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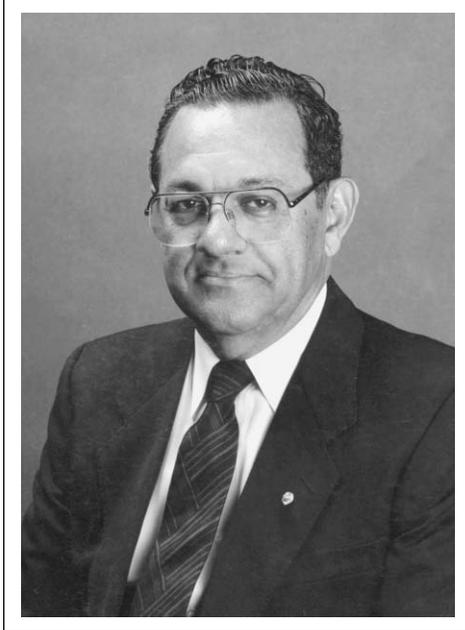
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**About the Wiley A. Branton/
Howard Law Journal Symposium:**



Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal's* spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, *Rights vs. Control: America's Perennial Debate on Guns*, in recognition of the great Wiley A. Branton. Past Symposium issues include:

*Unfinished Work of the Civil Rights Act of 1964:
Shaping An Agenda for the Next 40 Years*

The Value of the Vote: The 1965 Voting Rights Act and Beyond

*What Is Black?: Perspectives on Coalition Building
in the Modern Civil Rights Movement*

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

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THE WILEY A. BRANTON/ HOWARD LAW JOURNAL SYMPOSIUM ISSUE

Letter From the Editor-in-Chief

CADENE A. RUSSELL

Each year, the *Howard Law Journal* honors the legacy of Wiley A. Branton, our former dean and civil rights leader, in our Wiley A. Branton/*Howard Law Journal* Symposium issue. For the past eleven years, the Symposium has served as a conduit for students, scholars, and advocates engaging in debate and discussion in an effort to further the ongoing fight for social justice. It seems as though gun violence and gun related tragedies are occurring with greater frequency across our nation. With the killings of Michael Brown in Ferguson, Missouri; Eric Garner in Staten Island, New York; Trayvon Martin in Sanford, Florida, and the countless men and women across the country who have been the victims of gun violence, the *Howard Law Journal* has dedicated this issue to the gun violence and gun rights debate.

This year's Symposium, *Rights vs. Control: America's Perennial Debate on Guns*, created a positive space where both advocates for gun control and proponents for gun rights discussed real solutions to this growing problem. The discussions our Symposium explored included: whether various state regulations seeking to reduce gun violence are effective and constitutionally permissible; whether certain self-defense laws such as "stand your ground," actually facilitate gun violence rather than curb it; what a U.S. citizen's rights are under the Second Amendment; how the right to bear arms can be balanced with the increasing need for appropriate gun control; what the causes and consequences are for gun violence in our society and how we can move forward together in order to end it.

Our Symposium featured keynote speaker, Angela Alsobrooks, State's Attorney for Prince George's County, Maryland. She has served Prince George's County formerly as an assistant state's attorney between 1997 and 2002, and now as State's Attorney since 2011. State's Attorney Alsobrooks remains dedicated to creating safe communities as a public servant. She has also been a strong advocate for individuals affected by domestic violence

and has contributed to the reduction in homicides and violent crimes in Maryland.

This year's Symposium also featured distinguished panelists in the fields of law, academia, public service, mental health, and community activism. The panelists, Professor Aderson Francois, David T. Hardy, David Kopel, Miles Rapaport, Dr. Robert Kinscherff, Chelsea Parsons, Rahiel Tesfamariam, Karen Volker, and Jonathan E. Lowy, carefully examined the tension between gun control measures and the constitution's guarantees under the Second Amendment. They addressed issues ranging from the history of gun rights in the United States to strategies to reduce violence in our communities.

This issue also highlights the work of professors of law who participated in the Mid-Atlantic Criminal Law Research Collective: Andrea L. Dennis, Roger A. Fairfax, Jr., Kristin Henning, Sherri Lee Keene, Michael Pinard, and Kami Chavis Simmons. The Collective focused this scholarship on gun violence, the grand jury, law enforcement accountability and the effect of violence on our communities in the wake of the killings of Trayvon Martin, Michael Brown, Eric Garner, and countless others.

We introduce to you our final issue for the academic year, Issue 3 of Volume 58:

Former attorney with the U.S. Department of Interior and current Arizona private counsel David T. Hardy, discusses the Second Amendment's guarantees of an individual's right to arms in his essay, *Criminology, Gun Control and the Right to Arms*. Through an examination of seminal cases interpreting gun rights, Mr. Hardy's article assesses the nature of American firearm ownership and the nature of violent crime in America. Mr. Hardy creates an interesting parallel between the number of American individuals/households that possess firearms and the extent of violent crime rates. Mr. Hardy also notes the many countervailing considerations in this area by exploring the evidence (or potentially a lack thereof) associated with firearm ownership being used to deter illegal violence.

Professors David B. Kopel and Clayton E. Cramer's article *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill* challenges legislators and supporters to consider the parallel between deadly gun violence and mental illness. The article focuses on recent mass killings and the absence of existing state laws that could have authorized committing those that are mentally ill. Ultimately, Kopel and Cramer propose reforms in mental health legislation with the hope of better protecting the public, including the mentally ill, while preserving the due process rights for all.

Professor Andrew Jay McClurg's article *In Search of the Golden Mean in the Gun Debate* promotes reasonable gun measures that would be effective in combatting gun violence within our rights held under the Second Amendment. Professor McClurg advances five specific measures, ranging

from bolstering federal support for research into the causes and prevention of gun violence, to implementing micro-stamping technology that would enable law enforcement to trace crime guns and ammunition cartridges found at crime scenes.

In *Good Cop-Bad Cop: Police Violence and the Child's Mind*, Professor Andrea L. Dennis addresses police violence against our nation's citizens, and its impact on a child's physical, mental, emotional and social well being. Professor Dennis discusses federal law enforcement's need to devote significant resources to the problem of children's exposure to gun violence, especially in the wake of the incidents showcasing police violence against individuals in Ferguson, Missouri; Staten Island, New York; Cleveland, Ohio; Baltimore, Maryland; and elsewhere. According to Dennis, current police efforts have not resulted in a sufficient focus on, among other things, evidence-based programming that is sensitive to youths' developing perspectives on the legal system and legal actors.

Associate Dean Roger A. Fairfax, Jr. focuses his article, *Should the American Grand Jury Survive Ferguson?*, on the Ferguson, Missouri and Staten Island, New York shooting incidents, and the lens both shine on the American public's frustration and sadness with the grand jury process. Associate Dean Fairfax argues that the grand jury serves multiple purposes—not only serving as a “filter for probable cause” but also acting as a sounding board for political structure. While he highlights the lack of knowledge that the general public has about the grand jury process, Associate Dean Fairfax also notes the importance of the grand jury in serving as a voice and conscience for our communities.

Professor Kristin Henning tackles the sensitive issue of race and status in her article *Status, Race and the Rule of Law in the Grand Jury*. Beginning with the premise that the grand jury process specifically and rule of law generally can be subverted through the government's arbitrary enforcement of law and procedure across different race and class groups because of the different applications of the law to individuals that are police officers, Professor Henning highlights how the events in Ferguson, Missouri have forced our nation to discuss the grand jury's utility in our judicial system. Professor Henning discusses what she deems the “unusual process” of the grand jury and identifies what reform efforts must take place in order for the most utility, and equal application across race, class and professional status, to result from this grand jury process.

Assistant Professor Sherri Lee Keene, in *Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males*, addresses one main question: to what extent does race play a role in grand jury decisions in cases where unarmed, African American men and boys are shot and killed, and the shooter is not charged nor convicted. Professor Keene focuses on the role that race plays in jury decision-making and how these racial factors affect a juror's assessment of these cases. While

Professor Keene recognizes that she cannot answer these questions in their totality, she seeks to shed some light on how matters of race can influence the decisions made in these cases.

Professor Michael Pinard's article, *Poor, Black and "Wanted": Criminal Justice in Ferguson and Baltimore*, focuses on two main issues: (1) the ways in which poor, Black residents are entrenched in Ferguson's and Baltimore's criminal justice systems largely because of the relatively minor offenses that have flooded the lower courts, and (2) the ways many of these residents remain stuck in the criminal justice system because of warrants that courts issue when they do not appear in court for docket calls. From these problems, Professor Pinard discusses reform measures that can result in progress after Ferguson and Baltimore.

Professor Kami Chavis Simmons discusses a key area of law enforcement in *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*. Professor Simmons discusses the importance of police accountability in the wake of the deaths of Michael Brown in Ferguson, Missouri and Eric Garner in Staten Island, New York. She questions: what do you do when there are only two people, the shooter and the victim, who knew what occurred in a shooting that results in death? Professor Simmons outlines the debate of whether citizens would be willing to relinquish some of their privacy in order to benefit from the use of body camera technology on police officers.

Finally, our Executive Notes & Comments Editor, Brandon A. Mullings, also publishes his work in this Branton issue. His Comment, *Impropriety of Last Resort: A Proposed Ethics Model for the U.S. Supreme Court*, focuses on presenting an ethics model, which will bind the Supreme Court of the United States. Specifically, Mr. Mullings seeks a feasible means to address The Supreme Court Ethics Act of 2013's lack of a disciplinary provision. Mr. Mullings takes a comparative look at various ethics models across the United States and discusses the importance and practicality of disciplining Supreme Court Justices, as well as concerns, which any such model would raise.

As this final issue of Volume 58 is published, it is with great pride that I thank you on behalf of the entire *Howard Law Journal*. This issue is in remembrance of all who have been killed due to gun violence. We honor their legacy and will continue to work toward smart, effective policies that ensure safe and effective gun use amidst our rights held under the Second Amendment.

Cadene A. Russell
Editor-in-Chief
2014-2015

Criminology, Gun Control and the Right to Arms

DAVID T. HARDY*

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* David T. Hardy, PC, Tucson, Arizona. Mr. Hardy's articles on firearms laws and the right to arms have been cited by the United States Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742, 762 n.10, 841 (2010) (Thomas, J., concurring) (plurality opinion) and in *Staples v. United States*, 511 U.S. 610, 626 n.4 (1974) (Stevens, J., dissenting).

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SYNOPSIS

*District of Columbia v. Heller*¹ recognized that the Second Amendment guarantees an individual right to arms; *McDonald v. Chicago*² established that the Fourteenth Amendment makes this right applicable to State authorities. *Heller* moreover indicated that impairments of the right were to be assessed under a heightened standard of review – strict scrutiny, intermediate review, or some variant thereof.³

To assess the validity of regulations under any heightened standard of review requires a careful examination of empirical evidence. The challenged regulations must be shown (by varying levels of certainty) to be likely to achieve their objectives – in this case, be likely to achieve reductions of criminal violence.⁴

We are fortunate in that the issue has been subject to serious academic study for four decades. The research that has been undertaken over that time is of varying quality. The majority of the research was conducted by criminologists, and advanced with the passage of time as earlier studies were re-examined, criticized for weaknesses, and improved results obtained. Later contributions by medical researchers have not followed this pattern, and their results too often ignore the

1. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

2. *See McDonald*, 561 U.S. at 778.

3. *See Heller*, 554 U.S. at 628.

4. *See generally* David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 Conn. L. Rev. 1435, 1454–55 (2014) (“In applying a strict version of intermediate review, courts should demand that empirical data be presented that supports a gun restriction [and especially as it relates to] the relationship between guns, gun control, and crime.”).

history of the literature or employ methodologies that range from the questionable to the logically useless.

This article will move from the general to the specific, beginning by assessing the nature of American firearm ownership and the nature of violent crime, followed by examination of studies into the relationship of gun density (percent of individuals or households that possess firearms) to violent crime rates. It will then examine studies on the relationship between firearm regulations and crime, in a general sense (e.g., are more regulations associated with lower crime rates?) and then in a specific one (e.g., are certain regulations so associated?). It will then examine countervailing considerations, i.e. what evidence is there that firearm ownership can operate to deter, to some degree, illegal violence?

This review of literature cannot resolve all questions: in some cases the results are ambiguous, in others seriously disputed, and in others not yet firmly resolved. But a modern day court can often, if not always, base its application of heightened scrutiny upon empirical data, and when it cannot, is able at least to know where the empirical conclusions cannot presently be drawn.

INTRODUCTION

Over recent years, there have been repeat calls for a “conversation” on gun control and gun violence.⁵ However, an ongoing conversation, at a very serious level, has already been occurring over the past forty years. In the 1960s, approaches to demonstrating links between guns, violence, and gun control were abysmal at best. By the early 1970s, they had at least become primitive. But beginning in the mid-1970s, professional criminologists became involved, and serious work was being performed. It is the purpose of this article to set forth, in concise form, a survey of this literature.

5. See Lindsey Boerma, *One Year after Newtown, Congress Still Stalled on Gun Control*, CBS NEWS (Dec. 14, 2013, 7:02 AM), <http://www.cbsnews.com/news/one-year-after-newtown-congress-still-stalled-on-gun-control/> (“Newtown seemed to mark a turning point in national conversation about gun control.”). See, e.g., Nate Silver, *In Public “Conversation” on Guns, a Rhetorical Shift*, NY TIMES (Dec. 14, 2012, 9:35 PM), http://fivethirtyeight.blogs.nytimes.com/2012/12/14/in-public-conversation-on-guns-a-rhetorical-shift/?_r=0. I have an innate dislike of such trendy word usages. A decade ago, everything was supposed to be “nuanced.” The Washington Post even complained that a gun-related bill was “not a nuanced piece of legislation,” as if being void for vagueness were a virtue. See *A Gift to the Gun Lobby*, WASH. POST, June 2, 2005, at A22.

Such a survey cannot supplant the detailed treatises that criminologists and economists have published.⁶ This article is meant to extend the last such survey of literature, which was undertaken two decades ago.⁷

I. OVERVIEW: FIREARMS AND FIREARM CRIME IN THE UNITED STATES

Before assessing the policy effects of firearm legislation, it is necessary to gain a background understanding of the issues posed. Thus, we begin by examining the nature of firearm ownership, the nature of firearm crime, and the relationship between the levels of firearm ownership, or gun density, and crime.

A. The Nature of American Firearm Ownership

The exact number of firearms owned by Americans is unknown,⁸ but one estimate of ownership in 2009 was 310 million, of which about 36% are rifles, 28% are shotguns, and 37% are handguns.⁹ The number possessed is increasing, and at an accelerating rate: in 1986, just over 3.7 million civilian firearms were produced or imported into the U.S.; in 2012 over 13 million were.¹⁰

Firearms are not evenly distributed across the nation, however. Polls indicate that the proportion of households owning guns ranges from 57.8% in Alaska and 57.7% in Montana to 8.7% in Hawaii and 12.3% in New Jersey.¹¹ Viewed in regional terms, the Northeast has fewer gun owning households (27%), compared to the Midwest

6. Among the best, in my opinion, are: DON B. KATES, JR., FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY (1984); GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991); GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL (1997); JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (3D ED. 2010); JOHN R. LOTT, JR., THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG (2003); JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1983).

7. See Don B. Kates, et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 61 TENN. L. REV. 513, 514 (1995).

8. Firearm manufacturers were not required to report their annual production of firearms to the Federal government until 1938. See U.S. DOJ, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, OMB No. 1140-0017, ANNUAL FIREARMS MANUFACTURING AND EXPORTATION REPORT UNDER 18 U.S.C. CHAPTER 44, FIREARMS (MAR. 31, 2014) (citing 18 U.S.C. § 923(g)(5)(A) as authority); 18 U.S.C. § 923(g)(5)(a) (2004).

9. WILLIAM J. KROUSE, CONG. RESEARCH SERV., GUN CONTROL LEGISLATION 8 (2012).

10. See U.S. DOJ, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES ANNUAL STATISTICAL UPDATE 1, 5 (2014).

11. See *Chart: Gun Ownership by State*, WASH. POST, (2004) <http://www.washingtonpost.com/wp-srv/health/interactives/guns/ownership.html> (last visited Mar. 4, 2015).

(35%), West (34%) and South (38%).¹² Like firearms themselves, the proportion of households that contain them appears to be on the rise.¹³

There are also gender differences. Historically, men were considerably more likely to own firearms than women;¹⁴ among those persons who do own firearms, men are more likely to cite sporting purposes as the reason, and women more likely to cite self-defense.¹⁵ This division may, however, be changing.¹⁶

B. Criminal Use of Firearms

The information available on this subject has expanded, one might even say exploded, over the last decade. For most of the late 20th century, the available data indicated little more than those firearms were used in a certain percentage of different crimes, the majority of homicides did not involve killing of strangers, and that killers commonly had prior criminal records, broadly defined.¹⁷

The past decade has, however, seen remarkable advances in this area, as sociologists applied their methods to the issue. An early study

12. See Rich Morin, *The Demographics and Politics of Gun-Ownning Households*, PEW RES. CTR. (June 15, 2014), <http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/>.

13. A 2014 survey puts nationwide ownership at 39% of households, up from 35% in the last decade. See Paul Bedard, *Gun Ownership Surges to 39%, Ending 4-Decade Slump*, WASH. EXAMINER (Jan. 10, 2014, 12:00 AM), <http://washingtonexaminer.com/article/2541876>. A Gallup 2011 poll put the number at 47%, compared to 40-44% during the previous decade. See Lydia Saad, *Self-Reported Gun Ownership in U.S. is Highest Since 1993*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150353/Self-Reported-Gun-Ownership-Highest-1993.aspx?version=print>. The downward trend reported by past General Social Surveys has been questioned. See John R. Lott, *Problems with using the General Social Survey to Measure Gun Ownership*, CRIME PREVENTION RESEARCH CENTER (Nov. 19, 2013), <http://crimepreventionresearchcenter.org/2013/11/problems-with-using-the-general-social-survey-to-measure-gun-ownership/> (noting that GSS data contradicts other polls, and reports declines in firearms ownership in Illinois, over years where the number of gun possession permits has been significantly rising).

14. See Jeffrey M. Jones, *Men, Married, Southerners Most Likely to be Gun Owners*, GALLUP (Feb. 1, 2013), <http://www.gallup.com/poll/160223/men-married-southerners-likely-gun-owners.aspx>.

15. See Joseph Carroll, *Gun Ownership and Use in America*, GALLUP (Nov. 22, 2005), <http://www.gallup.com/poll/20098/gun-ownership-use-america.aspx>.

16. Between 1999 and 2013, the proportion of gun owners who cited self-defense as the reason for gun ownership rose from 26% to 48%. See *Poll: Protection is Main Reason for Owning Guns*, USA TODAY (Mar. 12, 2013 10:09 PM), <http://www.usatoday.com/story/news/nation/2013/03/12/poll-gun-protection/1982749/>. Between 2001 and 2011, the proportion of women reporting a firearm in their household rose from 36% to 43%. See Saad, *supra* note 13.

17. The source most commonly employed during this period was the FBI's Uniform Crime Reports, later retitled Crime in the United States, which gave this data for homicides. See, e.g., Federal Bureau of Investigation, *Crime in the United States, 1995*, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/1995>.

of Boston, for example, found that gun crime was isolated both geographically and socially.¹⁸ Over a twenty-eight year period, 74% of firearm assaults occurred on only 5% of the city's blocks and street corners.¹⁹ Half of the city's gun homicides could be attributed to the 1% of the city's population that was involved in gangs.²⁰

This was followed by another study in Boston that sought to explore the "social networks" of individuals within a particularly high-crime area.²¹ The social networks were reconstructed based on police reports observing two or more individuals together. This necessarily was limited and subjective: police do not report every person they observe, nor can they identify everyone they see. The resulting network was probably more reflective of persons known to police who were observed to associate under suspicious circumstances.

The network constructed consisted of essentially "who hangs out with who." If A was observed with B, it would be a first level relationship; if A and B are not observed together, but each is observed with C, it would be a second level relationship, and so on. Known victims of gun violence were then singled out for attention.

This latter study found that gun violence was concentrated within a high-risk subpopulation. Every increase in the social distance from a victim – e.g., going from having been observed with him to associating with someone who associates with him – reduced by 25% a person's chances of themselves being a victim of gun violence.²²

The study was capped by a far more ambitious one: a study of 82,000 persons who resided within a particularly violent portion of Chicago.²³ The homicide rate for the area averaged 55.2 per 100,000 population,²⁴ or over *ten times* the national average.²⁵ Yet even within

18. See generally Anthony A. Braga, Andrew V. Papachristos & David M. Hureau, *The Concentration and Stability of Gun Violence at Micro Places in Boston, 1980-2010*, 26 J. QUANTITATIVE CRIMINOLOGY 33 (2010).

19. See Anthony A. Braga, David Hureau & Christopher Winship, *Losing Faith? Police, Black Churches, and the Resurgence of Youth Violence in Boston*, 6 OHIO ST. J. OF CRIM. L. 141, 154-55 (2008)

20. See Anthony A. Braga, et al., note *supra* 18, at 38.

21. See Andrew V. Papachristos, Anthony A. Braga & David M. Hureau, *Social Networks and the Risk of Gunshot Injury*, 89 J. URB. HEALTH 992, 993 (2012).

22. *Id.* at 1000.

23. See Andrew V. Papachristos & Christopher Wildeman, *Network Exposure and Homicide Victimization in an African American Community*, 104 AM. J. PUB. HEALTH 143, 144 (2014).

24. *Id.*

25. In 2008, in the middle of the period studied, the homicide rate for the U.S. was 5.4 per 100,000. See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2008 (Sept. 2009), available at http://www2.fbi.gov/ucr/cius2008/offenses/violent_crime/murder_homicide.html.

this group, firearms violence was quite concentrated; 85% of gunshot murder victims themselves had an arrest record.²⁶

The Chicago study constructed social networks based upon whether persons had “co-offended,” i.e. been arrested at the same time and for the same offense. It then plotted this relationship, and the gun murder victims within it, over a five-year period. The results were impressive:

Simply being arrested during this period increases the aggregate homicide rate by nearly 50%, but being in a network component with a homicide victim increases the homicide rate by a staggering 900% (from 55.2 to 554.1).²⁷

Indeed, “being a member of the largest component of the network was associated with a 3080% increase in the odds of being a homicide victim, (OR=31.338) a tremendously large (although expected) effect”²⁸ Conversely, every social tie that a person was removed from a victim decreased their odds of becoming a victim by 57%.²⁹

In short, even within an area with ten times the national homicide rate, firearm violence is concentrated in small groups of individuals who co-offend.

C. The Relationship Between Gun (or Gun Owner) Density and Violent Crime

1. Problems With Estimating Gun Density

a. Problems With Using Polling Data

To compare crime levels with gun owner density requires a method to determine that density. The simplest way to determine the level of gun ownership would be, one might think, to consult survey data. However, this method is quite problematic for two reasons. First, until fairly recently, polling samples were large enough to be reliable at the national and regional levels, but too small to be reliable at the state level.³⁰

26. See Papachristos & Wildeman, *supra* note 23, at 144.

27. *Id.* at 145.

28. *Id.* at 147.

29. *Id.*

30. The first survey that was of sufficient size to be reliable at the state level was the 2001 survey by the Behavioral Risk Factor Surveillance System. See N.C. STATE CTR. FOR HEALTH STATISTICS, *BRFSS Survey Results 2001 for Nationwide: Firearms*, <http://www.schs.state.nc.us/schs/brfss/2001/us/firearm3.html> (last visited Mar. 4, 2015).

Second, telephone or door-to-door surveys may understate the level of gun ownership, i.e., some portion of people surveyed might be reluctant to disclose gun ownership to a stranger. The question might be considered intrusive, or if disclosed, put a person at risk for theft, or (in areas with strict gun control) be tantamount to asking a person to confess a crime. Yet any understatement would be difficult to prove, let alone quantify: how can one, by a survey, determine how often people mislead the persons taking a survey?

Two studies took ingenious approaches to answer this question. Find a State where legal gun owners must disclose that fact to the government, and where those records are available, and then survey only those known owners. In the first (very small) survey, researchers chose two cities that required handgun registration, and attempted to survey 75 households.³¹ Twenty of the households simply refused to participate.³² Of the remaining 35, 31 answered that they had a handgun, 1 denied ever having owned one, and 4 said that they once had one, but did not now.³³ This result suggested that 3% of the respondents were clearly giving an answer that contradicted the handgun registration information, and another 9% were at least giving a suspicious one.³⁴ At the same time, we must recognize that the small number of households surveyed, and the large proportion that refused to answer, render the results rather doubtful.

A second survey was conducted in Michigan, where handguns must be registered.³⁵ Responses from persons who (a) had a handgun registered to them or (b) had a current hunting license³⁶ were compared to response rates for a sample of the general public. 193 handgun registrants and 188 hunting license holders were surveyed.³⁷ 13% of the first and 10% of the second denied having a gun in their household.³⁸ Another 9.2% and 7.6% refused to participate at all (compared with 5.7% of the general public).³⁹

31. See Arthur L. Kellermann, et al., *Validating Survey Responses to Questions About Gun Ownership Among Owners of Registered Handguns*, 131 J. EPIDEMIOLOGY 1080, 1080 (1990).

32. *Id.* at 1084–85.

33. *Id.*

34. *Id.* at 1085–86.

35. See Ann C. Rafferty, et al., *Validity of a Household Gun Question in a Telephone Survey*, 110 PUB. HEALTH REPS. 282, 283 (1995).

36. The questions asked related to gun ownership, not only handgun ownership.

37. Rafferty, *supra* note 35, at 284.

38. *Id.* at 285.

39. *Id.* at 284.

It thus appears that around 10-13% of gun owners will, if surveyed, inaccurately deny owning a firearm, even if their ownership is legal.⁴⁰

A second problem with using surveys is that the results can depend upon whether (in the case of multi-person households) the caller gets a male or a female on the telephone. When asked whether there is a firearm in the house females are apt to give lower affirmative answers than males. The extent of this disparity is substantial but not uniform, with the difference between the two numbers varying from 1.6 to 12.1 percentage points.⁴¹

b. Problems with Using Proxies to Estimate Gun Density

As noted above, until recently (2001) there was no survey data on gun ownership that was reliable at the State level. Researchers were thus forced to rely upon proxies or surrogates to estimate State gun density. Some, such as subscriptions to gun magazines, had obvious problems: they likely reflected sporting purposes and ownership of long guns, and understated ownership of defensive handguns.

A more popular surrogate was percentage of suicides that involved firearms use. This had some reliability problems, however. As noted above, gun density is increasing over time, with millions of new guns being sold per year and a far smaller number wearing out.⁴² Over the last decade, the percent of households reporting guns present has significantly increased.⁴³ Yet over that decade the percent of suicides involving firearm use did not increase – indeed it declined,

40. This remains an estimate: (1) it is possible that registered gun owners are less apt to conceal ownership, since it is already a public record; (2) it is also possible that they will be more apt to conceal ownership, since registration requirements might be associated with the potential for further and stricter gun controls; (3) any survey of the general public, rather than just lawful owners, would encounter illegal owners, who would have a stronger motive to conceal their ownership. On balance, it seems most likely that 10–13% is an understatement rather than an overstatement of what portion of gun owners will give a false negative response if polled. Here I'm discussing possibilities.

41. See Jens Ludwig, Philip J. Cook & Tom W. Smith, *The Gender Gap in Reporting Household Gun Ownership*, 88 AM. J. PUB. HEALTH 1715, 1716 (1998). Curiously, a similar gap was found when teenage sons and daughters were asked. See Philip J. Cooke & Susan B. Sorenson, *The Gender Gap Among Teen Survey Respondents: Why are Boys More Likely to Report a Gun in the Home than Girls?*, 22 J. QUANTITATIVE CRIMINOLOGY 61, 61 (2006).

42. See *supra* note 10 and associated text. The author collects Krag's, the American military rifle produced from 1892 until 1902. Every rifle in the collection is as functional as it was when made over a century ago.

43. See *supra* note 13.

falling from 54% in 2002⁴⁴ to 51% in 2012.⁴⁵ It appears that the percentage of suicides involving firearm use bears a doubtful relationship to gun ownership levels.

In sum, prior to 2001 it was impossible to directly measure gun density at the State level; thereafter measurement became possible, albeit with a significant potential error margin. How then were criminologists to assess any relationship between gun density and violence?

2. David Bordua Finds a Solution to Problems of Determining Gun Owner Density

The premier work here was undertaken by David J. Bordua, professor of sociology at the University of Illinois.⁴⁶ He realized that Illinois was uniquely suited for such analysis.

- It had 102 counties, with widely varying demographics and crime rates.⁴⁷

- It had a firearms legal regime whereby every firearms owner was required to have a Firearms Owner Identification Card (FOID).⁴⁸

- The FOID data was available broken down by county and by gender, so that it was possible to determine the exact number of male and female legal gun owners in each county.⁴⁹

Working with the raw crime data, Bordua found that total gun ownership was negatively related to violent crime. Male gun ownership had a strong negative relationship, while female gun ownership had a positive relationship to violent crime levels;⁵⁰ since surveys had shown female firearm owners were much more likely than men to own for self-protection, the latter was likely a matter of crime causing gun

44. See ARIALDI M. MININO ET AL., NAT'L CTR. FOR HEALTH STAT., CTR. FOR DISEASE CONTROL AND PREVENTION, DEATHS: INJURIES, 2002 9 (2006);

45. See NAT'L CTR. FOR HEALTH STAT., CTR. FOR DISEASE CONTROL AND PREVENTION, DEATHS: FINAL DATA FOR 2012 (forthcoming). Computed from data obtained from the Centers for Disease Control: total suicides 31,655, firearm suicides 17,108; 2012 total suicides 40,600, firearm suicides 20,666. Comparing 2001 to 2011 gives similar results, with the firearms fraction dropping from 55% to 50.6%. See DONNA L. HOYERT & JIAQUAN XU, NAT'L CTR. FOR HEALTH STAT., CTR. FOR DISEASE CONTROL AND PREVENTION, DEATHS: PRELIMINARY DATA FOR 2011 19 (2012); ELIZABETH ARIAS ET AL., NAT'L CTR. FOR HEALTH STAT., CTR. FOR DISEASE CONTROL AND PREVENTION, DEATHS: FINAL DATA FOR 2001 33 (2003).

46. See David J. Bordua, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in THE SOCIAL ECOLOGY OF CRIME 156, 156-57 (James M. Byrne & Robert J. Sampson, eds. 1986).

47. *Id.* at 157.

48. *Id.*

49. *Id.* at 164.

50. *Id.* at 169.

ownership than the other way around.⁵¹ The same held true for handgun ownership.⁵²

These data were not too surprising. They were, after all, raw data, and firearms ownership tends to be higher in rural areas, while violent crime tends to be higher in urban ones. So Bordua proceeded to apply multivariate tools, compensating for a number of other factors found in other studies to affect violent crime rates, such as urbanization, population density, age and race.⁵³ He further broke down data on firearms ownership into male and female, and gun ownership into total ownership, handgun only ownership, long gun only ownership, and ownership of both.⁵⁴ Combining these with various types of violent crime yielded 165 equations.⁵⁵ The results:

Two findings leap out of the table. First, there is *no general relationship at all* between firearms ownership and violent crime rates comparing these Illinois counties. Generally speaking, *both* the negative male and positive female relationship disappear. Second, there *is* a positive relationship with firearms murder but not with criminal homicide generally.⁵⁶

The last would be consistent with “where firearms are available, killers will use them; where they are not available, they will use something else.” But Bordua proceeded to further analysis, based on gender, and found that (as the raw data had indicated) for females there was an association between gun ownership and violent crime.⁵⁷ Given the low involvement of women in violent crime, and the fact that self-defense was disproportionately a motive for female gun ownership, he concluded that the one relationship found likely had a simple explanation; more crime causes more women to own guns.⁵⁸ “Causally, only one plausible interpretation survives the analysis. At least one form

51. *Id.*

52. *Id.* at 172.

53. *Id.* at 164.

54. *Id.* at 175.

55. *Id.* at 173.

56. *Id.* at 173 (emphasis in original).

57. *Id.* at 177.

58. Gallup surveys in 2000 and 2005 found that 74% of female gun owners were motivated by a need for self-protection, versus 63% of male gun owners. Joseph Carroll, Gun Ownership and Use in America, *available at* <http://www.gallup.com/poll/20098/Gun-Ownership-Use-America.aspx>. The rate for women committing murder is about one-ninth that of the rate of men doing the same (1.7 vs. 15.1 per 100,000 per year). U.S. Dep't of Justice, Bureau of Justice Statistics, Homicide Trends in the United States, 1980-2008, at 3, *available at* <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

of crime causes at least one kind of firearms ownership. Firearms murder increases female gun ownership.”⁵⁹

3. Kleck and Patterson Take a Different Approach

Criminologists Gary Kleck and E. Britt Patterson took a different approach to searching for possible relationships between gun density and violence.⁶⁰ Their study sought to determine the effects of gun owner density and gun restrictions upon violence; the latter results will be discussed below.⁶¹

Rather than focusing upon states, they analyzed data from the 170 American cities that had populations over 100,000 (the focus was dictated by their desire to pin down more precisely the applicable gun regulations – several states had populous cities with stricter controls than the state did).⁶² Demographic data (39 variables were considered) was taken from the 1980 census, and crime rates averaged for a three-year period that straddled the census.⁶³ Gun density was estimated using five proxy measures, which could be tested at the regional level against survey data.⁶⁴ (Interestingly, the measure, which best agreed with survey data was one used for the first time here, the value of guns reported as stolen.)⁶⁵ They sought to find relationships between gun density and six forms of violence: homicide, aggravated assault, robbery, suicide, rape, and fatal gun accidents; with the first four, data was available that could differentiate between gun and non-gun uses.⁶⁶

The result was that gun density *may* be related to the suicide rate; employing one comparison tool indicated that it was, while another indicated that it was not.⁶⁷ For the remaining forms of violence, gun density had no relationship at all. “We tentatively conclude that gun

59. See Bordua, *supra* note 46, at 177.

60. See Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. Quantitative Criminology 249, 249 (1993).

61. See *infra* notes 145–55 and accompanying text.

62. Gary Kleck & E. Britt Patterson, *supra* note 60, at 253 (noting that a person might live in a State with modest gun restrictions, but in a city with quite strict ones). A good example is Illinois. The State has no handgun ban, but nearly a quarter of its population lives in Chicago, U.S. Census Bureau, Quick Facts, *available at* <http://quickfacts.census.gov/qfd/states/17/1714000.html>, which had such a ban until it was stricken in *McDonald v. Chicago*, 130 S.Ct. 3020 (2010).

63. Kleck & Patterson, *supra* note 60, at 256, 262.

64. *Id.* at 263.

65. *Id.* 263–64.

66. *Id.* at 256.

67. *Id.* at 272.

prevalence rates *may* increase total suicide rates, but have no effect on total rates of homicide, robbery, aggravated assault, rape, or fatal gun accidents.”⁶⁸

4. Attempts to Use Gun Suicide Rates as a Surrogate for Gun Ownership: The Problem of Asserting a Truism

There have been more recent attempts, in medical journals, to demonstrate a link between firearm owner density and firearm violence.⁶⁹ These need no detailed discussion, since they all suffer from a core logical flaw:

They used the percent of suicides that employ guns as a surrogate measure of gun owner density.⁷⁰

They then compared that to adjusted firearm murder rates.⁷¹

They concluded that there was a positive relationship between the two.⁷²

That is, they succeed mostly in demonstrating that where guns are more often used in suicide they are more often used in homicide, which is hardly surprising. This approach makes for article abstracts that draw media attention, but is useless for making policy choices.

5. Policy Implications

The policy implications of the studies outlined above seem clear.

1. Attempts to reduce violent crime by reducing overall legal gun ownership are futile. More legal firearms owners do not mean more firearms crime.

2. The problem of firearm crime is driven by a very small and criminally inclined part of the population. Even in high-crime areas, the crime rates are driven by a small, violent, part of the population.

68. *Id.* at 272.

69. See, e.g., Michael Siegel, Craig R. Ross & Charles King, *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2000*, 103 AM. J. PUB. HEALTH 2098 (2013); Matthew Miller, Deborah Azrael & David Hemenway, *Rates of Household Firearm Ownership and Homicide Across U.S. Regions and States, 1988-1997*, 92 AM. J. PUB. HEALTH 1988 (2002).

70. See Michael Siegel et al., *supra* note 69, at 2099; Matthew Miller, et al, *supra* note 69, at 1988. The percent of suicides involving guns has proven a very poor proxy for gun density; between 2002 and 2012, millions of new firearms entered the market, even as the fraction of suicides involving firearms fell. See *supra* notes 42–45 and associated text.

71. See Michael Siegel et al., *supra* note 69, at 2099; Matthew Miller, et al, *supra* note 69, at 1989.

72. See Michael Siegel et al., *supra* note 69, at 2102; Matthew Miller, et al, *supra* note 69, at 1988, 1990.

Measures directed at this population may have an impact on crime, but conversely face difficulties with enforcement and deterrence.

3. In terms of restrictions via permit systems or similar measures, the impact of a restrictive regime and a permissive one will likely be the same. The problem is not ensuring that only the best citizens have firearms; it is of ensuring that only the worst do not, and restrictive and permissive regimes are likely to have the same success in this.

