, one cannot tell whether they have been internally modified to accept fewer rounds without actually loading them. Many people do not know how to do this—-either how to determine the proper ammunition or physically how to load the magazine. Many such claims of ignorance will be difficult to disprove and easily credited by officials inclined toward nonenforcement.[298]

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290. *Id.* at 603.

291. *See id.* at 609.

292. *See 10 Pack M1 Garand Stripper Clips 8 Shot Parkerized Steel Phosphate AEC GI Contractor $2.90 per Clip M-1 3006 .30-06 or 308 .308*, GUNS AMERICA, https://www.gunsamerica.com/934839184/10-Pack-M1-Garand-Stripper-Clips-8-Shot-Parkerized-Steel-Phosphate-AEC-GI-Contractor-2-90-per-Clip-M-1-3006-30-06-or-308-30.htm (last visited Aug. 28, 2022) (depicting the feeding device for the Garand as a "clip" loaded through the top of the receiver as distinguished from a box "magazine" that loads into the bottom of the receiver).

293. *See, e.g.*, *Staples*, 511 U.S. at 603 (describing internal configurations of M-16s versus AR-15s).

294. *See* Open Letter from NYPD to Gun License and Permit Holders (May 2013), https://www.nyc.gov/html/nypd/downloads/pdf/permits/ny_safe_act_letter_re_lcafd_2013_05_v9.pdf (describing internal modifications to a high-capacity magazine by a gunsmith).

295. *See id.* For many guns, especially handguns, the body of the magazine must maintain the same outside dimensions in order to fit in the gun. *Id.* However, there may be continuing disputes about the process of conversion—e.g., focusing on whether it is sufficiently permanent. *Id.* New York City, for example, accepts certification from a gunsmith that a high-capacity magazine has been permanently modified to accept only ten rounds in compliance with the New York Safe Act. *Id.*

296. *See* Mike V., *How Many Rounds Can a Handgun Hold?*, EVERYDAY CARRY CONCEALED, https://everydaycarryconcealed.com/how-many-rounds-can-a-handgun-hold/ (last visited Sept. 9, 2022) (depicting a magazine labeled with the number of rounds it holds).

297. *See id.* (depicting an unmarked magazine).

298. *See* Sullum, *supra* note 286 (noting that after New Jersey's magazine ban some people would

In some cases, even matching magazines with the right gun will be difficult—for example, where the contraband magazine is found separate from the gun.[299] For unmarked magazines, one must discern what gun they fit and what ammunition they hold.[300] Many magazines will actually accept various types of ammunition.[301] So, matching the gun, the magazine, and the ammunition presents multiple opportunities for subsequent holders to claim innocence, inviting discretionary nonenforcement.[302]

The New York State Sheriffs' Association filed an amicus brief that presented a version of this problem in litigation challenging the New York SAFE Act.[303] The brief explained that the capacity of tubular magazines "varies with the length of the cartridges used." [304] The Sheriffs argued, "If an officer encounters one of these firearms, is [he] to seize the firearm and arrest the individual . . . ? What if the firearm is unloaded, or if the individual is unaware it can hold eleven rounds of a different type of ammunition?"[305]

Another issue endemic to magazine bans is that many magazine bodies are easily repurposed to a different caliber.[306] The AR-15 rifle presents a good

be unaware they were breaking the law, and police officers only planned on filing charges against people who were also guilty of other crimes).

299. *See* Matthias Gafni, *For One Week, High-Capacity Ammunition Magazines Were Legal in California. Hundreds of Thousands May Have Been Sold*, S.F. CHRON. (Apr. 11, 2019, 12:56 PM), https://www.sfchronicle.com/bayarea/article/For-one-week-high-capacity-gun-magazines-were-13757973.php ("Magazines don't carry serial numbers, so tracking them is nearly impossible."). Many firearms are sold with extra magazines. *See* Jay Grazio, *How Many Magazines Should You Have?,* SHOOTING ILLUSTRATED (Apr. 4, 2020), https://www.shootingillustrated.com/content/how-many-magazines-should-you-have/ (noting that firearms often come with two magazines). Also, it is common for people to purchase extra magazines. *See id.* Since guns will only hold one magazine at a time, there is a good chance that subsequent holders will encounter loose magazines separate from the gun. *See id.*

300. *See* Gafni, *supra* note 299.

301. *See* DemolitionRanch, *Firing the Wrong Caliber*, YOUTUBE (Dec. 5, 2013), https://www.youtube.com/watch?v=lkJuu7rwNEc. The gun generally will not, but sometimes might, function with mismatched ammunition. *Id.*; *see also What Happens When You Fire the Wrong Caliber*, AMMUNITION DEPOT, https://www.ammunitiondepot.com/blog/what-happens-when-you-fire-the-wrong-caliber (last visited Sept. 10, 2022).

302. *See* JACOBS & FUHR, *supra* note 268, at 77 (explaining the limitations of policies requiring police to enforce magazine restrictions).

303. Amici Curiae Brief of N.Y. State Sheriffs' Ass'n et al., N.Y. State Rifle and Pistol Ass'n v. Cuomo, No. 13-cv-00291, 2013 WL 10767751 (W.D.N.Y. May 29, 2013).

304. *Id.*

305. *Id.*; *see also* JACOBS & FUHR, *supra* note 268, at 74.

306. Matthew Larosiere, *Losing Count: The Empty Case For "High-Capacity" Magazine Restrictions*, 3 CATO INST. CTR. FOR CONST. STUD. LEGAL POL'Y BULL. 1, 4 (2018), https://www.cato.org/sites/cato.org/files/pubs/pdf/legal-policy-bulletin-3-updated.pdf.

example.[307] It can be adapted to fire different calibers of ammunition by using different upper receivers.[308] One version of this modification allows owners to use larger caliber (i.e., larger diameter) ammunition than the standard .223 caliber round.[309]

A good example is the .450 Bushmaster version of the AR-15.[310] The .450 Bushmaster round is comparatively large, with a diameter of 450 hundredths of an inch versus the 223 hundredths of an inch for the standard AR-15 round.[311] Because the .450 Bushmaster cartridge is so large, standard AR-15 magazines will only hold ten or fewer rounds of .450 Bushmaster ammunition.[312] So, is the magazine that Uncle Bert's heirs find in a box at the lake house a legal, ten-round magazine for the .450 Bushmaster, or a piece of high-capacity contraband?[313]

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307. *Id.*

308. *See What Are the Different Types of AR15 Uppers?*, E2 ARMORY (Nov. 12, 2019), https://e2armory.com/types-of-ar-15-uppers.

309. *See* Larosiere, *supra* note 306. Caliber is a measure of the diameter of the bullet. Spider Concealment, *What Do the Different Gun Calibers Mean?,* THERMOLD MAG. (June 11, 2019), https://thermoldmagazines.com/blog/what-do-the-different-gun-calibers-mean/. Bullets of the same caliber or diameter may still be different lengths, and therefore have different weights. *Id.* Also, the same bullet may be joined with many different sizes of cases (the brass vessels that hold both the powder and the bullet). James Willmus, *Can Rifles Shoot Different Calibers of Bullets?,* BACKFIRE (July 8, 2021), https://backfire.tv/can-rifles-shoot-different-calibers-of-bullets/. The energy of the fired bullet is a function of its diameter, shape, weight, and the amount of propellent in the case. *What is Muzzle Velocity? – A Simple Explanation*, AIMING EXPERT, https://aimingexpert.com/what-is-muzzle-velocity-a-simple-explanation/ (last visited Sept. 10, 2022). Thus, caliber designations are highly incomplete measurements. *See id.* Caliber is technically measured in inches. Spider Concealment, *supra*. Metric designations like 9mm equate to particular calibers. *Id.* Proposals to ban 9mm firearms, such as the proposal President Biden has made, raise a host of practical framing and enforcement issues. *See Biden Pushes 9mm Handgun Ban, Harris Wants to Ban Common Semi-Autos*, NRA ILA (June 2, 2022), https://www.nraila.org/articles/20220602/biden-pushes-9mm-handgun-ban-harris-wants-to-ban-common-semi-autos. President Biden probably intends to ban pistols, but the 9mm cartridge is also a revolver round. *See* George Harris, *9mm Revolver Ammo: Avoiding Bullet Jump & Other Issues*, NRA SHOOTING ILLUSTRATED (Oct. 23, 2019), https://www.shootingillustrated.com/content/9mm-revolver-ammo-avoiding-bullet-jump-other-issues/. Moreover, 9mm is roughly .30 caliber and is the most popular kind of hunting round. *See* Philip Massaro, *Top 5 All-Around North American Big-Game Cartridges,* NRA AM. HUNTER (Nov. 8, 2021), https://www.americanhunter.org/content/top-5-all-around-north-american-big-game-cartridges/.

310. *See* Patrick Sweeney*, .450 Bushmaster: Why to Choose the Big, Big-Bore*, GUN DIG. (May 7, 2020), https://gundigest.com/gear-ammo/ammunition/the-big-big-bore-450-bushmaster.

311. *Id.*

312. *See id.* For a discussion of Bushmaster Magazine conversions and aftermarket dedicated 450 Bushmaster Magazines, see James Miller, *Stockpile Reviews: 5 Best 450 Bushmaster Magazines [2022]The Best 450 Bushmaster Magazines for Those Big Bore Rounds,* MINUTEMAN REV. (Aug. 3, 2022), https://www.minutemanreview.com/best-450-bushmaster-magazines/.

313. *See id*. To function with the .450 Bushmaster, the standard AR magazine is often modified

The complications that afflict practical enforcement of magazine bans help underscore how discretionary nonenforcement might unfold across a spectrum of scenarios.[314] The strength or weakness of a magazine infraction will vary based on the circumstances.[315] Those circumstances, in combination with other factors, will fuel a range of nonenforcement decisions.[316] For example, simple possession of a contraband magazine that is detached and isolated from the gun, where the holder claims ignorance to the magazine being banned, seems like an easy case of nonenforcement—even for an official with only marginal commitment to a local SAS policy.[317] That same official might well make a different decision in a combination case involving a gun loaded with a contraband magazine in the possession of someone arrested for a separate, even minor infraction.[318] Another enforcement official with a stronger

with a replacement follower (the piece that sits atop the magazine spring, cradles the bottom cartridge, and pushes the ammunition continuously upward through the magazine into the gun's chamber). *Id.* The follower is not marked in any way. *Frequently Asked Questions About Ghost Guns*, CTR. FOR AM. PROGRESS (Apr. 2, 2021), https://www.americanprogress.org/article/frequently-asked-questions-ghost-guns/ (explaining only "fully finished firearms, frames, and receivers" have a serial number). The only way to know is to attempt to fire it, but this actually complicates the answer. *See generally* DemolitionRanch, *supra* note 305 (showing consequences of firing the wrong ammunition). The replacement follower should mean that the .450 Bushmaster magazine will not function reliably with the .223 ammunition, and vice versa. *See generally id.* (showing guns with wrong caliber bullets misfiring). But functionality is dynamic. *Id.* Many magazines will feed one round of the wrong ammunition. *Id.* But that is not the design. *Id.* So, what is the test for whether the .450 magazine is also a functional piece of .223 contraband? Does it matter whether the magazines are accompanied by guns in both calibers? *See* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 507 (1992) (dealing with the similar issue of whether it is illegal to package together legal gun parts which have potential to be constructed into an illegal firearm). In *Thompson*, the Court concluded that an array of parts, all of which had legal uses, made possession lawful even though some combinations of those parts might be illegal. *Id.*

314. *See* JACOBS & FUHR, *supra* note 268, at 77; *see also* Fields, *supra* note 1, at 496–97 (discussing how sheriffs and prosecutors might use "discretion to decline to arrest or prosecute in the name of the Constitution").

315. *See, e.g.*, Adam Winkler, *Op-Ed: Why Gavin Newsom's Gun Law Won't Help*, L.A. TIMES (Apr. 8, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-0408-winkler-gavin-newsom-gun-initiative-20160408-story.html (arguing magazine bans will only be enforced when an illegal magazine is found on an arrestee).

316. *See id.* (arguing without gunowner compliance gun laws will go unenforced).

317. *See, e.g.*, Martin Kaste, *When Sheriffs Won't Enforce the Law*, NPR (Feb. 21, 2019, 4:16 PM), https://www.npr.org/2019/02/21/696400737/when-sheriffs-wont-enforce-the-law (recounting a moderate Washington sheriff refusing to enforce a minimum-age law against a twenty-year-old farmer with a semi-automatic rifle on his tractor).

318. *See* Winkler, *supra* note 315 (arguing officers will enforce magazine bans only when an illegal magazine is found on a person arrested for another offense).

commitment to the SAS policy might react differently.[319] And both decision makers might behave differently when the magazine infraction occurs in combination with more serious crimes.[320]

b. Contraband Guns That Don't Shoot . . . And Don't Even Look Like Guns

Some prompts for discretionary nonenforcement stem from the fact that the existing federal regulatory definition of firearms captures things that cannot be readily identified as guns.[321] This can make ETB contraband difficult to identify, and that problem invites discretionary nonenforcement.[322] The AR-15 rifle presents a prime example.[323] The AR-15 consists of two basic parts—the upper receiver and the lower receiver.[324] Most people would recognize the upper receiver with the attached barrel as part of a gun.[325] *But that part is not the regulated gun*.[326] It is freely transferrable, has no serial number,

319. *See, e.g.,* Kaste, supra note 317 (discussing sheriffs with differing levels of commitment to nonenforcement). Immigration and drug law nonenforcement provide models for appreciating conflicts between police and prosecutors, between policy makers and frontline enforcement officers, along with conflicts within each category. *See, e.g.*, Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1751–52 (2018) (describing conflict between the Santa Cruz City Council and the Santa Cruz Police Department over providing assistance to federal immigration officials); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 177 (2021) (discussing police opposition to Suffolk County Massachusetts prosecutor Rachel Rollins's platform of nonenforcement of minor drug violations and other petty crimes); Dewan, *supra* note 136 (describing opposition by Baltimore police to chief prosecutor Marilyn Mosby's marijuana nonenforcement policies); Andrew Boryga, *'Not Going to Do This Anymore': Fed-Up Prosecutor is Done With BS Traffic Stops,* DAILY BEAST (Sept. 8, 2021, 6:22 PM), https://www.thedailybeast.com/fed-up-ramsay-county-prosecutor-john-choi-is-done-with-minor-traffic-stops-after-philando-castile-death?source=articles&via=rss (discussing Ramsay County's decision not to prosecute felonies stemming from traffic stops for minor violations).

