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Dangerous Criminals or Dangerous Courts: Foreign Felonies as Predicate Offenses Under Section 922(g)(1) of the Gun Control Act of 1968

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NOTE

Dangerous Criminals or Dangerous Courts: Foreign Felonies as Predicate Offenses Under Section 922(g)(1) of the Gun Control Act of 1968

ABSTRACT

There is currently a split among U.S. Circuit Courts regarding 18 U.S.C. § 922(g)(1), a provision of the Gun Control Act of 1968 that makes it a crime for any individual "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess or receive a firearm in interstate or foreign commerce or affecting interstate commerce." The U.S. Supreme Court will examine the split later this year when it hears the case of United States v. Small. *The Author argues that the Supreme Court should determine that Section 922(g)(1) of the Gun Control Act of 1968 is ambiguous in its application to foreign felony convictions because of the legislative history of the Gun Control Act and the potential constitutional problems that may arise from recognition by U.S. courts of foreign convictions. More specifically, the Author proposes that the U.S. Supreme Court either affirm the Restatement test adopted by the Third Circuit Court of Appeals and allow for discretionary inclusion of foreign felony convictions or hold Section 922(g)(1)'s scope to cover only domestic felony convictions, which would help pave the way for Congress to speak more clearly to the issue and conclusively prohibit dangerous felons, both domestic and foreign, from owning handguns.*

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I. LOCKED AND LOADED: INTRODUCTION AND THESIS

A comparison of the judicial systems of the United States to other countries reveals that there are major discrepancies in the methods and procedures used to ensure the protection of constitutional rights and the adherence to the due process of law.[1] Rather than debate which, if any, of these systems best protects basic individual liberties, this Note uses U.S. constitutional rights as the baseline. Because of the incongruity between different nations' judicial systems, any efforts to enforce the disabilities accompanying foreign convictions in the United States should be carefully scrutinized to ensure that these convictions comport with our own system of jurisprudence. One federal statute in particular embodies the problems raised by foreign convictions: section 922(g)(1) of the Gun Control Act of 1968 (hereinafter, "Gun Control Act"). There is currently a circuit split regarding section 922(g)(1), which makes it a crime for any individual who has been convicted in any court of a crime punishable by imprisonment for more than one year to possess or receive a gun either through interstate commerce or in a manner that affects interstate commerce.[2]

This circuit split has arisen due to several conflicting sections within the Gun Control Act, one of which provides for sentence enhancement for career criminals.[3] Two of these sections apply to persons with prior convictions "in any court"; however, one section makes exceptions for certain state and federal offenses.[4] In addition, a previous section of the Gun Control Act limited its application to "a court of the United States or a State or any political subdivision thereof." [5] Understanding the interpretations of the previous provision of the Gun Control Act, which expanded the category of persons covered, is important because both sections 922 and 924 (often cited along with section 922) affect who may own a handgun[6]

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1. *See infra*, Part IV.
2. 18 U.S.C. § 922(g)(1) (2003).
3. *See* 18 U.S.C. § 924(e)(1) (1986) (referencing 18 U.S.C. § 922 (g)(1), which makes it unlawful for any person who has previously been convicted in "any court" to "possess . . . any firearm").
4. *See* 18 U.S.C. §§ 922(g)(1), 924(e)(1), 921(a)(20) (The term "crime punishable by imprisonment for a term exceeding one year" does not include –

> (A) Any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) Any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.")

5. See 18 U.S.C. app. § 1202(a)(1), Pub. L. 90-351 (since repealed).
6. 18 U.S.C. § 922(g)(1).

and what sentence would be imposed on an individual with a prior felony conviction found to be in possession of a handgun.[7] The split specifically arose when courts attempted to decide whether Congress intended "any court" to include foreign courts or whether Congress intended these provisions to apply solely to prior domestic convictions.[8] Courts interpreting this statute have debated whether this statute truly is ambiguous.[9] A case interpreting section 922(g)(1), *Small v. United States*, is currently on appeal to the U.S. Supreme Court.[10]

This Note analyzes the circuit split surrounding the Gun Control Act by reviewing related Court of Appeals, the decisions of the courts, the legislative history of the Gun Control Act and its subsequent amendments, and the problems raised by using foreign felony convictions as a basis for further criminal charges or as sentence enhancers. This Note sides with the decision of the Second Circuit in *United States v. Gayle* and argues that the application of section 922(g)(1) of the Gun Control Act to foreign felony convictions is ambiguous and problematic. After examining the legal and political issues that surround the split, the methods used by the courts in interpreting these provisions of the Gun Control Act, the problems inherent in foreign judicial systems and criminal statutes, and possible alternative solutions, this Note proposes a solution to the circuit court split. Specifically, this Note proposes that the U.S. Supreme Court construe section 922(g)(1) of the Gun Control Act narrowly, and apply it only to prior domestic felony convictions when it hears *United States v. Small*.

II. THE MOTTLED LANDSCAPE: THE DECISIONS OF THE U.S. COURTS OF APPEALS

The split among the circuits regarding the interpretation of section 922(g)(1) of the Gun Control Act emerged recently. Most of the cases regarding this provision of the Gun Control Act presented issues of first impression. The U.S. Supreme Court only recently granted certiorari to review the U.S. Court of Appeals for the Third

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7. 18 U.S.C. § 924(e)(1).

8. *See, e.g.*, United States v. Concha, 233 F.3d 1249 (10th Cir. 2000); United States v. Atkins, 872 F.2d 94 (4th Cir. 1989); United States v. Winson, 793 F.2d 754, 756 (6th Cir. 1986).

9. *See, e.g.*, *Concha*, 233 F.3d at 1256 (ambiguity); *Atkins*, 872 F.2d at 96 (statute unambiguous); *Winson*, 793 F.2d at 756 (no ambiguity). For a full discussion of how the courts have decided this issue see *infra* text accompanying notes 16-72.

10. Small v. United States, 124 S. Ct. 1712 (2004).

Circuit's decision in *United States v. Small*.[11] This presents a unique opportunity for the U.S. Supreme Court to clarify the law as it currently stands and for Congress to review the Court's interpretation to avoid establishing bad precedent and the potential miscarriage of justice. The issue pits the important constitutional right of an individual to bear arms against the importance of public safety, a particularly compelling interest in the present context of heightened security and the threat of terrorism.

A. *The Sixth Circuit Court of Appeals*

The U.S. Court of Appeals for the Sixth Circuit first addressed the application of section 922(g)(1) of the Gun Control Act to foreign felony convictions in the 1986 decision *United States v. Winson*. The defendant in *Winson*, charged with violating section 922(g)(1), had prior convictions in Argentina and Switzerland for the respective crimes of possessing counterfeit U.S. currency and committing fraud.[12] In order to determine whether the defendant fell into the scope of persons covered by § 922(g)(1), the Sixth Circuit examined both the legislative history of the subsequently repealed section 922 of the Gun Control Act as well as case law regarding a parallel provision, 18 U.S.C. App. § 1202, to ascertain whether the statute should apply because of the defendant's foreign felony convictions.[13]

Before the appeal, the U.S. District Court reasoned in dicta that allowing foreign convictions to be used under section 922(h) of the Gun Control Act (the provision prohibiting persons falling under section 922(g)(1)'s scope from participating in gun trafficking through interstate commerce), "would require judicial recognition of military tribunal adjudications in Nicaragua, as well as condemnations of political prisoners in Poland. Congress could not have intended such an inequitable application of the statute."[14]

On appeal, however, the Sixth Circuit found that a parallel provision, 18 U.S.C. App. § 1202, had a narrower scope than the corresponding language of section 922(g), therefore, section 1202 rightfully included only domestic convictions.[15] Referring to prior Supreme Court decisions,[16] the Sixth Circuit found that section 1202 was not meant to replace or limit section 922, but rather that each

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11. 18 U.S.C. § 922(g)(1) (2003).
12. *Winson*, 793 F.2d at 757.
13. *Id.* at 756.
14. *Id.*; *see also* 18 U.S.C. §§ 922(g)-(h).
15. *Winson*, 793 F.2d at 757.
16. *See e.g.*, Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 111 (1983); Lewis v. United States, 445 U.S. 55, 63-64 (1980); United States v. Batchelder, 442 U.S. 114, 119-21 (1978).

statute was meant to stand independent from the other. [17] Consequently, the Sixth Circuit held that section 922 should apply to foreign convictions because the court did not perceive "any congressional intent to exclude from the Act's coverage a class of felon whose unlawful conduct occurred outside of this country,"[18] despite section 1202's express exclusion of foreign convictions.[19] While the decision in *Winson* is arguably no longer valid, because section 1202 was repealed shortly after the Sixth Circuit's decision,[20] the court's analysis of the language and congressional intent behind section 922 is helpful in comparing its reasoning with the decisions of other circuits.

B. *The Fourth Circuit Court of Appeals*

In *United States v. Atkins*, the defendant was charged with violating section 922(g)(1) of the Gun Control Act because of a prior conviction in England for unlawful possession of a firearm with intent to endanger life.[21] Responding to the defendant's claim that Congress did not intend foreign felonies to be included, the Fourth Circuit followed the approach taken in *Winson* and found the statutory language unambiguous.[22] Reasoning that since "'any' is unmistakable and in the present case 'court' obviously refers to an English court, from where the American system of common law originated," the *Atkins* court found that section 922(g)(1) of the Gun Control Act included foreign felony convictions as predicate offenses.[23] Citing *Winson*, however, the Fourth Circuit made clear that the defendant had not challenged his English conviction on constitutional or civil rights grounds.[24] The Fourth Circuit noted that since U.S. common law stems from English common law, there was likely little difference in the means by which the conviction was obtained.[25] Since the

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17. *Winson*, 793 F.2d at 757 (citing 114 CONG. REC. 14774 (1968); *Batchelder*, 442 U.S. at 121).

18. *Winson*, 793 F.2d at 758 ("[W]e can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States.").

19. See language of 18 U.S.C. App. § 1202 in *Winson*, 793 F.2d at 756-78.

20. *See* 18 U.S.C. App. § 1202 (repealed by Act May 19, 1986).

21. United States v. Atkins, 872 F.2d 94, 95 (4th Cir. 1989).

22. *Id.* at 96.

23. *Id.*

24. *Id.* at 96 n.1. If the defendant had been arguing this, it is possible that under the approach taken by the Restatement and United States. v. Small, 124 S. Ct. 1712 (2004), a court may decide to set aside these convictions (not as invalid, but similarly so) for sentencing purposes. *But see* United States v. Custis, 511 U.S. 485 (1994) (holding that foreign convictions may not be attacked at a later sentencing hearing).

25. *Atkins*, 872 F.2d at 96.

problems arguably inherent with some foreign criminal proceedings were not argued by the defendant, the Fourth Circuit had no reason to address the fundamental problem inherent in section 922(g)(1)—the potential unconstitutionality of foreign felonies.[26] The Fourth Circuit failed to address whether the outcome would have been different had Atkins' prior conviction been from a country with a judicial system not founded on principles of English common law; therefore, it serves a limited purpose in the present discussion.

C. *The Tenth Circuit Court of Appeals*

In contrast, the U.S. Court of Appeals for the Tenth Circuit found ambiguity in the Gun Control Act's provision regarding prior convictions and consequently limited its application to prior domestic convictions.[27] The defendant in *United States v. Concha* was previously convicted of burglary, arson, and of a "Lewd and Lascivious Act Involving Child Under 14" in the United Kingdom.[28] The government sought sentencing enhancements under 18 U.S.C. § 924(e) because of the application of section 922(g)(1) of the Gun Control Act.[29] Examining the statute in question, the Tenth Circuit found the plain language to be ambiguous as to whether the language "in any court" included foreign courts.[30] The *Concha* court looked to other related sections of the U.S. Code for guidance and concluded, for example, that the general approach of the U.S. Sentencing Guidelines does not include foreign convictions when computing a defendant's criminal history.[31] Instead, as many courts in the United States argue, the Guidelines look to foreign felony convictions as sentence enhancers.[32] In other words, foreign convictions are used not as the basis for bringing suit, but as additional proof of the defendant's potential danger to society.[33]

The Tenth Circuit articulated other concerns as well. For instance, it concluded that the procedural safeguards used in U.S.

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26. *Id.*

27. United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000).

28. *Id.* at 1251.

29. *Id.*

30. *Id.* at 1253-54. While the primary focus of this Note is on the statutory provision in § 922(g)(1), related statutes within the Act raise similar concerns. *Id.*

31. *Id.* at 1254.

32. *See* Brief for United States, Small v. United States, 2004 WL 18844488, *42-43 (3d Cir. 2004) (No. 03-750) [hereinafter Brief for United States].