4. One question remains: can gun restrictions be employed that are directed, not at reducing overall gun density, but at reducing gun density among the portion of the population that misuses firearms? The concentration of firearms violence among a tiny and lawless sub-population suggests that this approach would be difficult, but not necessarily impossible. I thus turn to that issue.

II. FIREARM RESTRICTIONS AND VIOLENT CRIME

The criminologists have been studying this issue since the 1970s, continually refining their techniques to avoid errors or limitations than had been found. They were, moreover, objective. After all, some had (like Prof. Gary Kleck)⁷³ started with the belief that gun control would reduce violent crime, and changed their minds after weighing the evidence. When Gary Kleck and Marc Gertz's study of firearm use in self-defense was released, it was prefaced by an article by Marvin E. Wolfgang, the dean of American criminology, and aptly entitled *A Tribute to a View I Have Opposed*.⁷⁴ Moreover, there tended to be serious dialogue, and thus improvement regarding meth-

73. Prof. Kleck has noted:

When I began my research on guns in 1976, like most academics, I was a believer in the "anti-gun" thesis, i.e., that gun availability has a net positive effect on the frequency and/or seriousness of violent acts. It then seemed like self-evident common sense which hardly needed to be empirically tested. However, as a modest body of reliable evidence (and an enormous body of not-so-reliable evidence) accumulated, . . . most of the able specialists in this area shifted . . . to a more skeptical stance, in which it was negatively argued that the best available evidence does not convincingly or consistently support the anti-gun position . . . [Subsequent research] has caused me to move beyond even the skeptic position. I now believe that the best currently available evidence, imperfect though it is (and must always be), indicates that general gun availability has no measurable net . . . effect on the rates of homicide, suicide, robbery, assault, rape, or burglary in the U.S.

Gary Kleck, Address to the National Academy of Sciences/National Research Council Panel on the Understanding and Prevention of Violence, *quoted in* Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 525 (1995).

74. Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188, 192 (1995) ("I am as strong a gun-control advocated as can be found among the criminologists in this country . . . I do not like [Kleck and Gertz's] conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.").

odology. John Lott's controversial book *More Guns, Less Crime* went through three editions in twelve years, growing from 225 pages to 442, as he defended or refined his methods and answered his critics.⁷⁵

Then in the 1990s, medical researchers began to enter the field, taking the phrase "epidemic of gun violence" quite literally.⁷⁶ The entry was not a smooth one. The medical researchers' lack of objectivity was manifest from the outset. One of the first major articles was published in the *New England Journal of Medicine*⁷⁷ accompanied by a two-page editorial criticizing Congress for failing to enact more gun laws, praising political figures that had advocated such legislation, and blasting the "gun lobby" for opposing them.⁷⁸ When readers challenged the objectivity of the editorial, the author became even more strident, listing the gun restrictions he wanted and ending with "Congress has finally heard the wail of the people, and the NRA has lost some of its hold on lawmakers. The more the gun lobby spends trying to defeat courageous politicians, the less power they will have to oppose reasonable and effective gun-control legislation."⁷⁹ The researchers' behavior moreover was suggestive of advocacy, carried out with little concern for scientific method or professional candor.⁸⁰

75. Compare JOHN LOTT, *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (1998) with JOHN LOTT, *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (3rd ed. 2010).

76. Don Kates, et al., *supra* note 7, at 514 nn. 4, 5 (summarizing medical authors' use of disease metaphors in the gun context). The metaphor was awkward. Human choice is rarely at issue in treating disease: millions of Americans do not want typhoid. One need not balance a disease's good with its bad: cholera has no beneficial aspects. Nor is coercion considered appropriate therapy, at least for adults. Failure to accept treatment is not a felony carrying a mandatory prison term.

77. See Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 *NEW ENG. J. MED.* 1084 (1993).

78. See Jerome P. Kassirer, Editorial, *Guns in the Household*, 329 *NEW ENG. J. MED.* 1117, 1117-18 (1993).

79. Jerome P. Kassirer, Letter to the Editor, *Guns and Homicide in the Home*, 330 *NEW ENG. J. MED.* 365, 368 (1993).

80. For example, when criminologists requested that medical authors disclose the data underlying their conclusions (a routine request that permits the validity of the results to be tested), the authors of two medical articles refused. Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 *J. CRIM. L. & CRIMINOLOGY* 207, 210-11 & n.9 (1995). The Journal of the American Medical Association rejected a manuscript authored by 23 medical instructors and two law professors that responded to articles it had published supporting gun control. Don Kates, et al., *supra* note 7 n.15. A 1993 medical conference refused to allow a doctor who had questioned the efficacy of gun control even to attend, stating that attendance was limited to "like-minded individuals" who desire to "use a public health model to work toward changing public attitudes so that it becomes socially unacceptable for private citizens to have handguns." GARY KLECK & DON KATES, *ARMED: NEW PERSPECTIVES ON GUN CONTROL* 101-02 n.109 (2001).

A comprehensive critique of the medical articles can be found in Gary Kleck, *Targeting Guns*, *supra* note 6, at 31-62.

(Ironically, the same volume of the *New England Journal of Medicine* featured an article criticizing some researchers of purely medical matters for “torturing the data” until it told them what they wanted to hear.⁸¹ Several techniques of data torture were criticized. *Opportunistic Data Torturing* consists of running a number of comparisons, which increases the odds that relationships will be found that are purely coincidental.⁸² *Procrustean Data Torturing* involves splitting or lumping the data – e.g., calculating survival rates after therapy in terms of six months, one year, or three years, or altering the criteria for including patients— then reporting only the favorable results, while omitting the unfavorable ones. As we shall see, both these approaches would figure in all too many medical studies of the firearms issue.)

A. Early Medical Research: Do More Guns Mean More Crime?

The appearance of an agenda was reinforced by the approaches taken in many medical articles. First, rather than focusing upon levels of certain violent crimes, they focused upon levels of firearm crimes. This ignored the possibility of “substitution effects” – that a criminal unable to obtain a firearm might simply turn to another weapon with the same outcome. If gun robberies fell, but nongun robberies equally increased, measuring only gun crime would suggest a success that did not in fact occur.⁸³ Second, it concealed offsets. Reducing firearm availability may tend to reduce firearm crime, while (by reducing the risk of victim self-defense) it tends to increase non-firearm crime.⁸⁴

Gun Ownership as a Risk Factor for Homicide in the Home represented another of the early ventures by medical academics into the

81. See James L. Mills, *Data Torturing*, 329 *NEW ENG. J. MED.* 1196, 1196–97 (1993).

82. Customarily, a significance level of .05 is employed, meaning odds are only 5% that a relationship found is coincidence. But when 20 independent relationships at that level are found, the odds that all 20 are real rather than coincidence drops to 36%. See *id.* at 1197.

83. In the case of robbery, substitution effects have been well studied, and are quite complex. Nongun robberies are more likely to be directed at soft targets (individuals on the street rather than banks and businesses), are more likely to result in an actual attack, are more likely to result in victim resistance, are less likely to succeed, and are more likely to lead to injury, but less likely to lead to death. GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 238–39 (1997). Drawing conclusions as to future scenarios from these data, however, depends upon the assumption that gun robbers and nongun robbers are otherwise identical, viz., that they have the same economic goals and the same willingness to injure or kill a victim. A gun robber forced to use a knife or club may not behave the same as a robber who voluntarily chooses to use a knife or club.

84. See *infra* notes 203–15 and associated text.

field.⁸⁵ It applied the case-control approach, in which the life-events of persons with a disease are matched against non-diseased control to compute which experiences raised the risk of contracting it. A risk-ratio (RR) of 1.0 indicates that the experience was associated with no increase in risk, one of 2.0 indicated that it was associated with a doubling of the risk, and so on.

The authors chose three States' most densely populated county.⁸⁶ From these they selected 420 homicides that had occurred in the victim's home or yard.⁸⁷ (Inability to obtain interview data reduced this number to 388.)⁸⁸ Associates of these victims were interviewed to determine the victims' characteristics and known behavior. Then, for each victim a "control" was selected, who resided near the victim, and was interviewed regarding the same questions.⁸⁹

The victims and the controls were similar in most demographics, but had wide variances in those relating to behavior.⁹⁰ Victims were five times as likely (20.3% vs. 4.2%) to have used illegal drugs, twice as likely (36% vs. 15.7%) to have been arrested, and fifteen times as likely (5.5% vs. 0.3%) to have work-related problems over drinking.⁹¹ As we have noted above,⁹² even in high crime areas, gun crime tends to be concentrated in a very small part of the population. Matching victims and controls based on age, sex, race and economics might suffice for the study of a disease, but in this context, it was apt to be comparing a violent population to a nonviolent one. To use John Lott's comparison: suppose one got a list of recently deceased persons, took a group of living controls that matched them in ethnicity, location, income and other demographics, and verified how many of each group had been hospitalized within the last year. The conclusion would likely be that recent hospitalization strongly correlated with dying – "hospitals kill people!"⁹³ The comparison would control for

85. Kellermann et al., *supra* note 77, at 1084.

86. *Id.* at 1084.

87. *Id.*

88. *Id.*

89. *Id.* at 1086.

90. *Id.*

91. *Id.* at 1088. As noted above, even in areas with high violence rates, the violence is concentrated in a small subpopulation. *See supra* notes 18–29 and accompanying text. Matching victims and controls by location and demographics may suffice for epidemiological studies, but not for crime studies.

92. *See supra* notes 18–29 and accompanying text.

93. LOTT, JR., *supra* note 6, at 25.

demographics, but not for the key issue of whether a person was seriously ill – or, in this case, involved in crime and other risk factors.

Turning to firearms, 45% of the victims had guns in their households vs. 36% of the controls; 36% of victims' households had held a handgun vs. 23% of controls.⁹⁴ From these, it was calculated that having a firearm in the house was associated with a homicide risk factor of 2.7.⁹⁵

It is interesting to note the other risk factors that were demonstrated: drinking alcohol (in any amount) was associated with a risk ratio of 2.6, drinking to the point of “causing problems” 7.0.⁹⁶ Just living in a rented home had a risk factor of 5.9, and living alone had one of 3.4.⁹⁷ Conversely, owning a rifle or shotgun reduced the risk ratio to below 1.0 (to 0.8 and 0.7, respectively).⁹⁸

The study was interesting, but its demise was more so. Critics raised a number of issues in letters to the editor.⁹⁹ One of the more powerful was simply: guns were *not* kept in the homes of 54.6% of the gun homicide victims, indicating that in those cases, the killer had used his own gun brought to the victim's house; that the victim also owned a gun had no relationship to the killing.¹⁰⁰ If the purpose was to ascertain the risk of having a gun in the household, why were these cases – a majority of those studied – included?

The authors of the study initially responded that “[n]inety-three percent of the homicides involving firearms occurred in homes where the gun was kept, according to the proxy respondents.”¹⁰¹ There was an obvious mathematical problem here: how could 93% of gun homicides occur in houses where the fatal gun was kept, if only 45.6% of gun homicide victims' houses held guns?

94. Kellermann, *supra* note 77, at 1087.

95. *Id.* at 1084.

96. *Id.* at 1088.

97. *Id.* at 1088 tbl.3.

98. *See id.* at 1088.

99. *See* Pat Baranello, Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 367 (1994); Paul Blackman, Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 366 (1994); MARK FERRIS ET AL., Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 366 (1994); JERRY E. LECLAIRE, Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 366 (1994); David Litaker, Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 367 (1994); J. Marc Pipas, Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 367 (1994).

100. JERRY E. LECLAIRE, Letter to the Editor, *Guns and Homicide in the Home*, 330 NEW ENG. J. MED. 301, 366 (1994).

101. J. Marc Pipas, *supra* note 99, at 368.

The answer came four years later, when the authors of the study conceded that:

What we should have said was that 93 percent of proxy respondents for victims of homicide involving firearms provided information about the presence or absence of a gun in the home. Sixty-two percent of this group reported that the victim lived in a home where one or more guns were kept, not 93 percent, as we stated in our reply.¹⁰²

The 45.6% of the study had inexplicably become 62%.¹⁰³ Even this does not answer the problem posed. If around half of the gun killings occurred in homes where no resident owned a gun, then at least half were committed by intruders using a gun that they brought with them. (The actual fraction is likely more than half, since an unknown number of cases where the victim owned a gun may likewise involve the killer bringing his own gun.) But how can one claim that owning a gun puts one at risk for being shot by someone else's gun? In a majority of cases, gun ownership necessarily was coincidence, not a risk factor.

National Case-Control Study of Homicide Offending and Gun Ownership represents the criminologists' response to *Gun Ownership as a Risk Factor*, assessing its weaknesses and then testing its conclusion by approaching the question from a different angle.¹⁰⁴

The authors begin by examining the weaknesses of Kellerman's study.¹⁰⁵ The study had been limited to a few hundred pairs of victims and controls in three urban counties.¹⁰⁶ It did not inquire as to whether the victim's gun was involved, or a gun carried to the home

102. Arthur L. Kellermann, Letter to the Editor, *Guns and Homicide in the Home*, 339 *NEW ENG. J. MED.* 861, 928–29 (1998).

103. *Id.* At length, I found a *possible* cause of the discrepancy in the study, but it is so serious that it suggests an incredibly sloppiness, if not intentional misleading. Table 3 shows that of gun homicide victims' households, 45.6% had firearms, 35.7% had handguns, 13.6% had shotguns, and 12.2 had rifles. Adding up the handgun, shotgun, and rifle figures comes to 61.5%. The 45.6% figure for households having firearms is explicable by the fact that many households must have had more than one type of firearm, a handgun plus a rifle, for instance. To reach the 62% figure the writer would have had to ignore the listing for percent of households with a firearm, and then add the next three figures. This is not a mistake easily made, especially for writers accustomed to performing multivariate statistical analysis.

104. See generally Gary Kleck & Michael Hogan, *National Case-Control Study of Homicide Offending and Gun Ownership*, 46 *SOC. PROBS.* 275 (1999) (discussing whether gun ownership increases the likelihood that a person will commit homicide).

105. See *id.* at 281–82.

106. See *id.*

by the killer.¹⁰⁷ The cause-effect relationship might be entirely or partially reversed. Since self-defense is a significant reason for owning handguns, it is likely that being at risk for homicide to some degree causes gun ownership, rather than the other way around.¹⁰⁸ Moreover, sampling error could account for all its results. The disparity between reported gun ownership by victims and by controls (45% vs. 36%) assumes that both groups were equally candid in admitting gun ownership.¹⁰⁹ But, as noted above,¹¹⁰ the indications are that about 10% of people who own guns will deny it if surveyed by a stranger. The count for homicide victims likely suffered little from this: these were reports from family or friends, regarding a person who was deceased.¹¹¹ It would, however, have influenced reports by the control group, who were being asked about their own ownership.¹¹² If ten percentage points are added to the control group's figures, their ownership would have been equal to or a bit higher than that of the victims.

National Case-Control Study attempted to overcome these weaknesses by taking a different approach. It compared survey results for 13,168 incarcerated killers and survey results for the general population from General Social Surveys.¹¹³

A comparison showed that killers were "slightly more likely to own guns than other adults" and were more likely to be male, minority, Southern, younger, less educated, and single.¹¹⁴ After compensating for all those factors, it indicated that the odds of a gun owner committing a unlawful killing were about 1.36 times that of the rest of the population; the ratio could range from insignificance to 1.4 if one or another confounding variable were omitted.¹¹⁵

At that, the authors noted that the result might be partially or wholly due to inability to account for confounding factors. First, living

107. *See id.* at 281. Kleck and Hogan point out that only 7% of gun homicides are committed by the victim's family members, lovers, or roommates, indicating that the great majority is committed by persons who came to the home from elsewhere. *See id.*

108. *See id.* at 286.

109. *See supra*, note 94. All surveys are dependent upon the truthfulness of the person being interviewed. In this case the question would be whether the victims' families, and the strangers chosen as controls, were equally truthful in relating gun ownership.

110. *See supra* notes 31-40 and accompanying text.

111. Kellermann, et al., *supra* note 77, at 1086.

112. *Id.* at 282-83.

113. *See id.*

114. *See id.* at 284.

115. *See id.* at 285 tbl.3.

in a high crime area elevates gun ownership.¹¹⁶ The killers may, in fact, not have had higher rates of gun ownership than others in their area. Second, neither the survey of prisoners nor the General Social Surveys asked whether the respondent was a gang member or a seller of illicit drugs, both of which had been shown to increase greatly the chance of greatly increasing inner-city gun ownership, and of involvement in violent crime.¹¹⁷ The authors, thus, cautioned that “[t]he omission of even one confounding factor with effects as large as these would be sufficient to completely account for odds ratios of 1.36 or even of 2.7.”¹¹⁸

B. General Relationships Between Gun Control and Violence

Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities was an early effort that compared Seattle and Vancouver, and attributed the lower homicide rate of the latter to Canada’s stricter handgun regulations, which proved to be a desultory beginning.¹¹⁹ Critics quickly pointed out that the two cities had virtually identical homicide rates for the 75% of the population that was non-Hispanic Caucasian or Native American, and handgun regulations were unlikely to affect only some groups without affecting the others.¹²⁰ Others questioned the choice of Vancouver; Canadian gun controls are imposed at the national, not the city, level.¹²¹ Still, others pointed out that Vancouver’s homicide levels had been even lower before the latest national handgun restrictions were adopted.¹²² Crim-

116. Self defense is now the prime reason for obtaining a firearm. *See supra* note 16. It is thus not surprising that rates of violent crime raise gun ownership rates, especially among women. Gary Kleck & E. Britt Patterson, *supra* note 61, at 272.

117. Kleck & Hogan, *supra* note 104, at 286–87.

118. *See* Kleck & Hogan, *supra* note 104, at 287.

119. *See generally* John Henry Sloan et al., *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 319 *NEW ENG. J. MED.* 1256 (1988) (investigating the associations among hand gun regulations and crime in Seattle, Washington and Vancouver, British Columbia).

120. *See* John W. Gryder, Letter to the Editor, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 320 *NEW ENG. J. MED.* 1161, 1216 (1989); David C. Stolinsky, Letter to the Editor, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 320 *NEW ENG. J. MED.* 1161, 1215–16 (1989).

121. *See* Samuel Tirer, Letter to the Editor, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 320 *NEW ENG. J. MED.* 1161, 1216 (1989).

122. Paul H. Blackman, Letter to the Editor, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 320 *NEW ENG. J. OF MED.* 1161, 1214–15 (1989).

inologists derided the study as “worthless,”¹²³ and the authors’ defense was faltering at best.¹²⁴

Firearm Legislation and Firearm-Related Fatalities in the United States.

This approach sought to compare States based on total firearm fatalities (which has the flaws outlined above), weighting for, among other things, firearm density based on firearm suicide (again, with the flaws outlined above).¹²⁵

To assess the strength of firearm laws, it employed scores used by the Brady Campaign To Prevent Gun Violence, which introduces, not a problem, but a *considerable* mass of problems.¹²⁶ The study’s concession that “the legislative strength score, which tallies a single point per law, has not been validated. Neither has the weighted Brady scoring system, and we are unaware of any such scoring systems that have been validated”¹²⁷ is telling. It also appears to understate the problem.

First, the Brady scores represent the legislative aspirations of an interest organization, which gives no empirical reasons for weighting one law over another or, indeed, giving any weight at all to a given law. A state’s rank is appreciably elevated by enacting laws aimed at accidental childhood firearm deaths,¹²⁸ these make up a miniscule fraction of overall firearm deaths.¹²⁹ Indeed, a state can gain points by enacting laws that have no present impact, but will only take effect in the future when given technologies become available.¹³⁰

123. Paul H. Blackman, Correspondence, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 323 *NEW ENG. J. OF MED.* 36 (1990).

124. John Henry Sloan et al., Correspondence, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 323 *NEW ENG. J. OF MED.* 36–37 (1990).

125. See generally Eric Fleegeer et al., *Firearm Legislation and Firearm-Related Fatalities in the United States*, 173 *JAMA INTERNAL MED.* 732 (2013).

126. The Brady Campaign does not explain why it chooses to rank certain gun laws and not others. Its press release for the 2013 rankings, for instance, merely explains that they are based on “based on thirty policy approaches to regulating guns and ammunition. . . .” with no explanation of why those are more important than other approaches. See Brady Campaign, *One Year After Newtown*, available at <http://www.bradycampaign.org/inthenews/one-year-after-newtown-states-lead-the-way-on-gun-violence-prevention-according-to-new>.

127. Eric Fleegeer, *supra* note 125, at 739.

128. *Id.* at 734 tbl.1 (indicating a four point increase for such measures).

129. Accidental firearm fatalities comprise about 2% of total firearms fatalities, and those involving children comprise about 0.2%. National Safety Council, *Injury Facts 2011 Edition* 143 (noting 31,234 total firearms fatalities, 613 accidental firearms fatalities, and 65 accidental firearms fatalities involving juveniles under age 14).

130. Two conspicuous examples are requirements for handguns that can only be fired by their owner, and “microstamping” fired cartridges. The technology for the first is somewhere between nonexistent and possible-but-unreliable. Joseph Steinberg, *Why You Should Be Con-*

Second, the standard varies, sometimes radically, from year to year as Brady Center sees new legislative opportunities or downgrades past ones.

The study was published in 2013, but used fatality rates from 2007-2010,¹³¹ and Brady ratings as available in 2012.¹³² If the 2013 Brady ratings had been used, the results would likely have differed significantly, since the organization changed them to reflect its updated agenda. Requiring full background checks went from 8 points to 11 points, dealer licensing, reporting of multiple sales, and non-preemption of local laws each went from 1 to 6, and many new categories and scores were added (prohibited buyers and domestic violence, 9 points, mental health reporting 2, handgun design standards 2, medical “gag rules” 2, no “stand your ground laws” 2, firearm registration 6, limited magazine capacity 3).¹³³

It seems doubtful to place much weight on results of a study whose core criteria have not been validated, and appear unlikely to be capable of such validation due to their arbitrary and shifting nature. At that, the study found statistically significant differences only in comparing the top quartile of states with the bottom quartile.¹³⁴ The comparison appears rather arbitrary; if “quartile” were defined as 13 States rather than 12, a different result would have been found.¹³⁵

cerned about the New Smart Guns, *Forbes*, available at <http://www.forbes.com/sites/josephsteinberg/2014/05/04/smartguns/>. In 2010, California passed legislation requiring microstamping, to take effect when the patent on that technology expired, which did not occur under 2013. At that, it only applies to firearms which are not already approved for sale in California. Microstamping, available at <http://en.wikipedia.org/wiki/Microstamping>. But the 2011 Brady Campaign rankings gave California ten points for having passed the legislation, even though it was not in effect and could not reduce crime rates. NRA, *The Annual Big Yawn*, available at <https://www.nra.org/articles/20120224/the-annual-big-yawn-brady-campaign-state-gun-control-score-card-2011>. This would not be inappropriate for the use for which the rankings were intended – to reflect a legislative agenda, where enactment is the goal – but would be utterly inappropriate if used to gauge the status of gun restrictions in effect.

131. Fleegeer et al., *supra* note 125, at 732.

132. *Id.* at 733, n.10 (noting webpage was accessed in August, 2012, which would likely reflect a date of 2011 or 2012).

133. Brady Campaign, 2013 State Scorecard, available at <http://www.bradycampaign.org/sites/default/files/SCGLM-Final10-spreads-points.pdf>.

134. Fleegeer et al., *supra* note 121, at 736–38.

135. The top 12 States ranged from Massachusetts (Brady score of 22.5) to Pennsylvania (8.5), with overall firearms fatality rates of 2.9 to 10.6. If “quartile” were rounded down to comprise 13 States, Alabama (score of 8, firearms fatality rate 16.3) would have been added in, raising the highest quartile firearm death rate.

The Effectiveness of Legislation Controlling Gun Usage: A Holistic Measure of Gun Control Legislation.

This study took a novel, perhaps idiosyncratic, approach. It sought to explore connections between gun laws and total gun fatalities, which, as noted above, is a seriously problematic approach.¹³⁶ Likewise, it assessed gun laws in terms of state enactments, overlooking that in some states a substantial part of the population resides in localities with stricter regulation.¹³⁷ The authors appear to be unconscious of some of the difficulties posed – they hypothesize a positive relationship between African American populations and the number of firearms fatalities,¹³⁸ although suicides make up 58% of the fatalities they counted,¹³⁹ and African Americans have a lower than average suicide rate.¹⁴⁰

For the gun control variable, the study used a scale of strictness taken from the Open Society Institute,¹⁴¹ which assigns weights to various forms of gun laws on bases that are not explained.¹⁴² At that, the study does not assess all states, but rather compares only 24 – the top and bottom quartile as measured by the Open Society Institute scores. This results in North and South Carolina, Minnesota and Iowa being lumped together with New York and California into the strict gun control quartile.¹⁴³

The study's conclusion was that states in the highest quartile experienced about 3.5 fewer firearm fatalities per 100,000 than States in the lowest.¹⁴⁴ Given the study's limitations, we may fairly question whether the conclusion was valid, and certainly we may question its real-world value: is this support for adopting laws similar to those of New York and California, or ones similar to those of North and South Carolina?

136. Ik-Whan G. Kwon & Daniel W. Baack, *The Effectiveness of Legislation Controlling Gun Usage: A Holistic Measure of Gun Control Legislation*, 64 AM. J. ECON. & SOC. 533 (2005).

137. See *supra*, note 62 and accompanying text.

138. Kwon & Black, *supra* note 136, at 539.

139. *Id.* at 537.

140. See FACTS AND FIGURES, AM. FOUND. FOR SUICIDE PREVENTION, <https://www.afsp.org/understanding-suicide/facts-and-figures> (last visited Feb. 25, 2015).

141. See Kwon & Baack, *supra* note 136, at 540.

142. See OPEN SOC'Y INST'., GUN CONTROL IN THE UNITED STATES, available at <http://www.opensocietyfoundations.org/sites/default/files/GunReport.pdf>. For example, gun registration is assigned seven points, although it is unclear why that would be expected to influence suicide or murder, points are likewise given for safety training and for secure storage requirements, which might affect accidents but not suicide or murder; waiting periods for receipt are given points only if they are three days or more. Kwon & Baack, *supra* note 136, at 541.

143. See Kwon & Baack, *supra* note 136, at 542.

144. *Id.* at 544.

C. Relationships between Specific Forms of Gun Control and Violence

Multiple studies have attempted to determine whether specific forms of gun control are related to lower violence rates.

*The Impact of Gun Control and Gun Ownership Levels on Violence Rates*¹⁴⁵ assessed a number of specific forms of gun control. Its methodology stands in sharp contrast to that of the medical researchers. The authors, criminologists Gary Kleck and E. Britt Patterson, took an exhaustive approach to searching for possible relationships between gun laws and violence.

Rather than focusing upon states, they analyzed data from the 170 American cities that had populations over 100,000.¹⁴⁶ Demographic data (39 variables were considered) was taken from the 1980 census, and crime rates averaged for a three-year period that straddled the census.¹⁴⁷ Nineteen types of gun regulations were tested,¹⁴⁸ with the study controlling for a considerable number of other variables.¹⁴⁹ They sought to find relationships between these gun regulations and six forms of violence: homicide, aggravated assault, robbery, suicide, rape, and fatal gun accidents; with the first four, data was available that could differentiate between gun and non-gun uses.¹⁵⁰ They specified a test for whether a given form of regulation had a beneficial effect; it must (1) have a significant negative association with gun violence of a given type and (2) have a significant association with overall violence of that type, and have, preferably, a weaker association with nongun violence of that type.¹⁵¹ The first requirement is obvious; if a gun regulation is not associated with lower gun violence rates, it cannot have a beneficial effect. The second, association with lower total violence rates, would show that the regulation had not merely shifted offenders from using guns to using other weapons, leaving the totality of violence unchanged. The third, a weaker association with nongun violence than with gun violence, is a check on the

145. See Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249, 249 (1993).

146. *Id.* at 253.

147. *Id.* at 256, 262.

148. *Id.* at 259. The study considered both State and local laws in assessing whether a city had a given form of gun control. *Id.* at 262.

149. Among them were poverty, unemployment, income inequality, education, population density, divorce rates, and an indicator of alcoholism (deaths due to alcoholic liver disease). *Id.* at 260–61.

150. *Id.* at 256.

151. *Id.* at 265.

first two. To the extent a gun control measure is more associated with lower *nongun* than with lower gun violence, this suggests that its association with gun violence may be pure coincidence, or the product of some variable not being considered.¹⁵²

In the end, they tested for 102 associations between gun control and violence levels, each association being estimated in three different ways.¹⁵³ The results were mostly negative, with a few positives and some “maybe” findings.

[E]stimates indicated that owner licensing appears to reduce homicides and may reduce total suicides. Purchase permits may reduce homicides (there was still, however, a stronger negative association of permits with *nongun* homicide than with gun homicide). These estimates also indicated that handgun bans appear (somewhat implausibly, given how rarely rapists use guns) to reduce rapes, but not other forms of violence. The rest of the gun law assessments were unaffected.¹⁵⁴

With regard these findings, we must note that consideration of a large number of variables increases the chance that an association will be shown which is the result of simple coincidence rather than causation.¹⁵⁵ The association of purchase permit requirements with lower gun homicide is illustrative, since (as the authors note) that requirement is even more strongly associated with lower *nongun* homicide, and it is hard to see how gun purchase restrictions would cause a reduction in *nongun* homicides.

1. Age Limits on Receipt and Possession

A 2005 study¹⁵⁶ undertook to determine the effect of several types of firearm regulation, including restricting handgun purchases and possession to persons under the age of 21.¹⁵⁷ The study focused upon a time-series analysis of States over 1979-1988; over this period seven states enacted, and two states repealed, such age limits for

152. *Id.* at 265–66.

153. That is, did the form of regulation at issue (1) show an association with the violence at issue; (2) did it show such an association when controlled for enforcement effort; and (3) did it show such an association when narrowed to four categories of regulation most likely to cause such an association? *Id.* at 275. “Thus, the gun control efficacy hypothesis was given 18 chances for confirmation for any one form of gun control. . . .” *Id.* at 275–76.

154. *Id.* at 276–77.

155. *See supra* note 82.

156. M. Rosengart et al., *An Evaluation of State Firearms Regulations and Homicide and Suicide Death Rates*, 11 *Injury Prevention* 77 (2005).

157. The other restrictions assessed will be examined later in this paper.

handgun purchases, and five enacted such limits covering handgun possession.

The study concluded that there was “little evidence” (more accurately read as no evidence) that the purchase restriction affected either firearm homicide or firearm suicide levels; the effect of the possession restriction was not statistically significant.¹⁵⁸

2. Restrictions on Physical Access by the Underaged

A 2001 study attempted to determine the effects of “child access prevention laws” which required handguns to be stored in a safe or fitted with a trigger lock or similar device.¹⁵⁹ At the time, fifteen states had adopted such laws, and the study applied a time series analysis, comparing states, which passed such laws with those that did not.¹⁶⁰ “Following adoption, the relative rate of accidental gun deaths in states passing the laws, first falls and then rises. The rate of accidental total gun deaths in the two sets of states ends up being virtually the same at the end of the period as when the law passed.”¹⁶¹ Likewise, gun suicide and total suicide rates appeared unaffected.¹⁶²

3. Waiting Periods/Background Checks

The theory behind waiting periods (the requirement that the purchaser of a handgun wait for several days before receiving it) is that it would ensure that, if the purchaser were motivated by homicidal rage, he would have had time to “cool off.”¹⁶³ The theory seems doubtful. Persons in a homicidal rage who do not possess a firearm seem likely to attack with whatever is at hand rather than decide they would do better with a firearm, locate a licensed gun dealer, make their purchase, learn how to use it, and return. Nor do victims seem likely to wait for their killer to return from his shopping trip. Finally, the

158. Rosengart et al., *supra* note 156, at 79.

159. See generally John R. Lott, Jr. & John E. Whitley, *Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J. L. & ECON. 659 (2001) (discussing the relationship between safe-storage laws and juvenile accidental gun deaths or suicides).

160. *Id.* at 665–67.

161. *Id.* at 667.

162. *Id.* at 668.

163. When the Brady Act’s *de facto* waiting period expired, the Brady Campaign’s predecessor organization complained “gun purchasers considering crimes of passion or impulse suicides will no longer have a “cooling-off” period to protect themselves or their victims.” Press release, Brady Law Waiting Period Expires Today: Public Safety at Risk, available at <http://www.commondreams.org/pressreleases/Nov%2098/113098a.htm>.

highest murder rates occur late at night when gun dealers are unlikely to be open.¹⁶⁴

A 2000 study took an ingenious approach to evaluating waiting periods.¹⁶⁵ In 1994, Congress had enacted the Brady Act, which for a time effectively imposed a five-day waiting period on firearm sales.¹⁶⁶ But several states at that point already had their own waiting period statutes.¹⁶⁷ Accordingly, the Brady Act changed the status quo in states that had waiting periods and did not change it in states that did not. Using medical jargon, the states, which already had waiting periods, were labeled the “control States,” since nothing changed, and the ones which did not were labeled the “treatment States,” the ones “treated” by the Brady Act. The study undertook a time-series comparison of the two sets of States.¹⁶⁸

With regard to suicide, the study found that there was no statistically significant association between overall suicide rates and imposition of the Brady Act waiting period and background check.¹⁶⁹ When suicide rates were divided based on age, the class aged 55+ showed a statistically significant reduction in firearm suicides, and a statistically insignificant increase in non-firearm ones.¹⁷⁰

The results for homicide were curiously mixed. “For victims aged 21 years or older, none of the differences between treatment and control states in any of the homicide or suicide measures are statistically significant at the traditional 95% level.”¹⁷¹ The reason for passing over the younger victims was simply that, while their rates did diverge, the divergence began before the Brady Act.¹⁷²

164. See Chi. Police Dep’t, 2011 Chicago Murder Analysis 19 fig.8 (indicating that mid-day murders occurred at around 13-16 per hour, while each hour from 9:00 PM to 1:00 AM had 36, 30, 31, 16, and 31).

165. See generally Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 J. AM. MED. ASS’N 585 (2000) (concluding that the greatest reductions in fatal violence would be within states that were required to implement background checks and warning periods).

166. When the Brady Act started out, local police were required to perform the background checks; if they did not act within five days, the firearm dealer was allowed to make the transfer. 18 U.S.C. § 922(s)(A)(ii) (2000). In theory, the waiting period would end if local law enforcement informed the dealer that the background check had been completed and approved, but the author’s recollection is that the process invariably took days, and most often, all five days.

167. See Ludwig & Clark, *supra* note 165, at 586.

168. See Ludwig & Clark, *supra* note 165, at 586–87.

169. See Ludwig & Clark, *supra* note 165, at 588.

170. See Ludwig & Clark, *supra* note 165, at 588.

171. See Ludwig & Clark, *supra* note 165, at 588.

172. See Ludwig & Clark, *supra* note 165, at 588.

An unmentioned reason was that the divergence was actually a convergence; rates in the treatment states, those in which the Brady Act imposed a new waiting period, actually fell faster than those in the control states where background checks were unchanged.¹⁷³ It is apparent that the changes in juvenile rates were responding to some unaccounted-for influence other than the imposition of background checks, which indicates the need for some skepticism on the study's finding with regard suicides in the over-55 age class.

4. "Semiautomatic Assault Weapon Bans"

We should not expect to find much in the way of demonstrable benefits under this category. First, there is little reason to expect it. In 2013, rifles *of all types* were used in a total of 285 homicides, out of 12,253 total killings.¹⁷⁴ A survey of over 200,000 incarcerated inmates found that between 1.5% and 1.7% of them had carried a (broadly-defined) "military style semi-automatic or fully automatic" weapon.¹⁷⁵ Second, the 1994 Federal ban on assault rifles in fact was not a ban, nor did it affect assault rifles. It was not a ban – it cut off further production, for civilian use, of the firearms listed, while leaving all previously manufactured ones in circulation.¹⁷⁶ It was not directed at "assault rifles" because the true assault rifle is full automatic, not semi-automatic, and its target was semi-automatics.¹⁷⁷ It applied to rifles with certain names or certain characteristics, such as a separate pistol grip, a flash suppressor, or a bayonet lug.¹⁷⁸ In the case of the

173. See Ludwig & Clark, *supra* note 165, at 588, fig.2.

174. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013 tbl. 8.

175. CAROLINE WOLF HARLOW, FIREARM USE BY OFFENDERS, Bureau of Justice Statistics Special Report 2 & tbl.2 (2001). The breadth of the definition is underscored by the fact that the same survey reported that only 1.3% of inmates had carried a rifle. *Id.* at 2, tbl.1. The numbers only make sense if a lot of the "military style semi-automatic or fully automatic" firearms were in fact fully automatic.

176. See 18 U.S.C. §922(v) (banning possession of the described firearms, with an exception for those "otherwise lawfully possessed under Federal law on the date of enactment of this subsection") (expired).

177. Full automatic rifles shoot more than one shot per trigger squeeze, like a machine gun; semi-autos shoot one shot per trigger squeeze; the British know the latter as "self-loaders." Full automatic weapons have long been restricted by the National Firearms Act of 1934, 26 U.S.C. § 5801 et seq. See generally William J. Krouse, CRS Report for Congress, Semiautomatic Assault Weapons Ban 5-7 (2004), available at https://wikileaks.org/wiki/CRS:_Semiautomatic_Assault_Weapons_Ban,_December_16,_2004.