320. *See* Sullum, *supra* note 286.

321. *See* 18 U.S.C. § 921(a)(3) (2020) (including mufflers, silencers, and "any destructive device" in the definition of firearm).

322. *See* Jake Bleiberg & Stefanie Dazio, *Design of AR-15 Could Derail Charges Tied to Popular Rifle*, AP NEWS (Jan. 13, 2020), https://apnews.com/article/nv-state-wire-usnews-ap-top-news-ca-state-wire-oh-state-wire-396bbedbf4963a28bda99e7793ee6366 (describing judges dismissing gun charges if defendants only possessed a lower receiver, not a completed gun).

323. *Id.*

324. *Id.*

325. *See AR-15 Uppers*, PALMETTO STATE ARMORY, https://palmettostatearmory.com/ar-15/barreled-upper-assemblies.html (last visited Sept. 11, 2022) (displaying images of barreled upper receivers).

326. Bleiberg & Dazio, *supra* note 322.

and there is no system for controlling possession of it.[327]

The part of the AR-15 that is considered the "gun" for regulatory purposes is the *lower receiver*, which houses the trigger group and accepts the ammunition magazine.[328] Absent the shoulder stock, the pistol grip, and the trigger group (i.e., the externally visible trigger as well as the internal hammer, sears and springs, and selector), many people will not recognize the AR-15 lower receiver as a gun part.[329] Many people, especially subsequent holders, in possession of contraband lower receivers might convincingly claim ignorance of possessing a gun, and those claims will support an array of nonenforcement decisions.[330]

The regulated receiver—the only thing federal law considers "the gun"—is even more obscure for other guns subject to ETBs.[331] The FN-FAL semiautomatic rifle is a good example.[332] For this gun, which is also on most assault weapons ban lists, the *upper receiver* is deemed "the gun."[333] If one studies the FN-FAL upper receiver, there is evidently a place for a barrel.[334]

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327. *Id.*

328. *Id.* For images of lower receivers in various stages of completion, see *AR-15 Lower Receivers*, PALMETTO STATE ARMORY, https://palmettostatearmory.com/ar-15/lowers.html, (last visited Sept. 11, 2022).

329. *See generally* Bleiberg & Dazio, *supra* note 322 (showing the component parts of an AR-15).

330. *See id.* (discussing defense attorneys who argue defendants who solely possess the lower receiver do not possess a gun). With the stripped lower receiver, the AR-15 is not difficult to assemble for someone who can follow directions and has decent dexterity. *See How to Build an AR-15 Rifle*, MIDWAY USA, https://www.midwayusa.com/how-to-guides/how-to-build-ar-15-rifle (last visited Sept. 11, 2022). Many enthusiasts have purchased stripped lowers and built guns from them. *Id.* This is entirely legal under federal law and most state laws. *See* 18 U.S.C. § 922 (2020); 26 U.S.C. § 5822 (2020); 27 C.F.R. §§ 478.39, 479.62, 479.105 (2020); *see, e.g.*, CAL. PENAL CODE §§ 31900–32100 (West 2012) (allowing one to build an AR-15 meeting certain requirements). One appeal of the stripped lower is that someone can purchase the regulated "gun" at a significant discount compared to the fully functioning gun. *Compare AR-15 Lower Receivers*, *supra* note 328, *with Complete AR-15 Rifles*, PALMETTO STATE ARMORY, https://palmettostatearmory.com/ar-15/ar15-guns/rifles.html (last visited Sept. 11, 2022). A fully built AR-15 might cost around $650 in a normal market. *Complete AR-15 Rifles*, *supra*. For many years, a standard quality stripped lower receiver, "the regulated gun," has sold for under $100. *AR-15 Lower Receivers*, *supra* note 328.

331. *Compare AR-15 Lower Receivers*, *supra* note 328, *with DSA FAL SA58 Type 3 Carry Handle Cut Semi Auto Receiver–7.62x51mm*, DS ARMS, https://www.dsarms.com/p-16472-dsa-fal-sa58-type-3-carry-handle-cut-semi-auto-receiver-762x51mm.aspx (last visited Sept. 11, 2022).

332. *DSA FAL SA58 Type 3 Carry Handle Cut Semi Auto Receiver–7.62x51mm*, *supra* note 331.

333. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF NATIONAL FIREARMS ACT HANDBOOK 10 (2009), https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download.

334. *See DSA FAL SA58 Type 3 Carry Handle Cut Semi Auto Receiver–7.62x51mm*, *supra* note 331.

However, the stripped FN-FAL upper receiver is many difficult assembly steps away from being a discernable firearm.[335]

Many gun owners purchase stripped receivers in preparation for building a fully functional gun.[336] From a regulatory perspective, the stripped receiver is the same as a fully functional gun.[337] But nothing on the face of things will alert a subsequent holder of stripped AR-15, FN-FAL, or many other receivers that she possesses a firearm, let alone a contraband firearm.[338] And that fact might be dispositive in contested nonenforcement decisions.[339]

c. Innocuous But Evil Accoutrements: The Carolyn McCarthy Problem

There are many examples of ETBs that define "contraband" by reference to innocuous but politically laden accoutrements.[340] This is an outgrowth of the "bad gun" legislative form that focuses on "scary looking" or military-style guns but allows continued possession of functionally identical ones that are less "scary looking."[341] The ultimate result is a set of rules that defy intuitions about dangerousness and breach the boundaries articulated in *Staples*.[342]

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335. *See* Christopher Mace, *FAL Build: The Next Step for AR Builders?*, GUNSAMERICA DIG. (Sep. 20, 2020), https://www.gunsamerica.com/digest/fal-build-the-next-step-for-ar-builders/.

336. *See* Suzanne Wiley, *What You Need to Build an AR-15*, THE SHOOTER'S LOG (Sep. 10, 2013), https://blog.cheaperthandirt.com/build-ar-15-starting-stripped-receiver/ (describing the methods gun owners use to build fully functional guns).

337. *See* Bleiberg & Dazio, *supra* note 322.

338. *See id.* These problems are an outgrowth of the fact that guns are relatively simple machines and are assembled from many generic metal or plastic parts. *See* Ryan Cleckner, *How to Build a Glock at Home [2022] Step by Step Guide*, GUN UNIV. (Mar. 24, 2022), https://gununiversity.com/build-glock-home-no-serial-number-no-registration/. Regulation of springs, detents, metal tubes, etc. is simply not practical. *See* Amy Swearer, *Breaking Down Biden's Proposed "Ghost Gun" Rules,* HERITAGE FOUND. (May 27, 2021), https://www.heritage.org/firearms/commentary/breaking-down-bidens-proposed-ghostgun-rules ("Federal law doesn't regulate the manufacture and sale of every firearm part."). So, ATF has made a series of decisions about what parts of the gun must be stamped with serial numbers to facilitate regulation. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *supra* note 333, at 46 (requiring serial numbers for "frames or receivers that are not components of complete firearms").

339. *See* Dewan, *supra* note 136 (exemplifying a combination case example causing disagreements about nonenforcement within, and between, categories of non-enforcers (e.g., police and prosecutors) regarding drug enforcement).

340. *See* Johnson, *Shots Across No Man's Land*, *supra* note 157, at 441–43.

341. *Id.*

342. *See* Staples v. United States, 511 U.S. 600, 608–16 (1994) (holding guns do not fall under the category of dangerous devices that dispense of the *mens rea* requirement).

This creates broad opportunities for discretionary nonenforcement.[343]

Even legislative sponsors of these ETBs have sometimes been unable to navigate or explain the distinctions that define contraband.[344] A good example is Carolyn McCarthy's befuddlement over why legislation that she sponsored proposed to ban guns with "barrel shrouds."[345] In a national news interview, McCarthy could neither describe the barrel shroud, nor explain why it should be banned.[346] The barrel shroud is not intuitively dangerous.[347] Indeed, the rationale for banning it remains elusive, except that some might say it adds an aggressive look to the gun.[348]

Other examples of the sort of discernment problem that befuddled Carolyn McCarthy plagued the 1994 AWB (now expired but still championed by its sponsor President, then-Senator, Joseph R. Biden).[349] The 1994 ban was a classic ETB.[350] It identified contraband by the number and configuration of prohibited components, including flash suppressors and bayonet lugs.[351]

The flash suppressor is a vented cylinder that fits onto the muzzle of the gun.[352] It suppresses the brief flash of burning gunpowder at the muzzle when

343. *See* Meghan Keneally, *Understanding the 1994 Assault Weapons Ban and Why It Ended*, ABC NEWS (Sept. 13, 2019, 2:21 AM), https://abcnews.go.com/US/understanding-1994-assault-weapons-banended/story?id=65546858 (articulating how technicalities in the 1994 Assault Weapons Ban created loopholes for using guns that were technically legal, but identical to those banned by the act).

344. Jeff Cook, *Carolyn McCarthy*, YOUTUBE (Apr. 19, 2007), https://www.youtube.com/watch?v=ospNRk2uM3U (showing Carolyn McCarthy unable to explain what a barrel shroud is after she introduced legislation to ban them).

345. *Id.*

346. *Id.*

347. *What's the Deal With Barrel Shrouds?,* FIREARMS HIST., TECH. & DEV. (Dec. 16, 2014), https://firearmshistory.blogspot.com/2014/12/whats-deal-with-barrel-shrouds.html (explaining the function and design of barrel shrouds).

348. *See id.*

349. *See* German Lopez, *The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained*, VOX (Sept. 29, 2020, 10:25 AM), https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-lawmass-incarceration; *see also* Kelly, *supra* note 284, at 349 (1994 AWB defined guns by cosmetic standard, so manufactures could just rebrand a gun to get around regulations).

350. *See supra* Section V.C.1. *Compare* Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. § 2 (1994) (making it unlawful "to manufacture, transfer, or possess a semiautomatic assault weapon"), *with* 18 U.S.C. § 922(r) (2018) (making it unlawful only to assemble particular types of semiautomatic weapons).

351. *See* H.R. 4296, 103d Cong. (1994) (detailing which guns and gun components would be deemed illegal).

352. *How Does a Flash Hider Work?*, SILENCER SHOP (May 4, 2021), https://www.silencershop.com/blog/post/how-does-a-flash-hider-work (detailing the purpose and inner workings of a flash hider).

the gun is fired.[353] This muzzle flash can impede the shooter's vision, and the flash suppressor prevents that.[354] While the 1994 AWB banned guns with flash suppressors, it allowed guns with other visually and functionally similar muzzle devices.[355] For example, muzzle brakes remained legal.[356] Muzzle brakes look like flash suppressors, except they are intended to reduce recoil rather than muzzle flash.[357] The 1994 AWB also allowed continued use of unvented—and thus nonfunctional—flash suppressors.[358] Most subsequent holders would be unable to navigate these byzantine distinctions, and that uncertainty is fuel for discretionary nonenforcement.[359]

The 1994 AWB also prohibited guns with bayonet lugs.[360] Visually, bayonet lugs are non-descript pieces of metal attached to the gun's barrel.[361] They allow a specially configured blade to be secured onto the barrel.[362] The difference between a smooth gun barrel and one with a bayonet lug might be noticeable to the uninitiated.[363] But the difference would likely prompt the question, "What's that?" This common reaction is a foundation for compelling claims of innocence that would invite discretionary nonenforcement.[364]

353. *Id.*

354. *Id.*

355. *See* H.R. 4296, 103d Cong. (1994).

356. *Id.*

357. *See* Guy J. Sagi, *Muzzle Brake VS Flash Hider*, WIDENER'S GUNS, AMMO & SHOOTING BLOG (Apr. 27, 2020), https://www.wideners.com/blog/muzzle-brake-vs-flash-hider/; Brandon Maddox, *Muzzle Brake vs. Flash Hider: Do You Know the Difference?*, SILENCER CENT. (Aug. 28, 2019), https://www.silencercentral.com/blog/muzzle-brake-vs-flash-hider-do-you-know-the-difference/.

358. *See* H.R. 4296, 103d Cong. (1994).

359. *See* Keneally, *Understanding the 1994 Assault Weapons Ban and Why It Ended*, *supra* note 343.

360. *See* H.R. 4296, 103d Cong. (1994).

361. *Bayonet Lug*, ACAD. DICTIONARIES & ENCYCLOPEDIAS, https://en-academic.com/dic.nsf/enwiki/1705520 (last visited Sept. 11, 2022).

362. *Id.* There are many different types of bayonet lugs designed for different rifles. *See, e.g.*, *Israeli K98 Bayonet Lug, Long *Very Good**, APEX GUN PARTS, https://www.apexgunparts.com/israeli-k98-bayonet-lug-long-vg.html (last visited Sept. 11, 2022). A general internet search will generate multiple images of items that are difficult to identify as being gun related. *See id.* For a video showing the bayonet lug and its removal for compliance with the New York Safe Act, see Bushcraft412, *NY Safe Act Compliance—Removing the AR15 Bayonet Lug*, YOUTUBE (Nov. 9, 2013), https://www.youtube.com/watch?v=sotEXOsx5wo.

363. *See* Bushcraft412, *supra* note 362; IntoWeapons, *AK-47 Bayonet Lug Install: Zastava N-PAP Rifle*, YOUTUBE (Apr. 2, 2013), https://www.youtube.com/watch?v=v0WpXR89giw (displaying the installation of a bayonet lug).

364. *See* Staples v. United States, 511 U.S. 600, 608–16 (1994); Keneally, *Understanding the 1994 Assault Weapons Ban and Why It Ended*, *supra* note 343.

A coherent policy surrounding ETBs would abandon anti-technical, political distinctions like "military-style guns."[365] A coherent policy based on substantive criteria would focus on functional differences between gun types; for example, by treating all semiautomatics the same way.[366]

Of course, banning all semiautomatics seems constitutionally and politically untenable because common semiautomatic handguns are at the core of the constitutional right to arms, and Americans probably own more than one hundred million semiautomatic firearms.[367] So, we will likely remain afflicted by ETB legislation that pursues a thin slice of politically-defined "bad guns."[368] Defiant public officials will perceive the discernment problems embedded in this sort of legislation as presenting strong invitations for discretionary nonenforcement.[369]

d. The McCarthy-Style Discernment Problem and An Example From Recently Proposed Federal Executive Action.