33. *See id.* at *42-43. "While sentencing resulting from foreign convictions are [*sic*] not counted in determining a defendant's criminal history category, they may be considered by the court in assessing the adequacy of the criminal history category to determine whether an upward departure is warranted." *Id.*; *see, e.g.*, United States v. Simmons, 343 F.3d 72, 78-79 (2d Cir. 2003); United States v. Fordham, 187 F.3d 344, 347-48 (3d Cir. 1999).

courts are not necessarily in place in foreign courts to ensure compliance with the Due Process Clause.[34] As noted above, the Tenth Circuit also found the relevant provisions of the Gun Control Act to be ambiguous. Arguments could be made for both interpretations of "in any court," so the Tenth Circuit decided that the rule of lenity applied because the statute was criminal in nature.[35] In addition, the Tenth Circuit noted the problems that would arise by defining prior foreign felony convictions as applicable predicate offenses under the Gun Control Act: "[f]oreign criminals are likely to be as dangerous as domestic criminals"; however "unfair foreign convictions can be challenged with difficulty, if at all."[36] Thus, the Tenth Circuit court determined that section 922(g)(1) of the Gun Control Act applied only to domestic convictions.[37]

The Tenth Circuit's decision is also notable because, as in *Atkins*, the defendant Concha's prior felony convictions were issued by an English court, a country hardly known for its due process violations. The *Concha* court was therefore concerned about all foreign felony convictions used in U.S. courts, not just convictions from countries with questionable judicial procedures.[38]

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34. *Concha*, 233 F.3d at 1254. The court pointed to evidence of a dispute regarding whether Concha had legal counsel for one of his previous convictions. *Id.* at 1255 n.5.

35. *Id.* at 1256.

36. *Id.*

37. *Id.*

38. This difference between the *Atkins* and *Concha* decisions may stem from the decision in *Custis*. *See* Custis v. United States, 511 U.S. 485 (1994). The *Concha* opinion is distinguishable from the decisions in *Atkins* and *Winson* because the *Concha* court notes that those cases were decided prior to the Supreme Court's decision in *Custis*. *Id.* In interpreting *Custis*, the Concha court found that the decisions of *Atkins* and *Winson* were no longer viable, because whether or not the previous foreign convictions had been obtained fairly was not an issue capable of review during sentencing hearings for 18 U.S.C. § 922; rather, the inquiry must be made on habeas review. *Concha*, 233 F.3d at 1256. After *Custis*, the validity of foreign convictions may not be attacked at a later sentencing hearing; rather, these convictions must be challenged on habeas review. *Id.* Consequently, the *Concha* court held that it does not matter whether the foreign convictions were obtained fairly for sentencing purposes under 18 U.S.C. § 922(g)(1) and § 924(e)(1) –matters which troubled the *Winson* and *Atkins* courts. *Id.* at 1255-56. The mere fact of a prior felony conviction is enough to trigger the application of § 922(g)(1). Rather than limit itself to the interpretation in *Atkins*, the *Concha* court looked to the statutory language of § 924(e)(1) (which refers to § 922(g)(1)) to determine whether "in any court" should apply to foreign convictions. *See supra* Part II.C. The court found that it should not. *Concha*, 233 F.3d at 1256. This approach may conflict with the approach suggested by the Restatement, suggesting that the approach adopted by *Small* may not be tenable. *See* United States v. Small, 124 S. Ct. 1712 (2003).

D. *The Third Circuit Court of Appeals*

The U.S. Court of Appeals for the Third Circuit joined the debate with its recent decision in *United States v. Small*.[39] In *Small*, the defendant had prior convictions in Japan for violating the Japanese Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act.[40] Each offense is punishable by imprisonment for a term greater than one year.[41] The Third Circuit followed the holdings of the Sixth and Fourth Circuits in *Winson* and *Atkins*, respectively, and found that foreign offenses could indeed serve as the predicate felony conviction necessary for prosecution under section 922(g)(1) of the Gun Control Act.[42] The Third Circuit, however, adopted a new approach—the Restatement (Third) of *Foreign Relations Law of the United States* § 482.[43] The Restatement approach adopts, in part, the holding of *Duncan v. Louisiana*,[44] and adds six discretionary grounds for non-recognition of foreign judgments that could potentially be used as predicate felony convictions under the Gun Control Act.[45] The Third Circuit determined that the Japanese proceedings met the due process requirements of the American judicial system, and thereby deemed the foreign convictions applicable as the basis for a charge under section 922(g)(1) of the Gun Control Act.[46] The Third Circuit examined the district court's analysis and found that none of the Restatement's grounds for non-recognition of the Japanese conviction were present in the case.[47]

The Third Circuit, citing the Restatement (Third) of *Foreign Relations Law of the United States* § 482, held that "a court may make an explicit finding that the judicial system meets the essential requirements of fairness, but such a finding may be inferred from a decision to recognize or enforce the foreign judgment, or to deny

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39. *See* United States v. Small, 333 F.3d 425 (3d Cir. 2003).
40. *Id.* at 426.
41. *Id.*
42. *Id.* at 428.
43. *Id.*; *see infra* text accompanying notes 220-31 (for a detailed discussion of the Restatement approach).
44. *Id.* at 427. (As characterized by *Small*, the Court in Duncan v. Louisiana, 391 U.S. 145 (1968) held that "the Court must satisfy itself that the foreign conviction comports with our notions of fundamental fairness as required by the Due Process Clause.").
45. *See infra* note 223.
46. *Small*, 333 F.3d at 428. See Part VII for a discussion of what the Japanese proceeding entailed.
47. *Id.* at 428.

recognition on some other specific ground."[48] Consequently, the Third Circuit believed that the district court needed to hold an evidentiary hearing to determine whether one of the Restatement grounds for non-recognition of a foreign conviction applied.[49] Whether the Restatement approach will be upheld by the Supreme Court on appeal remains to be seen.

E. *The Second Circuit Court of Appeals*

A recent decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Gayle* reinforces the limited application of section 922(g)(1) of the Gun Control Act and is similar to the approach adopted by the Tenth Circuit in *Concha*.[50] *Gayle* concerned the defendant's prior Canadian conviction for using a firearm while committing an indictable offense.[51] The district court found that section 922(g)(1)'s "in any court" phrase applied to the Canadian conviction, which the government sought to use as a sentence enhancer.[52] The Second Circuit, however, reversed the district court's holding, concluded that the language of the statute was ambiguous, and subsequently reviewed the legislative history of the Gun Control Act and relevant holdings from other circuits.[53]

The Second Circuit noted that, when viewed as part of the Gun Control Act as a whole, expanding the scope of section 922(g)(1) to include foreign convictions as permissible predicate offenses would be inconsistent with the apparent intent of Congress.[54] In section 921 of the Gun Control Act, Congress excluded from the scope of the Act certain federal and state offenses relating to antitrust violations and

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48. *Id.* at 428. In other words, a court hearing a section 922(g)(1) challenge does not need to conduct its own inquiry into the validity of the foreign conviction—it may infer such validity from other sources.

49. *Id.*

50. United States v. Gayle, 342 F.3d 89 (2d Cir. 2003); United States v. Concha, 233 F.3d 1249, 1253-56 (10th Cir. 2000).

51. *See* R.S.C. C-46, § 85(1)(a), (3) (1985) (Can.).

> (1) Every person commits an offence who uses a firearm
>
> (a) while committing an indictable offence...
>
> (3) very person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable
>
> (a) in the case of a first offence, except as provided in paragraph
>
> (b) to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of one year.

Id.

52. *Gayle*, 342 F.3d at 95.

53. *Id.* at 91-96.

54. *Id.* at 92.

offenses that, although punishable by terms of more than one year, were classified as misdemeanors by states.[55] Consequently, antitrust convictions abroad that carry terms of imprisonment of more than one year would qualify as valid sentence enhancers or as the requisite predicate felonies under section 922(g)(1), whereas convictions in U.S. courts for similar offenses would not qualify as underlying felonies for sentence-enhancement purposes.[56]

The Second Circuit proclaimed that it was the first court to review comprehensively the legislative history of the Gun Control Act in an effort to determine what Congress intended.[57] The lower court concluded that the Senate Judiciary Committee Report on the Gun Control Act strongly suggests that Congress did not intend section 922(g)(1) to extend to foreign convictions: "The definition of the term 'felony,' as added by the committee, is a new provision. It means a Federal crime punishable by a term of imprisonment exceeding one year and in the case of State law, an offense determined by the laws of the State to be a felony." [58] Moreover, the Conference Report, which adopted the House's version of the bill, did not voice opposition to the Senate's definition of "felony"; instead, the House version replaced "felony" with "crime punishable by imprisonment for a term exceeding one year." [59] The Second Circuit determined that these two reports reveal that Congress did not intend the statute to extend to

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55. *Id.* at 93.

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
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> (C) any Federal or State offenses pertaining to antitrust violations, unfair trade practices,
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> restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (D) Any State offense classified by the laws of the State as a misdemeanor and
>
> punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.

18 U.S.C. § 921(a)(20)

56. *Gayle*, 342 F.3d at 93. "[W]e do not understand the logic whereby a person convicted of an antitrust violation in a foreign country would not be allowed to possess a firearm, yet a person convicted of the same antitrust violation in the United States would be allowed to posses a firearm." *Id.* (citing United States v. Concha, 233 F.3d 1249, 1254 (10th Cir. 2000)).

57. Most of the other courts found that there was no ambiguity in the statute, and therefore did not deem it necessary to consult the legislative history of the Act, or found the legislative history to be un-illuminating. *See, e.g.*, United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986).

58. *Gayle*, 342 F.3d at 94 (citing S. REP. NO. 90-1501, at 31 (1968)).

59. *Id.* at 95.

foreign convictions; Congress simply replaced one word for its commonly understood definition.[60]

The Second Circuit noted that had Congress meant for the statute to extend to foreign convictions, Congress would have discussed how to ensure that these foreign convictions were obtained in a manner sufficient to comport with the U.S. system of jurisprudence.[61] The Second Circuit found that Congress' silence regarding this issue "further contributes to the sense that its meaning is not clear and that it may be appropriate to look beyond [the statute's] words alone for guidance as to its meaning."[62] Consequently, the court overturned the district court's ruling by providing for a limited application of section 922(g)(1) to prior felony convictions.[63]

The district court's opinion in *United States v. Ingram* (*United States v. Gayle* on appeal) is notable because rather than focus on the phrase "in any court" when determining whether a foreign conviction may serve as a predicate offense, the *Ingram* court focused instead on the phrase "crime punishable by...."[64] Even though the defendant received a sentence of less than one year, because the defendant's violation of section 85(1)(a) of the Canadian Criminal Code was punishable by a maximum term of imprisonment of fourteen years, the court found that this clearly fell within the "crime punishable by imprisonment for a term exceeding one year."[65] Even though the Second Circuit overturned the court's earlier verdict, it did not explicitly accept or reject this argument.[66] While other courts considering the application of section 922(g)(1) of the Gun Control Act

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60. *Id.* In its brief, the United States argues that "the Conference Report expressly rejected the Senate's language and adopted the House bill's definition of 'felony,' which lacked language limiting the qualifying felonies to those entered by state or federal courts." Brief for United States, *supra* note 32, at *31-32.

61. *Gayle*, 342 F.3d at 95.

> [Congress] would in all likelihood have been troubled by the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of justice and those convicted of crimes that are anathema to our First Amendment freedoms, such as convictions for failure to observe the commands of a mandatory religion or for criticism of government.

Id.

62. *Id.* at 95-96.

63. *Id.* at 96.

64. *See* United States v. Gayle, 342 F.3d 89 (2d Cir. 2003) (What matters when determining whether an offense comes under 18 U.S.C. § 922(g) is not the actual sentence the defendant received. Rather, the court must examine the maximum possible sentence for the offense charged.); United States v. Ingram, 164 F. Supp. 2d 310, 317 (N.D.N.Y. 2001), *rev'd sub nom.*

65. 18 U.S.C. § 922(g)(1); *Ingram*, 164 F. Supp. 2d at 316-17.