178. 18 U.S.C. § 921(a)(30) (2015). Many of these features are misunderstood. The author has verified by firing on a darkened rifle range that even without the flash suppressor, rifle flashes are not visible (modern rifle powders include flash suppressing chemicals). The separate pistol grip is not meant to facilitate "spray firing" (would the military want to encourage that?) but is an artifact of moving the butt stock upward, to lessen the muzzle rise with each shot.

semiautomatic AK-47 (which is technically known as an AKS), manufacturers were free to continue production so long as they omitted the bayonet lug; bayonet charges do not play much of a role in domestic crime.¹⁷⁹ The net effect was that it would be virtually impossible for the 1994 statute to have any effect upon crime. To take the previous example, let us assume that at the time of the 1994 ban, there were one million AK-47s with bayonet lugs in private ownership. In 1995, there would have been that one million with bayonet lugs, plus thousands of “post-ban” AKs without the bayonet lug. It is hard to see much practical difference. The same would be true five or ten or twenty years later.¹⁸⁰

The Department of Justice nonetheless financed a 2004 study of the assault weapon ban, which had been in place for nine years and was about to expire.¹⁸¹ The author concluded that “the ban’s impact on gun violence is likely to be small at best, and perhaps too small for reliable measurement,” although it was “premature to make definitive assessments of the ban’s impact on gun violence.”¹⁸²

5. Permits to Carry: “Shall Issue” vs. “May Issue”

Most states require a person to secure a permit before carrying a concealed weapon. Such permit applications were traditionally handled on a “may issue” basis, with the permitting authority issuing permits in his sole discretion. Starting with Florida in 1987, states began changing this to “shall issue,” where concealed carry permits must be issued to any applicant who meets specified criteria, usually a background check and sufficient training.¹⁸³ By 2014, “shall issue” had become the rule rather than the exception. In 1986, about a third of the U.S. population lived in states where concealed carry was banned entirely, and most of the rest lived in States with “may issue” standards.

179. The author owns a “post-ban” (legally made during the supposed ban) AR-15 type rifle. The manufacturer, Colt, simply removed the bayonet lug and the flash suppressor that originally screwed onto the barrel. AKs lack flash suppressors, so their conversion was even simpler.

180. The author has never heard of a semiautomatic rifle which “wore out” or otherwise failed beyond repair, and the AK is an extraordinarily robust design.

181. The ban expired in September 1994, pursuant to a ten-year “sunset” provision in the statute. See Federal ban on assault weapons expires, USA Today, available at http://usatoday30.usatoday.com/news/washington/2004-09-12-weapons-ban_x.htm

182. CHRISTOPHER S. KOPER, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003 at 96-97 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

183. Clayton E. Cramer & B. David Kopel, “Shall Issue”: The New Wave of Concealed Handgun Permit Laws, 62 TENN. L. REV. 679 (1995).

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By 2014, no state banned concealed carry entirely, and two-thirds of our population lived in States with “shall issue” standards.¹⁸⁴

One might speculate whether the transition to “shall issue” would raise crime rates (since carriers might get into unjustified conflicts), lower crime rates (since criminals would be deterred by the risk that victims were armed) or do nothing (since the number of actual carriers might be too low to deter crime, and they appear to be a peaceful lot).¹⁸⁵

The premiere (and controversial) work here was done by economists John Lott and David Mustard,¹⁸⁶ which Lott later expanded into a book, which further expanded over its three editions.¹⁸⁷ Their conclusion was that “shall issue” laws led to measurable reductions in violent crime rates.¹⁸⁸ As might be expected, the conclusion was controversial, and in a spirit of full transparency Lott posted his raw data online so that others might analyze it.¹⁸⁹

Before long, the matter had become the subject of a considerable debate.¹⁹⁰ The National Research Council convened a sixteen-member panel on the subject which, with one dissent (which felt Lott had proven his case) declared . . . a tie.¹⁹¹

184. David Kopel, *Growth Chart of the Right to Carry*, WASH. POST (Feb. 17, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/17/growth-chart-of-right-to-carry/>.

185. In Dade County, Florida, police monitored the 20,000 new permit holders with special care. Over nearly a five year period they recorded an average of 1.7 permit holders arrested for armed violence annually. Over twice that number used their firearms to defend against crime. Gary Kleck, *supra* note 6, at 369; *see also* LOTT, JR., *supra* note 6, at 244–48 (concluding revocations average range from 0.03% and 0.345%, and that most do not involve criminal conduct). It is possible that both effects were so low as to have no measurable effect on crime.

186. John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

187. *See generally* LOTT, JR., *supra* note 6. All page references given here are to its third edition.

188. Lott concluded that “shall issue” laws reduced murder by 8%, rape by 5%, and aggravated assault by 7%. On the other hand, they elevated property crime by 2.7%, presumably because those bent upon theft shifted to forms where they could accomplish it without encountering the victim. LOTT, JR., *supra* note 6, at 59.

189. AM. ENTER. INSTIT. FOR PUB. POLICY RESEARCH., *The Bias Against Guns: Why Almost Everything You've Heard About Gun Control Is Wrong*, <http://www.johnlott.org/cgi-bin/login.cgi> (last visited Mar. 4, 2015).

190. For a concise summary, *see* MINN. HOUSE OF REPRESENTATIVES, RESEARCH DEP'T, THE EFFECTS OF “SHALL-ISSUE” CONCEALED-CARRY LICENSING LAWS: A LITERATURE REVIEW (1999), *available at* <http://www.house.leg.state.mn.us/hrd/pubs/concarry.pdf>.

191. Nat'l Research Council of the Nat'l Acads, *Firearms and Violence: A Critical Review 7* (2004), *available at* http://www.nap.edu/openbook.php?record_id=10881&page=7:

The committee concludes that it is not possible to reach any scientifically supported conclusion because of (a) the sensitivity of the empirical results to seemingly minor changes in model specification, (b) a lack of robustness of the results to the inclusion of more recent years of data (during which there were many more law changes than in the

It is worth noting that the first edition of Lott's book ran 225 pages and the third edition spans 442 pages, the additions being refinements of his method, updating of his data, and replies to his critics.¹⁹² The first edition analyzed the experiences of 18 States over a maximum of 16 years; the third edition studies 39 States over a maximum of 29 years.¹⁹³

The chief rival to Lott's conclusions is a 1995 article by David McDowall, Colin Loftin, and Brian Wiersema.¹⁹⁴ They assessed homicide rates in five urban counties of three states that had adopted "shall issue," and concluded that the results were ambiguous. Firearms homicides increased in three areas (all statistically significant) and fell in two (one statistically significant).¹⁹⁵ From this they reached two conclusions. "The stronger conclusion is that shall issue laws do not reduce homicides, at least in large urban areas."¹⁹⁶ The weaker one was that they might increase homicides, but here "we have only five replications, and two of these do not clearly fit the pattern."¹⁹⁷

The McDowall study likewise attracted criticism, from Daniel Polsby.¹⁹⁸ He suggested that the study appears to cherry-pick its data, focusing upon five urban counties, when the legal change to shall-issue was statewide. Three of the counties were in Florida, and two of those had a murder rate increase while the third had no statistically significant change . . . yet Florida as a whole had a decline in its murder rate over the period studied.¹⁹⁹ Obviously, there must have been significant murder rate declines in counties that were excluded from the study.²⁰⁰ Further, not a single murder included involved a concealed carry permit holder; how then could the law have affected the murder

earlier period), and (c) the statistical imprecision of the results. The evidence to date does not adequately indicate either the sign or the magnitude of a causal link between the passage of right-to-carry laws and crime rates. Furthermore, this uncertainty is not likely to be resolved with the existing data and methods.

The dissenter, the well-respected criminologist James Q. Wilson, suggested that the factors the majority had cited were equally true of many other criminological studies, that Lott's results were robust, and that the available evidence showed that, with regard to "shall issue" "the best evidence we have is that they impose no costs but may confer benefits." *Id.* at 270.

192. LOTT, JR., *supra* note 6, at 202-27.

193. LOTT, JR., *supra* note 6, at vii.

194. See David McDowall, Colin Loftin & Brian Wiersema, *Easing Concealed Firearm Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193 (1995).

195. *Id.* at 203.

196. *Id.*

197. *Id.*

198. See Daniel D. Polsby, *Firearms Costs, Firearms Benefits, and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207 (1995).

199. See *id.* at 214.

200. *Id.*

rate?²⁰¹ McDowall and his coauthors responded, but did not appear able to respond to these points.²⁰²

D. The Question of Offsets: Firearm Use in Self-Defense

A matter that must be considered in any debate on the firearms issue is whether firearm restrictions have an offset, in the form of reducing the ability of citizens to defend against crime. That in turn poses the issue – just how often do Americans use firearms in self-defense?

The leading work here is that of criminologists Gary Kleck and Marc Gertz, who in 1993 set out to undertake a detailed survey of defensive guns uses, or DGUs.²⁰³ They examined the thirteen prior surveys on the subject to determine their weaknesses – one was not anonymous, which probably lead to undercounting (persons might be reluctant to admit gun use to a stranger); others could have included defensive uses by police or security guards, or uses against wildlife and animals, which were not the desired focus.²⁰⁴ In consultation with other criminologists, they created a survey that would avoid these limitations, and surveyed nearly 5,000 persons.²⁰⁵

The results were consistent with 2.5 million DGUs per year, with three-quarters involve display but not firing of the gun.²⁰⁶ Those reporting a DGU were disproportionately likely to have been the past victim of an assault, to live in large cities, and to African-American or Hispanic.²⁰⁷

The authors closed by charting the thirteen prior surveys on the subject. With one outlier (the National Crime Victimization Survey, or NCVS) these had indicated 761,000 to 3,000,000 annual DGUs.²⁰⁸ The NCVS indicated a far lower 80,000 annual DGUs.²⁰⁹ Kleck and Gertz examined the NCVS and concluded that its design was such that

201. *Id.*

202. *See generally* McDowall, Loftin & Wiersema, *supra* note 181 (responding to Polsby's commentary).

203. *See generally* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

204. *Id.* at 157–60.

205. *Id.* at 160–61, 172.

206. *Id.* at 171, 175.

207. *Id.* at 178.

208. *Id.* at 182–83.

209. *Id.* at 153. Eighty-eight percent of the defensive uses found by Kleck and Gertz were outside the defender's home, where, they point out, carry a gun without a permit would often be illegal, and in ten states was a felony. *Id.* at 156.

it would result in underestimates. It was not confidential: respondents were asked their name and address, and interviewers were required to explain that they were compiling the data for the government. Under these conditions, interview subjects might be reluctant to admit that they had drawn or used a gun on someone (especially if the gun possession was not legal). The NCVS did not directly ask whether there had been a DGU, but only asked general questions about what the interviewee had done to protect themselves.²¹⁰

A short piece by Marvin Wolfgang, often considered as the “Dean of American Criminology,” followed Kleck and Gertz’s article and was aptly entitled “A Tribute to a View I Have Opposed.”²¹¹ Wolfgang began “I am as strong a gun-control advocate as can be found among the criminologists of this country I hate guns—ugly, nasty instruments designed to kill people.”²¹² He continued:

What troubles me is the article by Gary Kleck and Marc Gertz. The reason I am troubled is that they have provided an almost clear-cut case of methodologically sound research in support of something I have theoretically opposed for years, namely, the use of a gun in defense against a criminal perpetrator. Maybe Franklin Zimring and Philip Cook can help me find fault with the Kleck and Gertz research, but for now, I have to admit my admiration for the care and caution expressed in this article and this research. . . . The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.²¹³

The rebuttal to the study came from David Hemenway, a professor of public health.²¹⁴ Kleck and Gertz’s response can best be assessed as devastating.²¹⁵

The policy implications of Kleck and Gertz’s work are straightforward. If defensive gun use is that significant, restricting the possession

210. *Id.* at 155–58.

211. *See generally* Wolfgang, *supra* note 74.

212. Wolfgang, *supra* note 74, at 188.

213. Wolfgang, *supra* note 73, at 188, 192.

214. *See generally* David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430 (1997) (questioning the validity of Kleck and Gertz’s conclusions).

215. *See* Gary Kleck & Marc Gertz, *The Illegitimacy of One-Sided Speculation: Getting the Defensive Gun Use Estimate Down*, 87 J. CRIM. L. & CRIMINOLOGY 1446 (1997). (“It is obvious to us that David Hemenway (H) had no intention of producing a balanced, intellectually serious assessment of our estimates of defensive gun use (DGU).”).

of defensive arms has a downside or an offset. Even if a restriction were to be shown successful in reducing illegal firearms violence, unless the burdens of the restriction fell only upon criminals, the benefit might be offset by resulting increases in non-firearms criminality that is freed from the deterrent of armed defenders.

CONCLUSION

Under *Heller* and *McDonald*, courts assessing the constitutionality of an arms restriction must turn to hard data rather than speculation. After forty years of academic study and debate, a great amount of such data is today available. As a general proposition, measures aiming to reduce crime by reducing general availability of firearms simply fail. Even in high-crime areas, lethal violence is concentrated in a small part of the population. Specific regulations, if they are to have a beneficial effect, must succeed in burdening this subpopulation without burdening the remainder.

Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill

DAVID B. KOPEL* AND CLAYTON E. CRAMER**

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INTRODUCTION

Murders in Newtown, Connecticut, and elsewhere have spurred public debate about reforming mental health laws. This Article pro-

poses reforms, which will better protect the public, including the severely mentally ill, while preserving the due process rights of everyone.

About 18 percent of all murders are perpetrated by persons suffering from severe mental illness. For mass attacks against strangers, the percentage is far higher. Severe mental illness also plays a major role in many other violent crimes, often through secondary effects of the illness, such as unemployment.

Absurdly, there are three times more persons with severe mental illness in jails and prisons today than there are in psychiatric hospitals. Often, the people who end up in penal institutions had previously sought mental health treatment, but could not get it. The most necessary reform, from a public safety viewpoint, is the provision of sufficient funding so that voluntary treatment is available for the severely mentally ill.

Only a small minority of severely mentally ill people is dangerously violent. For them, involuntary commitment to inpatient or outpatient programs can be life-saving for them and for other persons. Today, more than one-quarter of the current state-to-state variation in murder rates can be explained by differences among involuntary commitment laws, with broader commitment standards correlating with lower murder rates.

This Article does not recommend weakening any due process protections currently in place for involuntary commitments. The Article does recommend removing the requirement in some states that an involuntary commitment based on serious danger may only take place when the danger is “imminent.”

Nothing in the statute books matters if persons who know about an obvious danger fail to act. The killers at the Aurora movie theater and in Tucson both could have been committed under the existing laws of their states, but officials at the University of Colorado and at Pima Community College failed to inform anyone about their dangerously mentally ill ex-students.

Part I provides the definitions for the mental illnesses which are the subject of this Article. Part I also provides estimates of the numbers of people in the United States who suffer from these illnesses.

Part II examines the data about the relationship between severe mental illness and violent crime. Severe mental illness does significantly raise the odds that a person will perpetrate a violent crime. But

most often, the increased risk is not from the immediate effect of the illness itself (such as hallucinations or delusions) but rather from other factors—such as developing a substance abuse problem, or being victimized—for which the seriously mentally ill are at particularly high risk. As Part II explains, seriously mentally ill people are much more likely to be crime victims than to be crime perpetrators, and the large majority of people who are seriously mentally ill never perpetrate violent crimes.

Part III examines the data on serious mental illness and homicide, especially mass homicide. At this extreme end of the criminality spectrum, the association between untreated severe mental illness and mass murder is overwhelming. The fraction of perpetrators who are severely mentally ill is grossly disproportionate to the small percentage of the population with severe mental illness.

Part IV explains current statutory and case law about when a person may be deprived of the constitutional rights to arms, based on alleged mental illness. The federal Gun Control Act of 1968 imposes a lifetime firearms prohibition for any person who has been adjudicated mentally ill. More recently, due process protections have been somewhat improved, especially for persons who had a problem decades ago, and who have fully recovered.

Part V details the depressing results of the de-institutionalization movement of the latter part of the twentieth century. Today, prisons and jails house far more seriously mentally ill people than do mental institutions.

Part VI describes the social science research showing that broader laws on civil commitment have a large effect in reducing homicides. Part VI also explains that the number of available mental health beds (for either voluntary or involuntary treatment) is grossly insufficient. Fixing the problem will require a great deal of spending; the spending would be cost-effective in the long run, due to reduced crime and other maladies.

Part VII explains the history of constitutional standards regarding civil commitment, and recent statutory reforms in Virginia and Wisconsin. We argue that states which currently require “imminent” danger for a mental health commitment should remove the imminence requirement, but should not weaken the due process requirements for short-term or long-term commitments.

Part VIII describes the mental health issues and the commitment laws which could have been used for the perpetrators of four recent, notorious mass murders: at the Washington Navy Yard, Tucson, the Aurora theater, and Newtown. In at least two of the cases, existing state laws could have authorized a commitment, but the people who knew about the danger failed to act.

Part IX summarizes state experiences with a relatively new form of commitment: involuntary outpatient commitment (IOC). Rather than being held in a mental institution, a person may be ordered by a court to undergo outpatient treatment. For some mentally ill persons, IOC works well, and is a less restrictive alternative to inpatient commitment.

I. DEFINING THE TERMS

The standard treatise about mental disorders is the fifth edition of *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), published by the American Psychiatric Association.¹ In DSM-5, “severe” cases have more symptoms and those symptoms are more powerful. For example, in the DSM-5’s “Clinician-Rated Dimensions of Psychosis Symptom Severity,” there are eight categories, including hallucinations,² delusions,³ and disorganized thinking, often manifested by disorganized or incoherent speech.⁴ Each symptom can range from “not present” to “severe.” In the category of delusions, the symptom is “mild” if the person feels “little pressure to act upon delusional beliefs” and is “not very bothered” by them. Delusions are “severe”

1. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5]. Various editions of the DSM have been criticized, sometimes appropriately, for labeling non-conformity or political incorrectness as psychiatric diagnoses. Those criticisms are not relevant to this Article, which uses the DSM solely in regards to mental issues for which there is a long-standing consensus that the problem is a genuine mental disorder, such as bipolar syndrome, or schizophrenia.

2. Hallucinations are “perception-like experiences that occur without an external stimulus. They are vivid and clear, with the full force and impact of normal perceptions, and not under voluntary control.” *Id.* at 87.

Auditory hallucinations are far more common than visual ones, which are relatively rare. Dewey G. Cornell & Gary L. Hawk, *Clinical Presentation of Malingers Diagnosed by Experienced Forensic Psychologists*, 13 LAW & HUM. BEHAV. 375, 380–81 (1989). Among the things which can trigger auditory hallucinations is watching television, especially the news. See I. Leudar et al., *What Voices Can Do with Words: Pragmatics of Verbal Hallucinations*, 27 PSYCHOL. MED. 885 (1997) (analyzing various characteristics triggering hallucinations).

3. Delusions are “fixed beliefs that are not amenable to change in light of conflicting evidence The distinction between a delusion and a strongly held idea . . . depends in part on the degree of conviction with which the belief is held despite clear or reasonable contradictory evidence regarding its veracity.” DSM-5, *supra* note 1, at 87.

4. *Id.* at 88.

when the person feels “severe pressure to act upon beliefs, or is very bothered by beliefs.”⁵

Under this definition, about six percent of the U.S. population has a severe mental illness.⁶ Because this Article concentrates on public safety issues, it only addresses some severe mental illnesses. The mental illnesses most strongly associated with violent crimes are *personality disorders*.

A personality disorder is “an enduring pattern of inner experiences and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.”⁷ About 9.1 percent of the U.S. adult population has a personality disorder (although not necessarily a severe one).⁸ A majority of violent criminals have some kind of a personality disorder.⁹

The personality order definition should not be taken literally in every situation. A freedom-loving person in Stalin’s Soviet Union who persisted in reading banned books, forthrightly expressing her political opinions, worshipping in a religion not allowed by the government, and so on, might suffer the “distress or impairment” resulting from being sent to a slave labor camp.¹⁰ But such a person was not mentally disordered; indeed, such a brave person was saner, better mentally ordered, than the general population, which submitted to slavery.

Personality disorders include *paranoid personality disorder* (“pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent”),¹¹ *histrionic personality disorder* (“excessive emotionality and attention seeking”),¹² and *narcissistic personal-*

5. *Id.* at 743–44.

6. Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of Twelve-Month DSM-IV Disorders, in The National Comorbidity Survey Replication (NCS-R)*, 62 ARCH. GEN. PSYCHIATRY 617, 619 tbl.1 (2005) (noting 1.3 percent of population with one serious disorder; 2.1 percent with two serious disorders, and 2.3 percent with three or more; using the previous edition of DSM).

7. DSM-5, *supra* note 1, at 645.

8. Mark F. Lenzenweger et al., *DSM-IV Personality Disorders, in The National Comorbidity Survey Replication*, 62 BIOLOGICAL PSYCHIATRY 553, 553 (2007).

9. Michael H. Stone, *Violent Crimes and Their Relationship to Personality Disorders*, 1 PERSONALITY & MENTAL HEALTH 138, 138–39 (2007).

10. *See generally* SIDNEY BLOCH & PETER REDDAWAY, *SOVIET PSYCHIATRIC ABUSE: THE SHADOW OVER WORLD PSYCHIATRY* (1985) (discussing various psychiatry issues in the Soviet Union).

11. DSM-5, *supra* note 1, at 649–52.

12. DSM-5, *supra* note 1, at 667–69.

ity disorder (“grandiosity . . . need for admiration, and lack of empathy”).¹³ These are classic traits of mass killers.¹⁴

Particularly associated with impulsive violent crime is *borderline personality disorder*. Some of the symptoms are:

- Problems with regulating emotions and thoughts
- Impulsive and reckless behavior
- Unstable relationships with other people.¹⁵

About 1.6 percent of the U.S. adult (18 and older) population has borderline personality disorder.¹⁶ Borderline personality disorder appears to be strongly influenced by genetics.¹⁷

Even more closely related to violent crime is *antisocial personality disorder* (ASPD). Such persons with this disorder frequently:

- Lack empathy.
- Tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others.
- Have an inflated and arrogant self-appraisal.
- Are excessively opinionated, self-assured, or cocky.
- Display a glib, superficial charm.¹⁸

About 1.0 percent of the U.S. adult population has antisocial personality disorder.¹⁹ Serial killer Ted Bundy was an example.²⁰

13. DSM-5, *supra* note 1, at 669–72.

14. Paul E. Mullen, *The Autogenic (Self-Generated) Massacre*, 22 BEHAV. SCI. & L. 311 (2004).

15. DSM-5, *supra* note 1, at 663–66.

16. Lenzenweger, *supra* note 8, at 556 tbl.3.

17. NAT’L INST. OF MENTAL HEALTH, BORDERLINE PERSONALITY DISORDER, available at <http://www.nimh.nih.gov/health/topics/borderline-personality-disorder/index.shtml> (last accessed Aug. 21, 2015).

Scientists are just beginning to understand the influence of genetics on crime. For example, a study of 153 men found that a particular genetic disorder that affects serotonin levels could explain five percent of the variance in the criminal behavior among the subjects. Wolfgang Retz et al., *Association of Serotonin Transporter Promoter Gene Polymorphism with Violence: Relation with Personality Disorders, Impulsivity, and Childhood ADHD Psychopathology*, 22 BEHAV. SCI. & L. 415 (2004). Yet a study specifically of persons with schizophrenia found no relation between the serotonin genetic disorder and homicide. Moshe Kotler et al., *Homicidal Behavior in Schizophrenia Associated with a Genetic Polymorphism Determining Low Catechol-O-Methyltransferase (COMT) Activity*, 88 AM. J. MED. GENETICS 628 (1999).

18. DSM-5, *supra* note 1, at 659–63; PsychCentral, *Antisocial Personality Disorder Symptoms*, available at <http://psychcentral.com/disorders/antisocial-personality-disorder-symptoms/> (last accessed Aug. 21, 2015).

19. Lenzenweger, *supra* note 8.

20. See generally RICHARD W. LARSEN, BUNDY: THE DELIBERATE STRANGER (1980); ANN RULE, THE STRANGER BESIDE ME (2000); Katherine Ramsland, *The Many Sides of Ted Bundy*, 22 FORENSIC EXAMINER 18 (2013) (reanalyzing data on the link between severe mental illness and increased risk of violence).

Many people with APSD also have depression. Besides frequently leading to prison, ASPD often results in difficulty holding employment due to being fired for being caught cheating. Long-term relationships are also difficult to maintain. But if persons with ASPD “are clever and do not get caught, they can be highly successful people with impressive jobs. In fact, some people with the disorder actually become model citizens as they age. It is thought that when they grapple with the limits of old age, these individuals learn to accept their limitations and have less of a need to prove their power over others.”²¹

A person’s upbringing can affect the development of personality disorders. Paul Frick’s study of preschoolers found many who could be classified as *psychopaths* (persons with a no empathy, low response to negative stimulus, and a sense of grandiosity).²² He also found that most such preschoolers who had consistent parenting eventually “grew” a conscience.²³

Much less associated with violent crime are *anxiety disorders*. An anxiety disorder differs from ordinary fear or anxiety in that it is persistent (typically for half a year or more), and it causes significant problems for the individual. Examples include panic attacks, various phobias, or post-traumatic stress.²⁴ It includes a wide variety of disorders, most of which seem unlikely to increase the risk of violent crime. For example, ranidaphobia (fear of frogs) might impair hiking, or natural history museum visits, but would not increase the probability of

21. MICHAEL T. COMPTON & RAYMOND J. KOTWICKI, RESPONDING TO INDIVIDUALS WITH MENTAL ILLNESS 153 (2007).

22. Paul J. Frick, *Using the Construct of Psychopathy to Understand Antisocial and Violent Youth*, in THE PSYCHOPATH: THEORY, RESEARCH, AND PRACTICE 343 (Hugues F. Hervé & John C. Yuille eds., 2007); see generally Mary Ellen O’Toole, *Psychopathy as a Behavior Classification System for Violent and Serial Crime Scenes*, in THE PSYCHOPATH: THEORY, RESEARCH, AND PRACTICE 303 (Hugues F. Hervé & John C. Yuille eds. 2007) (listing the 18 characteristics from the Hare Psychopathy Checklist—Revised, PCL-R). The DSM does not have a diagnosis for “psychopath,” which has a substantial overlap with the DSM’s “anti-social personality disorder.” The term “psychopath” has a well-established and clinically-valid use as a description of persons manifesting certain symptoms and behaviors. Hugues Hervé, *Psychopathy Across the Age: A History of the Hare Psychopath*, in THE PSYCHOPATH, *supra*, at 48–50; see generally Mark D. Cunningham & Thomas J. Reid, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 16 BEHAV. SCI. & L. 333 (1998) (analyzing the overlaps and the differences between psychopathology and the DSM’s anti-social personality disorder). Many people with ASPD are not psychopaths. James L. Knoll, *Clinical Framework for the Treatment Relationship*, in FRED COHEN, PRACTICAL GUIDE TO CORRECTIONAL MENTAL HEALTH AND THE LAW 8–16 (2011).

23. Paul J. Frick, *Using the Construct of Psychopathy to Understand Antisocial and Violent Youth*, in THE PSYCHOPATH, *supra* note 22, at 343.

24. See DSM-5, *supra* note 1, at 189–233.

committing violent crime. Hoplophobia (fear of gun owners)²⁵ would at least seem to reduce the risk of firearms crime.²⁶ Similarly, a person's agoraphobia (fear of being trapped, helpless, or embarrassed, in certain places, especially in public places)²⁷ may be very debilitating for the individual (e.g., the reclusive Howard Hughes²⁸), but there is little connection with criminal behavior.

Affective disorders involve long-term effects on mood. Depression is a common affective disorder.²⁹ About 6.7 percent of American adults suffer from major depressive disorder in a given year.³⁰

Another affective disorder is bipolar.³¹ Bipolar disorders involve episodes of mania (including but not limited to elevated mood and energy) and depression (depressed mood, diminished interest in pleasure, loss of energy, inability to concentrate). Sometimes bipolar disorder can make a person *psychotic*—that is, disconnected from reality. Bipolar disorder does increase the risk of violent crime, as will be detailed below. The disorder affects 5.7 million adult Americans (about 2.6%) in a given year.³²

Schizophrenia is often used as shorthand for various psychotic symptoms (also called “domains” or “features”). These include “positive symptoms” (presence of unusual things) such as delusions, hallucinations, or disorganized speech. There are also “negative symptoms” (the absence of normal things), as manifested by diminished emo-

25. See PHILIP T. NINAN & BOADIE W. DUNLOP, CONTEMPORARY DIAGNOSIS AND MANAGEMENT OF ANXIETY DISORDERS 107 (2006) (hoplophobia). Hoplophobia and ranidaphobia are examples of a *specific phobia*, and the DSM does not attempt to list every specific phobia. DSM-5, *supra* note 1, at 197–202.

26. Although it would probably elevate the risk of crime against gun owners. See Katie Mettler, *Man Shopping for Coffee Creamer at Walmart Attacked by Vigilante for Carrying Gun he was Legally Permitted to Have*, TAMPA BAY TRIB., Jan. 20, 2015 (unprovoked attack by middle-aged white man on older black man, who had handgun carry permit).

27. DSM-5, *supra* note 1, at 217–22.

28. See generally DONALD L. BARLETT & JAMES B. STEELE, HOWARD HUGHES: HIS LIFE AND MADNESS (2004) (describing Hughes' reclusive nature).

29. DSM-5, *supra* note 1, at 155–88. The greatest violence risk for depression is suicide, rather than interpersonal violent crime.

30. Kessler, *supra* note 6.

31. DSM-5, *supra* note 1, at 123–54.

32. Kessler, *supra* note 6. Percentages of adult population are calculated from U.S. Census Bureau Population Estimates for 2004, cited and detailed in NATL. INST. OF MENTAL HEALTH, THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA (2012).

tional expression or social withdrawal.³³ In addition, schizophrenia greatly impairs cognition.³⁴

Schizophrenia is extremely heterogeneous in its origin (many genetic³⁵ and environmental factors contribute to causation), in the variety of its symptoms, and in how effective various treatments are for different people.³⁶

In the United States, there are 2.4 million adults with schizophrenia, about 1.1 percent.³⁷ The age-adjusted schizophrenia rate appears to be stable. However, because more people live into old age, the total percentage of the population with schizophrenia has been increasing.³⁸

Schizophrenia certainly raises the risk of violent crime, as will be detailed in Part II, which also explains that the additional risks depend on many other variables.

Our understanding of the causes of mental illness is very incomplete. We do know that schizophrenia has a genetic component. It is not caused by bad habits or bad character. A person with schizophrenia who is hearing auditory hallucinations has no more moral culpability (zero) than does a person with Parkinson's dementia who cannot remember things. They have a biological condition, not a character flaw. The same appears to be true for bipolar disorder. Even psychop-

33. DSM-5, *supra* note 1, at 87; see generally Stanley R. Kay et al., *The Positive and Negative Syndrome Scale (PANSS) for Schizophrenia*, 13 SCHIZOPHRENIA BULL. 261 (1987) (providing foundational discussion of the Positive and Negative Syndrome Scale, PANSS).

34. Solomon Kalkstein et al., *Neurocognition in Schizophrenia*, in BEHAVIORAL NEUROBIOLOGY OF SCHIZOPHRENIA AND ITS TREATMENT 373 (Neal R. Swerdlow ed., 2010) (schizophrenia damages general intellectual functioning, attention, processing speed, executive function, learning and memory, language, visual perceptual/constructional skills, fine motor skills, and social cognition).

35. Jared W. Young et al., *Animal Models of Schizophrenia*, in BEHAVIORAL NEUROBIOLOGY OF SCHIZOPHRENIA, *supra* note 34, at 391, 412–15. Prenatal viral or bacterial infections, such as toxoplasmosis, appear to raise the risk of later development of schizophrenia. *Id.* at 443–48. So does maternal malnutrition. *Id.* at 448–50.

36. *Id.* at 392. “Diagnostically, the boundaries of the schizophrenia are less clearly marked than we once believed, expanding in some directions toward the bipolar disorders, in other toward the ‘Cluster A’ personality spectrum [Paranoid, Schizoid, and Schizotypal Personality Disorders], and in still others toward ‘pure’ genetic disorders.” Neal R. Swerdlow, *Introduction*, in BEHAVIORAL Neurobiology of Schizophrenia, *supra* note 34, at v.

37. Darrel A. Regier et al., *The De Facto Mental and Addictive Disorders Service System: Epidemiologic Catchment Area Prospective 1-Year Prevalence Rates of Disorders and Services*, 50 ARCH. GEN. PSYCHIATRY 85 (1993).

38. Heinz Häfner, *Are Mental Disorders Increasing Over Time?* 18 PSYCHOPATHOLOGY 66, 66 (1985) (“Except for age-related changes, we do not seem to have become more ill than the generation of our parents, but more pessimistic.”); CLAYTON E. CRAMER, *MY BROTHER RON: A PERSONAL AND SOCIAL HISTORY OF THE DEINSTITUTIONALIZATION OF THE MENTALLY ILL* 27–28 (2012) (summarizing evidence for and against rising schizophrenia rates).

athy appears have to have a strong genetic basis, perhaps related to a neurochemical disorder in the processing of negative stimuli.³⁹

When we see a person with Down's syndrome, or Alzheimer's, we recognize that we are fortunate not to have their illness, and we try to help; we do not blame them for having an illness. The same should be true for the mental illnesses, including schizophrenia, which are primarily biochemical in origin. This does not mean that people with schizophrenia, or Down's syndrome, or Parkinson's dementia, never have any responsibility for their actions; people can still make choices. But we can recognize that sometimes, the ability to discern the right choice may be gravely impaired by conditions beyond an individual's moral power to control.

II. DATA AND STUDIES ON CRIME AND THE SERIOUSLY MENTALLY ILL

According to one study, 46 percent of Americans will have a psychiatric disorder at least once during their lifetimes.⁴⁰ This does not mean that 46 percent of Americans should be put in mental hospitals, or that they are dangerous to themselves or others. The definitions of mental/personality disorders have expanded greatly since the early twentieth century. Likewise, there is much greater awareness of physical disorders and diseases, some of which are quite subtle.

In this Article, we focus on a much smaller set of mental disorders, and among them, we primarily address severe cases. But the 46 percent figure is still useful, since it is a reminder that if someone has a problem—such as a phobia about large social events, or moderate depression—there is nothing wrong with going to a mental health professional to get help. One of the most significant barriers to mental health treatment has been the stigma associated with mental illness. There is no stigma associated in going to the doctor when you think you may have a kidney disorder, and there should likewise be no

39. Robert D. Hare, *Forty Years Aren't Enough: Recollections, Prognostications, and Random Musings*, in *THE PSYCHOPATH: THEORY, RESEARCH, AND PRACTICE* 14 (Hugues F. Hervé & John C. Yuille eds., 2007). Another influence may be extreme prenatal malnutrition. Richard Neugebauer et al., *Prenatal Exposure to Wartime Famine and Development of Antisocial Personality Disorder in Early Adulthood*, 282 *JAMA* 455 (1999) (reporting the results of a study on Netherlands males born 1944-46. During part of this time, a Nazi blockade on food supplies was in effect. Severe maternal malnutrition during the first or second semesters of pregnancy increased the odds ratio of anti-social personality disorder by 2.5 times).

40. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 *ARCH. GEN. PSYCHIATRY* 593 (2005).

stigma in seeking treatment when you think you may have a mental disorder.

A. The seriously mental ill as crime victims

When we examine the data on serious mental illness and violent crime, it is clear that the problem of victimization is far larger than the problem of perpetration. A Swedish study found that the severely mentally ill are five times more likely to be murdered.⁴¹ A Chicago study found persons with severe mental illness eleven times more likely to be the victim of a violent crime.⁴² In Los Angeles, the data indicate that a person with schizophrenia is much more likely to be a crime victim than a crime perpetrator.⁴³ National U.S. data show that persons with mental disabilities are at far greater risk of being victimized by violent criminals.⁴⁴

The precise reasons for the higher victimization rate have not been delineated by social science. One reason may be that the symptoms of mental illness sometimes impair a person's situational awareness, so that he is less alert about a risky situation. Or if the person's symptoms are apparent to others, he may be identified as an easy target. Further, serious mental illness often leads to lower socioeconomic status, because of unemployment, less educational attainment, lower-paying jobs, and so on; thus the seriously mentally ill person may be unable to afford to live anywhere except in a high-crime neighborhood, where everyone is at greater risk. At the extreme end of the spectrum, the seriously mentally ill person may become homeless, with all of the attendant risks of being victimized.

So although this Article is primarily about reducing crime by the seriously mentally ill, the largest crime-reductive effect of implementing our proposals to help the seriously mentally ill would likely be in

41. Casey Crump et al., *Mental Disorders and Vulnerability to Homicidal Death: Swedish Nationwide Cohort Study*, 2013 *BRIT. MED. J.* 346 (2013) (finding 4.9-fold overall risk increase; 9-fold if in conjunction with substance abuse; without substance abuse, 3.2 for personality disorders, 2.6 for depression, 2.2 for anxiety disorders, and 1.8 for schizophrenia).

42. Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62 *ARCH. GEN. PSYCHIATRY* 911, 911, 913 (2005) (controlling for income and other demographic variables).

43. J.S. Brekke et al., *Risks for Individuals with Schizophrenia who are Living in the Community*, 52 *PSYCHIATRIC SERV.* 1358 (2001) (three-year study of 172 persons with schizophrenia in Los Angeles).