The previous subsection discussed existing examples of how problems with discerning ETB contraband invite discretionary nonenforcement. This subsection presents a looming potential example. The problem appears in a proposed agency rule governing "pistol-stabilizing braces."[370]

365. *See* Kelly, *supra* note 284, at 354; ROTH & KOPER, *supra* note 261.

366. *See* Kelly, *supra* note 284, at 354; ROTH & KOPER, *supra* note 261.

367. *See NSSF Releases Most Recent Firearm Production Figures*, NSSF (Nov. 16, 2020), https://www.nssf.org/articles/nssf-releases-most-recent-firearm-production-figures/ (estimating the number of firearms in circulation based on production figures since 1990). There is no precise count of the amount of semiautomatic firearms in the U.S. *Id.* One hundred million is a conservative estimate based on several factors. *Id.* Current estimates by the National Shooting Sports Foundation put the number of semiautomatic "assault rifles" alone at more than twenty million. *Id.* This count does not include other semiautomatic rifles that are not considered assault rifles, semiautomatic pistols (which alone might number close to one hundred million), or semiautomatic shotguns. *See id.* For data that will aid in constructing an estimate of the total number of semiautomatic firearms in the United States, see Philip J. Cooke & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT'L INST. OF JUST. 1, 5 (1997), https://www.ojp.gov/pdffiles/165476.pdf; WILLIAM J. KROUSE, CONG. RSCH. SERV., RL32842, GUN CONTROL LEGISLATION 8–9 (2012), https://sgp.fas.org/crs/misc/RL32842.pdf.

368. *See* Johnson, *Shots Across No Man's Land*, *supra* note 157, at 441–43 (detailing the bad gun formula).

369. *See, e.g.*, JACOBS & FUHR, *supra* note 268, at 45–61, 221 n.19 (discussing private defiance already witnessed).

370. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," 86 Fed. Reg. 30826 (June 10, 2021) (to be codified at 27 C.F.R. pts. 478, 479); Objective Factors for Classifying Weapons with "Stabilizing Braces," 85 Fed. Reg. 82516 (Dec. 18, 2020).

The pistol-stabilizing brace attaches to large, cumbersome "pistols" and allows the shooter to fire them more easily with one hand.[371] These large pistols are generally adapted from rifles.[372] But unlike rifles, they have short barrels and no shoulder stock.[373] Under federal law, this configuration renders these guns "pistols," even though their size and weight make them difficult to fire with one hand like one would a traditional pistol.[374] The pistol stabilizing brace attaches to the back of the gun, fits over the shooter's forearm, and helps the shooter fire the gun with one hand.[375]

The stabilizing brace also can allow the firing of the gun from the shoulder (although this is sub-optimal because the contact point is just the thin edge of the hollow brace versus a solid shoulder stock). This presents an esoteric regulatory issue, because using a stabilizing brace to fire guns from the shoulder mimics the functionality of a short-barreled rifle.[376] Short-barreled rifles are subject to the stringent regulations of the NFA. So far, ATF has treated the sale and possession of pistols with stabilizing braces like any other common GCA pistol.[377]

In December 2020, the ATF issued a notice of proposed rulemaking that would potentially reclassify guns with stabilizing braces as short-barreled rifles (governed by the NFA).[378] If this proposed rule is finalized, it will present a variety of enforcement problems and innocence claims.[379] For example, the rule suggests that some, but not all, stabilizing braces will be subject to the NFA.[380] The proposed rule would assign points to different stabilizing braces depending on whether they have characteristics that encourage or discourage

371. Jennifer Mascia & Alain Stephens, *Biden's Pistol Brace Rule Would Put Pressure on an Already Strained ATF Division*, THE TRACE (July 19, 2021), https://www.thetrace.org/2021/07/atf-national-firearms-actpistol-brace-application-delay/.

372. *Id.*

373. *Id.; see, e.g.*, *AR-15 and AK-47 Pistols*, CHEAPER THAN DIRT!, https://www.cheaperthandirt.com/firearms/tactical/ar-15-and-ak-47-pistols/ (last visited Sept. 11, 2022).

374. *See* Mascia & Stephens, *supra* note 371.

375. *Id.*

376. *Id.*

377. Mascia & Stephens, *supra* note 371.

378. Objective Factors for Classifying Weapons with "Stabilizing Braces," 85 Fed. Reg. 82516 (Dec. 18, 2020). After a flood of comments in opposition, the proposed rule was withdrawn and reintroduced, with the communication that comments on the prior rule would not carry over. *See id.*; Withdrawal of Guidance, 85 Fed. Reg. 86948 (Dec. 31, 2020).

379. *See* Mascia & Stephens, *supra* note 371.

380. *See* Objective Factors for Classifying Weapons with "Stabilizing Braces*," supra* note 378.

shouldering the firearm (e.g., padding or lack of a forearm strap).[381] A stabilizing brace that accumulates enough points would transform the gun into an NFA firearm subject to various requirements, whose violation triggers substantial fines and imprisonment.[382]

The proposed stabilizing brace rule is squarely within the category of ETBs that Second Amendment Sanctuaries deem objectionable, and it exhibits several characteristics that invite discretionary nonenforcement.[383] Implementation of the rule would require the sort of special effort by front line officials that invites nonenforcement.[384] The primary problem is that law enforcers cannot detect violations of the stabilizing brace ban just by observing the gun.[385] The violation would be failure to complete the registration and tax paperwork required by the NFA.[386] Random enforcement of the stabilizing brace rule would involve front line law enforcement officials questioning citizens about their papers.[387] So, in jurisdictions where SAS policies enjoy universal support among front line officials, the rare case where law enforcement encounters someone in possession of stabilizing brace contraband could easily result in good faith nonenforcement because the officer had no reason to suspect the paperwork was not in order.[388]

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381. Factoring Criteria for Firearms with Attached "Stabilizing Braces," *supra* note 370, at30832 (June 10, 2021) (to be codified at 27 C.F.R. pts. 478, 479).

382. *Id.* at 30829 (proposing the point system); 26 U.S.C. § 5871 (2018) (providing for up to ten years imprisonment).

383. *See generally* Factoring Criteria for Firearms with Attached "Stabilizing Braces," *supra* note 370. There are perhaps millions of guns fitted with stabilizing braces. *Id.* at 30828. So far, that configuration has been governed like any common firearm under the 1968 GCA. *Id.* at 30827–28. The proposed rule would subject these guns to the far more onerous financial and procedural requirements of the NFA (the federal law that governs machine guns). *Id.* at 30828. Failure to comply would expose violators to up to ten years in prison. 26 U.S.C. § 5871 (2018).

384. *See, e.g.,* JACOBS & FUHR, *supra* note 268, at 74 (outlining New York sheriffs' criticism of gun control law partly grounded in the difficulty of differentiating legal and illegal firearm accessories).

385. *See* Mascia & Stephens, *supra* note 371.

386. Factoring Criteria for Firearms with Attached "Stabilizing Braces," *supra* note 370, at 30828.

387. *See id.* Because the violation involves failing to register and pay tax for the gun, officers will inevitably have to ask gun owners with stabilizing braces about their papers. *See id.*

388. *Cf. infra* Section V.E (describing the non-investigation policies adopted by immigration sanctuaries). Like other ETBs, the federal rule would be quite effective prospectively by restricting new sales by easily identifiable and highly regulated manufacturers, wholesalers, and retailers who did not register these firearms under the NFA. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," *supra* note 370, at 30846 (describing four scenarios that allow manufacturers and individuals to comply with the law). By contrast, enforcement against current private owners would be difficult because there is no way to determine who they are. *See id.*

This nonenforcement dynamic surrounding paperwork violations extends to scenarios where prospectively banned guns are grandfathered so long as they are registered.[389] Identifying contraband in that context also requires discernment of paperwork violations that will not be evident from casual contact.[390] Even officials who are ambivalent about prevailing SAS policies might decline to enforce such violations because enforcement requires special effort, and violators might make a variety of plausible innocence claims.[391]

D. Discretionary Nonenforcement Policies Signal Illegitimacy and Encourage Private Defiance

Drawing from sociological research, immigration scholars have shown how narratives and perceptions of illegitimacy fuel noncooperation with federal immigration laws.[392] This section involves that framework to show how

389. *See* Factoring Criteria for Firearms with Attached "Stabilizing Braces," *supra* note 370, at 30847 (proposing an alternative where "existing firearms with an attached 'stabilizing brace'" are grandfathered in).

390. *Cf.* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131–32 (6th Cir. 2015) (arguing that allowing *Terry* stops purely on the evidence of being armed "would effectively eliminate Fourth Amendment protections for lawfully armed persons" (quoting United States v. King, 990 F.2d 1552, 1559 (10th Cir.1993))); Regalado v. State, 25 So.3d 600, 606 (Fla. Dist. Ct. App. 2009) ("[S]topping a person solely on the ground that the individual possesses a gun violates the Fourth Amendment."); *see also* Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited* Terry *Stops*, 54 IDAHO L. REV. 297, 331 (2018) (stating that *United States v. Ubiles,* 224 F.3d 213 (3d Cir. 2000) held that firearm possession alone provides an insufficient basis for conducting a *Terry* stop and frisk). *But see* Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 26–27 (2015) ("[F]ederal courts have largely declined to follow the Florida court's reasoning."). Consider for comparison the evolving jurisprudence regarding officers conducting *Terry* stops in jurisdictions with liberal concealed carry laws. *See* sources cited *supra*. Several state courts have ruled that simply carrying a firearm does not provide a basis for police to presume that the defendant was breaking the law, or for a *Terry* stop and frisk. *See* cases cited *supra*.

391. *See, e.g.*, JACOBS & FUHR, *supra* note 268, at 74.

392. *See, e.g.*, Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 13 (2016) (noting local law enforcement agencies were not complying with the federal government's voluntary detainer requests); *see also* Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions,* 52 BRIT. J. CRIM. 1051, 1053 (2012) (highlighting legitimacy as a key component to public obedience of laws); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4 (Princeton Univ. Press 2006) (describing that people who find authorities as legitimate are less likely to break laws); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 58–64 (Russell Sage Found. 2002) (highlighting trust in legal authorities' decisions as an important factor in whether individuals will accept those decisions); TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 16–17 (Princeton Univ. Press 2011) (noting that social utility can influence decision-making more than self-interest); Richard H. Fallon, Jr., *Legitimacy*

rhetoric and perceptions of illegitimacy might fuel discretionary nonenforcement in the SAS context. Subsection 1 will discuss substantive illegitimacy. Subsection 2 will discuss procedural illegitimacy.

1. The Practice and Rhetoric of Official Defiance Present Substantive Challenges to ETB Legitimacy

Immigration scholarship identifies various political, social, and moral challenges to the legitimacy of federal immigration policies that have fueled "erosion of community trust[,] . . . undermin[ed] the community policing relationships," and prompted government officials to resist federal law.[393]

The immigration experience prompts the expectation that similar issues will flow from the intense political disputes and rhetoric surrounding ETB legislation and the resulting SAS policies.[394] One aid to appreciating the possibilities here is New York's development and implementation of the "the

and the Constitution, 118 HARV. L. REV. 1787, 1791–94 (2005) (describing three concepts of legitimacy and claiming that sociological acceptance necessary for a legal system to exist); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 382 (1983) (noting greater legitimacy of law leads to greater conformity).

393. Chen, *supra* note 392, at 27, 33. One focus of defiance in the immigration context was the Secure Communities program. *Id.* at 22. The program allowed federal authorities to screen every arrestees' fingerprints against immigration records and request that jails "hold" people potentially subject to removal beyond their scheduled release until federal authorities could take custody and assess deportation options. *Id.* at 23. Resistance to this program was grounded on Fourth Amendment and Tenth Amendment arguments. *Id*. at 24 n.35, 30. These sorts of criticisms contributed to a "loss of sociological acceptance" that imperiled legitimacy. *Id.* at 31 (invoking Richard Fallon for the point that "laws depend much more on their present sociological acceptance than upon the legality of their formal ratification"). One empirical assessment found mounting resistance starting in 2012, culminating in 26 cities and 233 counties officially restricting law enforcement agencies from "hold[ing] individuals for transfer to ICE." *Id*. at 25. Chen notes that this was far from a majority of localities, but their resistance was "the snowball leading to the avalanche that disrupted detainer practices." *Id*. at 25–26.

394. *See* Chen, *supra* note 392, at 18 ("Survey-based studies of individuals' attitudes toward cooperation ask whether an individual feels it is okay to disobey a federal law; whether disobeying a law is sometimes justified; and what factors might cause someone to disobey."). The immigration critique suggests an array of other potential impacts of official defiance beyond encouraging private defiance. *See id.* at 20. Efficacy also might come in the form of official state county or local resistance that helps to "weaken, slow, or redirect the . . . mandate." *Id*. Another immigration scenario suggests a potential complication for state SAS policies. *See id.* at 40. In Texas, cooperation with ICE detainers generated dissent and resistance in the county housing Austin, a liberal outpost. *See* Tim Henderson, *Cities, States Resist–and Assist–Immigration Crackdown in New Ways*, PEW (Aug. 3, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/03/cities-states-resist-and-assist-immigration-crackdown-in-new-ways.

toughest gun law in America," the New York SAFE Act.[395] The SAFE Act included a variety of new gun policies, but its core provisions were classic ETBs, including assault weapon and magazine bans.[396]

Responses to the SAFE Act included rhetorical and practical challenges to its legitimacy.[397] Those challenges included statements by local officials questioning the core legal precepts of the legislation and proclaiming public commitments not to enforce it.[398] Those official challenges to the SAFE Act's legitimacy correlated with massive private defiance.[399]

James Jacobs's 2019 book provides a detailed assessment of the SAFE Act that includes rich accounts of SAFE Act defiance.[400] Jacobs notes at the outset, "[W]e did not anticipate the depth and breadth of anti–SAFE Act opposition, especially from county officials and sheriffs outside the New York City metropolitan area . . .[that] probably encouraged non-compliance."[401]

There were broad early signals of resistance.[402] The New York State Sheriffs' Association objected to the problems the SAFE Act posed for law enforcement in "determin[ing] which semiautomatics qualif[ied] as prohibited assault weapons."[403] A 2015 account in *Forbes* magazine described "a profound social stigma among gun owners against registering these guns with the government. . . . [T]hey are quick to tell you that many municipalities and county sheriff departments have reported they won't enforce the SAFE Act in

395. *See* JACOBS & FUHR, *supra* note 268, at 2.