66. *Gayle*, 342 F.3d at 89.

did not discuss the *Ingram* court's argument, numerous federal decisions have accepted it.[67] As this Note will discuss, the same crime may have differing terms of punishment in different jurisdictions, further resulting in a problematic approach of applying section 922(g)(1) of the Gun Control Act to foreign felony convictions.[68]

III. WHY THE GUN WON'T FIRE: REASONS FOR THE SPLIT

The U.S. Supreme Court should address the reasons underlying the circuit split when it hears *Small*. These reasons include whether section 922(g)(1) of the Gun Control Act should be construed according to its plain and natural meaning or whether the statute is ambiguous and must be construed otherwise. If the Court finds the statute to be ambiguous, the Court will need to examine the purpose of the statute within the context of the Gun Control Act and the legislative history of the statute. Moreover, it will need to resolve the Gun Control Act's exclusion of certain state and federal business crimes as predicate offenses and how this exclusion affects the application of section 922(g)(1) to foreign felonies.[69]

A. *Natural Meaning and Plain Language Evaluation*

Ordinarily, a court will look no further than the plain language of the statute to determine the statute's meaning and applicability. If the language of a statute "is plain and admits of no more than one meaning" and "if the law is within the constitutional authority of the law-making body which passed it," then "the duty of interpretation does not arise" and "the sole function of the courts is to enforce the

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67. *See, e.g.*, United States v. Mendoza-Lopez, No. 99-30209, 2000 U.S. App. LEXIS 31915 at *2 (9th Cir. 2000) ("Section 922(g)(1) does not key on the punishment meted out; it depends on whether the crime was "punishable" for a term exceeding one year."); *see also* United States v. Norris, 319 F.3d 1278, 1282 (10th Cir. 2003); United States v. Arnold, 113 F.3d 1146 (10th Cir. 1997). The lack of any case law rejecting this proposition may be enough to set the maximum sentence as the guideline for determining whether foreign felony convictions (for sentences exceeding one year) may qualify for sentence enhancement under § 922(g)(1). This, however, brings up the problem discussed later as to how to handle instances where the same felony is punishable by differing lengths of time in different jurisdictions. *Id.*

68. *See infra* part V.

69. *See*, Dionna K. Taylor, Comment, *The Tempest in a Teapot: Foreign Convictions as Predicate Offenses Under the Federal Felon in Possession of a Firearm Statute* [United States v. Gayle, 342 F.3d 89 (2d Cir. 2003)], 43 WASHBURN L.J. 763, 788-89 (2004). Taylor argues that the statute is not ambiguous, and even if it were, it should apply to a defendant's foreign felony convictions. *Id.*

statute according to its terms."[70] The plain meaning of a statute's text must be given effect "unless it would produce an absurd result or one manifestly at odds with the statute's intended effect."[71] While a dictionary definition of the term "any" is all-inclusive,[72] the plain-meaning reading does have the potential to lead to "absurd results" if unconstitutional foreign felonies are included. Treating groups of felons alike for purposes of section 922(g)(1) without considering the procedures which produced the sentences cannot be Congress' intent when enacting the statute. The inquiry must therefore move beyond a natural meaning and plain language evaluation of the statute to determine the breadth of section 922(g)(1).

B. *Canons of Construction*

Courts next look to certain statutory canons of construction to determine the correct meaning of a statute.[73]

1. Inclusion of One Equals the Exclusion of Others

The Inclusion of One Equals the Exclusion of Others statutory canon of construction provides that the inclusion of one term necessarily means that Congress intended to exclude other terms that could apply to the statute at issue.[74] Since section 922(g)(1)'s parent statute expressly excludes certain domestic felonies, but remains silent with respect to foreign felonies, the Court could conceivably apply this canon and rule that Congress intended to exclude certain domestic felonies while permitting the use of foreign felonies as predicate offenses.[75] Whether Congress intended this parent statute to govern the entire Gun Control Act is unclear, however. The parent statute is one of the few provisions of the Gun Control Act that actually specifies "federal or state offenses," while other statutes of the Act permit offenses obtained "in any court."[76] Including limiting language in 18 U.S.C. App. § 1202 and in 18 U.S.C. § 921(20), while

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70. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

71. Parisi by Cooney v. Chater, 69 F.3d 614, 617 (1st Cir.1995).

72. *See* Taylor, *supra* note 69, at 777.

73. United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000).

74. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 173 (2001) (It is well settled that "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting language used in Russello v. United States, 464 U.S. 16, 23 (1983)).

75. 18 U.S.C. § 921(20).

76. *Compare* 18 U.S.C. §§ 921(20), 922(g) *with* § 18 U.S.C. § 1202(a)(1) (repealed).

including no such language in section 922 of the Gun Control Act, may show that Congress intended section 922 to apply to all convictions, including foreign convictions.[77]

The United States government advances this argument in the *Small* case.[78] Unfortunately, when Congress significantly altered the Gun Control Act by incorporating section 1202 into section 921, the ambiguity was not fixed. Instead, as noted above, the ambiguity endured. In *Concha*, the Tenth Circuit determined that by inserting "any" alongside the limiting language of section 921(20) of the Gun Control Act, which exempts certain "federal or state offenses" that otherwise would be included as a predicate felony conviction, is evidence that Congress had no intention of including foreign felonies within the Act's scope—such that "in any courts" meant "in any United States courts."[79] Few circuits, however, have agreed with the Tenth Circuit's interpretation. As such, this canon of construction does not adequately resolve the question of Congress' intent on this issue.

2. Rule of Lenity for Criminal Cases

Because of the traditional notions of fairness and justice underlying the U.S. judicial system, courts apply the Rule of Lenity to ambiguous statutes in criminal cases.[80] The Rule of Lenity arises because courts are not legislators and would rather err on the side of lenity than incorrectly interpret the will of Congress and unjustly convict someone.[81] Courts apply the rule of lenity "only when the

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77. *See* 18 U.S.C. App. § 1202(a)(1); 18 U.S.C. § 922(g)(1).

78. Brief for United States, *supra* note 32, at *29-30.

> On two occasions before the present version of Section 922(g)(1) was enacted, Congress passed laws disqualifying felons from possessing or trafficking in firearms based only on convictions from state and federal courts.... Congress specifically deleted those later amendments, as part of a concerted legislative effort to enlarge [] the group of people coming within the Act's substantive prohibitions.

Id. (citing United States v. Bass, 404 U.S. 336, 343, n.10. (1971)).

79. United States v. Concha, 233 F.3d 1249, 1253-54 (10th Cir. 2000). The *Concha* court reasoned that individuals convicted of a crime within the exceptions in § 921(20) while abroad would be prohibited from possessing a firearm, whereas that same individual convicted for the same offense in the United States would not. *Id.* at 1254.

80. *Id.* at 1256 (quoting United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993)).

81. *Id.*; *see also* United States v. Johnson, 941 F.2d 1102, 1113 (10th Cir. 1991) ("[R]ule of lenity requires us to interpret criminal laws so as not to increase the penalty place on the individual.").

statutory language is ambiguous"[82] and then only if, "after seizing everything from which aid can be derived, ... no more than a guess [can be made] as to what Congress intended."[83] If this occurs, any "ambiguity concerning the ambit of a criminal statute is to be resolved in favor of lenity."[84] Because section 922 of the Gun Control Act is both criminal in nature and ambiguous, using the Rule of Lenity to resolve the ambiguity surrounding the breadth of section 922 of the Gun Control Act may assist a court's effort of interpreting the statute, and thereby exclude foreign felonies from the scope of section 922(g)(1).[85]

The Tenth Circuit court has already adopted this approach with regard to 18 U.S.C. § 924(e) in *Concha*.[86] This may be the best temporary course of action for courts to follow until either Congress or the U.S. Supreme Court expressly resolves the ambiguity. It would ensure that only prior domestic felonies would be used as a basis for sentence enhancement under section 924(e) or as a predicate felony under section 922(g)(1), thereby avoiding the problems associated with including foreign felony convictions as predicate offenses.[87]

C. *Congressional Intent*

The circuit courts have also looked to the legislative history of the Gun Control Act in their efforts to construe the correct application of section 922(g)(a). The legislative history of the Gun

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82. Brief for United States, *supra* note 32, at *47 (citing Lewis v. United States, 445 U.S. 55, 65 (1980)).

83. *See id.* (citing Muscarello v. United States, 523 U.S. 125, 138 (1998)).

84. Daniel A. Per-Lee, Annotation, *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes*, 62 L. Ed. 2d 827, 828 (2003).

85. *See id.* at 831-32 (describing instances in which the Supreme Court has held the rule of lenity to apply to gun control legislation) (citing *Lewis*, 445 U.S. at 55). According to § 922's predecessor:

> Noting that the touchstone of the principle of lenity is statutory ambiguity, the court state[s] that the plain language, legislative history, and structure of the Act itself all indicated Congress' plain intent that the fact of a felony conviction imposes a firearm disability until such time as the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or consent from the Secretary of the Treasury.

18 U.S.C.S. § 1202(a)(1)

86. *Id.* While the *Concha* court was considering the sentence enhancement factors for repeat offenders (three or more felonies) under 18 U.S.C. § 924(e), the analysis is identical to the other circuits' attempts to interpret § 922(g)(1). United States v. Concha, 233 F.3d 1249, 1256-57 (10th Cir. 2000). Both sections refer to prior felony convictions in "any court." 18 U.S.C. §§ 922(g)(1), 924(e).

87. *See infra* Parts VI-V (for a discussion of the potential problems in using foreign felony convictions to satisfy the requirements of the statute).

Control Act does not adequately support the use of foreign felony convictions as predicate offenses under section 922(g)(1).

1. Policy Goals and the Purpose of the Gun Control Act

During the 1960s, Congress passed the Omnibus Crime Control and Safe Streets Act (hereinafter, the "Safe Streets Act") in response to the nationwide epidemic of crime. The Safe Streets Act was passed during a turbulent time in U.S. history, following the assassinations of President John F. Kennedy and Dr. Martin Luther King Jr., and when tempers were rising on college campuses and cities across the country over deteriorating race relations and the growing U.S. presence in Vietnam.[88] As the Amendments within House Report 90-1577 set out, "[t]his increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic."[89] Unlike today, the threat of attack from foreign terrorists was not the driving force behind this legislation.[90] Thus, the overarching purpose of the Safe Streets Act was to keep handguns out of the hands of dangerous or potentially dangerous individuals.[91] This continues to be a legitimate concern, since according to the Bureau of Justice, in 2002, sixty-seven percent of all murders, forty-two percent of all robberies, and nineteen percent of all reported aggravated assaults were

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88. Tracey A. Basler, Note, *Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147, 169-71 (Fall 2002); *see also* ALEXANDER BLOOM, TAKIN' IT TO THE STREETS: A SIXTIES READER (2003); TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE (1993). It is also of note that the Act was passed on June 6, 1968, the same day that the announcement of the assassination of Senator Robert F. Kennedy was announced in the House. Basler, *supra*, at 169.

89. *See* 1968 U.S.C.C.A.N. 4410, 4412. These Amendments were introduced subsequent to the enactment of HR 5384 in Title IV to the omnibus crime bill, HR 5037, on June 19, 1968. Thus, the Gun Control Act was already in effect when these Amendments were voted upon.

90. *See* Taylor, *supra* note 69, at 782 (referencing the Firearms Fairness and Security Act, S. 2102, 108th Cong. 2(2)(1)(B) (2004)). This Amendment has two Senate co-sponsors, which hardly shows that even the current Congress is not solidly behind the notion of including foreign felony convictions within § 922(g)(1)'s ambit. *Id.*

91. H.R. 90-1577 cites handgun statistics in the general statement prior to the amendments:

> Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. Statistics indicate that 50 lives are destroyed by firearms each day. . . . . No civilized society can ignore the malignancy which this senseless slaughter reflects.

1968 U.S.C.C.A.N. at 4413.

committed with a firearm.[92] Use of firearms by criminals has, however, declined since 1993.[93] Regardless, the use of firearms in crimes still poses a significant threat to the safety of U.S. citizens.

If read at its broadest level of abstraction, the purpose of the Gun Control Act (and the Safe Streets Act) would appear to include foreign felony convictions. The United States government advances this argument in its brief in *Small*, asserting that if foreign convictions were entirely excluded

> then those convicted of murder, rape, armed robbery, and terrorism overseas could freely possess, receive, ship, and transport firearms within the United States, while a person convicted domestically of tampering with a vehicle identification number,[94] or possessing a 'three-neck, round-bottom flask,'[95] could be barred for life from possessing firearms.[96]

This is clearly inconsistent with Congress' purpose in enacting the Gun Control Act. The United States' argument, however, is slightly exaggerated. While it may appear unfair for the same class of individuals to be treated differently on the basis of where their conviction was obtained, section 922(g)(1)'s application is based on the mere fact of conviction—arguably, irrespective of the source of the conviction. The prior felony conviction is an essential element of the statutory offense; if there is no valid felony conviction, then an individual cannot be convicted of violating section 922(g)(1) of the Gun Control Act. It is therefore important to determine whether Congress intended to include foreign felonies within the scope of section 922(g)(1) of the Gun Control Act.

Numerous cases have considered Congress's intent when it enacted the Gun Control Act. For instance, "[t]he *Dickerson* court found that Congress determined that the best way to prevent crime was to keep firearms away from certain classes of persons, namely those who have been convicted of serious crimes."[97] The court in *Barrett v. United States* found that "the very structure of the 1968 Act demonstrates that Congress . . . sought broadly to keep firearms away

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92. *See* Bureau of Justice Statistics: Crimes Committed with Firearms, *available at* http://www.ojp.usdoj.gov/bjs/glance/guncrime.htm (last visited Sept. 19, 2004).

93. *See generally* Bureau of Justice Firearms and Crimes Statistics, *available at* http://www.ojp.usdoj.gov/bjs/guns.htm (last visited Sept. 19, 2004).