44. ERIKA HARRELL, UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CRIME AGAINST PERSONS WITH DISABILITIES, 2009-2011 tbl.3* (2012).

reducing the number of crimes perpetrated *against* the seriously mentally ill.

B. Studies of serious mental illness and crime

Before looking at the research on serious mental illness and violent crime, some caveats are appropriate. First, not all crimes committed by mentally ill persons may be related to the mental illness.⁴⁵ Diabetics commit crime, but that does not mean that diabetes itself makes people into criminals. Or imagine a person who has a severe phobia about riding in elevators. The person robs someone in a park. The particular mental illness and the crime would have nothing to do with each other. Similarly, if a violent criminal has borderline personality disorder and also has schizophrenia (e.g., auditory hallucinations), the borderline personality may well be related to the crime, while the schizophrenia may or may not be.

A crucial variable is how a person responds to symptoms of mental illness. For example, a person might have a quite severe case of persistent hallucinations. Yet the person is also aware that the hallucinations are not real. Such persons are less likely to act violently because of the hallucinations.⁴⁶

Several large-scale studies have indicated that serious mental illness is a risk factor for violence. A 1990 study by the National Institute of Mental Health (NIMH) found that in a one-year period, the prevalence of violence (very broadly defined) was 12 percent among persons with schizophrenia, bipolar disorder, or major depression, and 7 percent for persons who had these disorders but no substance abuse. In contrast, the violence rate for the general population without mental or substance disorders was two percent.⁴⁷ The lifetime violence

45. The closest link would be that a crime was directly caused by symptoms of mental illness. A small-scale study of 143 mentally ill criminals (with 429 crimes among them) found only 17 percent their crimes directly caused by symptoms. Jillian K. Peterson et al., *How Often and how Consistently do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?* 38 *LAW & HUM. BEHAV.* 439 (2014). As the authors point out, the mentally ill have many problems related to secondary or tertiary effects of their illnesses. *Id.* at 440. This will be examined further, in text *infra*.

46. A girlfriend of one of the authors long ago suffered from simple schizophrenia. She knew the voices that kept her awake yelling, “Kill yourself,” were not real. Because of this, she was able to voluntarily admit herself to a mental hospital.

47. Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from Epidemiologic Catchment Area Surveys*, in *VIOLENT BEHAVIOR & MENTAL ILLNESS: A COMPENDIUM OF ARTICLES FROM PSYCHIATRIC SERVICES AND HOSPITAL AND COMMUNITY PSYCHIATRY* 20–24 (1997). Because the study came from a large sample of more than 10,000 voluntary participants, the data may underrepresent the relative violence levels of persons suf-

rate (including self-reported minor and non-criminal violence) was 15 percent for the general population, 33 percent for serious mental illness alone, and 55 percent for serious mental illness plus substance abuse.

This lifetime rate includes periods when a person might not have serious mental illness or substance abuse. These rates are also calculated without regard to whether or not a person was receiving treatment for mental illness or substance abuse. The 1990 study also showed that risks were higher for mentally ill people in categories which are independently associated with higher risk of violence (young, male, low socioeconomic status) and therefore lower for persons not in those categories.

Subsequently, the MacArthur Violence Risk Assessment Study (MVRAS) followed about a thousand acute psychiatric patients after their hospital discharge, for a period of one year. For patients who did *not* have substance abuse problems, their violence rate was no higher than that of people who lived in similar neighborhoods and were not substance abusers—although the base violence rate was fairly high in itself (18 percent), since the discharged patients tended to live in high-crime, low-income neighborhoods.⁴⁸ Also, the persons studied had all received inpatient psychiatric treatment in the previous 20 weeks, which might have lowered their violence risk.

In contrast to the discharged patients without substance abuse issues, 31 percent of the discharged patients who did abuse substances had at least one violent incident during the subsequent year.

fering from severe mental illness. People suffering from paranoid schizophrenia, for example, are almost certainly less likely to participate in a voluntary survey; their delusions may have convinced them that the questioner works for the CIA, the KGB, or is an alien in human disguise.

48. Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCH. GEN. PSYCHIATRY 393, 398 tbl.4, 401 (1998). The MacArthur study looked at combinations of characteristics, which indicated whether persons were especially likely or unlikely to commit violence. Some of the results were surprising. For example, one combination for low violence, was low psychopathy, few prior arrests, no recent violence, hospital admission had been voluntary, and “symptom activation” was “high.” JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 100 fig.5.2 (2001). In other words, active symptoms actually reduced violence risks in this group. The highest-risk group (58.5 percent violence rate during the study period) was the combination of psychopathy, having been the victim of serious child abuse, being an alcohol or drug abuser, and the reason for the hospital admission was not suicide risk. *Id.* Overall, the single strongest factor for high risk was the score on the Hare Psychopathy Checklist—Screening Version. *Id.* at 108. But no “given variable constituted the cause of violence, even for a subgroup of patients.” *Id.* at 142. Rather, it was “the accumulation of risk factors, no one of which is either necessary or sufficient for a person to behave aggressively toward others.” *Id.*

The combination of mental illness with substance abuse can be particularly lethal. A Finnish study found that for females, a schizophrenia diagnosis was associated with a five- or six-fold increase in the risk of perpetrating a homicide. In contrast the diagnosis of alcoholism plus antisocial personality disorder increased the odds by forty- to fifty-fold.⁴⁹ An Australian study found that schizophrenics with substance abuse had an odds ratio of 7.7 for being convicted of a violent crime, compared to schizophrenics without substance abuse; for this latter group had a violent crime odds ratio of 2.5:1 compared to the general population.⁵⁰ Between 20 and 50 percent of persons with schizophrenia have a substance abuse disorder, and substance abuse is also elevated in persons with various other mental illnesses.⁵¹

Another study surveyed over 32,000 U.S. households. It found lower violence than the 1990 NIMH study, partly because of narrower definitions, and also because the U.S. crime rate has decreased greatly since 1990. That study found a 10 percent annual violence rate for substance abuse plus serious mental illness, 2.9 percent for serious mental illness alone, and 0.8 percent for persons with neither substance abuse nor serious mental illness.⁵²

Substance abuse by itself (not necessarily in conjunction with mental illness) increases the risk for violence by seven to nine times.⁵³

49. Markku Eronen et al., *Mental Disorders and Homicidal Behavior in Finland*, 53 ARCH. GEN. PSYCHIATRY 497 (1996). Epidemiologists often report their results as an “odds ratio” or as “relative risk.” Let’s suppose that there are two groups that are perfectly identical in all respects, except that people in Group 1 frequently drive at least 20 miles an hour above the speed limit, and the people in Group 2 rarely or never do so. A study investigates whether there was a particular “outcome” (an automobile accident) in a given period (let’s say the driving study covered a two-year period). During the two-year period, only one percent of Group 2 (non-speeders) had an auto accident, while twenty percent of Group 1 (frequent heavy speeders) had an accident. Then the “relative risk” for speeding and accidents would be 20. The “odds ratio” formula is more complicated; the odds ratio for speeding and accidents is 24.75. Relative risk and odds ratios of less than 2 are often ignored, as not being strong enough to demonstrate a relationship.

50. Cameron Wallace et al., *Criminal Offending in Schizophrenia over a 25-Year Period Marked by Deinstitutionalization and Increasing Prevalence of Comorbid Substance Use Disorders*, 161 AM. J. PSYCHIATRY 716, 721–22 (2004). “Most convictions for violent offenses were for robbery with violence and inflicting actual or grievous bodily harm.” *Id.* at 724. During the 25 years studied, “8.2% of all subjects with schizophrenia, and 13.0% of male subjects with schizophrenia, were convicted of a violent offense.” *Id.* at 724.

51. Anders Tengström et al., *Schizophrenia and Criminal Offending: The Role of Psychopathy and Substance Use Disorders*, 31 CRIM. JUST. & BEHAV. 367, 372–73 (2004) (summarizing prior research).

52. Richard Van Dorn et al., *Mental Disorder and Violence: Is There a Relationship Beyond Substance Use?* 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 487, 490 (2012).

53. Seena Fazel et al., *Schizophrenia and Violence: Systematic Review and Meta-Analysis*, 6 PLOS MED. Aug. 2009, at 1.

A meta-analysis (literature review and synthesis) of twenty previous studies estimated that persons with schizophrenia and substance abuse were about as likely to be violent as persons who are substance abusers but do not have schizophrenia.⁵⁴ The study did not account for whether these non-schizophrenics had other mental illnesses.

The result is consistent with a study of over 34,000 persons in the United States (including controls who were not mentally ill), finding that “severe mental illness alone did not predict future violence; it was associated instead with historical (past violence, juvenile detention, physical abuse, parental arrest record), clinical (substance abuse, perceived threats), dispositional (age, sex, income), and contextual (recent divorce, unemployment, victimization) factors.”⁵⁵ In other words, the same factors that are associated with greater violence in the general population.

While previous studies had found a powerful criminogenic interaction between substance abuse and schizophrenia, another study found that the effect of substance abuse on serious violence was rendered nonsignificant in the final model when controlling for age, PANSS positive symptoms,⁵⁶ childhood conduct problems, and recent victimization.⁵⁷ Likewise, although psychopaths have a very high rate of alcohol abuse, it does not appear to raise their already-high risk of violent recidivism.⁵⁸

Further, the study found that by far the highest rate of serious violence (9 percent in a six-month period) was not for persons with the most extreme symptoms; rather, violence was greatest among

54. *Id.*

55. Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 ARCH. GEN. PSYCHIATRY 152 (2009).

56. “Positive and Negative Syndrome Scale.” Positive symptoms of schizophrenia include hallucinations, delusions, or disorganized thought. Negative symptoms include social withdrawal, low emotional responsiveness, or catatonia. See Kay et al., *supra* note 33, at 261.

57. Jeffery W. Swanson et al., *A National Study of Violent Behavior in Persons with Schizophrenia*, 63 ARCHIVES GEN. PSYCHIATRY 490, 490 (2006).

58. Marnie E. Rice & Grant T. Harris, *Psychopathy, Schizophrenia, Alcohol Abuse, and Violent Recidivism among Mentally Disordered Offenders*, 18 INT’L J. L. & PSYCHIATRY 333 (1995); cf. Stephen Porter & Sasha Porter, *Psychopathy and Violent Crime*, in THE PSYCHOPATH, *supra* note 22, at 287, 289 (summarizing studies showing high crime risks for re-offending by criminally-convicted psychopaths, compared to non-psychopaths, and also showing larger risks for psychopathic ex-patients at mental institutions, compared to other ex-patients). It should be noted that the majority of psychopaths who are released from penal institutions do not recidivate, and of those that do, the recidivism is almost always within two or three years after release. Stephen C.P. Wong & Grant Burt, *The Heterogeneity of Incarcerated Psychopaths: Differences in Risk, Need, Recidivism, and Management Approaches*, in THE PSYCHOPATH, *supra*, at 461–62 (summarizing studies).

those who were high in positive symptoms (e.g., delusions, hallucinations) while being *low* in negative symptoms (e.g., emotional flatness, social withdrawal).⁵⁹

The importance of factors other than mental illness alone is also demonstrated by a four-state study of psychiatric inpatients and outpatients, based on perpetration of violence in the previous year. The study considered three risk factors: substance abuse, violent victimization history (after age 16),⁶⁰ and exposure to violence in the person's current neighborhood. If the mentally ill person had one risk factor, the violence rate was close to that of the general population (which includes substances abusers, and persons with undiagnosed mental illnesses). If the mentally ill person had two risk factors, the probability of violence doubled. When all three risk factors were present, 30 percent of this group perpetrated violence.⁶¹

Stated another way, persons who suffer from serious mental illness, but who grew up in a healthy family environment (e.g., not violently victimized by family members), developed self-control and coping skills (no substance abuse), and who are able to maintain gainful employment (better able to afford living in a non-violent neighborhood) often seem to escape whatever crime-causing effects mental illness might have. Unfortunately, this subset of the seriously mentally ill is far from a majority of the group. So it seems that one important way in which serious mental illness may lead to violence is that it leads to other problems, which themselves seem to increase violence.

As one literature review put it, "The weight of the evidence to date" shows that "a statistical relationship does exist between schizophrenia and violence."⁶² But the relationship is much more complex than just the immediate effects of the disorder itself.

For bipolar disorder, a meta-analysis of eight previous studies, in conjunction with a study of forty years' of data from Sweden, deter-

59. Swanson et al., *supra* note 57, at 496. The violence rate was one percent for people who were low in both positive and negative symptoms. It was three percent for people who were high in both positive and negative symptoms, or were low positive and high negative. *Id.*

60. The study found that victimization during childhood did not have an association with violence as an adult, unless the child victim was also re-victimized after age 16. Jeffrey W. Swanson et al., *The Social-Environmental Context of Violent Behavior in Persons Treated for Severe Mental Illness*, 92 AM. J. PUB. HEALTH 1523, 1528 (2002). If so, the person was more likely to be violent than were persons who had only been victimized after age 16. *Id.*

61. *Id.* at 1529.

62. Elizabeth Walsh et al., *Violence and Schizophrenia: Examining the Evidence*, 180 BRIT. J. PSYCHIATRY 490, 494 (2002). Also, "only a small proportion of societal violence can be attributed to persons with schizophrenia." *Id.*

mined that the violence risk ratio was 1.3 for persons without substance abuse, compared to the general population; this is not a large enough ratio on which to base policy choices. However, for persons with bipolar disorder coupled with substance abuse, the risk increased to 6.4.⁶³

Antisocial personality disorder is associated with a particularly large increase (12.8) in violence risks.⁶⁴

So what percentage of total violent crime is related to mental illness? “Population-attributable crime” answers the question “How much less crime would there be if the particular group were not present?” For example, in the United States in 2013, there were 7,120,525 arrests for any type of crime. Males accounted for 5,249,466 of these arrests.⁶⁵ So the population-attributable crime of males is 74 percent. This obviously does not mean that all of the crimes perpetrated by males were caused by the fact that the perpetrator was male. Population-attributable crime figures provide information that people with a particular characteristic are perpetrating crime at a disproportionate rate, but the figures do not mean that the characteristic is the cause of all their crime.

With that caveat, the population-attributable figures are: for psychoses (loss of connection with reality; often a symptom of schizophrenia, but sometimes a symptom of another mental disorder) 2-10 percent of violence;⁶⁶ for personality disorders, about 11 percent of violent crimes, and 29 percent of repeat offenses;⁶⁷ and for substance abuse (which could be in conjunction with a mental illness), 24.7 percent.⁶⁸

Again, this does not mean that a symptom of mental illness always precipitated the crime. Indeed, a study of patients who had been released after acute psychiatric hospitalization found that patients who continued to have delusions after release were not more violent

63. Seena Fazel et al., *Bipolar Disorder and Violent Crime: New Evidence from Population-Based Longitudinal Studies and Systematic Review*, 67 ARCHIVES GEN. PSYCHIATRY 931, 934 (2010) (studying persons discharged at least two times from Swedish hospitals with a bipolar diagnosis, and covering 1973–2004; using government data for violent crime convictions).

64. Rongqin Yu et al., *Personality Disorders, Violence, and Antisocial Behavior: A Systematic Review and Meta-Regression Analysis*, 26 J. PERSONALITY DISORDERS 775, 784 (2012).

65. FBI, CRIME IN THE UNITED STATES, tbl.33 (2013).

66. Fazel, *supra* note 53, at 5; see also Seena Fazel & Martin Grann, *The Population Impact of Severe Mental Illness on Violent Crime*, 163 AM. J. PSYCHIATRY 1397 (2006) (in Sweden, 5.2 percent for violent crime by persons with schizophrenia and “other psychoses”).

67. Yu, *supra* note 64, at 784.

68. Martin Grann & Seena Fazel, *Substance Misuse and Violent Crime: Swedish Population Study*, 328 BRIT. MED. J. 1233, 1234 (2004).

in the following year than were other released patients. Surprisingly, the study even found that people with “threat/control override” delusions (who “believe that people are seeking to harm them or that outside forces are controlling their minds”) were at no greater risk of perpetrating violence than were persons with non-delusional schizophrenia. The authors emphasized that sometimes delusions do precipitate crime—they just do not seem to do so more than does schizophrenia in general.⁶⁹ A subsequent study reported that threat/control override did not affect the frequency of violence, but was associated with more severe violence.⁷⁰

More generally, a study of former defendants in the mental health court in Minneapolis found that symptoms of the illness were *not* part of the cause of 65 percent of the crimes for which the prisoners were presently incarcerated.⁷¹ As discussed *supra*, mental illness may set in motion a series of problems (low socioeconomic status, leading to exposure to violence), which may subject the individual to other environmental factors which increase crime risk.

The above figures are for violence in general. As a practical matter, violent crime statistics are dominated by assault. For example, in the United States in 2013, there were estimated to be 1,163,146 major violent crimes. Of these, aggravated assaults comprised sixty-two percent, robbery thirty percent, rape seven percent, and homicide one percent.⁷² Thus, if the homicide rate doubled, or if homicide never occurred, the effect on the total violent crime rate would be small.

As noted above, the large majority of crime by the mentally ill does not appear to be immediately caused by psychotic symptoms.⁷³ But in a study of schizophrenic homicide offenders, psychotic symptoms *did* directly cause “a significant majority” of the killings.⁷⁴ Yet there was an exception: for persons who also had antisocial personality disorder, delusions did not increase the risk. Persons with ASPD were much more likely to attack non-relatives.⁷⁵

69. Paul S. Appelbaum et al., *Violence and Delusions: Data from the MacArthur Violence Risk Assessment Study*, 157 AM. J. PSYCHIATRY 566, 571 (2000).

70. Thomas Stompe, et al., *Schizophrenia, Delusional Symptoms, and Violence: The Threat/Control-Override Concept Reexamined*, 30 SCHIZOPHRENIA BULL. 31, 39 (2004).

71. Peterson et al., *supra* note 45, at 444.

72. FBI, CRIME IN THE UNITED STATES, VIOLENT CRIME (2013).

73. See *supra* text accompanying notes 45–70.

74. C.C. Joyal et al., *Characteristics and Circumstances of Homicidal Acts Committed by Offenders with Schizophrenia*, 34 J. PSYCHOL. MED. 433 (2004).

75. *Id.*

A meta-study found that persons with schizophrenia perpetrate homicide at a rate 20 times greater than the general population—although only one in 300 persons with schizophrenia kills someone.⁷⁶ As a literature view of mental illness and violence observed, “Odds are substantially higher when homicide is considered as the violence outcome.”⁷⁷

In other words, serious mental illness’s greatest effect in increased violent crime is in substantially greater homicide. This does not negate the importance of paying attention to other factors—such as substance abuse or victimization—which may have independent or synergistic effects in increasing the risks of all types of violent crime, including homicide, by persons with serious mental illness.

C. Incarceration Data

While we are a long way from fully understanding the relationship between serious mental illness and violent crime, we know one thing for certain: arrest and incarceration rates for the mentally ill are very disproportionate to the number of seriously mentally ill persons.

A study of all prisoners in Indiana who had been convicted of homicide found that 19 percent had severe mental illness.⁷⁸ Research in other nations has found between 5.3 and 17.9 of homicides to be perpetrated by the severely mentally ill.⁷⁹

The Oregon Department of Corrections reports that 22.8 percent of its prisoners suffer from “severe” mental health problems or from

76. Fazel, *supra* note 7, at 7.

77. Jeffrey W. Swanson et al., *Mental illness and reduction of gun violence and suicide: bringing epidemiologic research to policy*, 25 ANN. OF EPIDEMIOLOGY 366 (2015). The article also stated that risks for any violence are unusually high for first-episode psychosis. *Id.* One reason why violence risks for a person’s first psychotic episode may be so high is that the perpetrators “tend to be young adults whose symptoms may go untreated for an extended period before contact with a mental health treatment provider who could intervene.” *Id.* Just as mental illness has a greater relation to homicide than to violent crime in general, so does substance abuse. Between 45 and 80 percent of homicide offenders were drinking. John M.W. Bradford, David M. Greenberg & Gregory G. Motayne, *Substance Abuse and Criminal Behavior*, 15 PSYCHIATRIC CLINICS OF N. AM. 605 (1992).

78. Jason Matejkowski et al., *Characteristics of Persons with Severe Mental Illness Who Have Been Incarcerated for Murder*, 36 J. AM. ACAD. OF PSYCHIATRY & L. 74, 76 (2008) (out of 518 homicide offenders, 95 had severe mental illness; of the mentally ill for whom the treatment history was known, 43 percent had never been treated, or had only been treated once); see generally D.E. Wilcox, *The Relationship of Mental Illness to Homicide*, 6 AM. J. FORENSIC PSYCHIATRY 3 (1985) (among 71 persons convicted of non-vehicular homicides in Contra Costa County, California, in 1978-80, percent of homicides perpetrated by persons with schizophrenia, 49 of the 71 had serious mental disorders which affected the crime).

79. E. FULLER TORREY, *THE INSANITY OFFENSE: HOW AMERICA’S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS* 145, 213–18 (2008).

the next category: “highest need” for treatment.⁸⁰ Thirty percent of prisoners in the Cook County, Illinois, jail are mentally ill.⁸¹

A literature review of studies of prisoners in the United States found that “approximately one-quarter (25%) of offenders” suffer “from mental health problems including a history of inpatient hospitalization and psychiatric diagnoses.”⁸²

A Bureau of Justice Statistics study reported that while 10 percent of the U.S. population had a mental health disorder (anything in the DSM) in the past year, 64 percent of local jail inmates, 56 percent of state prison inmates, and 45 percent of federal prison inmates had such a disorder.⁸³

Looking specifically at some particular symptoms of severe mental illness, 11.8 percent of state prison inmates suffer from psychotic symptoms such as delusions.⁸⁴ This includes 7.9 percent suffering from hallucinations.⁸⁵

Federal prisoners were less likely to have these conditions: 7.8 and 4.6 percent respectively. This may be a consequence of the fact that the federal prison system consists primarily of persons convicted of drug sales offenses; mental illness may impair a person’s ability to operate a business, including an illegal business such as drug sales.

In city or county jails, 17.5 percent of prisoners suffer delusions, with 13.7 percent experiencing hallucinations.⁸⁶

The above data are consistent with other studies, which have found that the percentage of the population which is incarcerated for serious violent crimes consists disproportionately of persons who are seriously mentally ill.⁸⁷

80. OREGON DEPARTMENT OF CORRECTIONS, INMATE POPULATION PROFILE FOR 12/01/2013, available at http://www.oregon.gov/doc/RESRCH/docs/inmate_profile.pdf (last accessed Aug. 21, 2015).

81. Adam Geller, *Jails Struggle with Mentally Ill Inmates*, HUFFINGTON POST (July 14, 2014), available at http://www.huffingtonpost.com/2014/07/14/mentally-ill-prisoners_n_5586065.html (last accessed Aug. 21, 2015).

82. Robert D. Morgan et al., *Treating Offenders with Mental Illness: A Research Synthesis*, 36 LAW & HUM. BEHAV. 37 (2012).

83. U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (2006).

84. *Id.* at 2.

85. *Id.*

86. *Id.*

87. Seena Fazel & John Danesh, *Serious Mental Disorder in 23000 Prisoners: A Systematic Review of 62 Surveys*, 359 THE LANCET 545 (2002) (analyzing 62 surveys across 12 countries published between 1966 and 2001 shows that for imprisoned persons, 3.7 percent had psychotic illnesses, 10 percent major depression, 47 percent antisocial personality disorder and 65 percent a personality disorder; for women, the figures were 4 percent psychotic, 12 major depression, 21

Obviously it would not make sense as a violent crime prevention strategy to force every alcoholic into treatment (including confined inpatient treatment) simply because a minority of them are violent. The same is true for persons with schizophrenia, affective disorders, and other mental illnesses. The vast majority of persons with serious mental illness, like the vast majority of persons with substance abuse problems, never commit violent crimes.⁸⁸

III. MASS MURDERS AND PSYCHOSIS

A study of 30 adult mass murderers and 34 adolescent (19 years old or younger) mass murderers found a very high rate of serious mental illness among the adults. Of the adults, 40 percent were psychotic at the time of the mass murder, and another 27 percent “exhibited behaviors suggestive of psychosis.”⁸⁹ As explained previously, “psychosis” is a loss of contact with reality; it usually includes false beliefs about what is taking place or who one is (delusions), or seeing or hearing things that aren’t there (hallucinations).

Even compared to other mass murderers, the adults suffering from psychosis were far more dangerous. They killed almost twice as many people per incident as did the non-psychotics, and were much more likely to attack strangers. Indeed, in all of the incidents in which all of the targets were complete strangers, the killer was psychotic.⁹⁰

percent antisocial personality disorder, and 42 percent any personality disorder.); H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVICES 483 (1998) (6 to 15 percent of persons in jail, and 10 to 15 percent of persons in prison have severe mental illness); Larry Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 AM. J. PSYCHIATRY 33 (1978) (higher arrest rates for violent and non-violent crimes for 301 former state mental hospital patients in San Mateo County, California); Larry Sosowsky, *Explaining the Increased Arrest Rate Among Mental Patients: A Cautionary Note*, 137 Am. J. Psychiatry 1602 (1980) (in previously-cited study, arrest rate for serious violent crimes for ex-patients with no pre-admission arrests was five times greater than for the general county population); Linda A. Teplin, *The Prevalence of Severe Mental Disorder Among Urban Jail Detainees: Comparison With the Epidemiologic Catchment Area Program*, 80 AM. J. PUB. HEALTH 663 (1990) (studying male jail inmates; schizophrenia rate three times greater than in general population, after controlling for demographics); Arthur Zitrin et al., *Crime and Violence Among Mental Patients*, 133 AM. J. PSYCHIATRY 142 (1976) (in two-year periods before admission and after release from Bellevue Hospital, patients had a higher arrest rate than the general population).

88. Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 101–36 (John Monahan & Henry J. Steadman eds., 1994).

89. J. Reid Meloy et al., *A Comparative Analysis of North American Adolescent and Adult Mass Murderers*, 22 BEHAV. SCI. & L. 291, 297 (2004).

90. *Id.* at 300.

Further, the majority of adults and adolescents appeared to have narcissistic, antisocial, paranoid and/or schizoid personality disorders.⁹¹ Notably, “In virtually all cases of adult and adolescent mass murder, psychiatric treatment was either unavailable or underutilized.”⁹²

Mass murders are very atypical but highly publicized crimes in America. *USA Today* has constructed an online database of mass murders (incidents with more than four dead victims) since 2006. In seven years, these incidents totaled more than 900 deaths,⁹³ or about 0.7 percent of all U.S. murders.⁹⁴ Mass murders fit into four categories:

- family murders;
- public murders;
- mass murders resulting from a robbery or burglary; and
- other.

The 36 public mass murders since 2006 have received significant attention. Yet the family mass murders are much more common: 117 since 2006 (and many of which do not involve firearms). The mass murders as parts of robberies or burglaries incidents are almost as common as the public mass murders: 31 cases, but almost unknown outside the town where they take place.⁹⁵

Public mass murders receive enormous publicity. The far more typical murders in the U.S. involve only one or two dead victims. Unless involving someone famous, the fatal acts are seldom considered worthy of news coverage outside the community in which they are perpetrated.

Mass murders are distinct outliers from the average murder in the United States. Nonetheless, thoughtful actions that state legislators take to deal with the public mass murder cases can also prevent some of the hundreds of individual murders and tens of thousands of other

91. *Id.* at 297. Schizoid Personality Disorder is long-term detachment from social relationships, coupled with very limited emotional range in communicating with other people. DSM-5, *supra* note 1, at 652–55.

92. Meloy, *supra* 89, at 304. The same is true for homeless people who are mentally ill. See generally E. FULLER TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL (1988); CRAMER, MY BROTHER RON, *supra* note 38.

93. *Explore the Data on U.S. Mass Killings Since 2006*, USA TODAY, available at <http://www.usatoday.com/story/news/nation/2013/09/16/mass-killings-data-map/2820423/> (last accessed Aug. 21, 2015).

94. FBI, CRIME IN THE UNITED STATES, tbl.1, (2012).

95. *Id.* at 20.

violent felonies committed each year by severely mentally ill offenders.

It is therefore worth considering how current state mental health laws and their enforcement have failed the citizens. As is typical with other mass murderers,⁹⁶ the killers at the Aurora theater, Sandy Hook Elementary, Tucson, and the Washington Navy Yard had given clear signs of serious mental illness problems to police, family, or mental health workers. Unfortunately, state commitment laws and practice failed the victims in all four incidents, as will be explained in Part VIII.

Besides the just-cited examples, there are many other cases of notorious multiple homicides where the perpetrator was recognized well in advance of the crime as mentally ill, and in need of treatment. These include John Linley Frazier,⁹⁷ Patrick Purdy,⁹⁸ Laurie Wasser-

96. Laurie Goodstein & William Glaberson, *The Well-Marked Roads to Homicidal Rage*, N.Y. TIMES, Apr. 10, 2000 at A1; CENT. FL. INTELLIGENCE EXCH., ACTS OF VIOLENCE ATTRIBUTED BY BEHAVIORAL AND MENTAL HEALTH ISSUES (2013) (study of mass shooters from Jan. 2011 to May 2013; 79 percent “demonstrated signs of continuous behavioral health issues and mental illness”).

97. John Linley Frazier first exhibited symptoms of schizophrenia in his early twenties. Fixated on ecology, after a traffic accident he became convinced that God had given him a mission to rid the Earth of those who were altering the natural environment. Frazier’s mother and wife recognized how seriously ill he was, and tried to obtain treatment for him, but he refused. In October 1970, Frazier warned them that “some materialists might have to die” in the coming ecological revolution. The following Monday, Frazier murdered “Dr. Victor M. Ohta, his wife, their two young sons, and the doctor’s secretary.” DONALD T. LUNDE, *MURDER AND MADNESS* 49–52 (1976).

98. Patrick Purdy, a mentally ill drifter, used his Social Security Disability payments to buy guns, while having a series of run-ins with the law. After one suicide attempt in jail in 1987, a mental health evaluation concluded that he was “a danger to his health and others.” *Gunman ‘Hated Vietnamese’*, PRESCOTT COURIER, Jan. 19, 1989, at 2. In January 1989, Purdy went onto a schoolyard in Stockton, California with a Kalashnikov rifle, murdered five children and wounded twenty-nine others, before taking his own life. *Slaughter in a School Yard*, TIME, Jan. 30, 1989, at 29.

man Dann,⁹⁹ Buford Furrow,¹⁰⁰ Larry Gene Ashbrook,¹⁰¹ David W. Logsdon,¹⁰² Russell Eugene Weston, Jr.,¹⁰³ and Jennifer Sanmarco.¹⁰⁴

99. Federal prosecutors held back for a few days from indicting Laurie Wasserman Dann in May 1988 for a series of harassing and frightening phone calls—and in those few days, she went on a rampage, killing one child in an elementary school, wounding five children and one adult, and distributing poisoned cookies and drinks to fraternities at Northwestern University. She had a history of odd behavior going back at least two years, riding the elevator in her apartment building for hours on end. *Police Still Unraveling Trail Left by Woman in Rampage*, N.Y. TIMES, May 22, 1988, at 16.

100. Buford Furrow was a member of a neo-Nazi group in Washington State. Conflicts with his wife led her to take him to a mental hospital, where he threatened suicide and “shooting people at a nearby shopping mall.” He threatened nurses with a knife. At trial, he told the judge about his mental illness problems and suicidal/homicidal fantasies. The judge refused to hospitalize Furrow, sending him to jail instead. Released within a few months, Furrow went to Los Angeles in August 1999, where he acted out the fantasy that he had earlier told the court: he shot up a Jewish community center, wounding five people, and murdering an Asian-American mail carrier nearby. Jaxon Van Derbeken et al., *L.A. Suspect Dreamed of Killing: History of Erratic Behavior, Ties to Neo-Nazi Group*, S.F. CHRON., Aug. 12, 1999, at A1.

101. Larry Gene Ashbrook gave plenty of warning, writing letters to local papers referring “to encounters with the CIA, psychological warfare, assaults by co-workers and being drugged by police.” Neighbors had long noticed his bizarre behavior—exposing himself in response to laughter that he thought (incorrectly) was directed at him. In September 1999, he went into a Fort Worth, Texas Baptist Church. He screamed insults about the worshippers’ religion, then killed seven people inside before killing himself. Jim Yardley, *Deaths in a Church: The Overview; An Angry Mystery Man who Brought Death*, N.Y. TIMES, Sept. 17, 1999; *Tapes, Letters Reveal Gunman’s Chilling Actions, Thoughts*, CNN, Sept. 17, 1999.

102. In April 2007, David W. Logsdon of Kansas City, Missouri, beat to death a neighbor, Patricia Ann Reed, and stole her late husband’s rifle. At the Ward Parkway Center Mall, he shot and killed two people at random, wounding four others. Only the fortuitous arrival of police, who shot Logsdon to death, prevented a larger massacre. Maria Sudekum Fisher, *Mall Shooter Used Dead Woman’s Home While She Was Still Inside*, TOPEKA CAPITAL-JOURNAL, May 3, 2007. According to Logsdon’s sister, Logsdon had a history of mental illness and alcoholism. *Id.* His family contacted police over Logsdon’s deteriorating mental condition and physical conditions in Logsdon’s home. *Id.* The police took Logsdon to a mental hospital for treatment in October 2005, concerned that he was suicidal. *Id.* He was released six hours later with a voucher for a cab and a list of resources to contact. *Id.* The problem was not that the law prevented Logsdon from being held. Instead, Logsdon’s early release was because of a shortage of beds in Missouri public mental hospitals. In addition, Missouri in 2003 had eliminated mental health coordinator positions in its community mental health centers as a cost-cutting measure. See Eric Adler, *Case Points up a Crisis in Care*, KAN. CITY STAR, May 1, 2007, at A1; Maria Sudekum Fisher, *Mall Gunman Planned to “Cause Havoc,”* HOUS. CHRON., May 1, 2007.

103. After Russell Eugene Weston, Jr., shot two police officers at the U.S. Capitol in 1999, he explained to the court-appointed psychiatrist that he needed to do it because “Black Heva,” the “most deadliest disease known to mankind,” was being spread by cannibals feeding on rotting corpses. Bill Miller, *Capitol Shooter’s Mind-Set Detailed*, WASH. POST, Apr. 23, 1999 at A1. He needed to get into the Capitol “to gain access to what he called ‘the ruby satellite,’ a device he said was kept in a Senate safe.” *Id.* Weston explained that the two “cannibals” he had shot to death, police officers Jacob J. Chestnut and John M. Gibson, were “not permanently deceased.” *Id.* Weston explained that he needed access to the satellite controller so that he could turn back time. *Id.* Before this incident, Weston had been involuntarily hospitalized for fifty-three days in Montana after threatening a neighbor, but he was then released. *Id.* According to Weston’s parents, he had been losing the battle with schizophrenia for two decades before he went to the Capitol. *Id.*

104. An employee of the Postal Service, Jennifer Sanmarco was removed from her Goleta, California, workplace in 2003 because she was acting strangely, and placed on psychological

IV. LEGAL STANDARDS FOR DEPRIVATION OF THE RIGHT TO KEEP AND BEAR ARMS

When the Second Amendment was ratified in 1791, and then made enforceable against the states by the ratification of the Fourteenth Amendment in 1868, there were no laws against firearms possession by the mentally ill. The first such laws did not appear until after 1930, when the Uniform Firearms Act (a model law adopted by some states) forbade delivery of a pistol to a person of “unsound mind.”¹⁰⁵

The federal Gun Control Act of 1968 made possession of a firearm or ammunition a federal felony for anyone “who has been adjudicated as a mental defective or who has been committed to a mental institution.”¹⁰⁶

By regulation, this is defined to mean “A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetence, condition, or disease: (1) is a danger to himself or others; [or] (2) Lacks the mental capacity to contract or manage his own affairs.”¹⁰⁷ Further: “Committed to a mental institution” means:

formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.¹⁰⁸

The Supreme Court’s decision in *District of Columbia v. Heller* expressly recognized the constitutionality of mental illness restrictions: “nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by . . . the mentally

disability. She moved to Milan, New Mexico, where her neighbors described her as “crazy as a loon.” “A Milan businessman said he sometimes had to pick her up and bring her inside from the cold because she would kneel down and pray, as if in a trance, for hours.” She returned to the Goleta mail sorting facility in January 2006—and murdered five employees, before taking her own life. Martin Kasindorf, *Woman Kills 5, Self at Postal Plant*, USA TODAY, Feb. 1, 2006; Jim Maniaci, *Crazy as a Loon*, GALLUP [N.M.] INDEP., Feb. 2, 2006.

105. Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376–77 (2009).

106. 18 U.S.C. § 922(g)(4) (2014). There is a parallel provision making the transfer of firearms or ammunition to such a person into a felony. 18 U.S.C. § 922(d)(4) (2014).

107. 27 C.F.R. § 478.11 (2015).