396. JACOBS & FUHR, *supra* note 268, at 2. "[T]he thirty-nine-single-spaced-page bill contained at least ten separate gun control initiatives, including strengthened bans on assault weapons," and ammunition magazines, including a bizarre provision that prohibited individuals from loading more than seven rounds into ammunition magazines designed for ten rounds. *Id.* at 2, 70. "States at the vanguard of gun control law . . . had set ten-bullet-or-more maximum for gun magazines. So New York's maximum would be seven, Andrew ruled. The Republican Staffers tried to explain the problem with that. Gun clips were designed to hold ten bullets at least." *Id.* at 70 (quoting MICHAEL SHNAYERSON, THE CONTENDER: ANDREW CUOMO, A BIOGRAPHY 374 (Grand Cent. Publ'n 2015)). "Gun owners' . . . protests quickly persuaded [Democrats] to replace the seven-round limit with a ten-round limit, but with the face-saving proviso that a ten-round magazine may not be loaded with more than seven cartridges." *Id.* at 70.

397. *Id.* at 51.

398. *Id.*

399. *Id.* at 51–52.

400. *Id.* at 49–61.

401. *Id*. at 51.

402. *Id.* at 55.

403. *Id.* In state litigation, the prohibition on semiautomatic versions of fully automatic machine guns was struck down for vagueness because "an ordinary person cannot" discern it. *Id.* at 54.

their jurisdictions."[404]

Forty counties and two hundred seventy-one municipalities passed resolutions opposing the SAFE Act.[405] "[F]orty-four counties, with the support of the New York Association of County Clerks, passed resolutions purporting to prohibit state agencies from using county seals on communications with gun owners regarding SAFE Act compliance."[406] Owners of newly restricted assault weapons rallied in opposition.[407] Advancing the New York State Sheriffs' Association's sharp criticism of the SAFE Act, individual sheriffs were openly defiant.[408] In the words of one commentator, "[S]heriffs in upstate communities revolted" against the SAFE Act.[409]

The Schoharie County Sheriff attacked the SAFE Act's core substantive legitimacy by assuring his constituents: "If you have an (assault) weapon, which under the SAFE Act is considered illegal, I don't look at it as being illegal just because someone said it was."[410] The Schuler County Sheriff's commitment to nonenforcement invoked the Constitution to imply that the SAFE Act was illegitimate.[411] His public statement that none of his officers would be coming to take citizens' guns included the rationale, "I believe in our rights under the Second Amendment, and . . . the Fourth Amendment."[412]

Other challenges were more matter-of-fact.[413] The Essex County Sheriff said, "I assure you that I have no intention of going door to door to pick up any weapons legally owned by any Essex County residents, nor does any other sheriff in New York State."[414] The Chemung County Sheriff emphasized that SAFE Act enforcement was "at the bottom of the list."[415]

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404. Frank Miniter, *Nearly One Million New Yorkers Didn't Register Their 'Assault Weapons,'* FORBES (June 24, 2015, 9:31 AM), https://www.forbes.com/sites/frankminiter/2015/06/24/nearly-one-million-new-yorkers-didnt-register-their-assault-weapons/#12753db2702f; *see also* Erica Goode, *Sheriffs Refuse to Enforce Laws on Gun Control*, N.Y. TIMES (Dec. 15, 2013), https://www.nytimes.com/2013/12/16/us/sheriffs-refuse-to-enforce-laws-on-gun-control.html.

405. JACOBS & FUHR, *supra* note 268, at 18.

406. *Id.* at 22–23.

407. *Id.* at 50.

408. *Id.* at 51.

409. *See* Su, *Intrastate Federalism supra* note 16, at 204.

410. JACOBS & FUHR, *supra* note 268, at 51.

411. *Id.*

412. *Id.*

413. *See id.*

414. *Id.*

415. *Id.*

Private defiance of the SAFE Act appears to be pervasive.[416] FOIL responses show that 23,847 people registered roughly 45,000 assault weapons in compliance with the law.[417] The National Shooting Sports Foundation estimated the number of assault weapons actually owned, and requiring registration, to be about one million.[418] James Jacobs estimates compliance with the SAFE Act assault weapon provisions to be about five percent.[419] This is consistent with other states' assault weapons restrictions' single digit compliance rates.[420]

Jacobs's conclusion that public officials' open defiance probably encouraged noncompliance is basically what the legitimacy critique would predict.[421] But these results also illuminate the difficulty of answering the contingent question raised in Part IV: whether discretionary nonenforcement will supplant formal SAS policies as a tool of official defiance.[422] The fact that seemingly massive resistance to the SAFE Act occurred prior to the rise of the SAS movement suggests that SAS goals might be achieved through less formalized commitments to nonenforcement.[423] However, it may be difficult to tease out precisely how much private defiance those commitments caused versus how much private defiance would have occurred independently.[424] Precise

416. *Id.* at 50.

417. *Id.*

418. *Id.*; *see also* Rick Karlin, *New York SAFE Act Gun Registration Numbers are Released: Details Given to Rochester Lawyer in Response to a Lawsuit,* TIMES UNION (June 22, 2015), https://www.timesunion.com/news/article/New-York-SAFE-Act-gun-registration-numbers-are-6343080.php.

419. JACOBS & FUHR, *supra* note 268, at 50.

420. *See* Jacobs & Potter, *supra* note 38, at 106.

421. JACOBS & FUHR, *supra* note 268, at 51. The seemingly widespread official and private defiance of the SAFE Act also informs the question raised in Part IV—how undeclared resistance will ultimately compare to formal SAS policies in terms of efficacy. *See* Gunter, *supra* note 81. If it turns out that upstate New Yorkers are massively defying the SAFE Act without significant consequences, how different is that from a successful formally declared SAS policy? *See also* Miniter, *supra* note 404. In private correspondence, one observer noted that the assault weapons aspect of the SAFE Act "is not being enforced—I live in upstate N.Y. and I know a lot of people who have these banned firearms; they don't hesitate to take them to the range." *See supra* Part IV. This behavior by upstate gun owners, seemingly prompted by the belief that local officials will not enforce the SAFE Act, is consistent with the scholarship showing that criminal deterrence is driven primarily by risk of detection. *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1030–32 (2020).

422. *See* Gunter, *supra* note 81.

423. *See supra* Part IV. The thwarting of the Lautenberg Amendment is a core example of this effect. *See supra* Part IV.

424. *See* Brian Mann, *Will Upstate NY Cops, Sheriffs Enforce Gun Control Laws?,* NCPR (Aug. 14, 2013), https://www.northcountrypublicradio.org/news/story/22532/20130814/will-upstate-ny-

measurement is further confounded by the difficulty of quantifying informal or covert defiance by public officials.[425] This difficulty highlights a lingering uncertainty about how to estimate the comparative utility and tactical appeal between formal SAS policies and more covert nonenforcement strategies.[426]

2. Procedural Illegitimacy, Official Defiance, and Private Defiance

The immigration resistance scholarship shows how questions of "procedural legitimacy" may feed both official and private defiance of contested laws.[427] Enactment of the New York SAFE Act presents an example of such questions in the firearms context.[428]

The passage of the SAFE Act was unusual.[429] Andrew Cuomo's biographer wrote that the process was rooted in the Governor's ambition to establish "the toughest gun control bill in the land" following the Sandy Hook massacre.[430] Success might have advanced his political ambitions by drawing a contrast to President Obama's failure to get federal gun restrictions through Congress.[431] The Governor's drafting team worked in secret to avoid sparking a surge in gun sales if news of an impending ban went public.[432] There was no public debate.[433] The team introduced the bill in the early evening on January 14, 2013, under a "message of necessity," a procedure that circumvents the constitutionally required three-day wait between the introduction of a bill and the final vote on it.[434] The Governor signed the SAFE Act into law on January 15, 2013.[435]

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cops-sheriffs-enforce-gun-control-laws.

425. *See* Nicholas J. Johnson, *Defiance, Concealed Carry, and Race*, 83 L. & CONTEMP. PROBS. 159, 164 (2020).

426. *See* Fields, *supra* note 1, at 442–45, 456–57.

427. Chen, *supra* note 392, at 17–18, 27–33.

428. JACOBS & FUHR, *supra* note 268, at 50.

429. *See id.* at 192.

430. *See id.* at 10.

431. *See id.*

432. *Id.* at 11. This is a common phenomenon, the dynamics of which I critiqued in 2008. *See* Johnson, *supra* note 28, at 838–39.

433. *See* JACOBS & FUHR, *supra* note 268, at 12.

434. *Id.* at 12–13.

435. *Id.* at 15. Jacobs includes a detailed treatment of the politics that led to the votes. *See id.* at 13-15. Jacobs's ultimate assessment was that the SAFE Act was long on symbolism but short on efficacy. *Id.* at ix–xi. "[T]he political priority was passing the SAFE Act rather than administering it." *Id.* at xi. Throughout the book, Jacobs argues that much of the SAFE Act was practically impossible to implement with the desired effect. *See, e.g.*, *id.* at 50–52, 161, 167, 191.

This unusual legislative process alone might prompt skeptics to question the procedural legitimacy of the SAFE Act.[436] But attempts to implement the SAFE Act presented additional questions of procedural legitimacy.[437]

Among other things, the SAFE Act required sellers of ammunition to be registered and state police to conduct background checks of all ammunition purchasers using a state-created database.[438] Difficulties in developing the database, and protests from various corners, led to a series of "adjustments" to the ammunition control regulations.[439]

First, in 2014, the New York State Police Superintendent issued an "open letter" exempting businesses and organizations that sell ammunition for use on their premises from some of the ammunition regulations.[440] James Jacobs observes that "[s]ince the State police superintendent lacks authority to amend legislation, this letter technically constituted a promise that the State Police would not enforce the ammunition provisions against clubs and shooting ranges."[441]

Comparing the state police open letter to statements—such as sheriffs' commitments of overt defiance—prompts two observations. First, private refuseniks might credit the sheriffs' nonenforcement commitments out of simple confusion.[442] Casual refuseniks might reasonably perceive that public nonenforcement commitments by sheriffs stand on similar footing to those of the state police.[443] Second, private refuseniks might justify their defiance by consciously rejecting any distinction between "legitimate" nonenforcement by state police and "illegitimate" nonenforcement by sheriffs, and thus rationalize their defiance as traditional civil disobedience.[444]

Another aspect of the SAFE Act ammunition controls adds texture to the procedural legitimacy critique. In July 2015, with Governor Cuomo's approval, New York State Police entirely halted the effort to create the

436. *See id.* at 16.

437. *See* Judson Berger, *NY Guv Looks to Clarify Gun Law After Concern About Exemption for Police*, FOX NEWS (Dec. 20, 2015, 11:34 PM), https://www.foxnews.com/politics/ny-guv-looks-to-clarify-gun-law-after-concern-about-exemption-for-police.

438. JACOBS & FUHR, *supra* note 268, at 160–61.

439. *See id.* at 164–65.

440. *See id.* at 159.

441. *Id.*

442. *Id.* at 45–47, 50–51.

443. *See id.*

444. *See* Jesse J. Smith, *Massive Noncompliance with SAFE Act*, HV1 (Apr. 1, 2019), https://hudsonvalleyone.com/2016/07/07/massive-noncompliance-with-safe-act/.

ammunition background check system.[445] New York Senate Republicans seized this opportunity to introduce an amendment repealing the ammunition provisions.[446]

Shortly after the Republican amendment failed, the Republican Senate Majority Leader and the New York State Director of Operations signed a Memorandum of Understanding (MOU) that the ammunition database could not be established, and that no further funds would be allocated to the project without bilateral agreement.[447] Governor Cuomo's counsel issued a statement that the MOU was consistent with the "letter, spirit [and] intent" of the SAFE Act.[448]

The Senate Minority Leader called the MOU "outrageous" and chided whether there would be similar MOUs coming on minimum wage.[449] The Deputy Senate Minority Leader considered the MOU blatantly illegitimate, saying that "[t]he notion that . . . the [G]overnor, with one house only, can agree to change state law, turns our democracy on its head."[450] The Democratic Assembly Speaker criticized the MOU as an "end run around the legislature and the SAFE Act."[451]

So how closely did New York's gun owners and their political representatives watch and respond to all of this?[452] Immigration scholars actually surveyed stakeholders in order to determine how narratives of procedural

445. JACOBS & FUHR, *supra* note 268, at 165. Initially, SAFE Act drafters planned to use the federal instant check database, but that aim was disappointed because the NICS system is not authorized to conduct checks on ammunition purchasers. *Id.* at 160.

446. *Id.* at 165.

447. *Id.*

448. *Id.* at 166.

449. *Id.*

450. *Id.*

451. *Id.* at 166–67. *Cf.* Chen, *supra* note 392, at 13, 28, 45–47 (discussing how similar procedural warts contributed to the federal detainer program's loss of legitimacy).

> Secure Communities' history was shrouded in mystery and missteps that bred community mistrust from its inception. DHS implemented its enforcement program in communities using a variety of strategies, shifting over time from the use of Memorandums of Understanding (MOUs) to other types of negotiated agreements, and then altering the substance of the agreements to focus on cooperation with detainer requests rather than access to LEA databases. These inconsistent and changing practices generated confusion over the mandatory or voluntary nature of local participation in federal immigration enforcement.

Id. at 28.