94. *See* 18 U.S.C. § 511(a).

95. *See* 21 U.S.C. § 843(a)(6).

96. *See* Brief for United States, *supra* note 32, at *26.

97. 460 U.S. 103, 119 (1983).

from the persons Congress classified as potentially irresponsible and dangerous."[98]

The *Dickerson* decision specifically addresses Congress' concern with the utility and public policy concerns of including foreign felony convictions as predicate offenses under the Gun Control Act. The *Dickerson* court was concerned that state provisions that expunged prior convictions would hamper Congress' attempt to prevent and deter crime by precluding federal courts (and other state courts) from using now-expunged convictions to serve as either a basis for conviction or as a basis for sentence enhancement under sections such as 922(g)(1) and 924(e)(1) of the Gun Control Act.[99] Consequently, that *Dickerson* court found that Congress could not have meant for states to be able to modify which prior convictions counted toward sentence enhancement under federal law.[100] This is an important distinction because the split is among not only the federal Courts of Appeals, but also the federal district courts.

After focusing on the statute's language and legislative history, the *Barrett* court concluded that Congress' purpose in enacting the Gun Control Act was to keep firearms away from "*potentially* irresponsible persons, including convicted felons."[101] Thus, the fact that a conviction may have been obtained through unconstitutional methods would be irrelevant. The mere fact of conviction becomes determinative, rather than the mechanics of the felony proceeding. If the individual committed a felony, or a crime that a foreign court found to be a felony, then he is prohibited from possessing a firearm by section 922 of the Gun Control Act because he is "*potentially*" irresponsible. If the U.S. Supreme Court adopts this liberal view, the foreign felony argument would be moot.

The more important question that Congress did not consider was whether felons convicted abroad are as dangerous as felons convicted in U.S. courts. The Tenth Circuit determined that felons convicted abroad are as dangerous as those convicted in the United States in *Concha*.[102] Several law review articles have also addressed this

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98. 423 U.S. 212, 218 (1976). The *Barrett* Court was interpreting a different section of the Gun Control Act, § 922(h); however, the Court discussed at length the history and purposes of the legislation.

99. *See supra* notes 6-9.

100. *Dickerson*, 460 U.S. at 119. Other courts have noted that, "in the absence of plain indication to the contrary ... it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." NLRB v. Natural Gas Utility Dist., 402 U.S. 600, 603 (1971) (quoting NLRB v. Randolph Electric Membership Corp., 343 F.2d 60, 62-63 (4th Cir. 1965)).

101. *Barrett*, 423 U.S. at 220. (Emphasis added.)

102. 233 F.3d 1249, 1256 (10th Cir. 2000) ("foreign criminals are likely to be as dangerous as domestic criminals").

question.[103] In the context of state repeat-offender statutes, one author argues that "[o]ne who violates laws in another country is just as dangerous in the future as one who violates laws in the United States and is therefore equally in need of rehabilitation."[104] Accordingly, there is reason to infer that Congress intended section 922(g)(1) of the Gun Control Act to apply to foreign felons as well as domestic felons because all felons *are* felons, regardless of where the person committed the felony. The classic Shakespearean adage would clearly apply: "[w]hat's in a name? that which we call a rose / by any other name would smell as sweet."[105] No matter how the conviction was obtained, the fact of conviction should be enough.

Nevertheless, as the debate within the Committee report shows, "felon" is simply a label for a class of offenses arbitrarily decided by each state and, indeed, each country. For purposes of section 922(g)(1) of the Gun Control Act, a felony is a "crime punishable by imprisonment for a term exceeding one year."[106] This definition sits independent of the purpose of the Gun Control Act, but also fits squarely within it. If Congress intended section 922(g)(1) to extend to foreign felony convictions, so long as these convictions constituted crimes "punishable by imprisonment for a term exceeding one year," then these convictions would be a valid foundation or sentence enhancer for charges under sections 922 and 924, respectively.[107] If Congress intended the Gun Control Act to apply only to individuals convicted within the United States, the Act also achieves this purpose. Therefore, an examination of the aim of the Gun Control Act does not clear up the debate over the use of foreign felonies to prevent individuals from possessing handguns.

2. Exclusion of Certain State and Federal Business Crimes

In *Small*, the United States argues that even though the Gun Control Act exempts certain state and federal business crimes, Congress still contemplated the Safe Streets Act to include all foreign felony convictions. In its brief to the U.S. Supreme Court, the United States asserts that

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103. *See e.g.* Taylor, *supra* note 69; *see also* Alex Glashausser, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134 (1994).

104. Glashausser, *supra* note 103, at 151, 155.

105. *Romeo and Juliet* Act II, Scene II, lines 47-48, *in* THE COMPLETE WORKS OF WILLIAM SHAKESPEARE (Craig, W.J. ed., Oxford University Press 1914), *available at* www.bartleby.com/70/ (last visited Sept. 12, 2004).

106. *See* 18 U.S.C. § 922(g)(1). *But see* 18 U.S.C. § 921 (excluding certain antitrust convictions).

107. 18 U.S.C. §§ 922(g)(1), 924(e).

> Congress carved out from Section 922(g)'s prohibition only business crimes involving forms of regulation with which Congress was quite familiar. Due to the variety and disparity in how other nations define, label, and classify their penal provisions, however, Congress could be less confident that analogous conduct in foreign jurisdictions would lead to felony convictions in the first place, or that granting the exclusion would exempt only relatively non-dangerous individuals.[108]

To include foreign felonies because "all felons are felons" and are therefore potentially dangerous, but to exclude certain domestic felonies, is an absurd result. The United States' argument is based on the propositions that Congress is unfamiliar with the judicial systems of other nations and that conduct abroad may not be truly criminal if committed in the United States.[109] Congress and the courts are familiar with the white-collar crimes excepted from the scope of the Gun Control Act.[110] Congress' unfamiliarity with similar crimes in foreign countries, however, should lead to the exclusion of those same crimes under section 922(g)(1) of the Gun Control Act. This is the predominant reason why foreign felonies should be excluded from section 922(g)(1)'s scope. Conflicting outcomes for conviction of the same prior offense may ultimately be the key issue to the resolution of the circuit split.

3. Legislative History

As discussed above, the relatively sparse legislative history available regarding 18 U.S.C. §§ 922(g) and 1202(a)(1) renders it difficult to discern Congress' purpose in enacting the statute. Section 1202(a)(1) passed "with little discussion, no hearings, and no report."[111] As the U.S. Supreme Court noted in *United States v. Bass*, however, Title VII (including section 1202) was a last-minute Senate addition to the Safe Streets Act.[112] Indeed, the Gun Control Act itself grew out of and was enacted as a series of amendments to the Safe Streets Act.[113] When Title VII was repealed in 1986 and superseded by the more current version of 18 U.S.C. § 921, one would assume that this new version would clear up any lingering ambiguities surrounding the two former sections. Although the new version

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108. Brief for United States, *supra* note 32, at *23-24
109. *Id.*
110. *Id.*
111. 13 A.L.R. FED. 103.
112. *See* William R. Vizzard, Note, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79 n.44 (1999).
113. *See* Century v. Kennedy, 323 F. Supp. 1002 (D. Vt. 1971).

presumably should have faced closer scrutiny in Committee hearings,[114] that was not the case.

Congress' concern in enacting section 921 of the Gun Control Act (including section 922(g)(1))—namely, the problem of convicted felons possessing handgun—has not changed since it enacted the Safe Streets Act in 1968.[115] The Senate Report would have restricted the scope of the Gun Control Act to "a crime of violence punishable as a felony."[116] The Conference Report, however, adopted the House's language that the Gun Control Act was applicable to "a crime punishable by imprisonment for more than one (1) year."[117] Moreover, this Report, from which the final language of the Gun Control Act was adopted, excluded certain offenses that state law classified as misdemeanors, despite being offenses punishable by imprisonment for over one year.[118] Thus, when considering foreign statutes whose offenses are punishable by imprisonment for over a year, whether the offenses are classified as felonies or not becomes important.[119]

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114. *See* United States v. Bass, 404 U.S. 336 (1971); *see also* 13 A.L.R. FED. 103 (discussing the legislative history of the Act).

115. When Congress enacted [18 U.S.C. § 921 et seq.] it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.... The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'

Dickerson v. New Banner Inst., Inc. 460 U.S. 103, 119 (1983) (quoting Huddleston v. United States, 94 S.Ct. 1262, 1268 (1974)).

116. 1968 U.S.C.C.A.N. 4426, 4428; *see also* S. Rep. No. 90-1501, at 31 (1968).

117. 1968 U.S.C.C.A.N. 4426, 4428.

118. Definition of crimes.—

Under both the House bill and the Senate amendment the crimes were defined to exclude Federal and State offenses relating to antitrust violations and similar business offenses. The conference substitute adopts the crime referred to in the House bill (one punishable by imprisonment for more than 1 year) but excludes from that crime any State offense not involving a firearm or explosive, classified by the laws of the State as a misdemeanor, and punishable by a term of imprisonment of not more than two years.

1968 U.S.C.C.A.N. 4426, 4428. It is noteworthy to mention that the bill does put a two-year cap on the offenses which may be classified as misdemeanors under state law. It is also noteworthy that the Senate's definition makes certain provisions for what would constitute an equivalent felony under state law, without making such a clarification for foreign convictions. Presumably, foreign convictions would be the more problematic area for courts to interpret for charges under § 922(g)(1).

119. The issue that arises then is that not all countries and jurisdictions use the term "felony" or "misdemeanor" when describing a class of crimes—if a foreign country were to classify an offense punishable by imprisonment for over one year as a misdemeanor, would it also be excludable under the statute? Arguably yes, though this

While the Safe Streets Act (which includes the Gun Control Act) now had a class of offenses to which it would apply, a further problem with the application of the Safe Streets Act arose with the passage of the Armed Career Criminal Act (ACCA) in 1984.[120] Several sections within the Safe Streets Act, specifically, the Gun Control Act and the ACCA, arguably conflicted: namely, Title VII of the ACCA, 18 U.S.C. App. § 1202 (a)(1), and 18 U.S.C. § 922(g), which is part of Title IV.[121] At the time of its passage, section 1202(a)(1) applied to "any person who has been convicted by a court of the United States or a State or any political subdivision thereof of a felony. . . ."[122] Congress, however, repealed the 1984 Amendment in 1986 with an updated version of section 921 of the Gun Control Act.[123] This change merged the provisions of the ACCA into the Gun Control Act. In doing so, however, Congress failed to include any similar language relating to domestic versus foreign felony convictions in section 921, generating confusion regarding the use of foreign felony convictions as predicate offenses under the Gun Control Act.[124] For example, in hearings on the 1986 amendments, the Director of the Bureau of Alcohol, Tobacco and Firearms noted that "the bill provides that what constitutes a felony conviction would be determined by the *law of the jurisdiction where the conviction occurred.* This would require the Bureau to examine the peculiar *laws of each State* to determine whether a person is convicted for Federal purposes."[125]

Congress' passage of H.R. 4322 in 1986, which combined the provisions of Title I of the Gun Control Act (section 922(g)) and Title VII of the ACCA (section 1202), merely noted that a category of persons excluded from possessing guns are those "under indictment for or convicted of a felony."[126] Thus, while the narrower language of

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is an additional problem that courts will face should they decide to find that 18 U.S.C. § 922(g) unambiguously includes foreign "felonies."

120. See H.R. REP. No. 98-1073 (1984) (regarding bill H.R. 6248, to amend title VII of the Omnibus Crime Control and Safe Streets Act of 1968).

121. Dickerson v. New Banner Inst., Inc. 460 U.S. 103, 105 (1983) (referencing 82 Stat. 226 and 82 Stat. 1214). "Title VII makes it unlawful for any person 'who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year' to ship, transport, or receive any firearm or ammunition in interstate commerce." *Id.*

122. 18 U.S.C. App. § 1202(a)(1), Pub. L. 90-351. See also Report 98-1073, regarding H.R. 6248, "Section 2 amends 18 U.S.C. App. § 1202(a) by adding a new offense proscribing any felon who has been convicted previously of three felonies for robberies or burglaries (either Federal or State) from . . . ."

123. 18 U.S.C. app. § 1202 (2003); Pub. L. 99-308, § 104(b).

124. *See supra* note 118.

125. *See* Legislation to Modify the 1968 Gun Control Act, Hearings, Committee on the Judiciary House of Representatives, 99th Congress, Part 2, Serial No. 131, p.1170-71, Memorandum to Assistant Secretary from the Director of the Bureau of Alcohol Tobacco and Firearms, February 10, 1986 (emphasis added).