108. *Id.*

ill.”¹⁰⁹ The Court described such prohibitions as “presumptively lawful.”¹¹⁰

A. What is a commitment?

1. Federal standards on short-term involuntary commitment

Federally, there is a circuit split regarding short-term involuntary commitments. In the 2012 case of *United States v. Rehlander*, the First Circuit held that the “commitment” which triggers a lifetime gun ban under 18 U.S. Code section 922(g)(4) does not include a short involuntary hospitalization. The First Circuit explained the arms rights deprivation would be permissible if it were “a temporary suspension of the right to bear arms pending further proceedings. It could also be different if section 922 permitted one temporarily hospitalized on an emergency basis to recover, on reasonable terms, a suspended right to possess arms on a showing that he no longer posed a risk of danger.”¹¹¹

In contrast, the Fourth Circuit in the 1999 *United States v. Midget* upheld the application of 922(g)(4) to short involuntary commitments, which had no judicial authorization.¹¹² However, *Midget* dates from a period when some lower federal courts, including the Fourth Circuit, labored under the misunderstanding that ordinary American citizens had no Second Amendment rights.¹¹³ Accordingly, it is not strong authority in the era following *Heller* and *McDonald*, in which the Supreme Court has instructed that the Second Amendment is not a “second-class right” which can be “singled out for special—and specially unfavorable—treatment.” Rather, the same “body of rules” gov-

109. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also McDonald v. Chicago*, 561 U.S. 742, 786 (2010) (*Heller* “does not cast doubt” on laws against gun possession by the mentally ill).

110. *Id.* at 626–27 n.26. The phrase “presumptively lawful” does not mean that the presumption is irrebuttable. Further, if a new restriction on the mentally ill is not of the same type as previous “longstanding” restrictions, there might not be any presumption of lawfulness; the government would bear the burden of proving it constitutional, as is always the case when heightened scrutiny is involved.

111. *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012).

112. *United States v. Midget*, 198 F.3d 143, 147 (4th Cir. 1999).

113. *District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008) (criticizing lower courts which “overread” the Supreme Court’s 1939 *United States v. Miller*, and whose “erroneous reliance” on their misinterpretation of *Miller* led them to “nullify” the Second Amendment); *Id.* at 638 n.2 (Stevens, J., dissenting) (citing the Fourth Circuit’s *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) as among the decisions which interpreted *Miller* as denying Second Amendment rights to anyone who is not in a militia).

erns the Second Amendment as “the other Bill of Rights guarantees” that have been incorporated.¹¹⁴

Interpreting the federal statute, the Nebraska Supreme Court took the modern approach in *Gallegos v. Dunning*.¹¹⁵ Joseph Gallegos was a veteran with post-traumatic stress disorder (PTSD) and depression, and whose marriage was ending in divorce. He voluntarily went to a veteran’s hospital for treatment. During intake, he explained that he had homicidal and suicidal thoughts, but would not act on them because of his religious beliefs.¹¹⁶ A physician at the hospital filed a petition to the state Mental Health Board (MHB), asking that Gallegos be kept at the hospital. The MHB ordered Gallegos held for one week, and scheduled a hearing for him in the middle of that week. At the hearing, Gallegos asked for and was granted a 90-day continuance, so that he could voluntarily undergo treatment. He did so, and was later discharged. The MHB petition was dismissed. His treating physician’s records stated that Gallegos was no longer a danger to himself or others.

Several years later, Gallegos sought to purchase a handgun, and register it with his county sheriff, as required by state law. The registration request was denied, because Gallegos’s voluntary treatment had been reported to the FBI’s National Instant Check System (NICS), the national database of “prohibited persons.”

Like the Fifth and Eighth Circuits, the Nebraska Supreme Court looked to state law to determine what was a “formal commitment.”¹¹⁷ The state Mental Health Board had never made a finding by clear and convincing evidence that Gallegos was dangerous, which was what Nebraska law required for a formal commitment. Accordingly, Gallegos was not prohibited from possessing a firearm under 18 U.S.C. § 922(g)(4), and the sheriff was ordered to allow Gallegos to register his gun.

In Colorado, when a person has been involuntarily held for 72-hour observation or short-term treatment (up to three months), the person’s name is sent to the FBI’s National Instant Criminal Background Check System as having been committed against his will. After three years, Colorado removes that person from the prohibited per-

114. *McDonald v. Chicago*, 561 U.S. 742, 778–80 (2010).

115. *Gallegos v. Dunning*, 277 Neb. 611 (2009).

116. *Id.* at 612.

117. *Id.* at 614 (citing *United States v. Giardina*, 861 F.2d 1334 (5th Cir. 1988); *United States v. Hansel*, 474 F.2d 1120 (8th Cir. 1973)).

sons list if he has not been subject to additional commitment orders or outpatient treatment orders.¹¹⁸ The submission of the records for the 72-hour observational holds is inconsistent with the approach in *Rehlander* and *Gallegos*.

2. State standards on commitment

Some states have firearms restrictions which are more severe than federal law. In Virginia, a voluntary commitment is treated the same as an involuntary commitment. As a result, the person who voluntarily commits himself forfeits the right to arms. This has the unfortunate consequence of discouraging people from seeking treatment.¹¹⁹

The Pennsylvania Superior Court upheld a lower court's determination that a person had been involuntarily committed, within the meaning of state law, when he went to a mental health facility, and was then detained there for four days under a physician's order because of his suicidal thoughts.¹²⁰

In California, a person can be held for up to 72 hours, based on the order of a government employee or a physician.¹²¹ This automatically results in a five-year loss of the right to keep and bear arms, even if the intake physician at a facility discharges the person immediately. The only way for a person's gun rights to be restored before the end of the five years is to bring a section 8103 hearing in court, where the government must then prove by a preponderance of the evidence that the plaintiff is still dangerous. The California intermediate court of appeals upheld this system against a challenge brought under the Second and Fourteenth Amendments.¹²²

A more positive attitude towards due process is followed by Minnesota. Firearms disqualifications for mental health reasons must be

118. C.R.S. § 13-9-123 (2010).

119. Robert Luther, III, *Mental Health and Gun Rights in Virginia: A View from the Battlefield*, 40 N.E. J. ON CRIM. & CIV. CONFINEMENT 345, 349 (2014).

120. *J.C.B. v. Penn. State Police*, 35 A.3d 792 (Pa. Super. Ct. 2012). Pennsylvania's "302" commitments are not a "formal commitment" for purposes of federal law, according to the ATF. Letter from Lawrence Duchnowski, Special Agent in Charge, Dep't of Treasury, Bureau of Alcohol, Tobacco, and Firearms, to Jon Pushinsky, Attorney (Sept. 4, 1996) (on file with author). Nevertheless, about 70 to 75 percent of the mental health records which Pennsylvania transmits to the federal government are for 302 commitments. Moriah Balingit, *Pa. Sends Mental Health Data for Gun Checks*, PITTSBURGH POST-GAZETTE, Jan. 19, 2013. New Jersey is likewise submitting voluntary admissions to the NICS database, in contravention of the federal regulation. David Levinsky, *413,000 NJ Mental Health Records Submitted for Gun Checks*, BURLINGTON COUNTY TIMES, Aug. 27, 2013.

121. CAL. WELF. & INST. CODE § 5150 (West 2014).

122. *People v. Jason K.*, 188 Cal. App. 4th 1545, 116 Cal. Rptr. 3d 443 (2010).

based on a commitment hearing which had full due process, and which resulted in the finding of certain specific conditions.¹²³

B. Restoration of Rights

The federal Gun Control Act of 1968 was a much more severe law than its state predecessors. Previous state laws had typically imposed prohibitions only for a period of years (rather than lifetime) for convicted criminals, or had only imposed bans for certain felonies (rather than for all felonies, including non-violent ones), or had only applied to handguns, rather than all guns. Or a state's gun licensing system might leave the licensing authority with some discretion to issue a license to a convicted person, depending on the licensor's evaluation of the circumstances.¹²⁴

The consequences of the federal lifetime ban were certainly anomalous. Weld County, Colorado, Sheriff John Cooke recalled one elderly citizen in his county who, around 2013, had been forbidden to buy a gun, because in the 1950s, the then teenager had been convicted of vehicular homicide. The senior citizen thought it strange that he was allowed to have a driver's license and drive in public (using the type of instrument which had led to an innocent person's death) yet he was forbidden to possess a firearm (an instrument which he had never misused), even at home.

The severity of the federal system of a lifetime bans was mitigated by a process for the restoration of firearms rights. A convicted felon could petition the federal Bureau of Alcohol, Tobacco and Firearms (BATF), and the Bureau would have discretion to restore rights, taking into account all the circumstances about the person. Unfortunately, the restoration of rights system was only for convicted felons (who could try to prove that they had gone straight), and was not available to persons in other prohibited categories (such a person who had briefly been mentally ill decades ago, and had been fine for a very long time).

A federal district court ruled this system to be an Equal Protection violation, because it "in effect creates an irrebuttable presumption that one who has been committed, no matter what the

123. MINN. STAT. § 624.713-1(3) (2014). Subdivision 4 provides a process for the restoration of rights.

124. C. Kevin Marshall, *Why Can't Martha Stewart have a Gun?*, 32 HARV. J.L. & PUB POL'Y 695 (2009).

circumstances, is forever mentally ill and dangerous.”¹²⁵ The case went to the Supreme Court.¹²⁶ Before the Supreme Court ruled, Congress enacted the Firearm Owners’ Protection Act of 1986, which made restoration of rights potentially available for all classes of prohibited persons, not just for convicted felons.¹²⁷

Having fixed the restoration system in 1986, Congress then broke it in 1992, with an appropriations rider that forbade BATF to spend money processing rights restoration applications.¹²⁸ The defunding via appropriations has continued ever since.¹²⁹

The Supreme Court refused to do anything about the problem. In the 2002 case *United States v. Bean*, the Court ruled that Bean had no standing to challenge the Bureau’s refusal to process his restoration of rights petition; the Bureau’s permanent “inaction” was not the same as a “denial.” There being no final agency “action,” Bean had no standing to raise a Due Process challenge to the deprivation of his statutory right to consideration of his rights restoration petition.¹³⁰

C. The 2007 NICS Improvement Amendment Act

The Virginia Tech murders in 2007 finally spurred Congress to begin to fix the broken system. The NICS Improvement Amendment Act offered states grants to do a better job of providing their records (e.g., of mental health commitments) to the FBI’s National Instant Criminal Background Check System (NICS). One of the conditions for the grants was that the states had to have a restoration process for all types of prohibited persons.¹³¹ The federal government would then

125. *Galiato v. Dep’t of the Treasury*, 602 F. Supp. 682, 689 (D.N.J. 1985).

126. *U.S. Dep’t of the Treasury v. Galiato*, 477 U.S. 556 (1986).

127. Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), amending 18 U.S.C. § 925(c). *See* 27 C.F.R. § 478.144(e) (stating that rights restoration for a commitment allowed only if “a court, board, commission, or other lawful authority” has held the individual “to have been restored to mental competency, to be no longer suffering from a mental disorder, and to have had all rights restored”).

128. Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 102-393, 106 Stat. 1732 (1993). The defunding was passed at the urging of the Violence Policy Center, a gun prohibition organization.

129. Consolidated Appropriations Act, Pub.L. No. 113-76, 128 Stat. 5, 57 (2014).

130. *United States v. Bean*, 537 U.S. 71, 75-76 (2002).

131. National Instance Background Check System Improvement Amendment Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008) (“[I]f the person’s record and reputation are such that the person would not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”).

treat a state restoration of rights as equivalent to the restoration contemplated in 18 U.S.C. § 925(c).¹³²

However, not all states have implemented rights restoration. One, which has not, is Michigan. Clifford Tyler had been involuntarily committed for one month, while undergoing a divorce. He was discharged, and remained mentally healthy for the next 28 years. Yet he was unable to purchase a firearm, so he brought suit in federal court for the restoration of his rights. The Sixth Circuit panel ruled (in a decision that has since been granted en banc review) that strict scrutiny is the norm in Second Amendment cases, and that, as applied to Tyler, the lifetime federal gun prohibition based on involuntary commitments was unconstitutional.¹³³

As of 2007, there were slightly under 300,000 disqualifying mental health records in the NICS database.¹³⁴ By the end of 2013, there were over 3.2 million such records.¹³⁵ In 2014, the NICS system denied 90,885 attempted purchases; of these, 3,557 were for mental health adjudications.¹³⁶

D. Limitations on what gun control can accomplish

It is possible that background checks, which include mental health records, might temporarily stop a mentally ill person from acquiring a

132. The federal government has not promulgated regulations for minimum standards for rights restoration. However, ATF says that its policies for what makes a mental health restoration process compliant with the NICS Improvement Act are as follows: the restoration program must be formally established by statute, regulation, or administrative order; it must allow petitions by persons who are disqualified under 18 U.S.C. § 922(g)(4); there must be a board, commission, or other lawful authority that will consider petitions, but it may not grant petitions arising from a commitment in a different states; the applicant must have the opportunity to present evidence; that there must be an independent decision maker; there must be a proper record; there must be findings that the individual is not likely be a danger to self or others, and that granting the relief is not contrary to the public interest; there must be judicial review in which the court may but is not required to defer to the findings below; and the state must inform NICS when restoration is granted. GAO, SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 46–48 (2012).

133. Tyler v. Hillsdale Cnty. Sheriff's Dept. 775 F.3d 308, 343–44 (6th Cir. 2014), *reh'g en banc granted*, *opinion vacated* 775 F.3d 308 (6th Cir. 2015).

134. Swanson, *supra* note 77. The increase came mostly from a dozen states; many other states have contributed few additional records. GAO, *supra* note 11 at 9.

135. FBI, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2013 12 (2013), *available at* <http://www.fbi.gov/about-us/cjis/nics/reports/2013-operations-report> (last accessed Aug. 21, 2015).

136. These figures are derived from subtracting the 1998–2013 cumulative denial figures (provided in *id.*) from the same figures for 1998–2014, which are provided in FBI, FEDERAL DENIALS: REASONS WHY THE NICS SECTION DENIES NOVEMBER 30, 1998 - DECEMBER 31, 2014, *available at* http://www.fbi.gov/about-us/cjis/nics/reports/federal_denials.pdf (last accessed Aug. 21, 2015).

firearm which would be used in a crime; it is also possible that some such individuals might not be able to acquire a substitute firearm from a black market source, or by theft. It is unrealistic, however, to expect that any laws on gun acquisition would stop mass killers.

“Tighter restrictions on gun purchasing—for example, eliminating multiple gun sales and closing the gun-show loophole—may help reduce America’s gun violence problem generally, but mass murder is unlike most other forms of violent conflict,” wrote criminologist James Alan Fox, a professor at Northeastern University who has tracked mass shootings. “Mass killers are determined, deliberate and dead-set on murder. They plan methodically to execute their victims, finding the means no matter what laws or other impediments the state attempts to place in their way. To them, the will to kill cannot be denied.”¹³⁷ This is consistent with the surprising finding that while crimes perpetrated by psychopaths include many unplanned, impulsive incidents, for homicide by psychopaths, 93 percent were planned.¹³⁸ The Sandy Hook attack was by no means the first mass murder committed with stolen guns. It was not even the first such attempt *that week*.¹³⁹

V. PUTTING THE SERIOUSLY MENTALLY ILL IN PRISONS AND JAILS RATHER THAN IN MENTAL INSTITUTIONS

In 1939, a comparative study of 18 European nations resulted in the declaration of “Penrose’s Law”: that there is an inverse relationship between the number of persons in mental institutions and the number of persons in penal institutions.¹⁴⁰ It is not an ironclad rule

137. See Ed Komenda & Jackie Valley, *What Now? Three Mass Shootings in a Week Leave Communities Wondering how to React*, LAS VEGAS SUN, June 15, 2014.

138. Stephen Porter & Sasha Porter, *Psychopathy and Violent Crime*, in *THE PSYCHOPATH* 290 (Hugues Hervé & John C. Yuille eds., 2007). Psychopaths perpetrate about half of all murders of police officers. A.J. PINIZZOTTO & E.F. DAVIS, *FED. BUREAU OF INVESTIGATION, KILLED IN THE LINE OF DUTY: STUDY OF SELECTED FELONIOUS KILLINGS OF LAW ENFORCEMENT OFFICERS* (1992).

139. *Oregon Mall Gunman Identified, Used Stolen Gun In Rampage, Police Say*, CLEVELAND PLAIN DEALER, Dec. 12, 2012 (reporting Jacob Tyler Roberts stole the AR-15 used in the Clackamas Mall shooting). Adam Lanza’s recklessly irresponsible mother was planning on buying him a firearm for Christmas, so if he had just waited a few weeks, he would not even have had to steal her guns.

140. Lionel Sharples Penrose, *Mental Disease and Crime: Outline of a Comparative Study of European Statistics*, 18 BRIT. J. MED. PSYCHOL. 1 (1939).

under all circumstances, but it has held up well in various studies of subsequent decades.¹⁴¹

Today, absurdly, “the United States has three times more individuals with severe mental illnesses in prison than in psychiatric hospitals.”¹⁴² By the mid-1990s, the largest institutional provider of mental health services in the United States was not a state or private psychiatric hospital, but the Los Angeles County Jail.¹⁴³

The criminal justice system is not designed for this situation. Not surprisingly, even with the best of intentions, the results are terrible. Penal institutions often fail to provide “even minimally appropriate mental health services for prison inmates.”¹⁴⁴

When in prison, mentally ill inmates are much more likely to be the victims of sexual assault. In a study covering a six-month period, one in twelve male mentally ill prison inmates was a sexual assault victim, compared to one in thirty-three inmates who were not mentally ill; the disparity is even greater for mentally ill female prison inmates.¹⁴⁵

A. Deinstitutionalization

One reason that the mentally ill are in prisons and jails rather than in mental institutions is the deinstitutionalization movement, which began in the 1960s.

141. Pål Hartvig & Ellen Kjelsberg, *Penrose's Law Revisited: the Relationship Between Mental Institution Beds, Prison Population and Crime Rate*, 63 *NORD. J. PSYCHIATRY* 51 (2009) (Norway 1930–2004); B.D. Kelly, *Penrose's Law in Ireland: an Ecological Analysis of Psychiatric Inpatients and Prisoners*, 100 *IR. MED. J.* 373 (2007) (Ireland 1963–2003); Miklós Péter Kalapos, *Penrose's Law: Reality or Fiction? Mental Health System and the Size of Prison Population - International Overview*, 150 *ORVOSI HETILAP* 1321 (2009).

142. Robert D. Morgan et al., *Treating Offenders with Mental Illness: A Research Synthesis*, 36 *LAW & HUM. BEHAV.* 37, 37 (2012); E. FULLER TORREY ET AL., *TREATMENT ADVOCACY CENTER, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES* (2010).

143. Likewise, in Colorado, the largest housing facility for the mentally ill is the Denver City & County Jail. Over 500 jail inmates (about twenty percent of total inmates) there are mentally ill; at the state psychiatric hospital in Pueblo, there are about 400 inmates, most of whom are there by court order. *TREATMENT ADVOCACY CENTER, THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY* 35 (2014). The county Sheriffs, who are in charge of the county jails in every Colorado county, described the increase in mentally ill inmates as the “top problem facing sheriffs statewide. By default, we’ve become the mental health agencies for the individual counties.” *Id.* See Kristin Jones, *Untreated: Steep Costs for Mentally ill Inmates*, *ROCKY MOUNTAIN PBS I-NEWS*, May 11, 2014.

144. Morgan, *supra* note 142.

145. Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates with and without Mental Disorders*, 58 *PSYCHIATRIC SERV.* 1087 (2007) (studying 7,582 inmates in a mid-Atlantic state prison system, consisting of 12 prisons for men and one for women).

As of the early nineteenth century, anyone could arrest the “furiously insane.” Then, the Sheriff would hold them until a court could make a decision about long-term institutionalization.¹⁴⁶ Someone who was obviously mentally ill stood a good chance of being diverted into the mental health system—such as it was back then—before placing himself or others at serious risk. The opening of state mental hospitals in Vermont (1836) and in New Hampshire (1840) reduced family murder rates.¹⁴⁷

Legitimate concerns about abuse of power led states to increasing formalization of the commitment process, especially for long-term commitment. Ohio was an early example, in 1824.¹⁴⁸ By the latter half of the nineteenth century, the laws required due process in every state but Maine.

The exact mechanisms varied. Some states mandated a jury trial, while others relied on panels of experts (“commissions of lunacy”). The general rule was that a person could not be locked up for more than a short time without some legal process; in practice, there were situations in which due process was not followed.¹⁴⁹ Because commitment was a civil procedure, the civil law standard of proof applied: was there a preponderance of evidence that a person was mentally ill, and would benefit from hospitalization?

By the early 1960s, most states relied on emergency commitment procedures, which provided a mechanism for hospitalizing persons believed to be a danger either to themselves or to others, or in need of treatment to prevent an irretrievably bad situation. The justification for allowing emergency hospitalization based only on a determination by a doctor or police officer was simple: the risk of leaving such a

146. ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES* 419–20 (2d ed. 1949).

147. Randolph A. Roth, *Spousal Murder in Northern New England, 1776-1865*, in *OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA* 72 (Christine Daniels & Michael V. Kennedy eds., 1999).

148. 29 Acts of a General Nature, Enacted, Revised and Ordered to be Reprinted, At the First Session of the Twenty-Ninth General Assembly of the State of Ohio 224 (1831) (1824 session law authorizing justices of the peace to accept applications by relatives or any overseer of the poor for commitment, with an inquest of seven jurors to return a verdict).

149. HENRY F. BUSWELL, *THE LAW OF INSANITY IN ITS APPLICATION TO THE CIVIL RIGHTS AND CAPACITIES AND CRIMINAL RESPONSIBILITY OF THE CITIZEN* 25–36 (Little, Brown & Co., 1885). Spot checking of the complete collection of all state laws in GEORGE LEIB HARRISON, *LEGISLATION ON INSANITY: A COLLECTION OF ALL THE LUNACY LAWS OF THE STATES AND TERRITORIES OF THE UNITED STATES TO THE YEAR 1883, INCLUSIVE* (1884), confirms Buswell’s claim; see also Isham G. Harris, *Commitment of the Insane, Past and Present, in the State of New York*, 7 N.Y. STATE J. MED. 487 (1907) (detailed account of the increasing formalization of the commitment procedure in that state).

person unrestrained exceeded the temporary loss of the patient's liberty, especially because the commitment was supposed to be short-term. But some state laws provided for extensions without due process, and a few, such as Maine, had no time limit for an emergency commitment.¹⁵⁰

Some emergency commitment procedures were too easy. A variety of movements and concerns converged in the 1960s and 1970s to destroy less humane practices of caring for the mentally ill.¹⁵¹ Today, however, the situation has gone too far the other way.

B. Dealing with serious mental illness on a post-hoc basis in the criminal justice system is fiscally wasteful

Mental health hospitals are quite expensive. Michigan's state system spends over 260,000 per bed annually.¹⁵² In Virginia, the cost is \$214,000 per year.¹⁵³ A "forensic hospital" (for persons found not guilty by reason of insanity, and for similar persons) is even more expensive; St. Elizabeth Hospital in Washington, D.C., spends about \$328,000 per patient-year.¹⁵⁴ To add capacity, there would have to be extensive spending on construction costs, since many former mental hospitals have been torn down or converted to other uses.¹⁵⁵

Outpatient treatment is expensive too—\$44,000 for a full year of outpatient treatment for each patient in Virginia.

Because mental hospitals or quality outpatient treatment cost a lot of money, there is reluctance by state legislatures to appropriate sufficient funds. But having to pay for the criminal justice system to deal with mentally ill homicide perpetrators costs a lot of money too. The average U.S. criminal justice system cost for murder in 2013 dollars was \$461,208.¹⁵⁶ As for homicide perpetrators who are mentally

150. ALEXANDER D. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 751-52 (1974).

151. See generally CRAMER, *MY BROTHER RON*, *supra* note 38, at chs. 7, 9, 13-15 (discussing the various movements that came together, sometimes unwittingly).

152. Dominic A. Sisti, Andrea G. Segal & Ezekiel J. Emanuel, *Improving Long-term Psychiatric Care: Bring Back the Asylum*, 313 *JAMA* 243, 244 (2015).

153. Anny Shin, *She Fought for Patients' Rights, Then She Was Put in a Hospital Against Her Will*, *WASH. POST*, Jan. 31, 2015.

154. Sisti et al., *supra* note 152, at 244.

155. Shin, *supra* note 153.

156. Matt DeLisi et al., *Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders*, 21 *J. FORENSIC PSYCHIATRY & PSYCHOL.* 501, 507 (2010) (costing \$426,255 in 2008). The 2013 figure is based on the 2008 figure, adjusted for inflation by the U.S. Inflation Calculator.

ill, almost all will be indigent; the taxpayer will have to pay for public defenders.

Based on the data in Part II, one can estimate that around 2,500 murders and non-negligent manslaughters are committed annually by severely mentally ill offenders. (Slightly under 20 percent of total homicides.)¹⁵⁷ This means that states are spending about \$1.2 billion a year before sending the offender to prison.

The costs of incarceration after conviction are substantial. Colorado currently spends \$32,335 per year per inmate. A mentally sane murderer who spends 30 years in prison will cost \$1,004,982 in 2013 dollars.¹⁵⁸ However, states are required to provide mental health services for prisoners. (This does not mean that they always do so.) Mentally ill inmates are more expensive to care for than sane inmates. Pennsylvania several years ago found that mentally ill prisoners cost \$51,100 per year, nearly twice as much as sane prisoners (\$28,000 a year).¹⁵⁹ Nationally, the estimated annual prison costs for mentally ill murderers are about \$3.7 billion.

The costs of dealing with mental illness post-hoc in the criminal justice system do not end when the prisoner is released. Ex-prisoners with serious mental illness are two to three times more likely to recidivate than other prisoners.¹⁶⁰ So in the long run, greater spending up-front to make treatment more available can partly be paid for via long-term savings in the criminal justice system.

Further, early investment in treatment will increase tax revenue in the long run. When fewer people are killed or injured, they can remain engaged in their on-going productive activities, thus helping the economy for everyone, and paying taxes.¹⁶¹

When we consider the costs to *victims*, such as lost earnings, medical care, pain and suffering, and so on, it seems clear that expensive mental health treatment up-front is a net cost savings to society.

157. FBI, *Crime in the United States 2012*, tbl.16 (2013).

158. *Budget Hearing Before Colorado Dep't of Corrections*, (2012) (statement of Tom Clements) (prison costs of \$970,060 in 2011 dollars). The 2013 equivalent calculated with U.S. Inflation Calculator.

159. Lynne Lamberg, *Efforts Grow to Keep Mentally Ill Out of Jails*, 292 JAMA 555 (2004).

160. Jacques Baillargeon et al, *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103 (2009).

161. One promising initiative is Maryland's planned Center for Excellence on Early Intervention for Serious Mental Illness. It aims to help people in early stages of psychosis, before they deteriorate further. Jonathan Pitts, *New Maryland Mental Health Initiative Focuses on Identifying and Treating Psychosis*, BALT. SUN, Oct. 21, 2013.

Besides that, treatment will help some people with mental illness achieve self-sufficiency, and contribute to society in many ways.¹⁶² The sooner, the better. Early and consistent treatment for schizophrenia can prevent further deterioration.¹⁶³

Currently, the needed mental hospital beds are not available. Since 1955, the number of available mental hospital beds per capita has declined by 95 percent; it has reached a per capita low not seen since 1850.¹⁶⁴ In the United Kingdom, there are 60 mental hospital beds per 100,000 seriously mentally ill persons. In the United States, there are about 11. The National Alliance on Mental Illness argues that at least 50 beds for 100,000 should be the minimum level of availability in the United States.¹⁶⁵

Given that there are about 2.2 million persons in prisons or jails¹⁶⁶ and that a very large fraction of those prisoners are seriously mentally ill,¹⁶⁷ NAMI's proposal for creating about 250,000 new beds, in public or private hospitals, does not seem unreasonable. The taxpayers are already paying the costs for incarcerating lots of mentally ill people after a violent crime was committed. Today, we really no longer have "deinstitutionalization"; rather we have "transinstitutionalization," with people who should have been in mental hospitals ending up in prisons and jails. Having sufficient mental hospitals available might help many of these people avoid ending up in prison after seriously injuring or killing someone.

In short, building more mental health treatment centers is a crucial element of mental health reform, from a crime reduction perspective.

162. The social costs of unemployment resulting from schizophrenia are estimated to be \$32.4 billion. E.Q. Wu et al, *The Economic Burden of Schizophrenia in the United States in 2002*, 66 J. CLINICAL PSYCHIATRY 1122 (2005).

163. Ming T. Tsuang et al., *The Treatment of Schizotaxia*, in EARLY CLINICAL INTERVENTION AND PREVENTION IN SCHIZOPHRENIA 294 (William S. Stone et al. eds., 2004); Tejal Kaur & Kristin S. Cadenhead, *Treatment Implications of the Schizophrenia Prodrome* in BEHAVIORAL NEUROBIOLOGY, *supra* note 34, at 97, 98 (citing studies).

164. E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., NO ROOM AT THE INN: TRENDS AND CONSEQUENCES OF CLOSING PUBLIC PSYCHIATRIC HOSPITALS, tbl. 2 (2012) (citing for 1831–1980, A.L. Stroup & R.W. Manderscheid, *The Development of the State Mental Hospital System in the United States: 1840-1980*, 87 J. WASH. ACAD. SCI. 59 (1988)).

165. NAT'L ALLIANCE ON MENTAL ILLNESS, GRADING THE STATES 2009: A REPORT ON AMERICA'S HEALTH CARE SYSTEM FOR ADULTS WITH SERIOUS MENTAL ILLNESS 33 (2009).

166. LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEPT' OF JUSTICE, BUREAU OF JUSTICE PROGRAMS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2 (2013).

167. *Id.*

VI. MENTAL HEALTH TREATMENT IS HIGHLY EFFECTIVE IN REDUCING HOMICIDE

University of Chicago Law Professor Bernard Harcourt has published two time-series studies using national and state level data to investigate the relationship of mental illness and murder.¹⁶⁸ These studies demonstrate a statistically significant relationship between the total institutionalization rate (the rate of criminal justice prisoners plus mental hospital inmates) and murder rates. As the total institutionalization rate rose, murder rates fell, and vice versa.¹⁶⁹

During the 1970s, as states emptied out their mental hospitals, murder rates rose. People seeking voluntary treatment had a harder time getting it. Involuntary commitment of the dangerously and severely mentally ill also becomes more difficult.¹⁷⁰ The reduction in murder rates in the 1990s occurred partly because states were giving longer sentences to violent criminals, which means that many mentally ill offenders now were going to prison for a long stretch. Unfortunately, many went to prison *after* they had committed a violent felony against someone else.¹⁷¹ It would have been better if they had been sent to a mental hospital for months or years before perpetrating a violent crime, rather than sentenced to a long term in state prison after the crime.

University of California at Berkeley Social Work Professor Steven P. Segal examined the influence of mental health care on variations in state-to-state murder rates. He too found strong evidence that deinstitutionalization has substantially contributed to the murder problem. A startling 27 percent of the state-to-state variation in murder rates can be explained by differences in the strictness of involuntary commitment laws, with easier commitment correlating with lower murder rates. This state-to-state difference is more important than the availability of psychiatric inpatient beds (which explains 20 percent of

168. A time-series study follows a single population or location through a period of time, assessing changes in behavior or symptoms. In contrast, cross-sectional studies compare different populations at a particular point in time.

169. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1766–75 (2006); Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution—Part II: State Level Analysis* (Univ. of Chicago Law & Economics, John M. Olin Working Paper No. 335, 2007), available at <http://ssrn.com/abstract=970341> (last accessed Aug. 21, 2015)

170. Other factors, of course, contributed to this development, but total institutionalization rate explains at least part of the change in murder rates than do other factors.

171. Harcourt, TEX. L. REV., *supra* note 169; Harcourt, Working Paper, *supra* note 169.

the state-to-state variation), and more important than the quality of state mental health care systems.¹⁷²

One benefit of inpatient treatment is that the patient can receive antipsychotic medication. There is considerable research demonstrating that medication, including “second-generation antipsychotics” such as clozapine, risperidone, olanzapine, and quetiapine reduce aggressive behavior.¹⁷³ For some of these, injectable versions which require only a shot every two weeks (or less often), rather than a daily pill(s), are now available, and they improve patient medication adherence.¹⁷⁴ Of course medication can work in outpatient treatment as well, provided that the patient follows the course of medication.¹⁷⁵

In 1990, the U.S. Supreme Court ruled that a prison inmate could be medicated with antipsychotics without consent, based on a determination by an administrative hearing.¹⁷⁶ The decision emphasized the importance of the state’s interest in maintaining prison safety.

172. Steven P. Segal, *Civil Commitment Law, Mental Health Services, and US Homicide Rates*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1449 (2011), available at <http://ken-dras-law.org/national-studies/commitmenthomiciderates.pdf> (last accessed Aug. 21, 2015).

173. Seena Fazel, Johan Zetterqvist, Henrik Larsson, Niklas Långström, Paul Lichtenstein, *Antipsychotics, Mood Stabilisers, and Risk of Violent Crime*, 384 LANCET 1206 (2014) (showing a 45 percent lower violent crime rate when 82,647 Swedish patients took medications from 2006 to 2009); Peter F. Buckley, *The Role of Typical and Atypical Medications in the Management of Agitation and Aggression*, 60 J. CLIN. PSYCHIATRY 52 (1999); Jan Volavka, Julie Magno Zito, Jozsef Vitrai & P. Czobar, *Clozapine Effects on Hostility and Aggression in Schizophrenia*, 13 J. CLIN. PSYCHOPHARMACOLOGY 287 (1993); Peter F. Buckley, Stephen G. Noffsinger, Douglas A. Smith, Debra R. Hrouda & James L. Knoll, IV, *Treatment of the Psychotic Patient who is Violent*, 26 PSYCHIATRIC CLINICS OF N. AM. 231 (2003); Maurizio Fava, *Psychopharmacologic Treatment of Pathologic Aggression*, 20 PSYCHIATRIC CLINICS OF N. AM. 427 (1997); J.W. Swanson, M.S. Swartz & E.B. Elbogen, *Effectiveness of Atypical Antipsychotic Medications in Reducing Violent Behavior among Persons with Schizophrenia in Community-based Treatment*, 30 SCHIZOPHR. BULL. 3 (2004); Jeffrey W. Swanson et al., *Comparison of Anti-Psychotic Medication Effects on Reducing Violence in People with Schizophrenia*, 193 BRIT. J. PSYCHIATRY 37 (2008) (violence was reduced from 16 percent of persons to 9 percent; no reduction for persons with childhood conduct problems). The mechanism by which these medications reduce positive symptoms of schizophrenia appears to be in “blunting the intrusion of aberrant cortical activity into consciousness.” Neal R. Swerdlow, *Integrative Circuit Models and Their Implications for the Pathophysiology and Treatments of the Schizophrenias*, in BEHAVIORAL NEUROBIOLOGY OF SCHIZOPHRENIA AND ITS TREATMENT 555, 567–68 (Neal R. Swerdlow ed., 2010). (“constraining the chaos created by reverberating misinformation.” The effect is often to make hallucinations milder and easier to ignore, and to make delusions “less complex and systematic.”).

174. See, e.g., Serdar Dursun, *An Atypical Long-Acting Injectable Antipsychotic: Implications for Pharmacotherapy of Schizophrenia*, 19 J. PSYCHOPHARMACOLOGY 3 (Supp. 5, Sept. 2005).

175. Jeffrey W. Swanson, Marvin S. Swartz & Eric Elbogen, *Effectiveness of Atypical Antipsychotic Medications in Reducing Violent Behavior Among Persons With Schizophrenia in Community-Based Treatment*, 30 SCHIZOPHRENIA BULL. 3 (2004).

176. *Washington v. Harper*, 494 U.S. 210, 212 (1990); see also COHEN, PRACTICAL GUIDE TO CORRECTIONAL MENTAL HEALTH 7-41 to 7-62 (analyzing *Harper* and related cases).

Courts have also allowed nonconsensual medication in other institutional settings, such as mental hospitals, if there is “imminent danger.”¹⁷⁷ Some courts, such as in Colorado have gone further, and allowed involuntary medication if there is an imminent risk of irreversible deterioration.¹⁷⁸ Other courts allow forced medication when the patient lacks the ability to make an informed decision about treatment, but this non-emergency decision requires an independent judicial determination.¹⁷⁹

Medication is often helpful in reducing psychoses and the “positive” symptoms of schizophrenia. But it does not reduce the “negative” symptoms. Nor does it help more than a little with impaired cognition.¹⁸⁰

177. See, e.g., *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984) (“[I]f a patient poses an imminent threat of harm to himself or others, and only if there is no less intrusive alternative to antipsychotic drugs, may the Commonwealth invoke its police powers without prior court approval . . .”); *Davis v. Hubbard*, 506 F. Supp. 915, 934 (N.D. Ohio 1980) (“Given the significant invasion of fundamental interests that the forced use of psychotropic drugs represents, the risk of danger which the State has a legitimate interest in protecting against must be sufficiently grave and imminent to permit their coerced use. The focus must therefore be in the first instance on the existence of danger, not merely the remote possibility, to others, since it is this which justifies the coercive power of the State.”).

178. *People v. Medina*, 705 P.2d 961, 974 (Colo. 1985) (allowing involuntary administration of a medication if “in the absence of the proposed treatment the patient will likely constitute a continuing and significant threat to the safety of himself or others in the institution. . . . [T]here may be emergency situations requiring a physician or other professional person to override the patient’s refusal of antipsychotic medication in order to protect the patient from inflicting immediate and serious harm on himself, to protect others from a similar danger, or to prevent the immediate and irreversible deterioration of the patient due to a psychotic episode”).