452. *See generally* Jimmy Vielkind, *SAFE Act Memo Doesn't Quell Primary Threats*, POLITICO (July 13, 2015, 1:11 PM), https://www.politico.com/states/new-york/albany/story/2015/07/safe-act-memo-doesnt-quell-primary-threats-023697 (highlighting some United States' senators' opinions on the SAFE Act MOU).

illegitimacy affected their decisions to resist federal immigration laws.[453] Scholars have not yet explored this connection for the SAFE Act.[454] And while defiance of the SAFE Act seems well established, cause and effect remain unclear.[455] Still, the procedural illegitimacy critique adds value with its warning about future, similar legislative efforts.[456]

The SAFE Act MOU was an adjustment to unforeseen enforcement problems.[457] But similar nonlegislative policy shifts often occur when control of the executive branch changes hands.[458] One consequence of these power shifts is that state reactions to SAS policies and ETB enforcement might vacillate dramatically.[459] This raises the opportunity for those who rely on enforcement signals from one administration to question the legitimacy of conflicting enforcement policies of other administrations.[460]

Similar arguments have been advanced in the marijuana and immigration contexts.[461] Zachary Price argues that state and local marijuana and immigration nonenforcement policies have invited large numbers of legally unsophisticated people to undertake legal risks in reliance on nonbinding governmental assurances and that due process principles might protect such reliance.[462] Over time, interactions between Second Amendment Sanctuaries and superior jurisdictions might produce similar contradictory signals about the legitimacy and enforcement of contested gun laws.[463] This sort of mixed messaging and vacillating enforcement fuels a narrative of procedural illegitimacy that encourages both discretionary nonenforcement and private defiance.[464] Again,

453. *See* Chen, *supra* note 392, at 18.

454. *See* Su, *The Rise of Second Amendment Sanctuaries, supra* note 13, at 20.

455. *See* JACOBS & FUHR, *supra* note 268, at 165 (discussing single-digit compliance with the SAFE Act registration requirement).

456. *See* Chen, *supra* note 392, at 29.

457. *See* JACOBS & FUHR, *supra* note 268, at 165.

458. *See* Price, *supra* note 111, at 943. The "intrastate federalism" scholarship shows how intrastate conflicts along the urban/rural divide on issues such as firearms policy and LGBTQIA+ rights have supplanted the traditional federalism model of distinct state cultures. *See* Su, *Intrastate Federalism*, *supra* note 15, at 204–05. Rick Su demonstrates how related policies might shift depending on which faction is in power. *See id.* at 197.

459. *See id.* at 202.

460. *See id.* at 201; Chen, *supra* note 392, at 56–57.

461. *See* Price, *supra* note 111, at 957–60.

462. *Id.* at 961–63.

463. *See id.* at 961–62.

464. *See supra* note 458 and accompanying text. Su argues that local policies on various issues that may be at odds with state policy and policies of other municipalities might affect what types of people choose to locate where. *See* Su, *Intrastate Federalism*, *supra* note 15, at 202. For example, pro-LGBT

the range of behaviors falls along a spectrum. Public officials who strongly sympathize with SAS policies can be expected to credit and encourage the procedural illegitimacy critique, and perhaps resist enforcement of ETBs on that basis.[465] Officials who oppose SAS policies can be expected to tilt the other way.[466]

E. Official Defiance by Whom: Decision-Making by Three Types of Non-enforcers

As discussed above, this Article does not address the countless idiosyncratic variables that will affect discretionary nonenforcement by policymakers, prosecutors, and police operating in various circumstances across multiple jurisdictions.[467] Still, decision-making by policymakers, prosecutors, and police does not entirely defy systematic analysis.[468] There are broad themes and categorical differences surrounding how policymakers, prosecutors, and police will engage in discretionary nonenforcement.[469] This section discusses those themes and differences in three subsections. Subsection 1 draws from the literature surrounding resistance against federal immigration policy to show how SAS policymakers might craft similar nonenforcement policies.[470] Subsection 2 focuses on prosecutorial nonenforcement.[471] It draws on lessons from progressive prosecutors who have used their discretion to combat mass incarceration by declining to enforce drug and quality of life crimes.[472] Subsection 3 discusses how police and prosecutors' discretionary nonenforcement decisions are complicated and discouraged in cases involving a combination of gun and non-gun infractions.[473] The discussion of these "combination cases" also introduces the concern about bias in exercising enforcement

local polices might draw people who feel those policies are important. *See id.* Once that trend starts, those polices will become more entrenched because they respond to a growing constituency. *See id.* This phenomenon seems to naturally extend to gun policy. *See id.* at 204. And the more deeply embedded it becomes, the more "legitimate" defiance will seem. *See id.* at 204–05.

465. *See* JACOBS & FUHR, *supra* note 268, at 166–67.
466. *See id.*
467. *See supra* Part I.
468. *See infra* Sections V.E.1–.3.
469. *See infra* Sections V.E.1.3.
470. *See infra* Section V.E.1.
471. *See infra* Section V.E.2.
472. *See infra* Section V.E.2.
473. *See infra* Section V.E.3.

discretion—the primary subject of Part VI.[474]

1. Nonenforcement by Policymakers: Lessons from Immigration Sanctuaries

Many local policy makers (county commissioners, mayors, and councilpeople) are unlikely to make the sort of frontline nonenforcement decisions charged to local police and prosecutors.[475] But there are a variety of ways, peculiar to local circumstances, for local policymakers to concretely advance SAS goals.[476]

Resistance by immigration sanctuaries is particularly instructive here and presents readily transferable tactics suitable for local policymakers to deploy in aid of SAS commitments.[477] Lasch provides a catalogue of immigration resistance policies.[478]

One of the most common forms of resistance to federal immigration laws is the non-investigation mandate.[479] Sometimes called "don't police" policies, these local rules direct front line law enforcement agents in contact with suspects to refrain from asking questions about immigration status and from investigating immigration violations.[480] The non-investigation mandate pairs well with the earlier observation that nonenforcement might result from failure to develop and implement the special, ad hoc mechanisms that ETB enforcement sometimes requires.[481]

Some "don't police" initiatives appear as police department policies, but

474. *See infra* Part VI.

475. *See* Su, *The Rise of Second Amendment Sanctuaries*, *supra* note 13, at 13–14.

476. *See id.*

477. *See e.g.*, *infra* notes 478–487 and accompanying text.

478. Lasch et al., *supra* note 319, at 1736–52 (synthesizing over five hundred sanctuary policies spanning nearly four decades).

479. *See id.* at 1739.

480. *Id.* These policies might also appear as internal police policy. *Id.* An example of this is LAPD Special Order 40, which prohibited officers from "initiat[ing] police action with the objective of discovering the alien status of a person." OFF. OF THE CHIEF OF POLICE, SPECIAL ORD. NO. 40, UNDOCUMENTED ALIENS (Nov. 27, 1979), http://libguides.law.du.edu/ld.php?content_id=34432079. Another variation is illustrated by the Princeton, New Jersey Police Department's General Order that prohibits officers from arresting people based on ICE administrative warrants. Princeton, N.J. Police Dep't, General Order, Enforcement of Immigration Law (Nov. 11, 2013), http://libguides.law.du.edu/ld.php?content_id=34435940 ("Officers shall not arrest or otherwise detain persons who are entered in the NCIC/SCIC system by . . . I.C.E. unless the entry is for an actual criminal arrest warrant."); Lasch et al., *supra* note 319, at 1742.

481. *See* CARLSON, *supra* note 184, at 112.

non-investigation mandates have also been imposed through legislation.[482] Legislative non-investigation policies have been established by ordinance in San Francisco[483] and Hartford,[484] and by state legislation in Oregon,[485] Vermont,[486] and California.[487]

There are already examples of this approach being deployed in service of SAS policies.[488] In June 2021, the Davis County, Utah Sheriff's Office adopted an internal policy that prohibited department employees from enforcing laws that infringe on the constitutional right to arms.[489] Sheriff Kelly Sparks described the approach as more "'actionable' than [just] declaring Second Amendment [S]anctuary status."[490] The Davis County commissioners expressed immediate support for the policy.[491]

Release policies adopted by immigration sanctuaries might also be utilized in defiance of ETBs, especially in cases involving non-gun infractions combined with ETB violations.[492] In those cases, policy makers might mandate an immigration-style practice of releasing on the ETB infraction if the primary infraction is resolved or dismissed.[493]

Some localities have resisted immigration enforcement by physically barring federal agents from accessing enforcement resources.[494] New York City,

482. *See* Lasch et al., *supra* note 319, at 1739–40.

483. S.F., Cal., Ordinance No. 375–89 (Oct. 24, 1989), http://libguides.law.du.edu/ld.php?content_id=34432127. New York City made similar observations about federal responsibility for enforcing immigration laws by enacting Executive Order 124. *See* N.Y.C., N.Y., Exec. Order No. 124 (Aug. 7, 1989), https://libguides.law.du.edu/ld.php?content_id=34436598.

484. HARTFORD, CONN., MUN. CODE ch. 2, art. XXI, §§ 2-925–29 (2008); Lasch et al., *supra* note 319, at 1739–40.

485. OR. REV. STAT. § 181A.820 (2020); Lasch et al., *supra* note 319, at 1740.

486. Act of June 17, 2014 Vt. Laws, No. 193, § 2366 (S. 184) (amending, VT. STAT. ANN. tit. 20, § 2366), https://legislature.vermont.gov/Documents/2014/Docs/ACTS/ACT193/ACT193%20As%20Enacted.pdf; VT. CRIMINAL JUSTICE TRAINING COUNCIL, MODEL FAIR AND IMPARTIAL POLICING POLICY ¶¶ VIII, IX (2017), https://libguides.law.du.edu/ld.php?content_id=41582278; Lasch et al., *supra* note 319, at 1740.

487. CAL. GOV'T CODE § 7284.6 (West 2018) (enacted as part of California S.B. 54 (Oct. 5, 2017)).

488. *See Utah Sheriff's Department Enacts Policy Defending Gun Rights*, AP NEWS (June 2, 2021), https://apnews.com/article/ut-state-wire-utah-gun-politics-government-and-politics-0023558079cfc6b6fdadde0fd96eeaaf.

489. *Id.*

490. *Id.*

491. *See id*.

492. *See also* Lasch et al., *supra* note 319, at 1711.

493. *See id.* (discussing sheriffs' defiance of immigration detainer requests).

494. *See id.* at 1743.

for example, passed an ordinance barring federal immigration officers access to the city jail at Rikers Island.[495] Municipalities in Illinois and California have deployed similar tactics.[496] This approach is a model for SAS policies that would prohibit access or aid to ATF, or other federal agencies, attempting to investigate local firearms refuseniks.[497]

A similar noncooperation strategy surrounds information sharing.[498] Some jurisdictions, including Hartford, Los Angeles, New York City, and Cook County, Illinois, have prohibited city or county officials from sharing information about suspected illegal immigrants with federal officials.[499] Substitute ETB enforcement for immigration enforcement and these policies transfer smoothly to facilitate SAS policies.[500]

The reality that local governments are the hands and feet of a great deal of federal law enforcement reveals another immigration resistance policy that seems transferable to the SAS context.[501] Various federal initiatives rely on joint operations between federal, state, and local law enforcement to put "boots on the ground."[502] Immigration sanctuaries have targeted this dependency through policies barring local law enforcement from participating in these joint operations.[503]

These types of policies are easily deployed and might have multiple consequences in the firearms context.[504] One example is a recent episode in Missouri, where the state's newly enacted SAS legislation apparently caused ATF to keep an enforcement operation secret from the local sheriff.[505] Missouri's

495. *Id.*

496. *Id.* at 1744.

497. *See id.* at 1737. SAS policies might add broad prohibitions on aid to the ATF or other federal agencies attempting investigations or operations targeting local refuseniks. *See id.*

498. *See id.* at 1745–46.

499. *Id.*

500. *See id.* at 1745. Where direct conflict between federal officials and local sanctuaries escalates to the point of independent federal enforcement, the opposition strategies discussed above would be predictable local responses. *See id.*

501. *See id.* at 1748–50.

502. *See id.* at 1748.

503. *See id.* at 1745, 48–50; THE PEW CHARITABLE TR., IMMIGRATION ENFORCEMENT WITHIN THE NATION'S BORDERS: FEDERAL, STATE, AND LOCAL EFFORTS 6 (July 2014), http://www.pewtrusts.org/-/media/assets/2014/07/immigrationenforcementbriefjuly2014.pdf (describing different types of joint operations); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–98 (2010) (describing different forms of joint operations).

504. *See* Fields, *supra* note 1, at 463.

505. *See* Janet Dabbs, *Sheriff 'Mad' ATF Concealed Plans to Raid Lake of the Ozarks Gun Shop*,

SAS legislation "prohibits state and local cooperation with federal officials that attempt to enforce any laws, rules, orders, or actions that violate the Second Amendment rights of Missourians."[506] Some Missouri counties have adopted additional, more aggressive policies.[507] For example, the Newton County Commission passed an ordinance in February 2021 that gives local law enforcement "full authority" to arrest federal agents who attempt to enforce laws that the ordinance declares invalid.[508]

Joint enforcement is sometimes formalized, as in the case of immigration joint operation 287(g) agreements.[509] Various jurisdictions, including Seattle and New York State, explicitly prohibit local law enforcement from entering into such agreements.[510] Federal gun laws invite similar forms of resistance.[511]

The immigration model primarily anticipates conflicts with federal officers that implicate constitutional anti-commandeering doctrine.[512] Local use of similar tactics in the intrastate context rests on far more tenuous legal footing.[513] However, there are occurrences of such local resistance whose validity is at least contestable.[514]

For example, the SAS policy adopted by commissioners in Washington

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LAKE EXPO (Nov. 11, 2021), https://www.lakeexpo.com/news/politics/sheriff-mad-atf-concealed-plans-to-raid-lake-of-the-ozarks-gun-shop/article_7694dc72-4315-11ec-81c3-5fd4057f1400.html (reporting that after an ATF raid on a local gun dealer, the Camden County, Missouri sheriff said, "It makes me mad I was not notified . . . . Before SAPA, [Missouri's new SAS legislation] they would have notified me if they were going to be in my county").

506. *Id.*

507. *See, e.g.,* Newton County, Mo., Newton County Missouri Second Amendment Preservation Act (Feb. 3, 2021), https://www.newtoncountymo.com/notices/newton-county-second-amendment-preservation-act.

508. *See id.*

509. *See* DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 112–13 (MIGRATION POL'Y INST. 2013) (describing DHS partnerships with local law enforcement).