126. 1968 U.S.C.C.A.N. 1327.

section 1202 was combined with the broader language of section 922, a problem arose regarding whether felonies, for the purpose of this statute, were limited to state and federal offenses. In *Gayle,* the Second Circuit noted that this question remains unclear.[127]

4. Pending Legislation

Pending legislation in the House regarding section 922(g) of the Gun Control Act specifically suggests amending the statute to prevent gun possession by individuals who, as juveniles, committed a crime that otherwise would have qualified as a crime of violence for purposes of the statute.[128] The relevant language is no longer "in any court," but rather "in a court."[129] This minor change does not suggest congressional intent one way or the other whether to include foreign felony convictions. There is also pending legislation in the Senate regarding section 922(g)(1) of the Gun Control Act, which intends to expand the scope of the section to apply to foreign felons.[130]

To review, assuming that Congress intended foreign felonies to serve as a predicate offense for section 922(g)(1) of the Gun Control Act, under both the Restatement approach (including *Small*) and the view of the *Gayle*, *Atkins,* and *Winson* courts, two major issues arise when considering foreign felonies: First, what should a U.S. court do when confronted with a conviction based on a crime which, while criminal abroad, is legal in the United States? Second, how should a U.S. court decide whether a foreign conviction was obtained through judicial proceedings that comport with our own? [131] The U.S. Supreme Court must address these issues when it renders its decision in the *Small* case.

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127. United States v. Gayle, 342 F.3d 89, 95 (2d Cir. 2003); *see also* Taylor, *supra* note 69 (for a discussion of the legislative history of the Act in reference to the *Gayle* decision). The *Gayle* court also found that the Conference Report, while adopting the House's version of the bill, did not disagree or conflict with the Senate Report's limitation of felonies to include only convictions in domestic courts. *Gayle*, 342 F.3d at 95.

128. 2003 Cong. U.S. H.R. 3411 (Introduced in House October 30, 2003).

129. *Id.*

130. 2003 Cong. U.S. S. 2102 (Introduced in Senate February 23, 2004). This bill has two co-sponsors, was read twice, and is pending review in the Committee of the Judiciary.

131. *See* Taylor, *supra* note 69, at 792. The author argues that, in reference to the decision in *Gayle*, the burden should be on the party challenging the inclusion and use of the foreign conviction to show how the conviction was obtained by methods contrary to fundamental due process and other unconstitutional means. While this proposal would relieve courts of the trouble and problems of sifting through foreign judicial material, the cost to the defendant would substantially increase. Furthermore, several courts have noted that the difficulty of challenging these foreign convictions is difficult, if they can successfully be challenged at all. *See* United States v. Concha, 233 F.3d 1249, 1255 (10th Cir. 2000).

IV. MAKING A RUN FOR THE BORDER: FOREIGN JUDICIAL PROCEEDINGS

There are undoubtedly many crimes which, while criminal in foreign countries, are either not crimes in the United States or are treated differently by U.S. courts. The United States has long prided itself on being the "land of the free," and consequently has placed few restrictions on the freedom of speech and the freedom of religion.[132] This is not the case in many other countries, however. While most of the offenses that qualify as felonies under U.S. law also qualify as felonies under many foreign felony statutes, problems arise with both the context of how these foreign felony convictions are obtained[133] and with how to proceed when foreign felony statutes make certain conduct felonious that does not merit equivalent treatment in the United States.[134]

A. *Procedural Fairness and Due Process Concerns*

Both the Bill of Rights and the Fourteenth Amendment's Due Process Clause ensure basic rights to the accused: the right to legal counsel, the right against self-incrimination, and the right to procedural and substantive due process.[135] Procedural due process sets certain guidelines that the government must follow in order to respect the constitutionally protected liberties afforded individuals under the Due Process Clauses of the Fifth and Fourteenth Amendments.[136]

The same constitutional protections, however, are not universally accepted around the world. The same crime may be tried differently in different countries and in a manner contrary to the public policy of the United States. For example, one author noted that in the developing area of Chinese sports law, there is no procedural right to due process or right to judicial evaluation of disputes arising under Chinese laws:[137]

> The Sports Law itself fails to articulate any rights for athletes; human rights do not qualify for competition with nationalist aspirations in the bold new program of Chinese sports. Nor does the law explicitly protect

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132. *See* U.S. CONST. amend. I-X.
133. *See infra* Part IV(A).
134. *See infra* Part IV(B).
135. *See* U.S. CONST. amend. I-X, XIV.
136. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).
137. James A.R. Nafziger & Li Wei, Note, *China's Sports Law*, 46 AM. J. COMP. LAW 453, 454 (1998) (From a Western viewpoint, what is missing in the Sports Law is, first, an identification of the rights of athletes, for example, to enjoy impartial rules of eligibility and due process; and, second, any recognition that adjudication can play a positive role by providing a remedy in exceptional cases involving the most serious breaches of fairness and justice.).

> a right to challenge decisions of the newly empowered sports associations, although it is possible that athletes will have standing to do so in the mediation and arbitration body under the Sports Law.[138]

While the author notes that there is nothing intrinsically unfair with the Chinese laws themselves, the lack of due process in proceedings against athletes where the underlying conduct or resulting sentence amounted to a felony under U.S. law would presumably be a point of contention in determining whether a foreign conviction in China would satisfy the requirements of section 922(g)(1) of the Gun Control Act.[139] In addition, the punishment meted out would have to meet the definition of what constitutes a felony under section 922(g)(1) in order to count as a predicate offense.[140]

The new Palestinian judicial system also suffers from due process and other basic constitutional protection problems. For example, in Gaza and the West Bank, many individuals are incarcerated for a significant period of time without receiving legal counsel. [141] Moreover, oftentimes individuals accused are not informed of their right to counsel.[142] Police officers involved may delay advising the accused of their rights until after the prosecutor interrogates the accused and takes a statement.[143] Considering these violations of basic due process, it can hardly be said that persons charged under Palestinian law are tried fairly according to U.S. standards of justice. This argument parallels the one advanced in *Concha* by the Tenth Circuit, where the court pointed to evidence that the defendant may not have had legal counsel in his prior felony proceeding in the United Kingdom.[144] The Tenth Circuit found this abuse represented a clear violation of the Sixth Amendment.[145]

Many countries' systems would presumably meet the constitutional requirements for basic procedural due process, however. The arguments against including felony convictions from these countries would be moot. For example, criminal defendants in the Philippines are afforded similar protections as those provided in

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138. *Id.* at 465.

139. *Id.*

140. *See* 18 U.S.C. § 922(g)(1) ([any] crime punishable by imprisonment for a term exceeding one year).

141. Hiram E. Chodosh & Stephen A. Mayo, Note, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 HARV. INT'L L. REV. 375, 423 (1997) (In the West Bank, a suspected criminal is not entitled to be appointed defense counsel unless charged with either a capital or life sentence or sentence.). *Id.* at 415.

142. *Id.* at 416.

143. *Id.* "Accused persons are often held for three or four days without an opportunity to communicate with their defense counsel." *Id.*

144. United States v. Concha, 233 F.3d 1249, 1255, n.5 (10th Cir. 2000).

145. U.S. CONST. amend. VI.

the United States.[146] In *People of the Philippines v. Lopez*, for instance, the Philippine Supreme Court overturned a criminal conviction because the evidence used was obtained improperly, in violation of the Philippine Constitution.[147] Thus, some foreign felony convictions could be properly used as the basis for a conviction under section 922(g)(1) of the Gun Control Act.

The question of whether wholly to exclude foreign felony convictions or, alternatively, to selectively disregard convictions from certain countries known to have judicial systems contrary to our own, is one that the U.S. Supreme Court must address.

1. Foreign Convictions in U.S. Courts

The decision of *Neprany v. Kir* indicates that even though some crimes are not necessarily crimes in the United States,[148] full faith and credit should be given to the foreign judgment by U.S. courts so long as domestic public policy is "not contravened" by the foreign law.[149] The only limiting factors appear to be traditional common law principles embodied in the Restatement (Third) of *Foreign Relations of Law* § 482.[150] Such limitations include non-recognition where "the procedure implemented in the foreign court denied the defendant such fundamental American rights as access to counsel, discovery, impartial tribunals and judicial review"[151] as well as limitations based on public policy.[152]

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146. *See e.g.*, United States v. Kole, 164 F.3d 164, 172 (3d Cir. 1998) (citing People of the Philippines v. Lopez, 1994 Philippine S.Ct. LEXIS 5145 (1994)).

147. *Id.* at 173. The Lopez court highlighted the basic tenets of the Philippine legal system, including "the right to counsel, the right to remain silent, and the duty of the arresting officers under the Philippine Constitution." *Id.*

148. *See infra* Part VI.B. (for a discussion of how the Restatement approaches the "public policy" problem).

149. Neprany v. Kir, 5 A.D. 2d 438, 439 (N.Y. 1958). In *Neprany*, the defendant was convicted under a Canadian statute for seduction and criminal conversation. *Id.* New York had previously abolished these crimes as causes of action. The Court, however, nevertheless held that "the comity of nations called for giving full effect to the foreign judgment in question." *Id.* The Court found that New York public policy was not offended by giving effect to the enforcement of the Canadian judgment. *Id.*

150. *See infra* note 223.

151. *See* Brian Richard Paige, Note, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 SEATTLE U. L. REV. 591, 603 (2003) for a discussion of grounds of non-recognition in U.S. Courts.

152. *Id.*; *see also* Telnikoff v. Matusevitch, 702 A.2d 230, 238 (Md. 1997). An English libel judgment was not recognized under state law because the Maryland defamation law was "totally different" from English defamation law in:

> virtually every significant respect and that the differences were rooted in history and fundamental public policy differences concerning freedom of the press and speech. The court noted that the principles governing defamation actions under English law were so contrary to Maryland defamation law and to

Courts, therefore, would have the ability to set aside foreign judgments under the Restatement, but the standards by which courts must do so are applied on a case-by-case basis. Interpreting the language of section 922(g)(1) of the Gun Control Act to include judgments of foreign courts, while not necessarily abhorrent to domestic civil procedure, will likely result in inconsistent recognition of foreign judgments.

More important, as Karen E. Minehan notes, "no U.S. court has enunciated a clear standard for using the public policy exception."[153] Instead

> [U.S.] courts have enforced foreign judgments based on causes of action that either do not exist under or vary from U.S. law. U.S. courts have enforced foreign damage awards that would not be granted in the United States. U.S. courts have thus exhibited a profound tendency towards the *liberal enforcement of foreign judgments that would not normally be awarded in U.S. courts.*[154]

While purely hypothetical, an interesting example of the procedural problems inherent in deciding that section 922(g)(1) should apply to foreign felony convictions occurred within the last decade. The caning of an eighteen-year-old U.S. citizen, Michael Fay, for violating Singapore's vandalism and mischief laws received worldwide attention.[155] While the Singapore Constitution recognizes such fundamental constitutional issues as due process and equal protection, it affords no protection against cruel, inhuman, or degrading punishment. The offense for which Fay was caned meets the statutory requirements for a "crime punishable by imprisonment for one year or more,"[156] and thus would qualify as a prior felony under § 922(g)(1). While much of the Singapore Constitution comports with traditional U.S. notions of jurisprudence, this particular punishment offends U.S. notions of "cruel and unusual

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> the policy of freedom of the press underlying Maryland law, that appellant's judgment should be denied recognition under principles of comity.

Telnikoff, 702 A.2d at 238.

153. *See* Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?* 18 LOY. L.A. INT'L & COMP. L. REV. 795, 799 (1996).

154. *Id.* at 804 (emphasis added).

155. *See* Firouzeh Bahrampour, Note, *The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?* 10 AM. U. INT'L L. & POL'Y 1075 (1995). This Note does not go into much discussion as to whether the judicial proceedings themselves were impartial and constitutional, questions which lie at the heart of this issue. *Id.*

156. *Id.* at 1080; *see also* Vandalism Act, ch. 108, § 3 (1966) (Sing.) (The maximum legal sentence for each count of vandalism could consist of a fine of two thousand Singaporean dollars or a prison sentence of three years, and caning of three to eight strokes.).

punishment," prohibited under the U.S. Constitution.[157] If Fay were to carry a handgun while traveling in the United States, it is possible that his prior felony conviction could be used under section 922(g)(1) for his conviction, even though this prior felony is arguably unconstitutional.

2. Religious Tribunals

Some jurisdictions base their criminal code on religious, rather than civil or moral, codes. For example, in Malaysia, the Syariah courts have criminal jurisdiction over persons of Islamic faith, "[p]rovided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof."[158] The Malaysian Constitution, for instance, permits the Syariah court to exercise jurisdiction over cases in which a person teaches doctrines contrary to Islamic law.[159] Punishment for this violation could be imprisonment for up to three years.[160] Such a crime would appear to be at odds with U.S. laws; however, it seems typical of religious tribunals. Since persons convicted of offenses punishable in excess of one year would fall under the scope of section 922(g)(1) of the Gun Control Act, [161] this casts further doubt about whether section 922(g)(1) should be interpreted to include foreign felony convictions.