179. See, e.g., *Rogers v. Comm’r Dep’t of Mental Health*, 458 N.E.2d 308, 321–23 (Mass. 1983) (allowing administration without prior court approval “only if a patient poses an imminent threat of harm to himself or others, and only if there is no less intrusive alternative to antipsychotic drugs,” or to prevent the “immediate, substantial, and irreversible deterioration of a serious mental illness.”; in other circumstances, a court hearing must be held for there to be a “substituted judgment decision”); *Rivers v. Katz*, 67 N.Y.2d 485, 496–98 (1986) (“an emergency situation, such as when there is imminent danger to a patient or others in the immediate vicinity”; or when patient lacks ability to make an informed decision, judicial hearing is required, with de novo consideration of the facts, and the state having burden of proof by clear and convincing evidence); *Steele v. Hamilton Cnty. Cmty Mental Health Bd.*, 90 Ohio St. 3d 176, 183–86 (2000) (noting that the state’s “police power” may be used for involuntary medication only when there is an “imminent” risk of harm by or to the patient; *parens patriae* power may be used for forced medication in other circumstances “when the patient lacks the capacity to make an informed decision regarding his/her treatment.”).

180. Dennis H. Kim & Stephen M. Stahl, *Antipsychotic Drug Development*, in *BEHAVIORAL NEUROBIOLOGY OF SCHIZOPHRENIA AND ITS TREATMENT* 123, 125 (Neal R. Swerdlow ed., 2010). But see Sololmon Kalkstein, Irene Hurford, & Ruben C. Gur, *Neurocognition in Schizophrenia*, *CURRENT TOPICS IN BEHAVIORAL NEUROSCIENCE* 373, 386 (2010) (stating that atypical anti-psychotics improve social cognition. Nicotine improves cognition for persons with schizophrenia. This may explain why so many people with schizophrenia smoke.); Deanna M. Barch, *Pharmacological Strategies for Enhancing Cognition in Schizophrenia*, *BEHAVIORAL NEUROBIOLOGY*, *supra*, at 23, 51–60; David L. Braff, *Prepulse Inhibition of the Startle Reflex: A Window on the Brain of Schizophrenia*, in *BEHAVIORAL NEUROBIOLOGY*, *supra*, at 349, 357–58.

Personality disorders, including antisocial personality disorder, cannot be treated by medication, except to the extent that they are producing psychotic symptoms. Dealing with personality disorders requires therapy. Of course all forms of serious mental illness usually also require therapy, not medication alone.

Further, anti-psychotics often have side effects, including raising cardiovascular and metabolic risk (e.g., of a heart attack) by causing weight gain.¹⁸¹

An essential crime-reductive reform of mental illness policy is providing much greater access to treatment, including inpatient hospitalization. Many people voluntarily seek treatment, and too many are turned away due to insufficient resources. Creating the increased capacity will require substantially greater government spending of taxpayer dollars, and greater charitable contributions. The long-run benefits will mitigate the cost to government, and result in a net savings to society.

VII. CIVIL COMMITMENT SHOULD NOT REQUIRE “IMMINENT” DANGER

In Parts VII-IX of this Article, we make the case for involuntary commitment to mental hospitals, and for involuntary commitment to outpatient programs—even in circumstances when a mentally ill person is not “imminently” dangerous. Our proposals would be futile, however, unless there were simultaneously greater financial support to increase bed availability. Addressing the problem of mental illness and crimes requires either higher taxes, or cuts in government spending on other things, or both.

A. The *Lessard* case and the imminence standard

In some jurisdictions, civil commitments are allowed only if there is an “imminent danger” The most important source of the imminent danger standard is the 1972 Wisconsin federal district court case *Lessard v. Schmidt*. *Lessard* defined “imminent danger” as “based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another.” *Lessard* did not expressly say that the danger

181. Jonathan M. Meyer, *Antipsychotics and Metabolics in the Post-CATIE Era*, BEHAVIORAL NEUROBIOLOGY OF SCHIZOPHRENIA, *supra* note 180 23, 23–42 (Neal R. Swerdlow ed., 2010).

would have to be immediate, but many later decisions following *Lessard* did.¹⁸²

The *Lessard* case transformed involuntary commitment law. The case lasted four years, and went to the U.S. Supreme Court twice.¹⁸³ Plaintiff Alberta Lessard, a school teacher, had been running through her apartment complex “shouting that the communists were taking over the country that night.”¹⁸⁴

She had refused to accept new pedagogical techniques for teaching reading, and thus lost her job as an elementary school teacher, and also her position training teachers at Marquette University.¹⁸⁵ She was convinced that “Richard Nixon’s goons” were after her. (Nixon did illegally spy on people,¹⁸⁶ although there is no evidence that he illegally spied on her.)

On the evening when her behavior brought her to the attention of police, she was dangling from the windowsill of her apartment building. In the four decades since she was first taken into custody, she was hospitalized more than a hundred times because of her paranoid delusions and behavior.¹⁸⁷ Her long history of hospitalizations strongly indicates that she was severely mentally ill; her well-documented record plainly shows that she was not a danger to others, but she was a danger to herself, as evidenced by dangling from the windowsill.

There were several significant rules that *Lessard* and similar cases created:

182. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093–94 (E.D. Wis. 1972).

183. “In *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D.Wisc.1972), the first consideration of this case, this court held that the Wisconsin civil commitment procedures did not provide adequate due process rights to those who were committed and ordered numerous safeguards be instituted, including adequate notice, the right to counsel, availability of the privilege against self-incrimination, and a speedy hearing. The Supreme Court vacated and remanded the case because the judgment entered did not meet the specificity requirements for injunctive orders of Fed.R.Civ.P. 65(d). *Schmidt v. Lessard*, 414 U.S. 473 (1974). In *Lessard v. Schmidt*, 379 F. Supp. 1376 (E.D.Wisc.1974), this court entered a specific judgment in accordance with the prior opinion. The Supreme Court again vacated and remanded, this time ‘for further consideration in light of *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).’ *Lessard v. Schmidt*, 413 F. Supp. 1318, 1319 (E.D. Wis. 1976).

184. E. FULLER TORREY, *THE INSANITY OFFENSE: HOW AMERICA’S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS* 76–78 (2008).

185. For all we know, she was right in refusing. Modern international comparisons regarding reading comprehension scores of U.S. students are very unimpressive.

186. See generally AMERICAN CIVIL LIBERTIES UNION, *WHY PRESIDENT RICHARD NIXON SHOULD BE IMPEACHED* (1973); David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 1 (2006).

187. *Alberta Lessard*, MILWAUKEE JOURNAL-SENTINEL (Dec. 9, 2011), available at <http://www.jsonline.com/multimedia/video/?bctid=1318733908001> (last accessed Aug. 21, 2015).

1. Involuntary commitment procedures, even though done in the interest of a person who may be mentally ill,¹⁸⁸ may not ignore due process requirements. Due process includes the right to be notified of a timely hearing,¹⁸⁹ and the right to be represented by counsel.¹⁹⁰
2. A mentally ill person had a right to the least restrictive alternative available, meaning that if there is some other method of treating a patient that does not involve involuntary hospitalization, the less restrictive alternative must be used.¹⁹¹
3. The preponderance of evidence standard traditionally used in civil commitment proceedings is insufficient. *Lessard* required proof beyond a reasonable doubt.¹⁹²
4. To justify the deprivation of liberty, an involuntary commitment required proof of dangerousness “based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another,” which *Lessard* considered to be “a finding of imminent danger to oneself or others. . . .”¹⁹³

Lessard led other courts to strike down many existing civil commitment laws.¹⁹⁴ *Lessard's* concern about the stigma of involuntary

188. *Lessard*, 349 F. Supp. at 1084 (“State commitment procedures have not, however, traditionally assured the due process safeguards against unjustified deprivation of liberty that are accorded those accused of crime. This has been justified on the premise that the state is acting in the role of *parens patriae*, and thus depriving an individual of liberty not to punish him but to treat him.”).

189. *Id.* at 1092 (“Notice of the scheduled hearing, ‘to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded,’ and it must set forth the basis for detention with particularity.”).

190. *Id.* at 1097–98 (“There seems to be little doubt that a person detained on grounds of mental illness has a right to counsel, and to appointed counsel if the individual is indigent.”).

191. *Id.* at 1095 (quoting *Shelton v. Tucker*, 364 U.S. 479 (1960) (“Even if the standards for an adjudication of mental illness and potential dangerousness are satisfied, a court should order full-time involuntary hospitalization only as a last resort. A basic concept in American justice is the principle that ‘even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.’”).

192. *Id.* at 1095 (“The argument for a stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication. We therefore hold that the state must prove beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous.”).

193. *Id.* at 1093–94.

194. Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 22–24 (2012). (“*Lessard's* least restrictive alternative principle, in particular, was extremely influential.”).

commitment¹⁹⁵ became one of the rationales for the U.S. Supreme Court's 1979 *Addington v. Texas* decision, which required "clear and convincing" proof for involuntary civil commitment.¹⁹⁶ "Clear and convincing" is about halfway in-between the traditional "preponderance" standard, and *Lessard's* "reasonable doubt" rule.

We support the due process improvements since the early 1970s, except for the requirement that the danger be imminent.

When courts struck down commitment laws for including danger that was not imminent, they would point back to *Lessard's* requirement for imminent and substantial danger.¹⁹⁷ Some courts after *Lessard* upheld existing state commitment laws in a particular case only because the state was able to reasonably argue that the patient "would be dangerous to others 'in the immediate future.'"¹⁹⁸ Not all courts agreed that involuntary commitment required imminence, with some state supreme courts accepting "a showing of a substantial risk of serious harm."¹⁹⁹

The effect of *Lessard* and social changes in the 1970s was to strongly discourage involuntary commitment except where a patient was an imminent danger to self or others. Many of the severely men-

195. *Lessard*, 349 F. Supp. at 1089 ("Evidence is plentiful that a former mental patient will encounter serious obstacles in attempting to find a job, sign a lease or buy a house. One commentator, noting that 'former mental patients do not get jobs,' insisted that, '[i]n the job market, it is better to be an ex-felon than ex-patient.'").

196. *Addington v. Texas*, 441 US 418, 425–26 (1979) ("[I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.").

197. *E.g.*, *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980) ("We agree that the danger must be imminent to justify involuntary commitment.") (The decision does not define imminent, but the language quoted from *Lessard* strongly suggests an immediate danger, as evidenced by immediately preceding actions or threats.).

198. *People v. Lane*, 581 P.2d 719, 722 (Colo. 1978) (upholding a continuing involuntary commitment based on previous violent criminal behavior); *People v. Howell*, 586 P.2d 27, 30 (Colo. 1978) (distinguishing the instant case from *Lessard* because Howell had a long history of violent criminal convictions and had been found not guilty by reason of insanity for murder.).

199. *In re Harris*, 654 P.2d 109, 112 (Wash. 1982) (upholding an involuntary commitment statute that did not require immediate danger); *Hatcher v. Wachtel*, 269 S.E. 2d 849, 852 (W.Va. 1980) (quoting the New Jersey Supreme Court, "The risk of danger, a product of the likelihood of such conduct and the degree of harm which may ensue, must be substantial within the reasonably foreseeable future. On the other hand, certainty of prediction is not required and cannot reasonably be expected."); *State v. Krol*, 68 N.J. 236, 260 (1975) ("Commitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future."); *Commonwealth v. Nassar*, 380 Mass. 908, 917 (1980) ("'Immediacy' is linked to the requirement of an enhanced standard of proof in the sense that the forecast of events tends to diminish in reliability as the events are projected ahead in time . . . We may accept, further, that in the degree that the anticipated physical harm is serious—approaches death—some lessening of a requirement of 'imminence' seems justified.")

tally ill, as long as the dangers their mental illness caused were not immediate, were now free to continue a path downward. The broad reading of *Lessard* by some courts seriously aggravated the problem of violence by the severely mentally ill, and also the risk to the severely mentally ill from suicide, violence, homelessness, and exposure-related deaths.²⁰⁰

B. State Laws Reforms Allowing Involuntary Commitment with Due Process, but without a Finding of “Imminent” Danger

1. Virginia

In the aftermath of the mass murder spree at Virginia Tech in April 2007, the Virginia legislature revised its commitment law so that “imminent” dangerousness was no longer required for law enforcement to take a person to a “licensed mental health facility in lieu of arrest.”²⁰¹ Virginia now allows emergency hospitalization if “any responsible person, treating physician” or the magistrate himself:

has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information²⁰²

Whereas some states require *imminent* danger, Virginia’s only requires danger “in the near future.” At the same time, Virginia still requires specific evidence, not merely a hunch: “as evidenced by recent behavior causing, attempting, or threatening harm.”²⁰³

200. One effect of the change was that large numbers of mentally ill people in Wisconsin “died with their rights on,” as Wisconsin Mental Health Institute psychiatrist Darold Treffert wrote. Darold A. Treffert, *The MacArthur Coercion Studies: A Wisconsin Perspective*, 82 *MARO. L. REV.* 759, 775 (1999). The Portland *Oregonian* newspaper was able to identify at least ninety-four Oregon mentally ill residents over a 3½ year period that they believed could be fairly attributed to a failure of Oregon’s public mental health system. Some starved themselves to death while family, police, and social workers looked on, by law prohibited from intervening. Michelle Roberts, *Free to Die*, *PORTLAND OREGONIAN* (Dec. 30, 2002).

201. Richard J. Bonnie, James S. Reinhard, Philip Hamilton & Elizabeth L. McGarvey, *Mental Health System Transformation After the Virginia Tech Tragedy*, 28 *HEALTH AFFAIRS* 800 (2009).

202. VA. CODE, § 37.2-808(A) (2013).

203. VA. CODE, § 37.2-808(A) (2013).

2. Wisconsin

After twelve years of discussion, the Wisconsin Legislature added what became known as the “fifth standard” for involuntary commitment. Like many other states, Wisconsin already had four basic commitment standards: imminent danger to others;²⁰⁴ imminent danger to self;²⁰⁵ substantial probability of physical injury,²⁰⁶ or “gravely disabled” because “unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment.”²⁰⁷

Wisconsin added a fifth standard, allowing involuntary commitment

if a lack of treatment will cause deterioration of a person’s mental and physical health, or cause him or her to suffer severe mental, emotional, or physical harm resulting in loss of independent functioning or loss of control over thoughts and actions, and if the person is incapable of understanding the advantages and disadvantages of accepting treatment and its alternatives.²⁰⁸

A lawsuit challenged the new law. A person suffering from schizophrenia, identified in court documents as Dennis H., was committed at the request of his father, a physician. Dennis H. was refusing to eat or drink, and had already suffered kidney failure as a result of a previous episode. The Wisconsin Supreme Court upheld the new “fifth standard.” Dennis H. was not in *imminent* danger because of his condition, but it was clear that his mental illness made it likely that he would deteriorate to a point where he was at risk if no treatment were given.²⁰⁹

Most of the Wisconsin Supreme Court’s decision focused on whether the fifth standard was clearly unconstitutional. The Wisconsin Supreme Court affirmed a traditional view of the state’s duty towards the mentally ill: “The state has a well-established, legitimate interest under its *parens patriae* power in providing care to persons unable to care for themselves”²¹⁰

204. WIS. STAT. § 51.20(1)(a)(2.b) (1995).

205. WIS. STAT. § 51.20(1)(a)(2.a) (1995).

206. WIS. STAT. § 51.20(1)(a)(2.c) (1995) (“[I]mpaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself.”).

207. WIS. STAT. § 51.20(1)(a)(2.d) (1995).

208. WIS. STAT. § 51.20(1)(a)(2.e) (1995).

209. *Wisconsin v. Dennis H.*, 647 N.W.2d 851, 855 (Wis. 2002); Eve Bender, *Wisconsin Court Rejects Attempt To Narrow Commitment Law*, 37 PSYCHIATRIC NEWS 24, 33 (2002).

210. *Wisconsin v. Dennis H.*, *supra* note 209, at 855.

We are not arguing that every state should follow the Wisconsin model. Our narrower point is that people who are dangerously mentally ill, but not imminently so, can be placed into treatment, and this is not unconstitutional.

And most importantly, statutes mean little if there are not enough psychiatric beds available. Remember Ms. Lessard? In the quarter-century after she won her case, she tried several times to check herself into a Wisconsin state hospital for treatment. She was turned away because of a shortage of beds. “They said I wasn’t sick enough,” she explained.²¹¹

VIII. CIVIL COMMITMENT AND FOUR NOTORIOUS MASS MURDERS

This Part examines the role that civil commitment laws could or could not have played in the prevention of four notorious crimes: at the Washington Navy Yard, Newtown, Tucson, and Aurora. In the latter two cases, state laws were in place, which could have allowed the commitment of the perpetrators, based on circumstances a few weeks before the killings. But the responsible and aware government officials did not take action by filing the necessary petitions. This Article’s proposals for expanded inpatient and outpatient commitment will be of little value unless people who know about specific dangers speak up.

A. Rhode Island Law and the Navy Yard Murders

About a month before Aaron Alexis shot to death twelve people at the Navy Yard in Washington, D.C., he “told police in Newport, R.I., that he heard voices speaking to him through the walls of his hotel room and felt a machine sending vibrations into his body. . . .” Alexis was convinced that others in the hotel intended to harm or control him through these vibrations. The conversation with the police included him telling them that “he had no history of mental illness in his family and had never had any type of psychological epi-

211. Jeffrey L. Geller, *The Right to Treatment*, in PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY 121, 126 (Richard Rosner ed., 1994) (citing *Mental-Illness Ruling Hinders Patients*, DULUTH NEWS TRIB. (Aug. 28, 2000)). Dr. Dobbins had a similar experience, attempting to check herself into a mental hospital shortly after the beginning of a psychotic episode, and being turned away because she was not “admit material.” The psychoses soon became much worse, and caused considerable problems. DOBBINS, *supra* note *.

sode. . . .”²¹² This disclosure does not sound like the sort of information that would typically be volunteered to police.

Previously, Alexis likely would have been taken into custody for psychiatric evaluation. Charles Krauthammer today writes a political column for the *Washington Post*, but 35 years ago, Dr. Krauthammer worked as an emergency room psychiatrist at Massachusetts General Hospital. He described of what would have happened if Alexis had been presented in the emergency room with the above symptoms:

Were he as agitated and distressed as in the police report, I probably would have administered an immediate dose of Haldol, the most powerful fast-acting antipsychotic of the time.

This would generally have relieved the hallucinations and delusions, a blessing not only in itself, but also for the lucidity brought on that would have allowed him to give us important diagnostic details—psychiatric history, family history, social history, medical history, etc. If I had thought he could be sufficiently cared for by family or friends to receive regular oral medication, therapy and follow-up, I would have discharged him. Otherwise, I’d have admitted him. And if he refused, I’d have ordered a 14-day involuntary commitment.²¹³

Why didn’t police take Alexis into custody for evaluation? Rhode Island’s emergency commitment statute contains a very important word that severely limits a modern emergency room psychiatrist’s options. A Rhode Island physician may arrange for involuntary commitment when a person “is in need of immediate care and treatment” if leaving him at large “would create an *imminent* likelihood of serious harm by reason of mental disability. . . .”²¹⁴

If Alexis had been committed, then by Rhode Island law, he would have had to wait at least five years to purchase a firearm, as well as provide “an affidavit issued by competent medical authority to the effect that he or she is a mentally stable person and a proper per-

212. Travis Andersen, *Navy Yard Shooter Had Odd Episode in R.I.*, BOSTON GLOBE (Sept. 17, 2013).

213. Charles Krauthammer, *The Real Navy Yard Scandal*, WASH. POST (Sept. 19, 2013).

214. R.I. GEN. LAWS § 40.1-5-7 (2010) (emphasis added). Oddly, the only Rhode Island case law immediately relevant to this provision involves suits alleging that mental health facilities, by having *failed* to involuntarily commit people with serious mental illness problems, caused harm to others. There seems to be no case law involving patients involuntarily committed without sufficient cause. See *Almonte v. Kurl*, 46 A.3d 1, 13 (R.I. 2012) (finding that a failure to hospitalize led to patient’s suicide); see also *Santana v. Rainbow Cleaners*, 969 A.2d 653, 655 (R.I. 2009) (finding that a failure to hospitalize outpatient client led to severe injuries to third party).

son to possess firearms.”²¹⁵ This would not have guaranteed that he could not have obtained a firearm illegally, but if he had been treated, then perhaps he would not have murdered twelve people.

B. Pima Community College fails to inform law enforcement about a known and serious danger

Arizona has good laws for temporary civil commitment, but a state college recklessly failed to inform law enforcement about the danger posed by a former student.

On January 8, 2011, U.S. Rep. Gabrielle Giffords (D-Ariz.) was holding a town hall meeting at a supermarket in Tucson. Jared Lee Loughner approached, and opened fire with a handgun, killing six people, and wounding nineteen, including Congresswoman Giffords.

Loughner had a history of police contacts involving death threats,²¹⁶ and was suspended from Pima Community College for bizarre actions and threats that strongly suggested that he was mentally ill. He was told that he could not return unless he received a mental health evaluation.²¹⁷ If the college had looked, it also would have found a series of disturbing web postings and YouTube videos confirming that Loughner’s grasp on reality was severely impaired.²¹⁸

In the aftermath of the shootings, Pima College’s director of contracts and risk management, Mark Dworschak, argued that the college had an obligation to do more than just tell Loughner to seek help: “Arizona has one of the most lenient criteria for a commitment procedure which, having read the police reports, should have been initiated. . . . You don’t dump them as (another official) suggests.”²¹⁹

Arizona uses the “clear and convincing evidence” language from *Addington v. Texas* (1979), but Arizona has no requirement for “imminent” danger. Rather, if “the proposed patient, as a result of mental disorder, is a danger to self, is a danger to others, is persistently or acutely disabled or is gravely disabled and in need of treatment, and is

215. R.I. GEN. LAWS, § 11-47-6 (2010).

216. Tim Steller, *Man Linked To Giffords Shooting Rampage Called “Very Disturbed”*, ARIZ. DAILY STAR (Jan. 8, 2011), available at http://azstarnet.com/news/local/crime/article_91db5db4-1b74-11e0-ba23-001cc4c002e0.html (last accessed Aug. 21, 2015).

217. *Tucson shooting suspect’s school releases records*, USA TODAY (Apr. 16, 2011), available at <http://usatoday30.usatoday.com/news/nation/2011-04-16-loughner-records.htm> (last accessed Aug. 21, 2015).

218. Steller, *supra* note 216.

219. Associated Press, *Emails Document Loughner’s Outbursts at College*, NATIONAL PUBLIC RADIO (May 20, 2011).

either unwilling or unable to accept voluntary treatment,” he can be ordered into either an inpatient or outpatient treatment program.²²⁰

Court-ordered psychiatric evaluations after the shooting concluded that Loughner was suffering from schizophrenia, and was incompetent to stand trial.²²¹ After months of medication and therapy, Loughner recovered enough to be tried, and pleaded guilty, accepting a life sentence. He was legally mentally ill, but not so much so that he was not responsible for his actions. He had even researched the death penalty before his attack.²²²

The Pima College administration recognized that there was something seriously wrong, but made no effort to have Loughner hospitalized, or even to inform law enforcement. Merely suspending him from school meant that he was no longer Pima College’s problem. He purchased the handgun on November 30, 2010, *after* he was suspended from Pima College. A few weeks later, he was the problem of many others.²²³

If Loughner had been involuntarily committed, and later released, Arizona law would have prohibited him from possessing a firearm, unless he successfully petitioned an Arizona court to restore his rights.²²⁴

C. The University of Colorado fails to alert law enforcement to well-known and grave danger

Colorado has two complementary systems for 72-hour commitments. One procedure is for “imminent danger.” It is Colo. Rev. Stats. § 27-65-105. The other procedure does not require that the “danger” be imminent, but is requires more judicial process. It is C.R.S. § 27-65-106.

220. ARIZ. REV. STAT. § 36-540 (2011).

221. Craig Harris & Michael Kiefer, *Judge Finds Jared Loughner Incompetent to Stand Trial*, ARIZ. STAR (May 25, 2011), available at <http://www.azcentral.com/news/articles/2011/05/25/20110525gabriel-giffords-shot-jared-loughner-competency-hearing.html> (last accessed Aug. 21, 2015).

222. Ashley Powers & Michael Muskal, *Jared Lee Loughner Sentenced to Life for Tucson Shootings*, L.A. TIMES, Nov. 8, 2012, available at <http://articles.latimes.com/2012/nov/08/nation/la-na-jared-loughner-20121109> (last accessed Aug. 21, 2015); *Jared Loughner pleads guilty to Tucson shootings, avoids death penalty*, NBC NEWS, (Aug. 7, 2012).

223. Michelle Price, *Emails Document Loughner’s Outbursts at College*, ASSOCIATED PRESS (May 19, 2011), available at <http://www.foxnews.com/us/2011/05/20/emails-document-loughners-outbursts-college/> (last accessed Aug. 21, 2015) (reporting emails that show “[a] campus police officer wanted to expel Jared Lee Loughner after he caused an outburst in a math class in June 2010, but a dean said she wasn’t ready to do so and expressed concerns about Loughner’s due-process rights, according to one of the notes”).

224. ARIZ. REV. STAT. §§ 13-925, 36-540 (2011).

After a 72-hour commitment, 90-day commitments can be authorized (and renewed) by a court; the individual will have an attorney and the opportunity to present evidence.

When there is an “imminent danger,” the process to order a 72-hour commitment for a mental health evaluation is that a certified peace officer, as well as certain other professionals (e.g., doctors, nurses, social workers) can file an affidavit with a court setting forth the facts supporting a 72-hour hold. If the affidavit contains the requisite facts, then the court is required to order that the person be taken into custody for an evaluation.²²⁵

Besides applying to a person who presents an “imminent danger to others or to himself or herself,” the statute can also be used for persons who are “gravely disabled.”²²⁶

James Holmes’ threats, which were communicated to his psychiatrist around May 2012, were real, but they may not have been sufficiently “imminent.” His crime did not take place until late July.

Nor did Holmes did meet the statutory definitions of “gravely disabled.” He was not unable or unwilling “to provide himself or herself with the essential human needs of food, clothing, shelter, and medical care.” There is no indication that he was having trouble feeding himself, taking care of other basic needs, and so on.

Nor did he meet the second definition of “gravely disabled”—to be a person “who lacks judgment . . . to the extent that his or her health or safety is significantly endangered and lacks the capacity to understand that this is so.”²²⁷ His intricate booby trapping of his apartment and planning of the crime suggest a person of considerable intelligence and foresight. Nothing indicated that he lacked “the capacity to understand” the risk to his own safety (e.g., being shot by police or by a victim) of his attack. Rather, he actively worked to reduce those risks.

To reduce the police risk, he set music playing very loudly in his apartment, apparently hoping that a complaint would draw the police to open the door, and set off the huge quantity of explosives he had rigged. With first responders converging in the chaotic aftermath of the bombing, there would be a distraction away from the Aurora theater.

225. COLO. REV. STAT. § 27-65-105 (2010).

226. COLO. REV. STAT. § 27-65-105 (2010).

227. COLO. REV. STAT. § 27-65-102(9)(a) (2010).

The place where Holmes chose his mass casualty attack was a theater with a posted “no guns” policy, so Holmes was able to reduce the risk of being shot by a victim. There are a significant number of mass shootings which have ended sooner than the attacker wished because someone shot the attacker or drew a gun on him.²²⁸ One took place at the Sister Marie Lenahan Wellness Center in Darby, Pennsylvania, in July 2014. A psychiatric outpatient killed his caseworker and wounded his psychiatrist. He was then shot by the psychiatrist, Dr. Lee Silverman, who had a concealed handgun, in violation of the hospital’s no-guns policy. The District Attorney said that the attacker had been intending a mass shooting.²²⁹

As for the third Colorado definition of “gravely disabled,” it would fit many mentally ill persons, but not Holmes. As applied in Colorado, “gravely disabled” includes chronic schizophrenia, chronic affective disorder, chronic delusional disorder, and chronic mental disorder with psychotic features.²³⁰ Holmes may have had these illnesses, but as of 2013 the Colorado statute further required that such a person must have been hospitalized “at least twice during the last thirty-six months.”²³¹ Holmes had never been hospitalized. The requirement was removed in 2014.

So Holmes could not have been committed for 72 hours based upon an affidavit from certain professionals, as is allowed by C.R.S. § 27-65-105.

Yet he could have been committed under section 106, which does not require “imminent” danger. Under section 106, any person (not just particular types of professionals) may petition a court for a mental health evaluation of an individual.²³² The statute allows the petition

228. See David Kopel, *Arming the Right People Can Save Lives*, L.A. TIMES (Jan. 15, 2013), <http://articles.latimes.com/print/2013/jan/15/opinion/la-oe-kopel-guns-resistance-nra-20130115>. This article identifies lesser known instances of thwarted violence, including “Pearl High School in Mississippi; Sullivan Central High School in Tennessee; Appalachian School of Law in Virginia; a middle school dance in Edinboro, Pa.; Players Bar and Grill in Nevada; a Shoney’s restaurant in Alabama; Trolley Square Mall in Salt Lake City; New Life Church in Colorado; Clackamas Mall in Oregon (three days before Sandy Hook); Mayan Palace Theater in San Antonio (three days after Sandy Hook).”

229. Meg Wagner, *Pennsylvania Patient Who Allegedly Killed Caseworker, Shot Doctor Had 39 More Bullets, Intended Mass Shooting: DA*, (N.Y.) DAILY NEWS (July 25, 2014), available at <http://www.nydailynews.com/news/national/penn-psychiatric-center-shooting-suspect-abusive-ex-wife-article-1.1880052> (last accessed Aug. 21, 2015).

230. Nat’l Alliance on Mental Illness Arapahoe/Douglas Counties, *Involuntary Commitment and Emergency Services in Our Community of Arapahoe and Douglas Counties for Persons Who Are Gravely Disabled* (Dec. 18, 2008).

231. COLO. REV. STAT. § 27-65-102(9)(b)(II) (2010) (current version at § 27-65-102 (2014)).

232. COLO. REV. STAT. § 27-65-106 (2010).

based on allegations that the individual is “gravely disabled” or is “a danger to others or to himself.” The statute does not require that the danger be “imminent.” The Petition for Evaluation is available online.²³³

Unlike in the professional affidavit statute (section 105), the court is not required to order the evaluation. The court makes its own decision. The proceeding may be *ex parte*.

Once a person has been detained for 72 hours for evaluation under either statute, the treating facility may file a certification which authorizes the facility to hold the person for up to three months for involuntary short-term treatment. The certification must be filed with a court, and the court must immediately appoint an attorney to represent the individual. The individual and his attorney may at any time petition the court for the individual’s release. The standard for involuntary treatment is that the individual is “gravely disabled” or “is a danger to others or to himself or herself.” Again, “imminent” danger is *not* required.²³⁴

How could section 106 (discretionary court-ordered hold, no requirement for imminence) have been used for James Holmes?

Holmes’s psychiatrist, Dr. Lynn Fenton broke doctor/patient confidentiality when she warned the Threat Assessment Team at the University of Colorado that Holmes had been talking about killing a lot of people.²³⁵ Violating patient confidentiality is generally illegal in Colorado, with one important exception.²³⁶ Under the “Tarasoff rule,” psychiatrists and other mental health workers have a duty to warn threatened persons based on conversations with a patient.²³⁷

The Tarasoff rule requiring disclosure when a patient poses a “foreseeable danger” was created in California in 1976, and has been

233. Petition for Evaluation *available at* <http://www.colorado.gov/cs/Satellite?blobcol=url data&blobheadname1=Content-Disposition&blobheadname2=ContentType&blobheader value1=inline%3B+filename%3D%22Petition+for+Evaluation+and+Motion+and+Order+or+ Screening.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=Mungo Blobs&blobwhere=1251742447393&ssbinary=true> (last accessed Aug. 21, 2015)

234. COLO. REV. STAT. § 27-65-107 (2010).

235. John Ferrugia, *CU Psychiatrist Called Threat Team About James Holmes*, 7NEWS DENVER, (Aug. 2, 2012, *available at* http://www.thedenverchannel.com/news/call7-investigators/james-holmes-cu-psychiatrist-was-concerned-he-spoke-fantasized-about-killing-people-sources-say?hpt=JU_bn5 (last accessed Aug. 21, 2015).

236. COLO. REV. STAT. § 12-43-218(1) (2010).

237. The rule was announced in *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 431 (1976), and has been adopted almost everywhere in the U.S. See Randy Borum & Marisa Reddy, *Assessing Violence Risk in Tarasoff Situations: A Fact-Based Model of Inquiry*, 19 BEHAV. SCI. & L. 375, 376 (2001).

adopted in one form or another almost everywhere in the U.S. The details of the rule vary among the states, with some states requiring an “identifiable victim” before a therapist must alert authorities.²³⁸ Dr. Fenton’s actions suggest that she recognized a Tarasoff duty to warn. Colorado’s statute imposes the duty to warn only when “the patient has communicated to the mental health provider a serious threat of imminent physical violence against a specific person or persons, including those identifiable by their association with a specific location or entity.”²³⁹

Dr. Lynne Fenton’s efforts indicated she perceived Holmes to be at least level 4 of the University of Colorado’s Behavioral Evaluation and Threat Assessment (BETA) matrix: “High Risk.”²⁴⁰

The University of Colorado Police asked Dr. Fenton if she wanted to place a 72-hour hold on Holmes, and she declined, apparently in part because Holmes was withdrawing from the University.²⁴¹ Given that Holmes’ defense in his criminal trial was based entirely on an insanity plea, it seems likely that if Holmes had been given a 72-hour evaluation, evidence of his severe and very dangerous mental condition would have been apparent.

The problems in Arizona and Colorado were not weaknesses in the statutes, but the failure of state higher education officials to take the appropriate steps regarding a known and dangerously mentally ill student.

D. Connecticut Law and Newtown

In the aftermath of the horrific December 2012 mass murder at Sandy Hook Elementary School, the question on everyone’s minds was: *Why?* People wanted to know what prompted Adam Lanza to murder first his mother, then twenty elementary school children and six adults at the elementary school he had attended long ago.

238. John M. Greene, Adjunct Clinical Faculty, Stanford Univ. Dep’t of Psychiatry, *Lecture: Psychiatrist Duties: Tarasoff* (Aug. 3, 2006), available at <http://forensicpsychiatry.stanford.edu/Files/Tarasoff%20Greene.htm> (last accessed Aug. 21, 2015).

239. COLO. REV. STAT. § 13-21-117(2)(a) (2014).

240. *Did CU Officials Consider James Holmes ‘High Risk’ For Violence?*, 7NEWSDENVER (Aug. 16, 2012), available at <http://www.thedenverchannel.com/news/31363132/detail.html> (last accessed Aug. 21, 2015).

241. Ferrugia, *supra* note 235.

Adam Lanza had a psychiatric disorder known as Asperger's Syndrome,²⁴² a diagnosis not associated with premeditated violence. Violence by persons suffering from Asperger's Syndrome is often related to a loss of temper, inability to read social cues, and narrowly-focused interests that lead to inappropriate behavior. Premeditated mass murder is not only atypical, but Lanza's case may be the first such instance.²⁴³

Lanza suffered from a sensory integration disorder (SID), where sensory inputs overwhelm the brain.²⁴⁴ There is sizable overlap between the description of SID and the sensory problems that appear to be part of schizophrenia.²⁴⁵ Some of his symptoms in pre-school overlap with symptoms of schizophrenia: "smelling things that are not there" and "excessive hand washing."²⁴⁶ Lanza's father later speculated that Asperger's "veiled a contaminant." Namely, "I was thinking it could mask schizophrenia."²⁴⁷ Was Lanza's psychiatrist reluctant to give this devastating diagnosis until he was certain? The final report of the Connecticut State Police indicates changes in behavior before the murders. He stopped playing Dance Dance Revolution in a local theater lobby about a month before, and exhibited signs of increasingly

242. In the DSM, Asperger's is diagnosed under the category of Autism Spectrum Disorder. See AMER. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 50–53 (5th ed. 2013); Andrew Solomon, *The Reckoning: The Father of the Sandy Hook Killer Searches for Answers*, THE NEW YORKER, Mar. 17, 2014, at 36, available at <http://www.newyorker.com/magazine/2014/03/17/the-reckoning> (last accessed Aug. 21, 2015).

243. Barbara G. Haskins & J. Arturo Silva, *Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCHIATRY & L. 374, 376–78 (2006) (showing that persons with Asperger's Syndrome are disproportionately violent, but noting that the violence may be related to co-occurring conditions, such as bipolar disorder, in some patients); Daniel C. Murrin, *et al.*, *Asperger's Syndrome in Forensic Settings*, 1 INT'L J. FORENSIC MENTAL HEALTH 59, 60–61 (2002) (existing studies are mixed, and have small samples, but on the whole they suggest that Asperger's patients are disproportionately violent).

244. Adam Clark Estes, *Revelations about Adam Lanza's Mental Health Still Don't Explain the Violence*, Atlantic Wire (Feb. 19, 2013), available at <http://www.theatlanticwire.com/national/2013/02/revelations-about-adam-lanzas-mental-health-still-dont-explain-violence/62317/> (last accessed Aug. 21, 2015). See also Stephen J. Sedensky, III, State's Attorney, District of Danbury, REPORT OF THE STATE'S ATTORNEY FOR THE JUDICIAL DISTRICT OF DANBURY ON THE SHOOTINGS AT SANDY HOOK ELEMENTARY SCHOOL AND 36 YOGANANDA STREET, NEWTOWN, CONNECTICUT ON?DECEMBER 14, 2012 34–35 (concerning "sensory issues.").