510. Lasch et al., *supra* note 319, at 1749. These policies are notable in the sense that they impose political officers' mandates on frontline law enforcers who might make a different judgement about joint operations. *Id.*

511. *See supra* Part V. The immigration model also demonstrates the possibility of conflict between frontline enforcers and political actors, which might thwart some nonenforcement policies. *See* Lasch et al., *supra* note 319, at 1751. In Oakland and Santa Cruz, for example, law enforcement defied policies of noncooperation and provided marginal assistance to federal immigration officers. *Id.* Oakland police provided traffic control for an immigration raid in defiance of municipal policy. *Id.* In Santa Cruz, police participated in a joint raid with ICE in direct defiance of a city council resolution. *Id.*

512. *See id.* at 1756.

513. *See id.* at 1756–57.

514. *See id.*

County, Colorado, responded to new state gun restrictions by resolving not to fund construction space or purchase storage facilities for weapons seized by law enforcement, and it generally committed not to fund enforcement of any law that unconstitutionally infringes the constitutional right to arms.[515] The resolution rests on the ostensible authority of Colorado law that "grants to each county the authority to adopt and enforce ordinances and resolutions regarding health, safety, and welfare issues for the wellbeing of the citizens of the county."[516] The peculiar details of local government prerogatives in different states might present other jurisdiction-specific arguments for de jure validity of local sanctuary policies.[517]

Other intrastate resistance has rested on power rather than right. A notable example is the conflict that ultimately led to the Supreme Court's decision in *New York v. United States*, which partially affirmed New York's challenge to federal legislation designed by a coalition of states that initially included New York.[518] The legislation required members of the coalition to create in-state facilities for disposal of low-level radioactive waste.[519] When New York attempted to develop its disposal sites in accordance with the legislation, communities targeted to host the sites revolted.[520] Municipalities closed access roads, residents formed human chains blocking access to potential waste sites, and masked protesters on horseback harassed state troopers.[521] Local prosecutors dismissed charges against local protesters who had been arrested by state police, and then chastised state police for making the arrests.[522] Ultimately, local resistance prevailed, and New York ended up challenging the

515. Res. 52-2019, Bd. of Cnty. Comm'rs of Wash. Cnty. (Colo. 2019).

516. *Id.*

517. *See, e.g.*, Gunter, *supra* note 81 (reporting that in Virginia, Culpeper County sheriff Scott Jenkins said that if a state assault weapon ban passed, he would "swear in hundreds or even thousands of [his] citizens as deputy sheriffs if need be, to allow them to possess weapons and push back on that overreach by [the] government"). Whether this is fully within a sheriff's powers under Virginia law is an open question. *Id.* For a critique of the powers and obligations of local constitutional officers in Virginia, see Halbrook, *supra* note 7, at 291–95 (arguing that local officials in Virginia are constitutional officers who have a duty to uphold the Constitution against constitutionally questionable gun legislation until the issue is resolved by the courts).

518. New York v. United States, 505 U.S. 144, 144–46 (1992).

519. *See* Su, *Intrastate Federalism*, *supra* note 16, at 224–26.

520. *See id.* at 224–25; THOMAS V. PETERSON, LINKED ARMS: A RURAL COMMUNITY RESISTS NUCLEAR WASTE 214–219 (State Univ. of N.Y. Press 2002).

521. *See* Su, *Intrastate Federalism*, *supra* note 16, at 224–25; PETERSON, *supra* note 520.

522. *See* Su, *Intrastate Federalism*, *supra* note 16, at 224–25; PETERSON, *supra* note 520.

constitutionality of the law it had helped design.[523]

The examples discussed here are part of wide-ranging local experiments with nonenforcement and resistance. We should expect that the lessons from those experiments will be adapted to and expanded by the SAS movement.[524]

2. Discretionary Nonenforcement by Prosecutors: Lessons from Progressive Declination to Charge Marijuana and Other Low-Level Infractions

There is a long tradition and a rich literature surrounding the broad powers of prosecutors to decline enforcement of criminal laws.[525] This power of declination is often exercised in individual cases.[526] More controversially, some prosecutors also have engaged in programmatic declination (also referred to as prosecutorial nullification) by refusing to enforce certain categories of crimes as a general matter.[527] Examples include prosecutors publicly declaring that they will not prosecute violations of federal marijuana laws,[528] low-level offenses[529] that fuel mass incarceration, and laws deemed morally or constitutionally objectionable.[530]

The parallel between this programmatic declination—prosecutorial nullification—and discretionary nonenforcement of gun laws is straightforward.[531] Indeed, one recent critique of prosecutorial nullification of marijuana prohibitions and other petty crimes candidly notes that the same approach might be deployed by prosecutors who object to gun laws.[532] The thwarting of the Lautenberg Amendment discussed in Part IV is an example of

523. *See* Su, *Intrastate Federalism*, *supra* note 16, at 225–26.

524. *See* Fields, *supra* note 1, at 501.

525. *See, e.g.,* Roger A. Fairfax Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243 (2011).

526. *See id.* at 1254–58.

527. *See id* at 1252–53, 1261.

528. *See* Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 831 (2020) (discussing a Virginia prosecutor who campaigned on a promise to decline charges for possession of small amounts of marijuana).

529. *Id*. (discussing promises not to charge for offenses like jumping subway turnstiles).

530. *Id*. at 842 n.76. Declination has been characterized as a progressive policy. *See* Murray, *supra* note 319 at 228. It has been deployed by big city prosecutors in defiance of federal cannabis policy and other low-level offenses. *See* Wright, *supra* note 528, at 846. Roger Wright notes how prosecutors' power to decline charges that police recommend is central to current debates about criminal justice reform. *Id.* at 828.

531. *See* Murray, *supra* note 319, at 228.

532. *See* Wright, *supra* note 528, at 831, 833.

nonenforcement, and underenforcement by police and prosecutors.[533]

The legitimacy of programmatic declination is contested.[534] Critiques of such policies allow instructive comparisons to SAS policies.[535] Many prosecutorial declinations reflect a conflict between police, who arrest suspects, and prosecutors who systematically refuse to charge them under programmatic declination policies.[536] This sort of conflict implicates W. Kerrel Murray's model for assessing the legitimacy of prosecutorial nullification.[537] Murray argues that the test of legitimacy should be whether prosecutorial nullification policies are transparent and endorsed by the local electorate.[538] Prosecutors achieve this legitimacy, says Murray, by campaigning and getting elected on explicit policies of nullification, even where nonenforcement puts them at odds with police.[539]

By this measure, many SAS jurisdictions—where prosecutors, police, and policymakers are in general agreement about nonenforcement of objectionable gun laws—will have comparatively stronger claims to legitimacy.[540] Powhatan County Virginia is emblematic.[541] The Powhatan Board of Supervisors adopted a SAS policy, which was publicly embraced by prosecutor Dickie Cox and Sheriff Brad Nunnally.[542] Comparative claims of legitimacy would be stronger still, where policy makers adopt SAS policies in fully-binding form, like municipal ordinances versus nonbinding resolutions of the type issued in Powhatan.[543]

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533. *See supra* Part IV.

534. *See* Murray, *supra* note 319, at 199.

535. *See generally* Associated Press, *In Virginia and Elsewhere*, *2nd Amendment 'Sanctuary' Movement Aims to Defy New Gun Laws*, L.A. TIMES (Dec. 21, 2019, 1:33 PM), https://www.latimes.com/world-nation/story/2019-12-21/second-amendment-sanctuary-push-aims-to-defy-new-gun-laws (outlining Virginia's SAS proposals and considering their pros and cons).

536. *See* Wright, *supra* note 528, at 835–36.

537. *See* Murray, *supra* note 319, at 209–10.

538. *See id.* at 209–10, 229–30. Ronald Wright emphasizes that prosecutors straddle different levels of government and answer to different polities—the legislative representatives of the state-wide electorate and the local county residents who elected them. Wright, *supra* note 528, at 826–27. Wright also notes that most local police are funded by local governments, facilitating local claims over the style and pervasiveness of local policing. *Id.* at 850.

539. *See* Murray, *supra* note 319, at 219–20 (discussing Virginia prosecutor, Parisa Dehghani-Tafti, who was elected on a platform that included her refusal to prosecute marijuana possession, and the resulting conflict with Virginia judges).

540. *See* McFarland, *supra* note 81.

541. *See id.*

542. *See id.*

543. *See supra* Part IV (discussing other forms of binding local policies).

The uniform embrace of SAS policies by policy makers, prosecutors, and police actually puts prosecutors in a diminished role versus the traditional prosecutorial nullification scenario.[544] Frontline officers, like county sheriffs and local police, will make many primary and dispositive nonenforcement decisions by declining to arrest violators of disfavored gun laws.[545] Prosecutors might never become involved in many of those nonenforcement decisions.[546]

Of course, even where there is general agreement on SAS policy, there is no guarantee that police and prosecutors will assess *every* case the same way.[547] So, prosecutors might pressure police to make arrests in some cases, and in others, might decline to charge individuals that police have arrested.[548] Another version of this dynamic might unfold where arrests on disfavored gun charges are made by state police. Local prosecutors might implement SAS policies by declining to charge on those arrests.[549]

3. Nonenforcement by Police: Discretionary Policing and the Challenge of Combination Cases.

The primary driver of the SAS movement is fear of laws that would outlaw guns that Americans already own, prompting a program of confiscation.[550] That would be unprecedented because the primary scenario of gun law enforcement in the U.S. is, and has been, the "combination case"—a gun violation occurring in combination with some other infraction.[551] Indeed, house-to-house gun confiscation is both politically impractical and, absent a scheme of registration that does not exist federally nor in most states, seems barred by the Fourth Amendment.[552]

544. *See* Fields, *supra* note 1, at 497–98.

545. *See id.*

546. *See* Dewan, *supra* note 136. Some controversial cases might garner public attention, generating pressure on police to exercise arrest powers. *See id.* In that sort of case, prosecutors' declination powers might play a greater role. *See id.* This is a context where reference to some of the substantive justifications for nonenforcement discussed early in Part IV could become important elements in a prosecutor's refusal to charge ETB violations. *See supra* Part IV.

547. *See* Fields, *supra* note 1, at 496–97.

548. *See id.*; Fairfax Jr., *supra* note 524, at 1261.

549. *See, e.g.,* PETERSON, *supra* note 520, at 214–219 (providing an example of this in the non-gun context, where prosecutors dismissed charges made by state police).

550. *See, e.g.*, McFarland, *supra* note 81 (providing a statement of Powhatan County prosecutor Dickie Cox).

551. *See* Stevenson, *supra* note 105, at 214.

552. *See infra* Section V.E.3.a.

This suggests that much of the nonenforcement decision-making in support of SAS policies will be less straightforward than SAS policies seem to anticipate.[553] There will be very little, if any, house-to-house confiscation, with or without SAS policies.[554] But there will be a great deal of highly contingent decision-making in messy combination cases.[555] Those cases will invite various interpretations of SAS policies and will fuel disagreements between enforcement officials whose commitments to SAS policies will be tested by a myriad of complexities.[556] Subsections (a) and (b) below present the details.

a. The Fear Versus the Reality (So Far) of ETB Enforcement

In the abstract, the most direct way to enforce an ETB would be the approach that Senator Diane Feinstein said she would have preferred to implement the 1994 Assault Weapons Ban—"Mr. and Mrs. America turn them all in."[557] This conjures images of the sort of door-to-door confiscation that Powhatan County prosecutor Dickie Cox described as a core motivation for the rise of Second Amendment Sanctuaries.[558]

While door-to-door confiscation strikes the most fear, it seems unlikely under our current system.[559] Random or universal searches seem plainly prohibited by the Fourth Amendment.[560] In the vast majority of cases, the government does not know who has what guns and thus lacks probable cause for a search.[561] There are notable exceptions like California, where gun registration links individuals to particular guns.[562] Targeted gun confiscation has

553. *See* McFarland, *supra* note 81 ("[D]iscretion is the hallmark of law enforcement.").

554. *See* Johnson, *supra* note 28, at 878.

555. *See, e.g.*, Mikos, *supra* note 92, at 1461.

556. *See id.*

557. Paranoid Pundit, *Senator Feinstein on Gun Control in '95 – "Turn 'em all in!"*, YOUTUBE (Apr. 15, 2014), https://www.youtube.com/watch?v=yLQINLIwQjA.

558. *See* McFarland, *supra* note 81.

559. *See* Johnson, *supra* note 28, at 865–66, 869.

560. *See id.*

561. *See id.* at 869–70 (showing that there is currently no federal system that ties individuals to particular firearms in a pervasively reliable way). The initial purchase of firearms produces paperwork connecting the buyer to the gun. *See id.* at 869. However, most subsequent transfers do not. *Id.* at 869–71. Overtime, guns will be transferred multiple times. *Id.* Eventually, this renders the initial purchase data useless. *Id.* ATF recognizes this dynamic in its policy of only conducting back traces on guns of recent vintage. *See* JOHNSON ET AL., *supra* note 48, at 33.

562. *See* CAL. PENAL CODE § 11106(b)(2) (West 2022) (explaining the California gun registry

indeed occurred under such systems.[563] However, absent a broad system of registration, the Fourth Amendment is an effective block to sweeping confiscation of contraband guns from American homes.[564] This obstacle helps explain why registration is the third rail of gun policy.[565]

The practical barriers to Feinstein-style confiscation allow a useful contrast between resistance to gun prohibitions and resistance to immigration nonenforcement.[566] The ETBs that prompt Second Amendment Sanctuaries establish a series of possession crimes.[567] The contraband created by defiance of ETBs is extremely durable and will last for many generations.[568] There are endless options for storing or hiding the contraband in private places that are protected by the Fourth Amendment.[569] Detecting these continuing ETB violations will be extremely difficult compared to the immigration scenario, where undocumented immigrants are continuously subject to detection as they live and work in the public space.[570]

This comparison shows that in some ways, Second Amendment Sanctuaries really just declare the practical reality that detecting and policing private defiance of ETBs is a low-yield proposition.[571] As I argued in 2009, people who store away an assault weapon for "stormy days" of public unrest are taking relatively low risks.[572] If they live in a SAS, the risk–reward calculation tips even more in favor of defiance; they might plausibly calculate that even in the unlikely case they have to use their contraband weapon defensively, frontline investigators (like sheriffs, local police, and prosecutors) would act

contains the "name, address, identification of, place of birth (state or country), complete telephone number, occupation, sex, description, and all legal names and aliases ever used" of all gun owners).