B. *Differing Definitions of Crime and Length of Punishment*

Some crimes necessarily contradict public policy in nearly all countries. Murder is one such crime. In Malaysia, the punishment

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157. U.S. CONST. amend. VIII.

158. Syariah Courts (Criminal Jurisdiction) Act, 1965 (Act 355.2), Laws of Malaysia, Golden's Federal Statutes (2003).

159. Syariah Criminal Offenses (Federal Territories) Act, 1997 (Act 559.4), Laws of Malaysia, Golden's Federal Statutes (2003). False doctrine states:

> (1) Any person who teaches or expounds in any place, whether private or public, any doctrine or performs any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to Islamic Law or any fatwa for the time being in force in the Federal Territories, be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

Syariah Criminal Offenses (Federal Territories) Act, 1997 (Act 559.4), Laws of Malaysia, Golden's Federal Statutes (2003).

160. Syariah Criminal Offenses (Federal Territories) Act, 1997 (Act 559.4), Laws of Malaysia, Golden's Federal Statutes (2003).

161. 18 U.S.C. § 922(g)(1).

for murder is death.[162] Punishment for "culpable homicide," where the death is caused with the intention of causing death, is punishable by imprisonment of up to twenty years and a fine.[163] In the United States, each state determines the punishment for murder.[164] So long as the punishment for the same crime meets the statutory definition of a "crime punishable by imprisonment for a term exceeding one year," no problem arises.[165]

Problems do arise, however, when either the length of the punishment does not meet the statutory requirements of section 922(g)(1) in one country but does in another, or where certain crimes in some countries are not criminal in others. In Malaysia, for example, carnal intercourse against the order of nature is punishable by imprisonment for twenty years and whipping.[166] Presumably, such a law is at odds with the recent U.S. Supreme Court decision overturning a Texas statute prohibiting same-sex sodomy.[167] In a pre-*Lawrence* state, a conviction in Malaysia for carnal intercourse against the order of nature would satisfy the requirements of section 922(g)(1) of the Gun Control Act, whereas a conviction for the same offense in Texas would not qualify as a predicate offense under section 922(g)(1).[168] This possibility of differing results under essentially the same statute is precisely why the ambiguity of section 922(g)(1) must be resolved.

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162. Penal Code, 1997 (Act 574.302), Laws of Malaysia, Golden's Federal Statutes (2003) (prescribing that "[w]hoever commits murder shall be punishable with death").

163. Penal Code, 1997 (Act 574.304), Laws of Malaysia, Golden's Federal Statutes (2003).

164. *See, e.g.*, CAL. PENAL CODE § 190(a) (2003) (Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.); MASS. GEN. LAWS ch. 265, § 1 (2003) (Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree.); N.Y. PENAL LAW §§ 60.06, 125.27 (Consol. 2003) (When a person is convicted of murder in the first degree as defined in section 125.27 of this chapter, the court shall, in accordance with the provisions of section 400.27 of the criminal procedure law, sentence the defendant to death, to life imprisonment without parole in accordance with subdivision five of section 70.00 of this chapter or to a term of imprisonment for a class A-I felony other than a sentence of life imprisonment without parole, in accordance with subdivisions one through three of section 70.00 of this chapter.); TENN. CODE ANN. § 39-11-17 (2003) (noting that first-degree murder is punishable by either life imprisonment or death).

165. 18 U.S.C. § 922(g)(1).

166. Penal Code, 1997 .(Act 574.377(b)), Laws of Malaysia, Golden's Federal Statutes (2003).

167. *See* Lawrence v. Texas, 123 U.S. 2472 (2003).

168. Under Texas law, a Class C misdemeanor does not meet § 922(g)(1)'s requirement of a "crime punishable by imprisonment for a term exceeding one year."

Another example in which conduct that is criminal in a foreign country is not criminal in the United States is flag-desecration for political purposes. In China, "insulting" or "scraping" or otherwise "trampling" the national flag or national emblem is punishable by a term of imprisonment of up to three years.[169] Flag desecration is not an offense punishable by more than one year of imprisonment in the United States, however.[170] Thus, a situation similar to the above-described example regarding convictions for violations of same-sex sodomy statutes occurs. Presuming that an individual is convicted in China of burning the Chinese national flag, he or she would be considered a felon for purposes of section 922(g)(1) of the Gun Control Act, and would therefore be prohibited from owning a firearm, while that same individual would not be convicted in a U.S. court for the same offense, and therefore would not be prohibited from owning a firearm under section 922(g)(1).

Consequently, if courts assume that section 922(g)(1) of the Gun Control Act includes foreign felonies, but the length of punishment for the same crime in the United States is different from the length of punishment abroad for the same crime, an inconsistency in justice would occur. If a felony abroad carries a sentence of more than one year while the same offense in the United States carries a sentence of less than a year, a discrepancy in the application of section 922(g)(1) of the Gun Control Act arises. This is the case, for example, with the Malaysian and Texas same-sex sodomy laws, and potentially the case with respect to the Chinese and U.S. flag-desecration laws.[171] Because of the longer sentence abroad, a defendant would then suffer not only from additional time served in prison, but also be prevented from or possibly prosecuted for owning a gun.

There are other statutes where discrepant sentences could lead to different applications of section 922(g)(1) as well. In China, for

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169. *See* William W. Van Alstyne, Note, *Civil Rights and Civil Liberties: Whose Rule of Law?* 11 WM. & MARY BILL RTS. J. 623, 636 (2003) (citing Xing Fa [Criminal Code] art. 299 (P.R.C.), translated in The 1997 Criminal Code of the People's Republic of China 33 (Wei Luo trans., Chinese Law Series, vol. 1, 1998) ("Anyone who deliberately insults the national flag or national emblem of the [PRC] in a public place with methods such as burning, destroying, scraping, trampling, etc., shall be sentenced to a fixed-term imprisonment of not more than three years, [or] criminal detention, [or] deprivation of political rights.").

170. 18 U.S.C. § 700(a)(1) (2004) ("Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for *not more than one year*, or both.") (emphasis added). Moreover, U.S. courts have construed that statute's application very narrowly in order to reconcile its restriction on First Amendment freedoms with the governmental interest in preserving a national emblem. *See* Hoffman v. United States, 445 F.2d 226 (D.C. Cir. 1971) (narrowly construing the predecessor of 18 U.S.C. § 700 to avoid possible conflict with the First Amendment).

171. *See infra* text accompanying notes 164-68.

instance, the punishment for counterfeiting currency is a minimum term of imprisonment for ten years, life imprisonment, or death.[172] In Malaysia, cheating is punishable by imprisonment for five years, a fine, or both.[173] In Canada, the maximum term of imprisonment for cheating while playing a game or betting is two years.[174] This is relatively light compared to the five-year sentence imposed in Malaysia for the same offense.[175]

Dionna Taylor categorizes the examples above as irrelevant, particularly with reference to the *Gayle* decision in the Tenth Circuit.[176] In *Gayle*, the defendant had at least eighteen prior convictions, enough to warrant characterizing the defendant as "armed and dangerous." Because the United States tried to use the defendant's Canadian felonies as predicate offenses under the Gun Control Act, and because the Tenth Circuit feared the repercussions that would result by allowing foreign convictions to serve as the basis for a section 922(g)(1) charge, the court deemed section 922(g)(1) inapplicable.[177] The Canadian system and the felony for which the defendant was convicted could hardly be colored as unconstitutional or inimical to the traditional notions of U.S. jurisprudence. The U.S. Supreme Court must determine whether situations like *Gayle* are the exception or the rule when it hears *Small*.

V. MADE IN THE U.S.A.: SIMILAR STATUTORY SCHEMES IN STATE LAW

An issue similar to the problem raised by foreign convictions is raised by state repeat-offender laws. These laws provide harsher penalties to repeat criminal offenders than to first-time offenders and, in many cases, the statutory language is arguably as ambiguous as 18 U.S.C § 922(g)(1).[178]

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172. Decision on Punishment of Crimes Disrupting Financial Order, No. 127, Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, The Laws of the People's Republic of China (1998) (adopted June 30, 1995).

173. Penal Code, 1997 (Act 574.417), Laws of Malaysia, Golden's Federal Statutes (2003).

174. *See* Criminal Code, R.S.C., ch. C-46, § 209 (1985) ("Every one who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.").

175. *See* Penal Code, *supra* note 173.

176. *See* Taylor, *supra* note 69, at 787 (the use of foreign convictions does not lead to absurd results).

177. United States v. Gayle, 342 F.3d 89, 89 (2d Cir. 2003).

178. *See, e.g.*, ALA. CODE § 13A-5-10.1 (2004); ARIZ. REV. STAT. § 13-604 (2004); CAL. PENAL CODE § 999e (2004); COLO. REV. STAT. § 18-1.3-801 (2004); DEL. CODE ANN. tit. 11, § 4214 (2004).

One author reviewed state laws relating to the use of foreign felony convictions as sentence enhancers and suggested that foreign felony convictions ought to be excluded, or at the very least, subject to strict scrutiny under a "fundamental fairness" standard.[179] Martha Kimes fond that eight states have laws that explicitly authorize the consideration of foreign convictions in sentencing, while twenty-one states and the District of Columbia have statutes that do not allow the use of foreign convictions.[180] The remaining jurisdictions either have ambiguous statutes or are silent regarding the use of foreign felony convictions.[181] This analysis is useful because it highlights the same problems faced by federal courts in deciding whether to allow foreign felonies to serve as sentence enhancers under section 922(g)(1) of the Gun Control Act.

In the case of *People v. Braithwaite*, the Michigan Court of Appeals noted that "since many foreign convictions do not provide due process rights equivalent to those existing in the United States, it would be manifestly unfair to allow foreign felony convictions to be considered in sentencing a defendant convicted of a crime in this country."[182] The *Braithwaite* court noted that the same decision

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179. Martha Kimes, Note, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503 (1997).

180. *Id.* at 507 (Kimes' note details a comprehensive survey of how states treat foreign felony convictions); *see also* CAL. PENAL CODE § 668 (2004); FLA. STAT. ch. 775.084(1)(d) (2003); KAN. STAT. ANN. § 21-4504 (2002); LA. REV. STAT. ANN. § 15:529.1(A) (2003); MINN. STAT. § 609.1095 (1998); OKLA. STAT. tit. 21, § 54 (2003); TENN. CODE ANN. § 40-35-106(b)(5) (1996); TENN. CODE ANN. § 40-35-120(e)(4) (2003); VT. STAT. ANN. tit. 13, § 11 (2003). *But see* COLO. REV. STAT. § 16-13-101(1)-(2) (1996); CONN. GEN. STAT. § 53a-40 (2001); DEL. CODE ANN. tit. 11, § 4214 (2003); D.C. CODE ANN. § 22-1804a (2003); GA. CODE ANN. § 17-10-7 (2003); 730 ILL. COMP. STAT. 5/5-5-3 (2004) (previous version held unconstitutional by Illinois Supreme Court); IOWA CODE § 902.8 (2003); ME. REV. STAT. ANN. tit. 17-A, § 9-A (2003); MASS. GEN. LAWS ch. 279, § 25 (2004); MISS. CODE ANN. § 99-19-81 (2004); NEB. REV. STAT. § 29-2221(1) (2003); N.J. STAT. ANN. § 2C:43-7.1(a) (2003); N.M. STAT. ANN. § 31-18-17(A) (2003); N.C. GEN. STAT. § 14-7.1 (2003); N.D. CENT. CODE § 12.1-32-09(1)(c) (2003); OHIO REV. CODE ANN. § 2929.01(JJ) (Anderson 2003); OR. REV. STAT. § 161.725(3)-(4) (2001); R.I. GEN. LAWS § 12-19-21(a) (2003); S.D. CODIFIED LAWS § 22-7-7 (Michie 2003); UTAH CODE ANN. §§ 76-3-407, 408 (2003); VA. CODE ANN. § 19.2-297.1(B) (2003); W. VA. CODE § 61-11-18 (2003).

181. *See* Kimes, *supra* note 179, at 509.

182. *See generally* People v. Braithwaite, 240 N.W.2d 293 (Mich. Ct. App. 1976). The Michigan law at issue, MICH. COMP. LAWS § 769.10 (1974), was revised numerous times, and the current version is as follows:

> (1) If a person has been convicted of a felony or an attempt to commit a felony, whether the conviction occurred in this state or would have been for a felony or attempt to commit a felony in this state if obtained in this state, and that person commits a subsequent felony within this state.