245. Peter Falkai *et al.*, *Pathophysiology of Schizophrenia*, in SCHIZOPHRENIA: CURRENT SCIENCE AND CLINICAL PRACTICE 31, 42 (Wolfgang Gaebel ed., 2011) (discussing dysfunction "of the cortico-cerebellar-thalamic-cortical neuronal circuit" and its role in filtering sensory information); Anthony J. Rissling & Gregory A. Light, *Neurophysical Measures of Sensory Registration, Stimulus Discrimination, and Selection in Schizophrenia Patients*, in BEHAVIORAL NEUROBIOLOGY OF SCHIZOPHRENIA AND ITS TREATMENT 283, 284–86 (Neal R. Swerdlow ed., 2010) (discussing the relationship between sensory input processing and schizophrenia).

246. Sedensky, *supra* note 244, at 34.

247. Solomon, *supra* note 242.

antisocial behavior in the preceding year.²⁴⁸ These *might* be evidence of the onset of depression, which is associated with schizophrenia.²⁴⁹

Connecticut's statutes concerning involuntary commitment do not require *imminent* danger. The provision for detention by a police officer for emergency commitment requires "a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment. . . ."²⁵⁰ The definition of "'dangerous to himself or herself or others' means there is a substantial risk that physical harm will be inflicted by an individual upon his or her own person or upon another person."²⁵¹

However, the Connecticut statute is undermined by a regulation created by the Connecticut executive branch. The state regulation defining "dangerous to himself or herself or others" includes a word previously seen: "the risk of *imminent* physical injury to others or self."²⁵²

The statute has been the basis for several recent Connecticut Supreme Court decisions concerning involuntary commitment. The cases involved persons found not guilty of manslaughter, arson, murder, kidnapping, and other serious felonies because of mental illness, and who were now seeking release from state mental hospitals. Most of these cases held that *imminent* physical injury was not a requirement for involuntary commitment.²⁵³

Lanza had very serious mental problems, and refused treatment and medication.²⁵⁴ Committing him on the basis of likely violence

248. Sedensky, *supra* note 244.

249. Samuel G. Siris, *Depression in Schizophrenia*, in *CONTEMPORARY ISSUES IN THE TREATMENT OF SCHIZOPHRENIA* 155, 156 (Christian L. Shriqui & Henry A. Nasrallah eds., 1995).

250. CONN. GEN. STAT. § 17a-503(a) (2010).

251. CONN. GEN. STAT. § 17a-495(a) (2009).

252. CONN. PSYCHIATRIC SECURITY REVIEW BD., *GENERAL OPERATIONS AND PROCEDURES* § 17a-581-2(a)(6) (1993).

253. See *State v. Dyous*, 53 A.3d 153, 160 (Conn. 2012) ("the defendant remained mentally ill and [would pose] an imminent and substantial risk of harm to himself or others if he [were] discharged from the [jurisdiction of the] board." The defendant had been found not guilty because of mental illness in a kidnapping case.); *State v. Harris*, 890 A.2d 559, 566 (Conn. 2006) ("[I]n order to meet the regulatory standard, the board would have to find an imminent risk that the acquittee would harm himself or others. . . . 'Imminent' is defined as 'ready to take place; esp: hanging threateningly over one's head. . . . ' Merriam-Webster's Collegiate Dictionary (10th Ed.1993)"); *State v. March*, 265 Conn. 697, 709 (2003) ("Section 17a-581-2(a)(6) of the Regulations of Connecticut State Agencies defines '[d]anger to self or to others,' as used in General Statutes § 17a-580 (5), . . . as 'the risk of imminent physical injury to others or self'"; *State v. Warren*, 919 A.2d 465, 468, 470 (Conn. App. Ct. 2007) (defining "'danger to self or to others,' as used in General Statutes § 17a-580(5), as "'the risk of imminent physical injury to others or self,'" involving a defendant found not guilty of first degree murder because of mental illness).

254. The State's Attorney reported that:

In the late 1990s he was described as having speech and language needs. At that time he was also being followed medically for seizure activities. In preschool his conduct

would not appear to have been supported by his prior history. If his mother had so chosen, it is possible that he could have been committed based on a separate criterion: his being “gravely disabled” due to his inability to care for himself.²⁵⁵

IX. INVOLUNTARY OUTPATIENT COMMITMENT

Involuntary outpatient commitment (IOC) is a program in which a mentally ill person might be “forced to undergo mental health treatment or care in an outpatient instead of an institutional setting.” The goal is to provide both a less restrictive and less expensive alternative for persons who have severe mental illness, and who might be successfully treated outside of a locked facility. Involuntary inpatient commitment can remain as the backup for persons who are unwilling or unable to use outpatient treatment.²⁵⁶

included repetitive behaviors, temper tantrums, smelling things that were not there, excessive hand washing and eating idiosyncrasies. In 2005, the shooter was diagnosed with Asperger’s Disorder and was described as presenting with significant social impairments and extreme anxiety. It was also noted that he lacked empathy and had very rigid thought processes He had no learning disability It was reported that his school issues related to his identified emotional and/or Pervasive Developmental Disorder (PDD) spectrum behaviors. His high level of anxiety, Asperger’s characteristics, Obsessive Compulsive Disorder (OCD) concerns and sensory issues all impacted his performance to a significant degree, limiting his participation in a general education curriculum. Tutoring, desensitization and medication were recommended. It was suggested that he would benefit by continuing to be eased into more regular classroom time and increasing exposure to routine events at school.

The shooter refused to take suggested medication and did not engage in suggested behavior therapies.

. . . .
[I]t is unknown, what contribution, if any, the shooter’s mental health issues made to his attack on SHES. Those mental health professionals who saw him did not see anything that would have predicted his future behavior.

Sedensky, *supra* note 244, at 34–35.

255. See CONN. GEN. STAT. § 17a-495(a) (“‘[G]ravely disabled’ means that a person, as a result of mental or emotional impairment, is in danger of serious harm as a result of an inability or failure to provide for his or her own basic human needs such as essential food, clothing, shelter or safety and that hospital treatment is necessary and available and that such person is mentally incapable of determining whether or not to accept such treatment because his judgment is impaired by his psychiatric disabilities.”); see also *id.* § 17a-497 (a)–(b) (commitment decision to be made by a probate judge, or if respondent so requests, by a three-judge panel); *id.* § 17a-498(c)(1), (3) (“clear and convincing evidence standard”; certificates from at least two examining physicians required; at least one of the physicians must be a psychiatrist).

256. Ingo Keilitz, *Legal Issues in Mental Health Care: Current Perspectives* 363, 368–89, in HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES (David A. Rochefort ed., 1989); Robert D. Miller, *Involuntary Civil Commitment to Outpatient Treatment*, in PRINCIPLES & PRACTICE OF FORENSIC PSYCHIATRY 116, 116–17 (Richard Rosner ed., 2d ed. 2003) (noting that before the 1980s, involuntary outpatient commitment was unstructured, and was almost always in the context of a judge granting someone a conditional release from inpatient custody. Beginning in the mid-1980s, state legislature enacted statutes to regularize outpatient commitment, and to allow such commitment for persons who were not already inpatients).

A. The first states

North Carolina's 1984 law allowed a court to order IOC for persons who were not an imminent danger, but were "in need of treatment . . . to prevent further disability or deterioration which would predictably result in dangerousness."²⁵⁷ North Carolina's goal appears not to have been to widen the power of the government over mentally ill persons, but to narrow it, by substituting involuntary outpatient commitment for hospitalization.²⁵⁸ By the early 1990s, IOC had also been tried in Iowa, Ohio, Tennessee, and the District of Columbia.

In North Carolina, IOC appears to have made little difference, perhaps because the courts rarely used the new procedure. In addition, community mental health professionals were reluctant to treat involuntary patients. Many of them lacked knowledge of how to use IOC.²⁵⁹

Tennessee appears to have been something of a success, at least as measured by what fraction of patients subject to IOC orders were showing up for follow-up appointments with clinicians.²⁶⁰

In Iowa, a five-year retrospective study found that IOC patients did much better, with reduced hospital and emergency room treatment, compared to a matched set of control subjects not subject to IOC.²⁶¹

B. New York

New York State tried the experiment next, starting with a trial program at New York City's Bellevue Hospital in 1994. The results were sufficiently positive to justify expanding the program.²⁶² One spur to expansion came on January 3, 1999, when 29-year-old Andrew Goldstein, who had schizophrenia, pushed Kendra Webdale in front of an oncoming subway train in midtown Manhattan, killing her. The victim was an aspiring writer from upstate New York. As her brother

257. N.C. GEN. STAT. § 122C-263(d)(1)(c) (2009).

258. Bruce J. Winick, Ken Kress & Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment Law: Kendra's Law as Case Study*, 9 PSYCHOL., PUB. POL'Y & L. 183, 187-89 (2003).

259. *Id.* at 189.

260. Miller, *supra* note 256, at 117.

261. Marvin S. Swartz & Jeffrey W. Swanson, *Involuntary Outpatient Commitment, Community Treatment Orders, and Assisted Outpatient Treatment: What's in the Data?*, 49 CAN. J. PSYCHIATRY 585, 587 (2004).

262. Sally L. Satel, *Real Help for the Mentally Ill*, N.Y. TIMES (Jan. 7, 1999), available at <http://www.nytimes.com/1999/01/07/opinion/real-help-for-the-mentally-ill.html> (last accessed Aug. 21, 2015).

explained, “She was the kind of person who would have helped the kind of person who did this.”²⁶³

Webdale was not the first person murdered in this way; the crime was not even the first murder by a mental patient pushing someone under a New York subway train. An escapee from a state psychiatric hospital had done something similar in 1995.²⁶⁴ But unlike the 1995 perpetrator, Goldstein had a long history of hospitalization followed by release. Even by the existing standards, Goldstein should have been subject to involuntary commitment. He had repeatedly sought hospitalization, only to be turned away.²⁶⁵ Again, this shows that increased funding for mental hospital beds is essential.

Goldstein had been hospitalized five times in 1998, and was released only three weeks before killing Webdale.²⁶⁶ Shortly before the subway incident, Goldstein stopped taking his medications because of the side effects.²⁶⁷

Goldstein provided a shocking example, particularly in ending the life of such a sympathetic victim. The *New York Times* published editorials calling for the state to take a more active role in caring for the deinstitutionalized mentally ill.²⁶⁸ Gov. George Pataki signed the bill providing for an involuntary outpatient commitment law in August 1999.²⁶⁹ It took effect three months later.²⁷⁰

263. Robert D. McFadden, *New York Nightmare Kills a Dreamer*, N.Y. TIMES (Jan. 5, 1999), available at <http://www.nytimes.com/1999/01/05/nyregion/new-york-nightmare-kills-a-dreamer.html> (last accessed Aug. 21, 2015).

264. Amy Waldman, *Woman Killed in a Subway Station Attack*, N.Y. TIMES (Jan. 4, 1999), available at <http://www.nytimes.com/1999/01/04/nyregion/woman-killed-in-a-subway-station-attack.html> (last accessed Aug. 21, 2015).

265. Michael Winerip, *Bedlam on the Streets*, N.Y. TIMES (May 23, 1999), available at <http://www.nytimes.com/1999/05/23/magazine/bedlam-on-the-streets.html> (last accessed Aug. 21, 2015).

266. Metro News Briefs: New York, *Hospital Stay Revealed For Man in Train Killing*, N.Y. TIMES (Mar. 31, 1999), available at <http://www.nytimes.com/1999/03/31/nyregion/metro-news-briefs-new-york-hospital-stay-revealed-for-man-in-train-killing.html> (last accessed Aug. 21, 2015).

267. N. R. Kleinfield & Kit R. Roane, *Subway Killing Casts Light On Suspect's Mental Torment*, N.Y. TIMES (Jan. 11, 1999), available at <http://www.nytimes.com/1999/01/11/nyregion/subway-killing-casts-light-on-suspect-s-mental-torment.html> (last accessed Aug. 21, 2015).

268. *After Kendra Webdale's Death*, N.Y. TIMES (Jan. 8, 1999), available at <http://www.nytimes.com/1999/01/08/opinion/after-kendra-webdale-s-death.html> (last accessed Aug. 21, 2015).

269. *A Signature for 'Kendra's Law'*, N.Y. TIMES (Aug. 28, 1999), available at <http://www.nytimes.com/1999/08/28/nyregion/a-signature-for-kendra-s-law.html> (last accessed Aug. 21, 2015).

270. N.Y. STATE OFFICE OF MENTAL HEALTH, *KENDRA'S LAW: FINAL REPORT ON THE STATUS OF ASSISTED OUTPATIENT TREATMENT 1* (2005).

The definition of eligibility for Assisted Outpatient Treatment (AOT)—as New York called its IOC program— was written with an apparent awareness of the battles the New York Civil Liberties Union had fought to prevent involuntary commitment. The care in drafting paid off; a series of challenges to the law failed to strike it down.²⁷¹

The criteria were specific, and appear to have been written with the “compelling governmental interest” and “narrowly tailored” requirements of strict scrutiny in mind. Criteria included a history of non-adherence to treatment where such failure had “been a significant factor in his or her being in a hospital, prison or jail at least twice within the last 36 months,” or has “resulted in one or more acts, attempts, or threats of serious violent behavior towards self or others within the last 48 months.”²⁷²

The law also included many other changes intended to improve the provision of mental health services to outpatients, as would be necessary to take care of an increased number of patients who would be subject to it.

In AOT’s first four years, 10,078 persons in New York State were referred to the program for potential inclusion. Of that number, mental health officials filed 4,041 petitions seeking AOT status, and 3,766 of those petitions were granted.²⁷³ The numbers suggest that mental health officials took care to make appropriate use of the program for patients, since more than half of the referrals did not lead to AOT.

Research showed that persons subject to AOT became somewhat better off in terms of functioning and self-care. In addition, the percentage of AOT patients who threatened suicide fell from 15 percent at the start to 8 percent by the first six-month renewal. Notably, the percentage of physically harming others also fell from 15 percent to 8 percent, with comparable improvements in the categories “Threaten Physical Harm,” “Damage or Destroy Property,” and “Verbally Assault Others.” Substantial reductions also took place in “hospitalization, homelessness, arrest and incarceration” thanks to AOT.²⁷⁴

271. Erin O’Connor, *Is Kendra’s Law a Keeper? How Kendra’s Law Erodes Fundamental Rights of the Mentally Ill*, 11 J.L. & Pol’y 313, 334–36 (2002).

272. N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 773, at 2. For persons participating in AOT, the arrest rate declined from thirty percent to five percent. *Id.*

273. *Id.* at 7.

274. *Id.* at 16–19. This is not to say that Kendra’s Law has been completely successful. See O’Connor, *supra* note 271, at 358–59, 364–67.

C. Other States

Success in New York was sufficiently clear that other states followed suit, with Florida passing an IOC law in 2004. A pilot program in Seminole County reduced by 43 percent the number of days mentally ill persons spent in a hospital, and numbers of days incarcerated by 72 percent, saving about \$14,000 per patient over an 18-month period.²⁷⁵

Studies across the industrialized world found that IOC patients were less likely to be hospitalized, half as likely to be involved in acts or threats of violence, far less likely to be victims of crime (23.5 percent of patients within a year versus 42.4 percent of patients in the control group), and enjoyed improved quality of life.²⁷⁶ A review of all English-language published studies of IOC concluded that IOC was most effective with patients suffering from psychotic disorders who were subject to IOC orders for six months or more.²⁷⁷

In several states, a factor that seems to have contributed to the limited use of IOC was that mental health professionals did not know about the program, or did not know how to use it. Perhaps not surprisingly, a 2001 survey concerning involuntary commitment (both inpatient and outpatient) found that large numbers of psychiatrists did not fully understand the commitment laws of the states in which they practiced. In general, they erred on the side of believing the law to be narrower than it actually was. Especially with respect to IOC, error

275. Rosanna Esposito, Valerie Westhead & Jim Berko, Letter, *Florida's Outpatient Commitment Law: Effective but Underused*, 59 PSYCHIATRIC SERVICES 328 (2008).

Colorado law provides for outpatient treatment orders for those found incompetent to stand trial, as well as for involuntary civil commitment with the option of having the treatment done on an outpatient basis. COLO. REV. STAT. § 16-8.5-111(2)(a) (2008) (“As a condition of bond, the court may require the defendant to obtain any treatment or habilitation services that are available to the defendant, such as inpatient or outpatient treatment at a community mental health center or in any other appropriate treatment setting, as determined by the court.”); *Id.* § 27-65-107(c)(6) (“The respondent for short-term treatment or his or her attorney may at any time file a written request that the certification for short-term treatment or the treatment be reviewed by the court or that the treatment be on an outpatient basis.”).

276. Swartz & Swanson, *supra* note 261, at 588–89.

277. *Id.* at 585. Unsurprisingly, IOC was effective only if community mental health services were available. Such programs are no panacea; a one-year follow-up study in North Carolina found that “few patients in any group did well on measures of compliance with medication, appointments kept and absence of disruptive symptoms.” However, patients subject to IOC did much better than patients who had been involuntarily committed or who had been held for 72-hour observation. Those who had been involuntarily committed were likely the most severely ill. The IOC patients may have done better because they experienced less severe problems. *Id.* at 586–87.

rates were quite high, with only 53 percent of psychiatrists correctly answering questions about whether IOC was allowed.²⁷⁸

IOC can work best when it is structured like probation: there is a supervisor assigned to the patient, and the supervisor is responsible for meeting with the patient from time to time, conducting home visits, and monitoring whether the patient is complying with the treatment program.²⁷⁹

IOC is not an alternative to involuntary inpatient commitment. Rather it is a relatively lower cost complement, appropriate for severely mentally ill patients who are willing and able to stay on their medications.²⁸⁰ That does not mean it is cheap; the data indicate that it only works “when more intensive services are provided, obviating its use as an inexpensive remedy.”²⁸¹

CONCLUSION

Much can be done to reduce not only the tiny fraction of U.S. murders that are random acts of mass killing, but also the rest of the 18-19 percent of homicides by the severely mentally ill that get no national attention.

One important change legislators in some states can make is to recognize that waiting for a mentally ill person to become an *imminent* danger to self or others is waiting too long. By the time a person with severe mental illness is an imminent danger, he is on the verge of murder or other major violent crime. The costs of waiting are enormously high: in blood, suffering, autopsies, inquests, trials, and prison cells.

Earlier intervention will, in the long run, greatly lower the societal costs of severe mental illness. Early treatment may be the differ-

278. Robert A. Brooks, *Psychiatrists' Opinions About Involuntary Civil Commitment: Results of a National Survey*, 35 J. AM. ACAD. PSYCHIATRY & L. 219, 223-24 (2007).

279. Christian A. Piccolo, Note, *Falling through the Cracks: The Need for Enhanced Supervision in the Involuntary Outpatient Civil Commitment Setting*, 54 VILL. L. REV. 309, 314, 335-36 (2009). Cf. Jennifer Eno Loudon et al., *Supervision Practices in Specialty Mental Health Probation: What Happens in Officer-Probationer Meetings?*, 36 L. & HUMAN BEHAV. 109 (2012) (finding that probation officers who specialize in supervising the mentally ill use probationer interaction strategies which, compared to standard probation work, pay more attention to general mental health, and rely less on threats).

280. One study (not specifically about IOC) found that 74 percent of persons with schizophrenia discontinued medication within 18 months. Jeffrey A. Lieberman et al., *Effectiveness of Antipsychotic Drugs in Patients with Chronic Schizophrenia*, 353 NEW ENG. J. MED. 1209 (2005); see also Cara R. Rabin & Steven J. Siegel, *Antipsychotic Dosing and Drug Delivery*, in BEHAVIORAL NEUROBIOLOGY, *supra* note 245, at 141, 151, 153 (citing similar studies). Nonadherence to medication increases the risk of relapse five-fold. *Id.* at 153-54.

281. Swartz & Swanson, *supra* note 261, at 590.

ence for some between lifelong disability and a healthy measure of economic and personal self-sufficiency. It is scandalous that so many severely mentally ill people who voluntarily seek treatment are turned away, and that so many of them therefore end up in jails or prisons.

Mere suspicion of mental illness does not justify taking away someone's rights. People suffering from minor emotional or psychological problems do not pose a genuine threat, under normal conditions. Nor, for that matter, do the majority of persons with severe mental illness. Yet the evidence is very clear that a subset of persons with severe mental illness pose a very real danger of violence.

Narrow and carefully written statutory reforms can make involuntary commitment to inpatient or outpatient treatment available when necessary to protect the public from persons whose severe mental illness creates a serious risk of violence. However, mental health professionals must work alongside others involved in the process (law enforcement, judges, lawyers, and social workers) to proactively solve the problems of severe mental illness and criminal violence. Prevention is cheaper than punishment. Statutory improvements, though, are empty gestures unless backed up by necessary funding for mental health treatment. Appropriate funding will provide a large net gain to society over the long run.

ESSAY

In Search of the Golden Mean in the Gun Debate

ANDREW JAY McCLURG*

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INTRODUCTION

As we prepare to enter the new millennium, our united goal should be the responsible management of our existing guns To have any hope of moving effectively in that direction, both sides are going to have to work together, or at least be more honest advocates and willing listeners in the debate.¹

A naïve, overly optimistic person wrote the above in 1999. Fifteen years later, nothing has changed in America's gun debate or firearms policies. If anything, conditions are worse. No one has worked together. Many on both sides continue to be dishonest advocates and

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1. Andrew J. McClurg, "Lots" *More Guns and Other Fallacies Infecting the Gun Control Debate*, 11 J. ON FIREARMS & PUB. POL'Y 139, 140-41 (1999).

unwilling listeners. Meanwhile, the enormous costs of firearms continue to mount daily. Much has been written about those costs.² Here, I resort to listing: more than 30,000 lives lost each year;³ more than 80,000 annual nonfatal, often disabling, injuries;⁴ lost productivity and earnings of gunshot victims;⁵ extraordinary medical costs borne largely by government (and, hence, taxpayers);⁶ fear;⁷ grief;⁸ and other costs.⁹

2. See generally PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* (2000) (detailing the costs of gun violence).

3. SHERRY L. MURPHY ET AL., NAT'L CTR. FOR HEALTH STATISTICS, *DEATHS: FINAL DATA FOR 2010*, at 11, 83 tbl.18 (2013) (showing that in 2010, 31,672 persons died from firearm injuries, accounting for 17.5% of all U.S. injury deaths; 61.2% of deaths were the result of suicide and 35.0% were the result of homicide). These figures have been relatively stable for several years.

4. Data tabulated from the Web-Based Injury Statistics Query and Reporting System (WISQARS) showed 84,258 nonfatal firearms injuries in 2013. WISQARS, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/injury/wisqars/index.html> (follow "Nonfatal Injury Data" and "Nonfatal Injury 2001–2013" hyperlinks; then select "All Intent" for "intent of injury," "Firearm" for "cause of injury," and "2013 to 2013" for "Year(s) of Report"; then follow "Submit Request" hyperlink; for only unintentional shootings data, follow same steps except change "intent of injury to "unintentional").

5. Looking only at fatal shootings, firearms researchers Philip Cook and Jens Ludwig estimated the lost lifetime earnings and value of household services for each person killed to be between \$460,000 and \$580,000 after adjusting for race and educational attainment. COOK & LUDWIG, *supra* note 2, at 77.

6. See *id.* at 65 (estimating the lifetime medical expenses for treating the 113,000 gunshot victims in 1997 to be \$1.9 billion).

7. See generally Mark Warr, *Fear of Crime in the United States: Avenues for Research and Policy*, in 4 MEASUREMENT AND ANALYSIS OF CRIME AND JUSTICE 451, 452 (David Duffee ed., 2000), available at https://www.ncjrs.gov/criminal_justice2000/vol_4/04i.pdf (analyzing fear of crime and quoting an assertion by the President's Commission on Law Enforcement and Administration of Justice that "[t]he most damaging of the effects of violent crime is fear, and that fear must not be belittled").

8. See Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 9–15 (2005) (discussing studies showing the disabling consequences of grief resulting from the traumatic death of a loved one).

9. The Pacific Institute for Research and Evaluation, an independent non-profit organization that provides research through grants or contracts to a long list of state and federal government agencies, estimated the total cost of gun violence in 2010 to be as high \$174 billion. Ted Miller, *The Costs of Firearm Violence*, CHILDREN'S SAFETY NETWORK (Dec. 2012), http://www.childrendefensanetwork.org/sites/childrendefensanetwork.org/files/Cost_ofFirearmViolence_Print.pdf. The study estimated the societal cost of a single fatal firearms assault to exceed \$5 million, the largest portion of which was for lost quality of life. *Id.* The estimated cost per fatal firearm assault broke down as follows:

Work Loss: \$1,552,381
Medical Care: \$28,741
Mental Health: \$10,883
Emergency Transport: \$544
Police: \$2,119
Criminal Justice: \$395,221
Insurance Claims Processing: \$2,361
Employer Cost: \$8,980
Quality of Life (pain and suffering, and loss of enjoyment of life for shooting victims and their families): \$3,093,750

Whether you are a gun-lover, gun-hater, or someone, like me, who is in the middle, no one can honestly or rationally assert that gun violence is not a terrible plague on American society. But when it comes to solutions involving guns, we are completely stuck. We have been stuck for a long time. Ironically, the last prominent gun law passed by Congress indirectly promotes gun violence. The 2005 Protection of Lawful Commerce in Arms Act (PLCAA)¹⁰ bars lawsuits against the gun industry arising from unlawful firearms use,¹¹ a unique immunity from tort responsibility among sellers of consumer products that has contributed to under-detering investments in safer conduct to prevent access to guns by unauthorized users, including criminals.¹² With regard to *restrictions* on guns, apart from the 1994 assault weapon and high-capacity magazine ban that Congress allowed to expire in 2004, the last major federal gun law came nearly a half century ago in the form of the Gun Control Act of 1968 in response to the assassinations of Robert F. Kennedy and Martin Luther King, Jr. Even after the 2012 Sandy Hook Elementary School mass shooting in Newtown, Connecticut, with a newly engaged media and public opinion aligned to take action, nothing happened. President Obama's proposals to impose universal background checks for gun purchases and renew the federal ban on assault weapons and high-capacity magazines did not progress.¹³

Total Cost Per Fatal Firearm Assault: \$5,094,980

Id.

10. 15 U.S.C. §§ 7901–7903 (2012).

11. § 7902(a). The Act bars nearly all lawsuits in state or federal court against gun makers and sellers for injuries arising from the criminal misuse of a firearm. *See* § 7903(5)(A) (defining a “qualified civil liability action,” which is banned by the Act, as “a civil action or proceeding . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages, punitive damages, . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party”).

12. *See* Andrew Jay McClurg, *The Second Amendment Right to be Negligent*, 68 FLA. L. REV. (forthcoming 2015) (asserting that through both common law and statutory law, the United States has conferred a *de facto* constitutionally rooted right to act without reasonable care in the manufacture, distribution, and possession of firearms), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584588.

13. Obama did achieve a measure of progress through the issuance of twenty-three executive orders calling for, among other things, improvements to the national instant background check system, increased tracing of crime guns, and ending the freeze on gun research. *See* NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE, WHITE HOUSE (Jan. 16, 2013) [hereinafter NOW IS THE TIME] (listing the twenty-three executive actions taken by President Obama to reduce gun violence), *available at* https://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_actions.pdf.

Of course, in a nation with over 300 million guns¹⁴ and a constitutional right to own guns,¹⁵ a true “solution” to gun deaths and injuries is unlikely to emerge. Imagining one, it would be comprehensive and multi-faceted, extending far beyond firearms policies to address issues of poverty, unemployment, mental health, substance abuse, education, domestic violence, media violence, policing, sentencing, gang culture, and many others. The solutions or, more accurately, “helpful steps,” suggested in this article are limited to actions involving guns.

The goal of the article is modest: to promote reasonable thinking about reasonable “middle ground” gun measures that would be effective in combatting gun violence without infringing Second Amendment rights. To advance that goal, I discuss and propose five specific measures: (1) bolstering federal support for research into the causes and prevention of gun violence, which Congress has blocked since the 1990s; (2) extending instant background checks, currently required only for sales by licensed firearms dealers, to all gun sales; (3) requiring gun purchasers to demonstrate their knowledge of state gun laws and basic gun safety rules and also their ability to safely handle the gun they are purchasing; (4) mandating security measures by retail gun sellers to prevent theft; and (5) implementing microstamping technology that would enable law enforcement to trace crime guns and ammunition cartridges found at crime scenes, facilitating the apprehension and prosecution of violent criminals. Other potential regulations exist that would be compatible with lawful, beneficial gun ownership and the public’s interest in reducing gun deaths and injuries, but I intentionally selected relatively benign measures that do not even arguably create a substantial burden on gun owners or the exercise of Second Amendment rights.

Spoiler alert: The proposals discussed in this article are subject to objections. Of course they are. No proposal is perfect and one of the most frustrating aspects of participating in the gun debate is that every proposal is met with the response that it will not work perfectly. Thus, for example, the proposal for universal background checks generates the response that “criminals will not comply with it.” That is correct. Nor do they comply with many other legal requirements, but no one is heard arguing that we should abolish murder, robbery, or other laws that are regularly violated. Demanding perfection in a proposal is a

14. Amy Roberts, *By the Numbers: Guns in America*, CNN (updated Oct. 6, 2014, 4:58 PM), <http://www.cnn.com/2012/08/09/politics/btn-guns-in-america/>.

15. U.S. CONST. amend. II.

well-known fallacy¹⁶ of argument.¹⁷ While there is nothing objectionable about pointing out weaknesses in one option as opposed to another option, rejecting proposals simply because they are not perfect, whether out of sincere conviction or as a rhetorical device, is a large contributor to the present stasis. “One can find objections to almost any plan—the fallacy is failing to weigh in the balance the objection to the alternatives.”¹⁸ Our alternatives in the gun policy debate are: (1) continue doing nothing; or (2) work together in advancing policies that present a likelihood of reducing gun deaths and injuries, but which also respect and protect lawful gun ownership.

Another common reasoning fallacy that blocks progress is the slippery slope argument,¹⁹ in which any restriction, no matter how benign or beneficial in itself, is assailed as “[t]he camel’s nose is in the tent.”²⁰ Because this argumentation strategy has nothing to do with the reasonableness of the measure under consideration, it is always available. Slippery slope arguments commit fallacies of both hyperbole and causation. In rhetoric textbooks, the fallacy travels under labels such as the “unnecessary parade of horrors,”²¹ “domino fallacy,”²² and “the wicked alternative.”²³

It is possible, of course, that one potential consequence of adopting a reasonable restriction on a constitutional right is that it could lead incrementally to another restriction, which may be an unreasonable one. However, employing such a concern to defeat a proposal is valid only if there is an independent likelihood that the next step will

16. A fallacy is a type of incorrect argument that appears on its face to be valid, but under scrutiny proves to be logically invalid. T. EDWARD DAMER, *ATTACKING FAULTY REASONING* 43 (4th ed. 2001) (describing fallacies as “mistakes in reasoning that typically do not seem to be mistakes” and explaining that “[f]allacious arguments usually have the deceptive appearance of being good arguments”).

17. Fallacies of this nature travel under different labels. See W. WARD FEARNSIDE & WILLIAM B. HOLTHUR, *FALLACY: THE COUNTERFEIT OF ARGUMENT* 129–32 (1959) (explaining and criticizing the logical fallacies of “Nothing but Objections” and “Impossible Conditions”); MADSEN PIRIE, *THE BOOK OF THE FALLACY* 173–76 (1985) (explaining and criticizing the fallacy of “Unobtainable Perfection”).

18. FEARNSIDE & HOLTHUR, *supra* note 17, at 129–32.

19. See Frederick Schauer, *Slippery Slopes*, 99 *HARV. L. REV.* 361, 361–62 (1985) (defining “slippery slope” as an argument asserting “that a particular act, seemingly innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious events”).

20. *Id.* at 361 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 402 (1973) (Stewart, J., dissenting)).

21. PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* 31–32 (1986).

22. DAMER, *supra* note 16, at 158–59.

23. FEARNSIDE & HOLTHUR, *supra* note 17, at 128–29.

in fact be taken.²⁴ As rhetorician T. Edward Damer explained in discussing slippery slope arguments, “[e]very causal claim requires a separate argument”²⁵ and failing to furnish evidence to support an argument that one event will cause an independent event or series of events simply exposes the “clumsy thinking of the arguer.”²⁶

Gun-rights advocates have long used, and continue to use, the slippery slope argument to oppose reasonable gun restrictions by stoking fears along the lines of: “Today it will be *x*, tomorrow it will be gun prohibition and confiscation.” Even assuming that such a fear may once have had merit,²⁷ the Supreme Court’s decisions in *District of Columbia v. Heller*²⁸ and *McDonald v. City of Chicago*²⁹ should put it to rest. Gun bans are unconstitutional.

I know well from teaching my law school firearms policy course that many people believe *any* restriction on guns is overly burdensome and violates the Second Amendment. Such beliefs are unfounded and result from inaccurately viewing the Second Amendment as an absolute right while failing to weigh the extent of the burden against competing communitarian interests and costs. To be clear, the only existing Second Amendment right established by the nation’s high court is *Heller*’s recognition of an individual right to maintain an operable firearm in the home for the purpose of self-defense.³⁰ In

24. See Schauer, *supra* note 19, at 381–82 (discussing the proper context for examining slippery slope arguments).

25. DAMER, *supra* note 16, at 158.

26. *Id.*

27. In a 1992 article, I noted that the slippery slope argument had some credence in the gun area compared to other areas involving restrictions on constitutional rights because some gun opponents did, in fact, call for blanket gun prohibition. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 87–89 (1992). That, however, is no longer the case. See Andrew Jay McClurg, *Firearms Policy and the Black Community: Rejecting the “Wouldn’t You Want a Gun If Attacked?” Argument*, 45 CONN. L. REV. 1773, 1782–90 (2013) (explaining that calls for gun bans have disappeared post-*Heller*, that gun bans are unconstitutional, and that they are politically unfeasible).

28. 554 U.S. 570, 628–30 (2008) (holding that the Second Amendment protects an individual right to possess an operable firearm in the home for the purpose of self-defense and invalidating the District of Columbia’s handgun ban).

29. 561 U.S. 742, 750 (2010) (incorporating the Second Amendment into the due process clause of the Fourteenth Amendment and making it binding on the states).

30. Of course, the Court could always choose to expand the right. The largest outstanding issue after *Heller* is whether the Second Amendment protects a right to carry guns in public. Several U.S. Circuit Courts of Appeal have either held or assumed for purposes of decision-making that the Second Amendment has some application outside of the home. See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1166, 1179 (9th Cir. 2014) (holding that the Second Amendment right to bear arms implies a right to carry guns in public and striking down San Diego County’s interpretation of a California law requiring a showing of “good cause” to obtain a handgun permit), *reh’g granted*, No. 3:09-cv-02371-IEG-BGS, 2015 U.S. App. LEXIS 4941 (2015); *Drake v. Filko*, 724 F.3d 426, 434, 440 (3d Cir. 2013) (assuming without deciding that the

roughly 900 post-*Heller* lawsuits challenging existing gun restrictions, courts have upheld nearly every law challenged.³¹ Because none of the proposals suggested herein even remotely impinge on *Heller*'s core right to possess a firearm in the home for purposes of personal defense, the Second Amendment may be set aside in considering the desirability of the measures.

Hopefully, explanation of the five proposals in this article will at least stimulate honest debate (not simply more heated rhetoric) about the *possibility* that reasonable measures for reducing gun deaths and injuries exist. Perhaps it will even change a few minds. In my firearms policy course, where nearly all of the students are strong gun-rights supporters, I often find that even deeply entrenched beliefs about guns and gun violence evolve in the face of facts and open discussion.

I. MORE RESEARCH AND DATA COLLECTION

The first measure does not involve additional regulations on guns, but rather removing existing restrictions on firearms research. One of the principal reasons for the low quality of much of the gun debate is that even participants with good intentions have little to rely on in terms of current, accurate research and other data. We do not even know how many privately held guns exist. Although it is commonly estimated that Americans own 300 million guns, no one has a firm idea as to whether that figure is accurate because we have never tried to keep count.

In the early 1980s, the U.S. Centers for Disease Control (CDC) began studying firearm deaths and injuries as a “public health” prob-

Second Amendment has some application outside the home but upholding New Jersey law requiring a showing of “justifiable need” to obtain a handgun permit); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (assuming without deciding that the Second Amendment has some application outside the home, but upholding Maryland law requiring a showing of “good-and-substantial-reason” to obtain a handgun permit); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (holding that the Second Amendment right to bear arms implies a right to carry guns in public and striking down Illinois’s complete ban on public carrying); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89, 101 (2d Cir. 2012) (assuming that the Second Amendment has some application outside the home, but upholding New York law requiring a showing of “proper cause” to obtain a handgun permit).