563. Robert Lewis, *Outgunned*: *Why California's Groundbreaking Firearms Law is Failing*, CAL MATTERS (July 21, 2021), https://calmatters.org/justice/2021/07/california-gun-law-failing/.

564. *See* Johnson, *supra* note 28, at 869 n.149.

565. *See id.* at 868–74. For a discussion of how fear of shadow registration has been a block to universal background checks, see Michael P. O'Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Record-keeping Legislation*, 46 CONN. L. REV. 1381, 1387–95 (2014); Nicholas J. Johnson, *Gun Control Advocates are Playing Chess*, LAW & LIBERTY (Apr. 18, 2013), https://lawliberty.org/gun-control-advocates-are-playing-chess/.

566. *See* Fields, *supra* note 1, at 439–41.

567. *See id.* at 449; Johnson, *supra* note 28, at 863.

568. *See* Johnson, *supra* note 28, at 838, 845–46, 869.

569. *See id.* at 869–72.

570. *See* Fields, *supra* note 1, at 462; Lasch et al., *supra* note 319, at 1728–29.

571. *See* Johnson, *supra* note 28, at 853, 869–70.

572. *Id.* at 862–63.

in accordance with sanctuary policies.[573] This is especially true where contraband weapons are used in the fashion that is most common for defensive guns—where no one is actually shot.[574]

b. The Reality of ETB Enforcement and the Concern About Bias

Nonenforcement policies in the gun, immigration, drug, and petty crime context are similar in that they are not commitments to zero enforcement of contested laws.[575] Immigration sanctuaries do not attempt to protect undocumented immigrants who have committed other serious crimes.[576] The same is true for policies that oppose enforcement of low-level drug and quality-of-life infractions.[577] Progressive declination policies make clear, for example, that drug infractions that also involve violence or gun charges will be prosecuted.[578]

SAS policies work the same way, as they are not commitments of zero enforcement of gun laws.[579] Rather, they are commitments to defy laws that criminalize people whose *only* infraction is possession of a newly outlawed firearm.[580] Either explicitly or implicitly, SAS policies aim to protect "law-abiding" gun owners, who have not violated any other criminal laws.[581] Even in staunch SAS jurisdictions, we should expect enforcement of otherwise objectionable gun laws against people who have committed other crimes, especially serious violent crimes.[582]

This introduces a crucial question: Given that most gun law enforcement occurs in combination with separate non-gun infractions, how will discretionary non-enforcers respond to various combinations of gun law violations and

573. *See id.* at 861, 863.

574. JOHNSON ET AL., *supra* note 48, at 19–25.

575. *See* Fields, *supra* note 1, at 467.

576. *See* Lasch et al., *supra* note 319, at 1741.

577. *See, e.g.*, Lasch et al., *supra* note 319, at 1721.

578. *See id.* at 1741 (noting how noncooperation policies in California; Connecticut; Cook County, Illinois; and New York City created exceptions for cases where illegal immigrants engage in serious criminal conduct).

579. *See, e.g.*, Gunter, *supra* note 81.

580. *See id.*

581. *See* sources cited *supra* note 67 and accompanying text (discussing Texas and Missouri as examples of jurisdictions explicitly limiting the protections of their SAS legislation to law abiding gun owners).

582. *See, e.g.*, Halbrook, *supra* note 7, at 309.

other criminal offenses?[583]

These combination cases will fall along a spectrum of seriousness and prompt a range of inferences about the enforcement decisions of SAS officials who encounter them. For combination cases that involve serious violent crimes, we should expect enforcement to be substantially unaffected by SAS policy.[584] At the other end of the spectrum, it is a reasonable speculation that SAS policies will result in nonenforcement where a trivial offense leads law enforcement to discover ETB contraband.[585]

This speculation is supported by actual experience surrounding two sets of combination cases and is illuminated by scholarly assessment of combination cases outside the SAS context.[586] Robert Mikos provides a useful general assessment of combination cases, identifying a variety of enforcement anomalies in a broad set of combination cases where federal laws layer additional sanctions onto state crimes.[587] This layering distorts state law charging and prosecution decisions, and it prompts state prosecutors to use a spectrum of nonenforcement and circumvention strategies. [588]

In the immigration context, for example, Mikos provides a dramatic example where the state offense of shoplifting fifteen dollars' worth of baby clothes was considered an aggravated felony by the Immigration and Naturalization Services (INS), resulting in the deportation of a Nigerian immigrant and her two children.[589] Reacting to these sorts of disparities, "prosecutors have acknowledged manipulating state charges to circumvent federal

583. *See, e.g.*, Glenn Thrush, *Inside Missouri's '2nd Amendment Sanctuary' Fight*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/us/politics/missouri-gun-law.html (emphasizing that while Missouri, as a SAS, will not enforce gun laws, the law is vague in that state officials will not stop raids, background checks, or prohibition on gun purchases by felons).

584. *See* Halbrook, *supra* note 7, at 309.

585. *See* Mikos, *supra* note 92, at 1437.

586. *See, e.g.*, *id.*

587. *See, e.g.*, *id.* at 1466–74. Mikos's combination cases generally involve multiple penalties for the same general action, while the combination cases in this analysis involve a gun infraction combined with some other distinct offense. *See id.*

588. *See id.* at 1411. Mikos catalogues a variety of combinations of state criminal infractions and immigration violations and presents a model for projecting how different combinations disrupt enforcement to different degrees. *Id*. at 1465. Mikos also examines successful expungements of domestic violence convictions that police officers sought to maintain access to firearms and keep their jobs. *Id*. at 1462–63. This is consistent with the hypothesis that various combinations of gun violations and independent infractions will produce a range of nonenforcement strategies, including reduction or dismissal of domestic violence charges and expungement of convictions. *See id.* at 1463.

589. *Id.* at 1449.

deportation."[590] This strategy has been deployed in cases far more serious than shoplifting, including a case of interfamily rape where the consequence of fully charging the rapist would have been deporting the entire family, including the victim.[591] In the SAS context, a similar tie between a federal ETB and some minor or mid-spectrum state infraction would be a textbook case for nonenforcement of the federal gun law.[592]

Mikos's general critique is sharpened by two direct examples from the intersection of gun regulation with domestic violence and drug crimes.[593] These examples sharpen our expectations regarding nonenforcement of ETBs in combination cases where the non-gun infraction is relatively serious.[594]

The discussion of the Lautenberg Amendment in Part IV shows that for a variety of reasons, state and local officials have exercised enforcement discretion mainly in favor of men accused of domestic violence infractions that also trigger gun law violations.[595] This willingness to evade the Lautenberg Amendment suggests the possibility of similar decision-making in cases that involve domestic violence in combination with some new federal ETB.[596] This seems especially likely if the penalty for violating the new ETB is equal to, or more serious than, the Lautenberg Amendment penalties that have already fueled nonenforcement.[597]

A second set of combination cases involves violations of both the Controlled Substances Act and gun laws.[598] Dru Stevenson argues that the Controlled Substances Act is "our primary operational form of gun control" because most gun law enforcement occurs in combination with drug law violations.[599] According to Stevenson, "[T]he Controlled Substances Act is actually the main device in our legal system that limits the number of firearms

590. *Id.* at 1454.

591. *Id.* at 1454–55. The seventeen-year-old defendant had raped and impregnated his twelve-year-old sister. *Id.* To avoid deporting the family, the prosecutor reduced the charge from first degree sexual assault, which carried a penalty of life in prison, to fourth degree criminal sexual conduct, a misdemeanor. *Id.*

592. *See, e.g.*, Halbrook, *supra* note 7, at 285.

593. *See, e.g.*, Mikos, *supra* note 92, at 1419.

594. *See id.*

595. *Id*. at 1461 ("Florida State Attorney acknowledged giving corrections officers accused of domestic violence preferential treatment because of the firearms ban.").

596. *See id.*; Ramsey, *supra* note 87, at 1330–32.

597. Ramsey, *supra* note 87, at 1330–32 (noting that non-enforcers of the Lautenberg Amendment list the lifetime ban on firearms possession penalty as one reason for evading the provision).

598. *See* Stevenson, *supra* note 105, at 211.

599. *See id.* at 215.

sold, the main device that in practice limits criminals' access to guns, and so on."[600]

These results are understandable considering that gun laws provide important tools in drug cases.[601] Stevenson explains:

> From a law enforcement perspective, gun control laws . . . probably facilitate investigations by providing alternative grounds for officers to meet the evidentiary requirements for obtaining warrants or making arrests. From a prosecution standpoint, firearms violations normally function as additional counts in the charges against drug traffickers, and as sentencing enhancements. Gun possession charges can serve as failsafe or "backup" charges for prosecutors in difficult cases, because of the streamlined elements under the statutes and evidence (the mere possession of guns is usually proof in itself). Thus, the firearm laws may give prosecutors in drug cases more leverage during plea negotiations or with turning a conspirator into a government informant; the firearm charges make the prosecutions more likely to be effective or successful . . . .[602]

So how will discretionary nonenforcement unfold in combination cases where drug, immigration, or domestic violence offenses are bound up with the firearms violations that are nominally excused by SAS policies?[603] These complexities will test individual commitments to SAS policies and present hard questions about the true boundaries of SAS policies drafted with the glib commitment to not enforcing unconstitutional gun laws.[604]

The complications here seem endless, but several broad observations

600. *Id.* Federal law prohibits both users of controlled substances, including those who have been arrested for drug crimes, and persons with felony drug convictions from purchasing or possessing firearms. *See* 18 U.S.C. § 922(g)(1)–(3) (2020); *see also* Stevenson, *supra* note 105, at 222–23 (citing T.D. ATF-391 Definitions for the Categories of Persons Prohibited from Receiving Firearms (June 27, 1997), https://www.atf.gov/file/84311/download).

601. *See* Stevenson, *supra* note 105, at 214.

602. *Id.*; *see also* Kimberly J. Winbush, Annotation, *Proscription of 18 U.S.C.A. § 922(g)(3) That Persons Who Are Unlawful Users of or Addicted to Any Controlled Substance Cannot Possess Any Firearm or Ammunition In or Affecting Commerce*, 44 A.L.R. Fed. 3d § 3 (2019) (describing imposed sentencing enhancements related to gun possession by drug users); Stacey M. Studnicki, *Federal Sentencing Guidelines*, 2 MICH. STATE L. REV. 351, 369 (1999) (discussing the sentencing enhancement based on gun possession by a drug user in *United States v. Jarman*, 144 F.3d 912 (6th Cir. 1998)).

603. *See, e.g.*, Stevenson, *supra* note 105, at 214.

604. *See, e.g.*, *supra* note 588 and accompanying text.

frame the dynamic.[605] First, in many cases the standard problem-solving mechanisms will be unavailable. For example, the more covert the nonenforcement policy, the less access frontline officials will have to systematic judicial resolution of various interpretation questions.[606] Rather, they will be left to navigate such questions independently, according to their individual experiences and preferences.[607] This is a model for the sort of idiosyncratic decision-making that we said at the outset was impossible to track in any systematic way.[608] And lack of predictability is not the only problem.[609]

Idiosyncratic decision-making on the hard questions posed by combination cases also prompts a concern about enforcement bias.[610] Analysis of domestic violence and drug enforcement already demonstrates a trend of racialized enforcement that disproportionately penalizes minorities.[611] Carol Ramsey and Robert Mikos both describe biased nonenforcement in favor of police suspected of domestic violence.[612] Not only is there substantial underenforcement of domestic violence laws against police, there is also strong evidence of disproportionate over-enforcement against Blacks and Browns.[613] Add to this the prominent examples of bias in the enforcement of drug laws, and it is fair to worry about bias in discretionary nonenforcement of combination cases which characterize most gun law violations.[614] Part VI below examines the bias concern in more detail.[615]

605. *See infra* notes 606–10 and accompanying text.

606. *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 510–12 (2004).

607. *See id.*

608. *See id.* at 512 ("[D]ay-to-day decisions that police officers make, including the ones that are most likely to involve police-citizen contacts, are determined more by the informal norms of street-level police culture than by formal administrative rules.").

609. *See infra* Part VI (discussing enforcement bias as it pertains to race).

610. *See* Ramsey, *supra* note 87, at 1330–32, 1340–42.

611. *See, e.g.*, *id.* at 1340–42.

612. *See id.* at 1335; Mikos, *supra* note 92, at 1440.

613. *See* Ramsey, *supra* note 87, at 1330–32 (showing that discretionary decision-making surrounding arrests, charging, and sentencing is subject to bias).

614. *See, e.g.*, *id.*; Stevenson, *supra* note 105, at 214.

615. Stevenson, *supra* note 105, at 215. The observed situational variability of discretionary nonenforcement suggests that front line officers will indeed enforce objectionable gun laws against some suspects but be less inclined to do so against others. Ramsey, *supra* note 87, at 1330-1332; Lininger, *supra* note 30, at 177–82.

VI. SANCTUARIES, DISCRETION, AND RACE

Given the bias embedded in many exercises of discretion in the criminal justice system, it is fair to worry that discretionary nonenforcement strategies in the SAS context might also succumb to bias.[616] This is especially concerning where nonenforcement means ignoring or discounting non-gun infractions that occur in combination with SAS insulated gun violations.[617]

The precedents for the worry about biased exercises of discretion in criminal law are legion.[618] There is rich literature detailing racially biased exercises of discretion in drug law enforcement,[619] stop-and-frisks,[620] charging decisions,[621] general Fourth Amendment administration,[622] and police officers' escalation to violence.[623] This fuels the concern that the exercise of enforcement discretion in the SAS context also might succumb to bias.[624] Moreover, because firearm laws are generally enforced in combination with other infractions, particularly drug law violations, it might be inevitable that the racially disparate treatment identified in enforcement of drug and other laws will flow

616. *See, e.g.*, Ramsey, *supra* note 87, at 1330–32; Armacost, *supra* note 606.

617. *See* Ramsey, *supra* note 87, at 1330–32; Stevenson, *supra* note 105, at 214.