MICH. COMP. LAWS § 769.10 (2003). This statute modifies the earlier statute and attempts to limit foreign felony convictions able to be used to those which occurred

could not have been reached if the same defendant were prosecuted under U.S. law.[183] As a solution, the Michigan Court of Appeals decided that rather than have sentencing courts examine the laws of foreign jurisdictions to determine whether they fit with traditional U.S. notions of due process ("a burdensome, difficult, and often impossible task"), courts should simply never consider foreign felony convictions when determining sentencing.[184] This decision is an outlier when compared to similar federal decisions that do not treat the issue in such unambiguous terms.[185] The reasoning behind the *Braithwaite* decision, as well as other cases dealing with foreign convictions under habitual criminal statutes, nonetheless illustrates the problems inherent when dealing with foreign convictions in domestic courts.

Another reason against the use of foreign felony convictions as sentence enhancers is the differing nature of what constitutes a crime from country to country. As Kimes argues, "[b]ecause some countries display a much more punitive policy than others by criminalizing more behaviors and prosecuting violations of the law more aggressively, the use of foreign convictions to enhance sentences invites arbitrary distinctions in punishment simply based on whether a defendant happens to have committed a prior crime in a country with strict, rather than lenient, policies."[186]

Scholars have addressed the due process and constitutionality concerns raised by *Braithwaite* and other state decisions. Kimes, in particular, agrees with the *Braithwaite* court, arguing that it would be a difficult and arguably impossible task for a court to determine whether a foreign conviction was obtained by a procedure that is comparable to the U.S. procedures that protect the right of due process.[187] While difficulty alone should not preclude courts from

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outside the state, which, however, would have been considered felonies had they occurred within the state. This arguably leaves open the possibility that a foreign felony could be used as a sentence enhancer, so long as that felony is also a felony within the state.

183. *Braithwaite*, 240 N.W.2d at 294.

184. *Id.*

185. *See, e.g., supra* Part II (for an in-depth discussion regarding the federal cases which have dealt with this issue).

186. *See* Kimes, *supra* note 179, at 519. The author notes that France has a much less punitive attitude toward crime than the United States, and also automatically expunges convictions automatically after a set period of time if the offender has no new convictions. *Id.* This could further lead to disparate treatment when, for example, a person previously convicted of a felony in France and a different person convicted of a felony in Italy are being tried under § 922(g)(1) for sentence enhancement, and the French felon's convictions have been expunged. *Id.*; *see* Richard S. Frase, Sentencing Laws & Practices in France, 7 Fed. Sent. Rptr. 275-77 (1995).

187. Kimes, *supra* note 179, at 521-22; *see also* People v. Gaines, 341 N.W.2d 519, 524 (Mich. Ct. App. 1983) (The inquiry into the law of a jurisdiction to determine

conducting this examination, the current backlog of cases in courts may prevent such an undertaking from occurring. The Restatement approach would, however, allow courts the option to do so.[188]

The opposite conclusion with regard to foreign felony convictions was reached in two separate law review articles.[189] Alex Glashausser argues that consideration of foreign convictions advances the same goals of recidivism statutes, rather than hindering them. [190] Recidivism statutes aim at levying harsher punishments on those previously convicted of a felony. Glashausser notes that "[o]ne who violates laws in another country is just as dangerous in the future as one who violates laws in the United States and is therefore equally in need of rehabilitation."[191] In addition, he notes that the simple fact that the previously convicted felon has committed another crime is evidence of his criminal tendencies.[192] This approach, however, is at odds with the "innocent until proven guilty" doctrine of the U.S. judicial system and certain Federal Rules of Evidence that limit the use of prior crimes as character evidence to prove that a person who previously committed a crime has a tendency to commit other crimes.[193]

VI. CORRECTING THE PROBLEM

Because of the significant possibility that courts might infringe on the constitutional rights of both potential and existing gun owners, the U.S. Supreme Court should determine that there is ambiguity in whether section 922(g)(1) of the Gun Control Act should extend to foreign felonies when it hears *Small*. The Tenth Circuit's discussion of the exception from consideration as prior felonies in *Gayle* of certain federal and state offenses relating to antitrust violations or unfair trade practices is evidence that by including federal and state

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its fairness will not work out in practice. It does not simply require researching a single point of foreign law, but instead demands a survey of that country's entire system of criminal justice in search of the basic components of due process.).

188. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987); *see also* Taylor, *supra* note 69, at 789-94 (suggesting that the burden be on the party challenging the validity of the foreign conviction [i.e., the defendant] to show that this felony was obtained through unconstitutional means).

189. *See* Glashausser, *supra* note 103; *see also* Taylor, *supra* note 69.

190. *See* Glashausser, *supra* note 103, at 151.

191. *Id.* at 155.

192. *Id.* ("Even if one presumed a defendant's foreign conviction to be the product of a foreign society, though, such a presumption should be negated by the first commission of a felony in the United States.").

193. *See* Bell v. Wolfish, 441 U.S. 520, 531 (1979); *see also* FED. R. EVID. 404(b) (evidence of other crimes, wrongs or acts are not admissible to prove the character of a person in order to show action in conformity therewith).

but not "foreign" crimes, section 922(g)(1) should not automatically be presumed to apply to foreign convictions.[194] Such an approach would, as discussed above from to the Malaysian and Chinese statutes, result in differing treatment for felonies committed abroad than for felonies committed in the United States. This would enhance the discrepancy between domestic and foreign felonies, rather than support a conclusion that such felonies should be treated similarly.[195] As the *Gayle* court noted:

> [Congress] would in all likelihood have been troubled by the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of justice and those convicted of crimes that are anathema to our First Amendment freedoms, such as convictions for failure to observe the commands of a mandatory religion or for criticism of government.[196]

Real ambiguity does exist with regard to the scope of section 922(g)(1) of the Gun Control Act. One solution to the problem of varying degrees of punishment for the same crime would be to have one truly international criminal code, with the same punishments applicable in all countries. This approach is explored in articles by Violeta Balan[197] and Karen E. Minehan.[198] Currently, several treaties address the problem of recognition and enforcement of foreign judgments.[199] The Hague Conference on Private International Law attempted to negotiate a multilateral judgments agreement that included a public policy exception similar to the Restatement.[200] While the United States is a signatory to the Hague Conference,[201] there is no indication that any of the recent Hague Conventions have resolved the section 922(g)(1) interpretation problem.

While an international agreement may solve the section 922(g)(1) problem, this alternative would also require a massive restructuring of the judicial systems of all nations and would erode the uniqueness and independence of each nation's judiciary because

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194. United States v. Gayle, 342 F.3d 89, 93 (2d Cir. 2003).

195. While such white-collar criminals may not have been the target of the Gun Control Act of 1968, not excluding the same foreign offenses from the scope does little to advance that distinction. *Id.*

196. *Id.*

197. Violeta I. Balan, Comment, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229 (2003).

198. Minehan, *supra* note 151, at 795.

199. *See, e.g.*, UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT Prefatory Note (revised 1964), 13 Part I U.L.A. 156 (2002); UNIF. FOREIGN MONEY-JUDGMENTS ACT, 13 Part II U.L.A. 39 (2002).

200. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987); *see also Hague Convention on Private International Law*, Oct. 19, 1996, *available at* http://www.hcch.net/e/conventions/text34e.html.

201. *See* H.R.J. Res. 778, 88th Cong. (1963).

some activities are not criminal in all nations. Such a solution would likely force all nations to either accept as criminal those previously non-criminal activities, or declare those activities legal. This would raise much political debate and certainly cause more problems than it would solve, and therefore is not the best solution.

In addition, the United States' reluctance to join the International Criminal Court because of fears that the tribunal will prosecute U.S. citizens for purely political reasons underscores the increased politicization of the judiciary.[202] The use of courts anywhere, including the International Criminal Court, to harass or otherwise interfere with the effective operation of a nation's government is a serious concern, and one that the U.S. Supreme Court should consider when it decides whether section 922(g)(1) of the Gun Control Act should extend to include foreign felony convictions as predicate offenses.

Effective alternatives include (1) upholding the *Custis* court's decision to remove the power of judicial review of foreign convictions for purposes of section 922;[203] (2) the approach suggested by the Restatement (Third) of *Foreign Relations Law of the United States* § 482, which would allow (and at times mandate) judicial non-recognition of a foreign felony if a court determines that a conviction was obtained through means at odds with U.S. notions of due process and jurisprudence;[204] or (3) passage of legislation clarifying Congress' intent, thus solving the interpretation problem once and for all.[205]

A. *Removing the Power of Judicial Review of Foreign Convictions*

The U.S. Supreme Court's decision in *Custis* impeded the ability of lower courts to review the fairness of previous convictions.[206] The *Custis* decision provided that persons convicted may only challenge

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202. *See* Diane Marie Amann, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVITH International Congress of Comparative Law: Section IV The United States of American and the International Criminal Court*, 50 AM. J. COMP. L. 381, 386 (2002) (citing the statement of Senator Rod Grams before the International Operations Subcommittee of the U.S. Foreign Relations Committee (July 23, 1998), *available at* 1998 WL 12762521 [hereinafter Grams statement]). "The International Criminal Court prosecutor will have the power to initiate prosecutions without a referral from the Security Council or state parties. There will be no effective screen against politically motivated prosecutions from being brought forward." Grams statement at ¶ 10.

203. *See* Custis v. United States, 511 U.S. 485, 485; *see also supra* text accompanying notes 40-41; *infra* text accompanying notes 227-31.

204. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482; *see also infra* Part VI.B.

205. *See supra* text accompanying notes 142-44; see *also supra* Part III.B.1 for a discussion of pending legislation on this statute in the House.

206. *See Custis*, 511 U.S. at 485; *see also supra* note 38.

their convictions on *habeas corpus* review.[207] As the *Concha* court noted, challenging these foreign convictions is itself a difficult undertaking.[208] At the state level, the Michigan Court of Appeals agreed with the U.S. Supreme Court in *Braithwaite*, noting that challenging such foreign convictions is a "burdensome, difficult, and often impossible task."[209] The fact that materials may be in a foreign language is an obvious source of difficulty. Little documentation may be available on the precise judicial methods employed in the trial, or records may not have been kept, making a determination of whether a specific trial was handled impartially or with due process difficult. As such, courts should simply not consider foreign felony convictions.[210] Both the U.S. Supreme Court and the Michigan Court of Appeals agreed that this difficulty alone may be dispositive of the issue of whether to include foreign felony convictions at all.

Consequently, potential defendants would be able to challenge their foreign convictions on *habeas corpus* review prior to obtaining a firearm. These defendants may not, however, be aware that their rights were in any way violated in the foreign proceedings. Courts would be in a better position to review whether the foreign judicial proceedings met the constitutional guarantees required in U.S. judicial proceedings. The *Concha* and *Braithwaite* courts, however, assert that this burden on courts is both difficult and time-consuming.[211] Shifting the burden to the defendants, as Taylor suggests, would be consistent with the habeas standard;[212] however, as Taylor also notes, "a foreign court system may not allow persons to attack and overturn their convictions. Even if it were possible, the time and expense to seek such relief would surely be an impossible obstacle to overcome for the criminal who is serving time in a United States prison."[213]

The Restatement approach, as adopted by the Third Circuit in *Small*,[214] would expressly allow a court to consider the process by which these foreign convictions were obtained.[215] Doing so would allow courts to decline to recognize these foreign convictions if it were determined that they were obtained in violation of due process, or on other public policy grounds.[216] Removing the power of review from the courts and declaring that all foreign convictions are irrelevant for

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207. *See Custis*, 511 U.S. at 485.
208. *See* United States v. Concha, 223 F.3d 1249, 1255 (10th Cir. 2000).
209. People v. Braithwaite, 240 N.W.2d 293, 294 (Mich. Ct. App. 1976).
210. *Id.*; *see also infra* text accompanying notes 231-35.
211. *See infra* text accompanying notes 231-35.
212, *See* Taylor, *supra* note 69, at 789-94.
213. *Id.* at 790.
214. *See* United States v. Small, 333 F.3d 425, 425 (3d Cir. 2003).
215. *See infra* Part VI.B.
216. *See id.* for a discussion of when a court may set aside a foreign judgment.

purposes of section 922(g)(1) of the Gun Control Act is not the best approach. As the Tenth Circuit noted, even though they are "innocent until proven guilty," "foreign criminals *are* likely to be as dangerous as domestic criminals."[217] Glasshauser agreed, finding that foreign convictions are evidence of criminal tendencies.[218] Therefore, removing foreign felony convictions from the scope of section 922(g)(1) or limiting a court's ability to review the validity of these convictions does not advance section 922(g)(1)'s policy goal of removing handguns from convicted felons, and is not a workable solution to the interpretation problem.[219]

B. *Restatement Approach*

The current Restatement approach allows courts to disregard foreign felony convictions if they determine, for example, that the convictions were obtained in an unfair or unconstitutional manner.[220] Giving courts this discretion, however, may not be the best solution, as different courts may reach different conclusions based on the same disputed criminal proceeding from any particular country. In addition, as both the Tenth Circuit in *Concha* and the Michigan Court of Appeals in *Braithwaite* noted, oftentimes these courts are not in a position to review comprehensively and fairly the methods employed by the foreign courts.