618. *See infra* notes 619–623 and accompanying text.

619. Stevenson, *supra* note 105, at 215 ("Despite the awful problems with the Controlled Substances Act and the mass incarceration it produces, one could argue that the CSA is our main form of gun control right now.").

620. *See* IAN AYRES & JONATHAN BOROWSKY, STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (U.S. Dep't of Just. 2008), https://www.ojp.gov/ncjrs/virtual-library/abstracts/study-racially-disparate-outcomes-los-angeles-police-department; Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 856 (2014) (discussing factual findings regarding patterns and practices of racial profiling within the NYPD).

621. *See* Nanasi, *supra* note 87, at 573–74; Ramsey, *supra* note 87, at 1340–42; DEMOGRAPHIC DIFFERENCES IN SENTENCING, U.S. SENT'G COMM'N (2017), https://www.ussc.gov/research/research-reports/demographic-differences-sentencing (showing that Black male offenders receive longer sentences than similarly situated White male offenders).

622. *See, e.g.*, Sarah Rankin, *Virginia AG Sues Town, Alleging Discriminatory Policing*, NBC N.Y. (Dec. 31, 2021, 9:45 AM), https://www.nbcnewyork.com/news/national-international/virginia-ag-sues-town-alleging-discriminatory-policing/3474093/; AYRES & BOROWSKY, *supra* note 620; *see also* Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1446–50 (2016); Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1492 (2013).

623. *See* Nicholas J. Johnson, *Lawful Gun Carriers (Police and Armed Citizens): License, Escalation, and Race,* 80 LAW & CONTEMP. PROBS. 209, 209–23 (2017); Armacost, *supra* note 606, at 453–54.

624. *See, e.g.*, Stevenson, *supra* note 105.

into SAS policies.[625]

Bias, favoritism, and cronyism also have strong antecedents in gun regulation.[626] A great deal of early gun control legislation was explicitly racist. [627] There are profuse examples of this in state constitutional right to arms provisions[628] and in federal constitutional jurisprudence.[629] Even where gun laws were not explicitly racist, there was often an understanding that in practice, the laws were intended to be enforced more harshly—or exclusively against—Blacks and Browns.[630]

Robert Cottrol and Raymond Diamond's article, *"Never Intended to Apply to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?* is a classic reference on this point.[631] The title of the article was taken from Florida Supreme Court Justice Buford's concurring opinion in the 1941 case, *Watson v. Stone*.[632] Buford explained in detail that a Florida law prohibiting carrying of firearms without a license was in fact only aimed at Black people, and "was never intended to be applied to the white population."[633] And lest we dismiss

625. *See, e.g.*, *id.*

626. *See, e.g.*, 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, 1313–18 (1995).

627. *See, e.g.*, *id.* at 1324–28.

628. *See* JOHNSON ET AL., *supra* note 48, at 439–49.

629. *See* Scott v. Sanford, 60 U.S. 393, 417 (1857) (arguing one reason for denying citizenship to African Americans was to ensure that African Americans did not have the right to bear arms under the Constitution); *see also* JOHNSON ET AL., *supra* note 48, at 441.

630. *See, e.g.*, Cottrol & Diamond, *supra* note 626, at 1329–33.

631. *See id.* at 1313–18.

632. *See* 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

633. *Id.* ("I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. . . . [T]he Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population. . . . [I]t is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. . . . [T]here has never been, within my knowledge, any effort [to] enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested."). Buford's knowledge of the Florida legislation stemmed in part from actually working in the lumber camps that he references. *See Justice Rivers Henderson Buford*, FLA. SUP. CT. (Dec. 4, 2020), https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-Rivers-Henderson-Buford#:~:text=Justice%20Buford%20served%20as%20Justice,1959%2C%20in%20Tallahassee%2C%20Florida. The Florida Supreme Court's biographical entry for Buford states that his "work life started when he was 10 as a day laborer and cook in a logging

this sort of concern as a vestige of an earlier time, consider the powerful case made by Amici Black Public Defenders in *N.Y. State Rifle & Pistol Ass'n v. Corlett* that New York City's discretionary licensing permit scheme for firearms has its own racist roots and continues to discriminate against Blacks and Browns.[634]

A highly textured presentation of racial bias in the discretionary enforcement of gun laws appears in Jennifer Carlson's work.[635] Carlson recasts the traditional gun debate by deploying the themes of "gun militarism" and "gun populism" to replace the traditional pro-gun/anti-gun dichotomy.[636] She demonstrates how policing the right to arms proceeds simultaneously along these two tracks, with gun militarism explaining the harsh application of gun laws to "bad guys" and gun populism explaining the police's embrace of armed "good guys."[637]

Carlson's gun populism resonates powerfully in the rise of SAS policies.[638] Gun populism explains how policy makers and law enforcers might consider armed good guys (even in the public space) an asset.[639] It also explains how the same officials who champion armed good guys simultaneously take a tough-on-crime, harsh-enforcement-of-gun-laws approach to "bad guys with guns."[640]

Carlson argues that law enforcers depict and talk about good guys and bad guys in highly racialized ways.[641] Her critique is particularly useful for thinking about SAS combination cases, where insiders who have only violated some objectionable gun law are the classic good guys that Second Amendment Sanctuaries aim to protect. Even where these good guys violate some

camp. The logging camp owner, a federal judge, noticed Buford's talent and intelligence and sent him to Tallahassee in 1899 to study for a law career." *Id.*

634. Brief of The Black Attorneys of Legal Aid et al. as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Corlett, 142 S. Ct. 2111 (2022) (No 20-843) [hereinafter Black Public Defenders Brief].

635. *See* CARLSON, *supra* note 184, at 57–85, 143–70.

636. *See id.* at 26, 57–60.

637. *See id.* at 142.

638. *See id.*

639. *See id.* at 141.

640. *See, e.g.*, *id.* at 136.

641. *Id*. at 142. Police talk about good guys as ranchers, farmers, and teachers, while they talk about bad guys as gang bangers and dead-beat dads. *Id.* at 142, 145, 161. Similar issues appear in Carlson's observations of a concealed carry license review board made up of white, male, former police officers, who exercised their discretion in dramatically different ways depending on whether applicants were white or Black. *Id.* at 145.

other law, insider bias might still result in nonenforcement. The corollary is that outsiders involved in similar combination cases should expect harsher treatment.

This danger of bias seems even greater where superior jurisdictions threaten to sanction defiant local officials.[642] Nonenforcement decisions under such pressures will present an array of risks for public officials, raising the question: Will defiant law enforcers take the same risks for outsiders that they will for friends, neighbors, and supporters?

The worry about biased exercises of discretion suggests a nominal preference for SAS policies adopted at the state level.[643] Nonenforcement policies formally enacted into state law and crafted to uniformly block state and local officials from enforcing federal law would nominally remove the danger of biased enforcement.[644] But here we must remember the lesson of combination cases—that SAS policies are not blanket refusals to enforce gun laws.[645] Both explicitly and implicitly, SAS policies endorse gun law enforcement against people who also have violated other criminal laws.[646]

The intersection of immigration and gun regulation presents illuminating combination cases and intriguing examples of potential nonenforcement bias even in the case of statewide SAS policies.[647] Note first that weapons offenses, along with drug violations, are one of the most common grounds for deporting criminal aliens.[648] Consider now the combination case of an ETB violation by an illegal immigrant under a statewide SAS policy. The anecdotal evidence suggests vastly different political ideologies driving Second Amendment Sanctuaries and Immigration Sanctuaries.[649] Witness how the progressive city of Tucson pressed immigration sanctuary policies to the point of conflict with state officials, and is now committed to resisting the state's new SAS legislation.[650] Note also how Texas has adopted strong SAS policies but is simultaneously committed to robust enforcement of federal immigration

642. *See supra* notes 72–73 and accompanying text.
643. *See, e.g.*, Halbrook, *supra* note 7, at 285.
644. *See id.*
645. *See supra* Section V.E.
646. *See, e.g.*, Halbrook, *supra* note 7, at 309.
647. *See, e.g.*, Lasch et al., *supra* note 319, at 1741–42.
648. *See* Mikos, *supra* note 92, at 1445.
649. *See supra* Sections V.E.1, V.E.3.
650. *See Tucson to Ignore Arizona's 'Second Amendment Sanctuary' Law*, AP NEWS (July 6, 2021), https://apnews.com/article/joe-biden-az-state-wire-arizona-tucson-gun-politics-f1521fa4e6c05a10f140abcdd8cf394a.

restrictions.[651]

So how will Constitutional Sanctuaries like Arizona and Texas treat combination cases involving ETB and immigration law violations? Their strong support for robust immigration enforcement suggests that undocumented immigrants are the exemplar of the outsider who should not expect to fully benefit from SAS policies.[652]

Bourgeoning critiques of the intersection between federal firearms law enforcement and mass incarceration also illuminate concerns about bias.[653] Critics of joint federal and state initiatives—such as Operation Trigger Lock, Project Exile, and Project Safe Neighborhoods—that target state firearms offenders for enhanced federal prosecution argue that the process and outcomes reflect pervasive racial bias.[654] These critics argue that bias is firmly embedded in firearms law enforcement, particularly for combination cases that involve both gun and drug infractions.[655]

These critiques suggest that while bias in the exercise of enforcement discretion is likely, it would be nothing new.[656] Rather, it would unfold as just another layer of an already pervasive problem that afflicts other aspects of criminal law enforcement.[657] Moreover, the insurgent and often covert nature of SAS policies would make it especially difficult to identify and redress bias occurring in their implementation.[658]

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651. *See* Henderson, *supra* note 394. Texas SAS legislation does not protect people who are otherwise prohibited by state law from possessing firearms. *See* H.B. 2622, 87th Leg. (Tex. 2021). Illegal aliens are prohibited by federal law from possessing firearms. 18 U.S.C. § 922(d)(5) (2020). Texas is committed by statute to nonenforcement of some federal gun laws. *See* H.B. 2622, 87th Leg. (Tex. 2021). It is not clear whether illegal immigrants would be barred from firearms possession as a matter of Texas state law. *See* Henderson, *supra* note 394; *see generally* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008).

652. *See* Mikos, *supra* note 92, at 1445. Similar concerns flow from racialized phenomena like the police license to escalate that has resulted in minor infractions spiraling out into violence. *See* Johnson, *Lawful Gun Carriers (Police and Armed Citizens): License, Escalation, and Race*, *supra* note 623, at 209–23.

653. *See, e.g.*, Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2193–2196 (2016).

654. *See id.* at 2207–09; David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L. J. 1011,1011–12 (2020).

655. *See* Patton, *supra* note 654, at 1021–22 (arguing that "[r]acial disparity has been part of [federal gun] prosecutions from the start," and criticizing prosecutors' inability to explain racial disparities in the cases diverted for federal prosecution); Levin, *supra* note 653, at 2191–2215 (extending the criticisms of racial bias in the War on Drugs to prosecution of firearm possession offenses).

656. *See supra* note 655 and accompanying text.

657. *See supra* note 655 and accompanying text.

658. *See, e.g.*, CARLSON, *supra* note 184, at 165–68 (hinting at the difficulty of redressing the disparity between the treatment of white versus Black gun permit owners at gun licensing hearings).

As a practical matter, the bias critique of SAS policies will likely just add texture to existing conversations about race-coded policing.[659] There is, for example, a superficial appeal to the criticism that SAS policies implemented through discretionary nonenforcement are a recipe for a revival of the sort of racialized gun regulation that Justice Buford described in *Watson*.[660] And indeed, the proposition of race-coded gun policing driven by red enclave defiance is eye-catching.[661]

But how different is this from the same result driven by relatively stringent gun policies enacted in blue enclaves that have high concentrations of Blacks and Browns? Joseph Blocher, Justice Breyer—in his dissent in *Heller*—and others have argued for more local discretion in imposing stricter gun laws in high-crime, urban areas, which uniformly have high concentrations of Blacks and Browns).[662] Discretionary nonenforcement operates on that same spectrum: the rural/urban divide.[663] The difference is that SAS policies portend discriminatory results through a selective loosening of rural gun regulation, while gun localism produces similar results through selective tightening of urban regulation.[664] Both approaches are potential pathways toward a landscape of racialized enclaves where gun regulation has dramatically different practical effects for different types of people.[665]

VII. CONCLUSION

While the experience with Second Amendment Sanctuaries is just unfolding, enforcement discretion promises to be a powerful tool for practical implementation of SAS policies.[666] This evident utility of enforcement discretion prompts several lingering questions and opportunities for future work. One question is whether discretionary nonenforcement will turn out to be

659. *See, e.g.*, Patton, *supra* note 654, at 1021–22 (expressing skepticism about reforms that would address the evident racial disparities in federal firearms law enforcement).

660. Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

661. *See generally id.* at 703 (asserting that a gun law was "never intended to be applied to the white population").

662. *See* Joseph Blocher, *Firearm Localism*, 123 YALE L. J. 82, 140–46 (2013); District of Columbia v. Heller, 554 U.S. 570, 681–82 (2008) (Breyer, J., dissenting).

663. *See, e.g.*, CARLSON, *supra* note 184, at 165–68.

664. *See supra* Parts V–VI; Blocher, *supra* note 662.

665. *See, e.g.*, CARLSON, *supra* note 184, at 165–68.

666. *See, e.g.*, McFarland, *supra* note 81.

more useful than formal SAS policies.[667] Will it become the dominant form and supplant more confrontational SAS policies? Answering these questions will be complicated by the challenge of identifying and measuring undeclared nonenforcement policies.

Other questions surround the intersection of SAS policies, discretionary nonenforcement, and combination cases. Will combination cases continue to dominate enforcement scenarios? If so, will the utility of discretionary nonenforcement be diminished by the complexities that combination cases present?

The long-term question is this: How will Second Amendment Sanctuaries stack up as policy? What will be their broad policy impact? Divergent state policies will present natural experiments that provide empiricists with the opportunity to compare results between jurisdictions that adopt various types of SAS policies and jurisdictions that do not.[668]

667. *See, e.g.*, Halbrook, *supra* note 7, at 285; Massaro & Milczarek-Desai, *supra* note 72, at 85.
668. *See, e.g.*, Halbrook, *supra* note 7, at 278–79, 284–85.