These potential problems aside, the Restatement (Third) of *Foreign Relations Law of the United States* § 482 may be a workable approach to square the problems inherent in foreign felony convictions with the public policy goals of the ACCA and the Gun Control Act.[221] The Restatement sets forth two mandatory grounds and six discretionary grounds for courts to disregard foreign judgments. This approach was adopted recently by the Third Circuit in the *Small* case.[222] The Restatement approach mandates that:

> (1) A court in the United States may not recognize a judgment of the court of the foreign state if:

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217. United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000) (emphasis added).

218. Glashausser, *supra* note 103, at 151.

219. *See supra* Part III.B.2 for a discussion of the public policy goals of the Act.

220. *See* United States v. Fleishman, 684 F.2d 1329 (9th Cir. 1982).

221. *See* Taylor, *supra* note 69. While reaching an opposite conclusion from Taylor, both articles agree that the Restatement approach adopted by the *Gayle* court may be the best method to balance the concerns of an outright non-recognition of foreign felonies against the potential for unconstitutional convictions to be used to unnecessarily and unlawfully deprive an individual of his right to possess a firearm. *Id.*

222. United States v. Small, 333 F.3d 425, 428 (3d Cir. 2003).

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to agreement between the parties to submit the controversy on which the judgment is based to another forum.[223]

Issues (2)(a)-(c) and (e)-(f) all deal with matters of civil procedure, rules which are concrete and easily applied.[224] The comments to Restatement § 482 give situations where a court would be likely to apply these grounds.[225] Such situations may include instances where the judiciary was dominated by a political branch or where certain classes of individuals are treated unequally, as the Jews in Germany were under the Nazi Party in the 1930s and 1940s.[226]

The first two provisions require a court to disregard a foreign judgment, whereas the following six provisions are discretionary.

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223. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

224. For example, the Supreme Court ruled that a fair procedure under 482(b) would include:

> [O]pportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.

Hilton v. Guyot, 159 U.S. 113, 202 (1895).

225. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmts. (1987).

226. *Id.*

Courts would have wide latitude to decide whether any of the provisions are met. Giving the courts such discretion, however, may invite inconsistent interpretations of foreign convictions or foreign statutes.

The primary concern that arises in the context of section 922(g)(1) of the Gun Control Act is the Restatement's suggestion in (2)(d). The comments to (2)(d) indicate that foreign judgments for causes of action that are not justiciable in the United States are still to be given full effect. [227] Arguing for enforcement of foreign judgments for which no domestic cause of action exists is a very ambiguous standard for courts to apply. It essentially forces upon a court the responsibility of deciding what, exactly, domestic public policy should be—an activist role many oppose courts and judges from taking. Thus, U.S. courts would presumably be required to give effect to felony status that the Chinese statute prohibiting flag burning would impute, even though there is currently only limited prohibition of such an act within the United States and would not be considered a felony.[228] Moreover, while the Restatement approach gives courts wide latitude to consider the judicial processes of a foreign court when determining whether a foreign conviction satisfies the statute, this latitude may open the potential for misuse or abuse.[229]

As the *Small* decision indicates, this also unfortunately imposes the added burden of requiring the parties to show that the foreign conviction was either intrinsically fair or unfair, which could add substantially to the cost of litigation.[230] This may be at odds with the *Custis* approach of only attacking prior convictions in *habeas* proceedings. In addition, in cases in which the defendant is being represented by a public defender, the costs could be prohibitive. Many courts are familiar with the judicial systems of the United States, but foreign systems may be much more difficult to understand. This will add further to the length of judicial

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227. *See, e.g.*, Neporany v. Kir, 5 A.D. 2d 438, 439 (1958).

> While the judgment of a foreign court is not entitled to the full faith and credit constitutionally required to be accorded to the judgments of another state, under principles of comity we will recognize and enforce private rights acquired under valid foreign judgments provided they are jurisdictionally well founded and not contrary to our public policy.

Id. at n.225. The reporter's note to (2)(d), however, indicates that judgments implementing racial laws would, however, probably not be enforced. The discrepancy between enforcing laws which, although not contrary to public policy, are not a cause of action in the United States while not enforcing judgments which are causes of action in the U.S. should not be overlooked. *Id.*

228. *See supra*, note 168.

229. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

230. United States v. Small, 333 F.3d 425, 428 (3d Cir. 2003).

proceedings and increase the cost to both the defendant and U.S. taxpayers. While there arguably is not a price to liberty (or, alternatively, an exceedingly high price), many citizens may not see it this way.[231]

C. *Additional Legislation to Clarify Congressional Intent*

Because of the confusion that already exists regarding the statutory language of section 922(g)(1) of the Gun Control Act, action by Congress to clarify the intended meaning of the statute represents the best solution. Congressional clarification could come in the form of Congress adopting the current amendment that is pending[232] or through legislation narrowing section 922(g)(1)'s applicability to domestic convictions.

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231. 18 U.S.C. § 925(c) may allow the Bureau of Alcohol Tobacco and Firearms to review foreign felony convictions in a manner similar to the Restatement. While outside the scope of this Note, similar problems are faced by felons with foreign convictions under §§ 922, 924:

> It is difficult to argue with the contention that an individual who has committed violent crimes in a foreign country is less likely to be a threat than someone who committed the same crime in the United States. Cases that have dealt with the issue of foreign convictions in the context of firearms disabilities almost always involve defendants convicted of serious crimes in those countries.
>
> While courts recognize that a foreign conviction may have been obtained in violation of the defendant's civil rights or contrary to [a] cherished principle of American constitutional law, they have relied upon 925(c) as the method by which a foreign felon can assert that his conviction was unlawfully obtained. This should be done, the Supreme Court noted, before the foreign felon attempts to obtain a firearm.
>
> The relief provision, by its terms, is broad enough to fully assay the validity of a foreign conviction, and the necessity of imposing firearms disabilities. The ATF can take into account that a foreign felony conviction was for a relatively minor offense by American standards. This was the case with Bean's conviction. It was also significant that the crime was eventually reduced to a misdemeanor. The crime with which Bean was charged in Mexico may not have required mens rea, a fundamental element of felonies in the United States.
>
> The ATF could also consider the means used to obtain the conviction, i.e., whether it was obtained in a manner consistent with fundamental fairness or basic notions of due process. Such an inquiry would include an examination of the conduct of foreign officials during the investigative stage of the criminal proceedings, as well as during the trial stage. For example, a confession may have been obtained through subterfuge, brutality, or other questionable methods. The ATF could also consider whether the sentence and subsequent punishment comported with evolving standards of human decency.

Mark M. Stavsky, Symposium, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 FORDHAM URB. L.J. 1759, 1803-04 (2003).

232. *See supra* notes 137-139 and accompanying text.

Even though the confusion that resulted from Congress' amendment to the Safe Streets Act with the ACCA was somewhat resolved, the split among the circuits endured, confirming that confusion still remains.[233] Therefore, should Congress decide to pass new legislation or clarify its purpose, it will be important during conference for Congress to consider this issue.

In addition, because of the cultural and political differences inherent in executing a reciprocal treaty, the United States has so far declined to enter into an international reciprocal treaty governing the recognition and enforcement of foreign judgments. [234] While impractical, such an arrangement would solve the ambiguity problem by placing foreign judgments on par with judgments obtained in U.S. courts.

The current approach of reading congressional intent into a statute is not the best method of statutory interpretation, because it has generated a circuit split. A plain-meaning reading would be the best alternative. Therefore, if Congress were to amend Title VII, it should add a clarifying term to modify "in any court" to read either "in any court of the United States" or, if Congress did in fact intend the statute to apply to all predicate convictions, domestic and foreign, perhaps "in any court of the world."

VII. SETTING THE SIGHTS A BIT "SMALLER": APPLYING THE SOLUTION TO THE *SMALL* CASE

Presumably, if the U.S. Supreme Court adopts the standards set forth in the Restatement's § 482, the decision of the *Small* court will be upheld. There may be no standing to challenge the applicability of section 922(g)(1) of the Gun Control Act to a potentially unconstitutional foreign felony conviction because the defendant in *Small* apparently did not suffer any of the injuries certain foreign felony proceedings might produce. Therefore, the U.S. Supreme Court may decline to rule on whether foreign felonies as a class should categorically be excluded from the scope of section 922(g)(1) of the Gun Control Act.

If the U.S. Supreme Court upholds the decision of the *Small* court on the basis that the defendant's foreign conviction was obtained through means that did comport with U.S. due process, the question of what courts should do when confronted with potentially

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233. *See* Jerald J. Director, Annotation, *Validity, Construction, and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968* (18 U.S.C.A. Appx. § 1202(a)(1)) *Making It Federal Offense For Convicted Felon to Possess Firearm*, 13 A.L.R. FED. 103 (1972).

234. Paige, *supra* note 151, at 622; *see also* Balan, *supra* note 197, at 229-31.

unconstitutional foreign felony convictions would remain unresolved. This decision would essentially leave the debate open and the circuit split untouched. It seems a likely outcome in *Small*, because while the defendant did commit a crime that arguably would also be a crime if committed in the United States (shipping what was purported to be a hot water heater across state lines, when actually the package allegedly contained pistols, a rifle, and ammunition), the Japanese constitution under which the Japanese court operated afforded the defendant essentially the same protections that the U.S. Constitution provides.[235] The defendant, however, did not have a right to a jury trial, and the defendant was not able to cross-examine several witnesses who gave sworn, written statements against the defendant.[236] In addition, the defendant refused to testify, and this silence was purported to be an indication of guilt by the prosecuting attorney, a conclusion that conflicts with the Fifth Amendment's "right to remain silent."[237]

Given the problems raised by *Small*, the best outcome would be for the U.S. Supreme Court to either (1) uphold the *Small* decision on the basis that the language of section 922(g)(1) of the Gun Control Act is unambiguous and the Restatement approach adequately affords protection to citizens with foreign felony convictions or (2) find that section 922(g)(1) is unambiguous and remove individuals with foreign felony convictions from the scope of section 922(g)(1) altogether. This Note has found section 922(g)(1) ambiguous, siding with the *Gayle* court. While firearm use by previously convicted felons is a problem, the greater problem of depriving individuals of liberty by unconstitutionally recognizing convictions of foreign tribunals outweighs the potential problem of foreign felons obtaining and using firearms.

VIII. CONCLUSION

It is unclear whether Congress intended section 922(g)(1) of the Gun Control Act to apply only to domestic felonies or to include foreign felony convictions.[238] The legislative history of section 921 and section 1202, and the subsequent merger of the two Acts, sheds no light on Congress' intention. As the world becomes more socially and commercially integrated, there will likely be an increase in foreign felons traveling to and from the United States.

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235. *See* Brief for United States, *supra* note 32, at *4 n.3.
236. *Id.*
237. *Id.* at *5-6; *see also* U.S. CONST. amend. V.
238. *See* Basler, *supra* note 88, at 180; *see also* Taylor, *supra* note 69, at 777.

Moreover, in a post-September 11 world, there is increased pressure on all branches of the government to prevent dangerous or potentially dangerous individuals from entering the United States. Section 922(g)(1) of the Gun Control Act could be interpreted to cover foreign felonies for this purpose. Congress did not have this purpose in mind when it passed the Gun Control Act, however. The U.S. Supreme Court should not necessarily read a different intent into the Gun Control Act solely because the circumstances facing the country today make it appealing to do so—particularly when important constitutional rights are at issue.

Overall, while some foreign felons are as dangerous as domestic felons, especially for the purpose of possessing firearms, the concerns of protecting due process, of labeling foreign convictions as "felonies," and of allowing foreign felony convictions to serve as the predicate offense for section 922(g)(1) of the Gun Control Act are the determinative issues that must be addressed. Should "full faith and credit" be given to foreign convictions in all circumstances, in some circumstances, or in no circumstances? This depends on whether the same constitutional protections guaranteed by U.S. courts are guaranteed to those charged and convicted abroad. As the discussion of the judicial systems of China, Malaysia, and Palestine shows, there are different standards of justice around the world.

The Restatement approach allows the reviewing court to examine the foreign conviction on a case-by-case basis and thus is a better solution than excluding all foreign felonies from consideration.[239] Unfortunately, this may lead to an inconsistent line of decisions by different courts as to whether certain nations' systems do, in fact, comport with the U.S. system of justice.

Therefore, since section 922(g)(1) of the Gun Control Act is ambiguous, and since a case-by-case basis may lead to injustice through inconsistency, the best solution would be to confine the scope of section 922(g)(1) to domestic felonies until Congress properly addresses the issue. Doing so will prevent courts from unjustly infringing on the Second Amendment right to bear arms[240] and will ensure that constitutional concerns override any automatic acceptance by U.S. courts of foreign convictions without review.

*Aron J. Estaver**

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239. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF LAW § 482 (1987).

240. U.S. CONST. amend. II.

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