31. L. CTR. TO PREVENT GUN VIOLENCE, POST-HELLER LITIGATION SUMMARY 1–2 (Nov. 21, 2014), available at <http://smartgunlaws.org/wp-content/uploads/2013/09/Post-Heller-Litigation-Summary-November-2014.pdf> (summarizing an analysis of more than 900 post-*Heller* lawsuits challenging gun laws and concluding that “[n]early all of these lawsuits have been unsuccessful”).

lem.³² In 1988, two CDC investigators published a commentary in the *New England Journal of Medicine* advocating that firearms injuries be studied using epidemiological methods traditionally used to study diseases.³³ Over the years, the CDC sponsored several firearms studies, virtually all of which reached conclusions supporting greater regulation of firearms or a reduction of firearms in homes.³⁴ The studies were, and still are, cited by the media and gun control organizations in making the case against guns.³⁵ Gun rights supporters have vigorously attacked both the methodologies and conclusions reached by the public health studies.³⁶

The National Rifle Association (NRA) and other gun-rights advocates lobbied Congress to disband the CDC's National Center for Injury Prevention, the center that funded the research.³⁷ The center survived, but the "Dickey Amendment" to the 1996 Omnibus Consolidated Appropriations Bill provided that "none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control."³⁸ The meaning of the Dickey Amendment has never been completely clear, but Arthur Kellerman, one of the most prominent and controversial (because of the conclusions his studies reached) gun researchers, stated in 2012 that "no federal employee was willing to risk his or her career or the agency's funding to find out."³⁹ In the 2000s,

32. See generally GUN CONTROL & GUN RIGHTS 77–78 (Andrew J. McClurg, David B. Kopel & Brannon P. Denning eds., 2002) (discussing the evolution of the CDC firearms studies dispute); Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, PSYCHOL. SCI. AGENDA (APA Sci. Directorate, Washington, D.C.), Feb. 2013, <http://www.apa.org/science/about/psa/2013/02/gun-violence.aspx> (exploring the history of government-funded gun research).

33. GUN CONTROL & GUN RIGHTS, *supra* note 32, at 77.

34. *Id.*

35. *Id.*

36. See Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 522 (1995) (characterizing the public health gun studies as "'sagecraft' literature in which partisan academic 'sages' prostitute scholarship, systematically inventing, misinterpreting, selecting, or otherwise manipulating data to validate preordained political conclusions" and offering examples to support this charge).

37. See Jamieson, *supra* note 32.

38. Department of Health and Human Services Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-242-44 (1996).

39. Jamieson, *supra* note 32. Interestingly, in 2012, former Republican Representative Jay Dickey, who introduced the 1996 Dickey amendment, reversed positions and said in a co-authored op-ed piece that he strongly believed "scientific research should be conducted into preventing firearm injuries and that ways to prevent firearm deaths can be found without encroaching on the rights of legitimate gun owners." Jay Dickey & Mark Rosenberg, Op-Ed., *We Won't Know the Cause of Gun Violence Until We Look for It*, WASH. POST (July 27, 2012), <http://>

Congress attached similar language to appropriation acts cutting off funding for gun research by the National Institutes of Health.⁴⁰

In January 2013, President Barack Obama, in the wake of the Sandy Hook mass shooting, issued an executive order to “end the freeze on gun violence research,” asserting that gun violence research “is not advocacy; it is critical public health research”⁴¹ But the statutory restriction on government funding of firearms research that “advocate[s] or promote[s]” gun regulation remains and unless and until it is removed, researchers remain wary of violating the law.⁴²

Other congressional actions have also hindered gun research. In the 1990s, analysis of crime-gun tracing data collected by the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) began creating a clearer picture of how legal guns get diverted to criminals, but trace data stopped flowing to researchers, journalists, and the public when Congress began attaching the Tiahrt Amendment to appropriations acts in 2003.⁴³ The amendment prohibits the agency from releasing gun-tracing data pursuant to Freedom of Information Act requests and bars (perhaps unconstitutionally) the use of it in court.⁴⁴ Congress also has hindered the ability of ATF to track the trail of guns used in crime. One of the agency’s responsibilities is to respond to crime gun trace requests from law enforcement agencies through its National Tracing Center, but that job is made much more difficult because Congress has blocked the agency’s efforts to computerize firearms transactions records.⁴⁵ An estimated one-third of trace requests

www.washingtonpost.com/opinions/we-wont-know-the-cause-of-gun-violence-until-we-look-for-it/2012/07/27/gJQAPfenEX_story.html.

40. See Department of Health and Human Services Appropriation Act of 2012, Pub. L. No. 112-74, § 218, 125 Stat. 1065, 1085 (2011) (“None of the funds made available in this title may be used, in whole or in part, to advocate or promote gun control.”).

41. NOW IS THE TIME, *supra* note 13, at 8–9.

42. See Julie Rovner, *Debate Rages on Even as Research Ban on Gun Violence Ends*, NPR (Feb. 6, 2013, 4:28 PM), <http://www.npr.org/blogs/health/2013/02/06/170844926/debate-rages-on-even-as-research-ban-on-gun-violence-ends> (discussing uncertainty, based on interviews with experts, regarding what types of government-funded firearms research are permissible and asserting that the “only real way to ensure the research restarts is for Congress to drop the existing language from the annual spending bill and restore funding”).

43. See Colin Miller, *Lawyers, Guns, and Money: Why the Tiahrt Amendment’s Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment*, 2010 UTAH L. REV. 665, 676–82 (2010) (explaining history of the Tiahrt Amendment to appropriations acts and arguing that the ban on admitting gun-tracing data as evidence in state courts violates the Commerce Clause and the Tenth Amendment).

44. *Id.* at 676.

45. Erica Goode & Sheryl Gay Stolberg, *Legal Curbs Said to Hamper A.T.F. in Gun Inquiries*, N.Y. TIMES (Dec. 25, 2012), <http://www.nytimes.com/2012/12/26/us/legislative-handcuffs-limit-atfs-ability-to-fight-gun-crime.html>.

require ATF employees to sift through paper or microfiche records in boxes and filing cabinets.⁴⁶

Less directly, a byproduct of the 2005 Protection of Lawful Commerce in Arms Act⁴⁷ was to cut off access to information through litigation discovery mechanisms about gun industry practices that had proved useful to understanding the gun industry and, specifically, to understanding how legal guns get diverted to the secondary illegal market.⁴⁸ Recall that it was through litigation discovery, not agency investigation or congressional hearings, that we learned how the tobacco industry misled the public for decades about the addictiveness and other dangers of cigarettes.⁴⁹

A consequence of this knowledge and information blackout is that even well-intentioned participants on both sides of the gun debate are forced to rely on incomplete or dated information.⁵⁰ Gun statistics are frequently used to intentionally mislead, but just as often, iffy facts get spread simply because reliable, current information is not available. In arguing for universal background checks for gun purchasers, President Obama and others asserted that 40% of all gun sales are private sales not subject to the federal background check requirement, which applies only to federally licensed dealers.⁵¹ A potent statistic, but where did it come from? Factcheck.org traced it to a 1994 telephone survey of 251 gun owners who were asked whether they thought their gun was acquired from a licensed dealer.⁵² Philip

46. *Id.*

47. *See supra* notes 10–12 and accompanying text (explaining the PLCAA).

48. As an example, discovery in a lawsuit against Colt's Manufacturing Co. prior to the enactment of the Protection of Lawful Commerce in Arms Act showed that the company was making remarkable progress in the development of personalized gun or "smart gun" technology and saw it as a potential major growth area in the market. Stephen T. Teret & Adam D. Mernit, *Personalized Guns: Using Technology to Save Lives*, in *REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS* 173, 177 (Daniel W. Webster & Jon S. Vernick eds., 2013) (discussing 1999 internal memo uncovered through discovery). Shortly thereafter, Colt and other gun makers discontinued work on personalized guns. *Id.*

49. *See generally* WORLD HEALTH ORG., *TOBACCO EXPLAINED: THE TRUTH ABOUT THE TOBACCO INDUSTRY . . . IN ITS OWN WORDS*, available at <http://www.who.int/tobacco/media/en/TobaccoExplained.pdf> (containing and giving context to 1200 excerpts from documents acquired by plaintiffs in lawsuits against the tobacco industry showing the industry's knowledge of tobacco dangers and describing industry marketing practices).

50. The shortcomings in the existing body of gun research and data are reflected in this article. Readers will note that several of the most relevant and reliable research and data sources cited herein are dated.

51. NOW IS THE TIME, *supra* note 13, at 3 (asserting that "studies estimate that nearly 40 percent of all gun sales are made by private sellers who are exempt from [the background check requirement]").

52. *Guns Acquired Without Background Checks*, FACTCHECK.ORG (Mar. 21, 2013), <http://www.factcheck.org/2013/03/guns-acquired-without-background-checks/>.

Cook, a respected gun researcher and co-author of the study, told Politifact.com he has “no idea” whether the 40% figure is accurate.⁵³ On the gun-rights side, an oft-repeated statistic is that Americans use guns in self-defense up to 2.5 million times a year,⁵⁴ which, if true, bolsters the utility of gun ownership. The figure comes from a legitimate but nearly two decades-old study by Gary Kleck and Marc Gertz, in which sixty-six random participants reported over the telephone that they had used a gun defensively during the previous year.⁵⁵ The 2.5 million figure was extrapolated from those responses.⁵⁶

That we cannot hope to solve any complex policy issue without current, accurate research and data is to state the obvious. The dearth of research into the causes and prevention of gun violence has left us in the dark about nearly every vital issue in the firearms policy debate. With regard to the above, how many gun sales occur annually without background checks and how many legitimate defensive gun uses occur each year? What is the association between guns in the home and homicides, suicides, and accidental shootings? How and from where do criminals acquire guns? What is the relationship of stolen guns to guns used in crime? How can we better predict which people with mental illness present dangers to others, and what are the best ways to prevent those people from acquiring guns? What is the deterrent impact of gun ownership on crime? What percentage of crime guns originate from corrupt federal firearms licensees? From straw purchases? The list could go on and on.

If gun-rights and gun-regulation supporters could agree on the need to remove the barriers to more research and data collection, it would be a large step forward in developing rational firearms policies. Research does not impinge anyone’s Second Amendment rights. In the past, both gun-rights supporters and gun-regulation supporters have attacked the quality of the other side’s research, sometimes with justification.⁵⁷ Some research is deficient precisely because researchers have only old or incomplete data to work with. The answer to

53. Molly Moorhead, *Kirsten Gillibrand Says 40 Percent of Guns Sold Today Escape Background Check*, POLITIFACT (Jan. 30, 2013, 11:39 AM), <http://www.politifact.com/truth-o-meter/statements/2013/jan/30/kirsten-gillibrand/gillibrand-says-40-percent-guns-sold-today-escape/>.

54. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995).

55. *Id.*

56. *Id.* at 164 (stating principal conclusion of study that “there are about 2.2 to 2.5 million DGUs [defensive gun uses] of all types by civilians against humans” annually).

57. See generally Kates, *supra* note 33.

low-quality research is not to terminate research, but to demand and fund only high quality, non-partisan research. This should be true whatever the issue, whether it's the association between guns in the home and firearms fatalities and injuries or the deterrent effect on crime of more guns. Only reliable information has value to legislators and individual citizens in making rational decisions about firearms and firearms policy. We should question the motives of anyone on either side who is afraid of the truth.

II. UNIVERSAL BACKGROUND CHECKS

In his call for congressional action on gun regulation after the Sandy Hook Elementary School shooting, President Obama proposed legislation requiring background checks through the National Instant Criminal Background Check System (NICS) for all gun purchases.⁵⁸ Currently, federal law requires background checks only for purchases from federal firearms licensees.⁵⁹ Though often referred to as the “gun show loophole,” the loophole is much bigger than that. It includes any purchase from a non-licensed gun seller whether at a gun show, over the Internet, or in a parking lot.⁶⁰

Instant background checks can determine whether prospective purchasers are prohibited from buying or owning a firearm under federal law because they are, for example, convicted felons, persons subject to domestic violence protective orders, or persons who have been adjudicated mentally ill or involuntarily committed.⁶¹ Although the

58. NOW IS THE TIME, *supra* note 13, at 3.

59. Lawrence E. Rosenthal & Adam Winkler, *The Scope of Regulatory Authority Under the Second Amendment*, in REDUCING GUN VIOLENCE IN AMERICA 231 (Daniel W. Webster & Jon S. Vernick eds., 2013) (explaining current background check system and advocating for universal background checks).

60. See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF TREASURY, GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES 10, 14, 26 (1999).

61. Federal law prohibits nine categories of persons from purchasing or possessing firearms. They include any person:

- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) who, being an alien[,] . . . is illegally or unlawfully in the United States . . . ;
- (6) who has been discharged from the Armed Forces under dishonorable conditions;
- (7) who, having been a citizen of the United States, has renounced his citizenship;
- (8) who is subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child . . . ; or

NICS is imperfect due to a lack of reporting by states (reporting is voluntary) in some of the prohibited categories, 700,000 persons have been denied gun purchases because of background checks in the past decade.⁶² A Justice Department report estimated that between 1994 (when background checks went into effect) and 2010, background checks prevented more than 2.1 million prohibited purchasers from obtaining guns from licensed dealers.⁶³

The 2013 background check bill, however, failed 54–46 in the Senate.⁶⁴ The failure reveals the disconnect between Congress and the public regarding the desire to move forward and find reasonable common ground in the area of firearms policy and regulation. Several polls showed that large majorities endorse universal background checks. After Sandy Hook, a Gallup poll showed broad bipartisan support for universal background checks, with 97% of Democrats and 92% of Republicans supporting the measure.⁶⁵ After the background check bill failed in the Senate several months later, the numbers had dropped, but 65% of those polled said the measure should have been passed, while only 29% agreed with the Senate outcome.⁶⁶

The federal government's failure to act has left the matter up to the states. As of 2014, six states (California, Colorado, Connecticut, Delaware, New York, and Rhode Island) and the District of Columbia require background checks for all gun sales.⁶⁷ Two states (Maryland and Pennsylvania) require background checks for all handgun

(9) who has been convicted in any court of a misdemeanor crime of domestic violence

18 U.S.C. § 922(g) (2012).

62. *National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics> (last visited Dec. 20, 2014).

63. RONALD J. FRANSDEN ET AL., BUREAU OF JUSTICE STATISTICS, *BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2010—STATISTICAL TABLES*, at 1 (2013). Those prevented from buying firearms included felons, individuals with domestic violence histories, drug addicts, individuals with mental health issues, and fugitives. *Id.* at 6 tbl.4.

64. Michael McAuliff, *Gun Bill Background Check Amendment Fails, Other Key Provisions Follow*, HUFFINGTON POST (updated Apr. 19, 2013, 6:22 PM), http://www.huffingtonpost.com/2013/04/17/background-checks-bill_n_3103341.html.

65. Lydia Saad, *Americans Back Obama's Proposals to Address Gun Violence*, GALLUP POLITICS (Jan. 23, 2013), <http://www.gallup.com/poll/160085/americans-back-obama-proposals-address-gun-violence.aspx>.

66. Frank Newport, *Americans Wanted Gun Background Checks to Pass Senate*, GALLUP POLITICS (Apr. 29, 2013), <http://www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx>.

67. CAL. PENAL CODE § 30105 (West 2012); COLO. REV. STAT. ANN. § 18-12-112 (West 2013); CONN. GEN. STAT. ANN. §§ 29-33, 29-37a (West 2013); DEL. CODE ANN. tit. 11, § 1448B (West 2013); DEL. CODE ANN. tit. 24, § 904A (West 2013); D.C. CODE § 7-2502.03 (2013); N.Y. GEN. BUS. LAW § 898 (McKinney 2013); R.I. GEN. LAWS §§ 11-47-35–35.2 (2002 & Supp. 2012).

purchases.⁶⁸ Two states (Illinois and Oregon) impose background checks for sales at gun shows.⁶⁹ Four states (Hawaii, Illinois, Massachusetts, and New Jersey) require that a person purchasing any type of firearm have a gun permit, which requires a background check to obtain,⁷⁰ and four other states (Iowa, Michigan, Nebraska, and North Carolina) have a similar permitting requirement applicable to handguns only.⁷¹ Thus, a total of eighteen states require background checks for all or some private sales.

In terms of how a background check works with a private sale, using California as an example, the seller and buyer appear in person at a federal firearms licensee to complete the paperwork.⁷² The licensee, who is permitted to charge a \$10 fee, reviews the paperwork and runs the background check through the NICS.⁷³ Because California has a ten-day waiting period for all handgun purchases, the dealer holds on to the gun for the ten-day period.⁷⁴

Omitting private sales from the background check requirement creates a huge, illogical gap that undermines the entire check system. Advanced education is not required for an illegal purchaser to reason through the problem as follows: “If I try to purchase a gun from a licensed firearms dealer, I may be denied the gun and will also have committed a documented federal crime.⁷⁵ If I purchase a gun from a

68. MD. CODE ANN., PUB. SAFETY § 5-117.1 (LexisNexis 2011); 18 PA. CONS. STAT. ANN. § 6111(f)(2) (West 2012).

69. 430 ILL. COMP. STAT. ANN. 65/3, 65/3.1 (West 2013); OR. REV. STAT. §§ 166.432–166.438, 166.441 (2011).

70. HAW. REV. STAT. ANN. § 134-2 (LexisNexis 2013); 430 ILL. COMP. STAT. ANN. 65/1–65/15a (West 2013), 720 ILL. COMP. STAT. ANN. 5/24-3(k) (West 2013); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B, 129C, 131, 131A, 131E, 131P (West 2014); N.J. STAT. ANN. § 2C:58-3 (West 2013).

71. IOWA CODE ANN. §§ 724.15–724.20 (West 2013); MICH. COMP. LAWS ANN. §§ 28.422, 28.422a (West 2014); NEB. REV. STAT. §§ 69-2404, 69-2407, 69-2409 (2009); N.C. GEN. STAT. ANN. §§ 14-402 to -404 (West 2013).

72. KAMALA D. HARRIS, CAL. DEP’T OF JUSTICE, CALIFORNIA FIREARMS LAW SUMMARY 3 (2013), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/pdf/cfl2013.pdf> (explaining the process for private party transfers of firearms in California, which require the parties to complete a Dealer Record of Sale in person in the presence of a federal firearms licensee).

73. *Id.*

74. *Id.*; see also CAL. PENAL CODE § 26815(a) (West 2012) (mandating a ten-day waiting period for handgun purchases).

75. It is a federal crime for a prohibited purchaser to attempt to buy a gun, although, as critics validly note, only a small number of those who do so are ever prosecuted. See generally Ronald J. Frandsen, Enforcement of the Brady Act, 2009: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2009 (April 2011) (unpublished report on file with the U.S. Department of Justice) (detailing federal and state investigations and prosecutions of persons who attempt to illegally purchase guns); see also Chris Good, *The Case Against Gun Background Checks*, ABC NEWS (Apr. 10, 2013, 9:26 AM), <http://abcnews.go.com/blogs/politics/2013/04/the-case-against-gun-background-checks/> (asserting that in 2010 more than

private seller, I can avoid these problems. I believe I will opt for the latter course of action.”

We do not know what percentage of gun sales are unregulated private sales. As mentioned, President Obama and others cite the statistic that 40% of gun sales are private sales, but that figure is based on an old, quite limited study.⁷⁶ Consistent with the call above, we need more research of the issue. In the meantime, we do know that many illegal purchasers avoid licensed dealers and also that many unscrupulous sellers are quite willing to sell guns to those whom they know or reasonably should know are illegal purchasers. In 2009, the City of New York conducted undercover integrity tests at seven gun shows in Ohio, Tennessee, and Nevada.⁷⁷ The tests were designed to identify private sellers willing to sell guns to prospective purchasers who indicated they would not be able to pass a background check.⁷⁸ The investigators followed the following script from a training document:

Stage 1: “Are you a licensed guy?”

If the seller denies having a license, the Undercover will proceed to Stage 2.

Stage 2: “So no background check, right?”

If the seller answers in the negative, the Undercover will proceed to Stage 3.

Stage 3: “That’s good because I probably couldn’t pass one.”

Stage 4: Consummate the cash purchase of a handgun or assault weapon.⁷⁹

Sixty-three percent of the private sellers—19 out of 30—failed the integrity test, selling twenty semiautomatic handguns and one assault rifle to investigators who told them they could not pass a background check.⁸⁰

A similar study of online gun sales arrived at nearly identical findings.⁸¹ Sixty-two percent—77 out of 125—of private online sellers

76,000 attempted purchasers were rejected, but only sixty-two of them were prosecuted, resulting in thirteen guilty pleas or verdicts).

76. *See supra* notes 51–53 and accompanying text (describing this study).

77. CITY OF N.Y., GUN SHOW UNDERCOVER: REPORT ON ILLEGAL SALES AT GUN SHOWS 6 (2009), available at http://www.nyc.gov/html/om/pdf/2009/pr442-09_report.pdf.

78. *Id.* at 14.

79. *Id.* at 15.

80. *Id.* at 16.

81. CITY OF N.Y., POINT, CLICK, FIRE: AN INVESTIGATION OF ILLEGAL ONLINE GUN SALES 10 (2011), available at <http://everytown.org/documents/2014/10/point-click-fire.pdf>; see generally Ann Daniels, Comment, *The Online Gun Marketplace and the Dangerous Loophole in the National Instant Background Check System*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 757

agreed to sell guns to buyers who failed a similar integrity test; that is, they sold guns to people who told them they probably could not pass a background check.⁸² Craigslist was found to have the highest failure rate at 82%.⁸³ Although Craigslist policies bar firearms sales, the New York investigators found 1792 gun ads on Craigslist during a forty-five day period.⁸⁴

Several objections have been lodged against universal background checks, although, notably, they do not include an argument that such checks violate the Second Amendment.⁸⁵ Nor could they. Background checks do not deny guns to anyone who is lawfully entitled to possess them. They only work to identify potential buyers for whom it is already illegal to acquire a firearm. Common complaints about universal background checks include that they would not be a perfect solution because most criminals obtain guns through theft or purchase on the illegal secondary market.⁸⁶ The argument proves too much, however, because the same argument could be used to support abolishing all background checks. Given the large number of variables involved, one should always be wary of cause and effect claims on both sides of the gun debate, but there is some evidence supporting the effectiveness of universal background checks in reducing gun crime. A study by the Johns Hopkins Center for Gun Policy and Research attributed a 14% rise in Missouri homicide rates to the state's repeal of its universal background check requirement for handgun purchases in 2007.⁸⁷ Specifically, the study found that repealing the law was associated with forty-nine to sixty-eight additional murders per year between 2008 and 2012.⁸⁸

(2014) (describing the online gun marketplace and how it interacts with current federal background check system).

82. CITY OF N.Y., *supra* note 81, at 10.

83. *Id.* at 12.

84. *Id.*

85. See Rosenthal & Winkler, *supra* note 59, at 231 (analogizing a background check requirement to minor burdens imposed on other constitutional rights, such as the preregistration requirement for voting and license requirement for marrying).

86. See generally Daniels, *supra* note 81 (discussing the effectiveness of gun background checks and closing loopholes like illegal sales on the secondary market).

87. See Daniel Webster et al., *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. URB. HEALTH 293, 298 (2014) [hereinafter *Missouri Background Check Law Study*]; Daniel Webster et al., *Erratum to: Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. URB. HEALTH 598 (2014) [hereinafter *Erratum to Missouri Background Check Law Study*].

88. *Missouri Background Check Law Study*, *supra* note 87; *Erratum to Missouri Background Check Law Study*, *supra* note 87.

Other objections are that background checks for private sales would be too burdensome for federal firearms licensees, even though they can and do charge a fee for the service, and that the extra checks would slow down the NICS system.⁸⁹ The feasibility of extending background checks to private sales, however, is shown by the many states already requiring them.⁹⁰ Opponents also argue that the current instant check system is imperfect due to inadequate reporting of data by the states, and, invoking the slippery slope argument, that requiring universal background checks could lead to national gun registration.⁹¹

Establishing and maintaining a nationwide system for instant background checks on gun purchases that exempts a large percentage of gun buyers does not comport with common sense. It would be akin to having laws that require criminal background checks for some workers at daycare centers, but not others, or requiring driving tests for some classes of drivers, but not others. Indeed, because most illegal purchasers presumably know they cannot purchase a gun from a licensed dealer, the exemption for private sales provides its most direct benefit to the most dangerous gun users.

III. REQUIRING GUN PURCHASERS TO DEMONSTRATE KNOWLEDGE OF APPLICABLE FIREARMS LAWS AND SAFE GUN HANDLING

It is universally agreed that guns are inherently dangerous instrumentalities that require the highest degree of care in handling.⁹² Gun

89. See NAT'L SHOOTING SPORTS FOUND., WHY THE FIREARMS INDUSTRY OPPOSES SO-CALLED "UNIVERSAL BACKGROUND CHECKS," http://nssf.org/factsheets/PDF/UBC_Concerns.pdf (last visited Dec. 21, 2014) (listing objections to universal background checks).

90. See *supra* notes 67–70 and accompanying text.

91. See NAT'L SHOOTING SPORTS FOUND., *supra* note 89.

92. See, e.g., *Bridges v. Dahl*, 108 F.2d 228, 229 (6th Cir. 1939) (stating that the utmost caution must be exercised by those in possession and control of dangerous instrumentalities such as firearms and explosives); *Jacoves v. United Merchandising Corp.*, 11 Cal. Rptr. 2d 468, 486 (Cal. Ct. App. 1992) (stating that firearm use or possession requires the highest standard of care, even slight deviation from which may constitute actionable negligence); *Jacobs v. Tyson*, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991) (classifying a firearm as an "inherently dangerous instrumentality" which imposes on users a duty to employ "exceptional precautions to prevent injury" and distinguishing firearms from other products that are capable of being used to inflict harm, such as knives and golf clubs, because of the unusual dangers presented by firearms); *Long v. Turk*, 962 P.2d 1093, 1096 (Kan. 1998) (characterizing a handgun as a dangerous instrumentality requiring the highest degree of care in safeguarding); *Strever v. Cline*, 924 P.2d 666, 671 (Mont. 1996) (stating that a firearm is a dangerous instrumentality requiring a higher degree of care in use and handling); *Luttrell v. Carolina Mineral Co.*, 18 S.E.2d 412, 417 (N.C. 1942) (stating that those having possession and control of dangerous instrumentalities such as firearms and explo-

safety, including safe handling and storage, is a concern shared by all. The NRA was founded in 1871 based on a perceived need for better firearms training, and training and education continue to be primary goals of the organization today.⁹³

To acquire a concealed handgun carry permit, most states impose a classroom and live-fire training component as part of the application process,⁹⁴ but what is the justification for limiting mandatory safety training to those with concealed carry permits? Some states allow concealed handgun carrying without a permit⁹⁵ and many more allow the open carrying of guns without a permit.⁹⁶ Most gun accidents occur in the home, not while carrying guns in public.⁹⁷ Many gun buyers lack knowledge of how to safely operate the gun they are purchasing. For example, three law professors conducted a survey of women gun buyers in Asheville, North Carolina, in which 67% of the gun dealers interviewed said they did not believe their female customers knew how to use a firearm at the time of purchase.⁹⁸

Knowledge of gun laws and basic gun safety should be demanded of all purchasers. California again serves as a model. California law

sives owe the highest degree of care and that utmost caution must be exercised in their care and custody).

93. See *A Brief History of the NRA*, NAT'L RIFLE ASS'N OF AMERICA, <https://www.nrahq.org/history.asp> (last visited Dec. 21, 2014).

94. Steven W. Kranz, Comment, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 *HAMLIN L. REV.* 637, 649–50 (2006).

95. See, e.g., ALASKA STAT. § 11.61.220(a) (2012); ARIZ. REV. STAT. ANN. § 13-3112 (2010 & Supp. 2012); VT. STAT. ANN. tit. 13, § 4003 (2009); WYO. STAT. ANN. § 6-8-104 (2013).

96. See *Open Carrying Policy Summary*, L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/open-carrying-policy-summary/> (July 29, 2013) (asserting that thirty-one states allow open gun carrying without a permit, although some states require that the gun be unloaded).

97. See SHARYN E. PARKS ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, SURVEILLANCE FOR VIOLENT DEATHS—NATIONAL VIOLENT DEATH REPORTING SYSTEM, 16 STATES, 2010 11 (2014) (finding that 67% of the accidental firearms deaths included in a sixteen-state study occurred in a house or apartment). Data collected by the National Vital Statistics System showed 851 accidental firearm deaths in 2011. DONNA L. HOYERT & JIAQUAN XU, NAT'L CTR. FOR HEALTH STATISTICS, DEATHS: PRELIMINARY DATA FOR 2011, NAT'L VITAL STATISTICS REP. 18 tbl.2 (2012). But see Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. TIMES (Sept. 28, 2013), <http://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html> (reviewing hundreds of child firearm deaths and concluding that “accidental shootings occurred roughly twice as often as the records indicate, because of idiosyncrasies in how such deaths are classified by the authorities”). The gun debate tends to focus on deaths, but most shooting victims do not die. In 2013, 16,864 persons were injured in nonfatal accidental shootings. See *WISQARS*, *supra* note 4 (follow “Nonfatal Injury Data” and “Nonfatal Injury 2001–2013” hyperlinks; then select “unintentional” for “intent of injury,” “Firearm” for “cause of injury,” and “2013 to 2013” for “Year(s) of Report”; then follow “Submit Request” hyperlink).

98. Debra Burke et al., *Women, Guns, and the Uniform Commercial Code*, 33 *WILLAMETTE L. REV.* 219, 236 (1997).

requires handgun buyers to pass a multiple-choice and true-false test made up of thirty questions showing knowledge of state gun laws and basic gun safety rules⁹⁹ and also to demonstrate in person their ability to safely load and unload the firearm they are purchasing.¹⁰⁰ Here is how it works¹⁰¹: first, the prospective buyer visits a licensed gun dealer and selects a firearm. Before the purchase, however, the consumer must pass the multiple-choice and true-false test to obtain a Handgun Safety Certificate.¹⁰² Consumers can prepare for the test using the *Firearm Safety Certificate Study Guide*, which is available from gun dealers and online.¹⁰³ Every firearms dealer is staffed with Certified Safety Instructors who administer the test via materials provided by the California Department of Justice.¹⁰⁴ The dealer is permitted to charge a fee of \$25, which also covers a second chance at the test if necessary.¹⁰⁵ Upon receiving a passing grade (75%) on the thirty-question test, the individual is granted the certificate needed to make a legal handgun purchase.¹⁰⁶

When the buyer returns to collect the weapon after California's ten-day waiting period between purchase and delivery has passed, the buyer is required to demonstrate in the presence of a certified instructor the ability to safely handle the purchased firearm.¹⁰⁷ This requires the buyer to execute a series of specific steps involved in loading, unloading, and securing the handgun.¹⁰⁸ Once these steps are completed satisfactorily, the instructor signs off on an affidavit to complete the purchase.¹⁰⁹ In states without a waiting period, the written test and safe handling demonstration could be conducted in one transaction and visit.

Several other jurisdictions require some type of safety certification. The District of Columbia requires a written exam similar to Cali-

99. CAL. PENAL CODE § 26840 (West 2014); *Frequently Asked Questions: Firearm Safety Certificate Program*, STATE OF CAL., DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., <http://oag.ca.gov/firearms/hscfaqs> (last visited May 25, 2015).

100. CAL. PENAL CODE § 26850(a) (West 2012).

101. *Frequently Asked Questions: Firearm Safety Certificate Program*, *supra* note 99 (explaining the steps and processes for obtaining a handgun in California).

102. *Id.*

103. OFFICE OF THE ATT'Y GEN., CAL. DEP'T OF JUSTICE, FIREARM SAFETY CERTIFICATE STUDY GUIDE (Jan. 2015), <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/hscsg.pdf>.

104. *Frequently Asked Questions: Firearm Safety Certificate Program*, *supra* note 99.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

ifornia as part of its gun registration process, although the test can be completed online.¹¹⁰ Other states, such as Connecticut, Hawaii, Massachusetts, and Rhode Island, require persons wishing to purchase a handgun to submit proof that they have completed an approved firearms or hunter safety course in order to obtain a handgun purchase permit.¹¹¹

Requiring purchasers of the most dangerous product¹¹² to demonstrate their knowledge of applicable gun laws and basic gun safety, including the ability to safely handle the particular gun they are buying, is a reasonable measure that does not unduly restrict access to guns. But, of course, there are objections.

Regarding California's requirements, there have been complaints that a safety exam—especially one that comes with a \$25 price tag—is an encroachment on Second Amendment rights because it forces Americans to “earn” and pay for a Constitutional right.¹¹³ Some liken safety test requirements and fees to a modern day poll tax, designed more to discourage people from exercising their constitutional rights than to promote gun safety.¹¹⁴ The argument is weak. Courts have held that administrative fees to defray the costs of regulating guns pass constitutional scrutiny under the Supreme Court's “fee jurisprudence,”¹¹⁵ and surely it is a reasonable burden to require that some-

110. See D.C. CODE § 7-2502.03(a)(13)(A) (2012); see also METRO. POLICE DEP'T, DISTRICT OF COLUMBIA FIREARMS REGISTRATION: GENERAL REQUIREMENTS GUIDE 7-8 (2013), available at http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/firearms_reg_req.pdf (providing an overview of the registration process).

111. See CONN. GEN. STAT. ANN. § 29-36f(b) (West 2013) (forbidding issuance of an eligibility certificate for a handgun to any applicant who has failed to complete an approved course in the safe use of such firearms); HAW. REV. STAT. ANN. § 134-2(g) (West 2013) (requiring applicants for the acquisition of a handgun to complete an approved hunter education or firearms safety course); MASS. GEN. LAWS ANN. ch. 140, § 131P (West 2014) (requiring applicants for a permit to purchase a firearm to submit a basic firearms safety certificate to the licensing authority); R.I. GEN. LAWS § 11-47-35(a)(1)(ii) (2002) (requiring applicants for permits to purchase or acquire a handgun to present to the seller a safety certificate issued by the Department of Environmental Management).

112. It is reasonable to characterize firearms in these terms because guns, at least handguns, are the only legal product for which the intended purpose and primary utility is to kill or injure human beings. Thus, comparisons to other dangerous products, such as automobiles, alcohol, or baseball bats, are inapt because their primary purposes and utilities are, respectively, transportation, recreation, and the national pastime. Robert Rabin offered the distinction that one “uses” a handgun to cause harm, whereas one “abuses” products such as alcohol in causing harm. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 453 (1999).

113. See Tim Tritt, *California Handgun Laws Make Us Safer. Or Not*, THE TRUTH ABOUT GUNS (May 3, 2011), <http://www.thetruthaboutguns.com/2011/05/tim-tritt/california-handgun-laws-make-us-safer-or-not/>.

114. *Id.*

115. See *Kwong v. Bloomberg*, 723 F.3d 160, 165-69 (2d Cir. 2013) (rejecting Second Amendment challenge to administrative code requiring a \$340 licensing fee for a three-year

one purchasing an instrumentality that can instantly end human life be familiar with state laws regulating that instrumentality and know how to use it safely.

Other objections include complaints by gun dealers that the California requirements add to operating costs because the dealers are required to certify their employees through the California Department of Justice as qualified safety instructors at their own expense, a modest \$14 application fee for a five-year certification.¹¹⁶ They also assert that the test and demonstration elongate each sale transaction, requiring more employee time and staff.

In other words, the system is not “perfect.” Surprise, surprise.

IV. MANDATORY SECURITY MEASURES FOR RETAIL GUN DEALERS

Thousands of firearms are stolen each year from federal firearms licensees (FFLs) through both shoplifting and burglaries.¹¹⁷ In the first six months of 2014, thieves shoplifted nine assault rifles in three separate incidents from the same Walmart Supercenter in Cordova, Tennessee, a suburb of Memphis.¹¹⁸ News reports, which include surveillance video, indicate the assault rifles were taken from a freestanding display cases on the open floor while the store was open.¹¹⁹ It is uncertain how the thieves were able to access the display cases, but one news report stated about the second theft: “According to a police

handgun permit, reasoning that the Supreme Court’s “fee jurisprudence” permits governmental imposition of “fees relating to the exercise of constitutional rights” if “designed to defray . . . the administrative costs of regulating the protected activity” and that the fee is only a “marginal” burden that passes intermediate scrutiny), *cert. denied*, 134 S. Ct. 2696 (2014); *see also* Rosenthal & Winkler, *supra* note 59, at 231 (analogizing minor burdens on acquiring guns to minor burdens imposed as a prerequisite for exercising other constitutional rights).

116. *See Frequently Asked Questions: Firearm Safety Certificate Program*, *supra* note 99 (explaining the \$14 application fee and that the resulting instructor certificate is valid for five years).

117. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUSTICE, 2012 SUMMARY: FIREARMS REPORTED LOST AND STOLEN 4 (2013) [hereinafter 2012 ATF STOLEN GUNS REPORT]. Federal regulations require FFLs to report stolen or lost guns to ATF within forty-eight hours of the observed theft/loss. 27 C.F.R. § 478.39a (2008).

118. *See* George Brown, *Gun Thieves Hit Same Memphis Walmart for Third Time This Year*, NEWS CHANNEL 3 (June 3, 2014, 12:11 PM), <http://wreg.com/2014/06/03/gun-thieves-hit-same-memphis-walmart-for-third-time-this-year/> (reporting that two assault rifles were stolen from the Cordova, TN Walmart on January 27, 2014, seven others on February 11, and one more on May 28, and listing the nine stolen assault rifles as three Colt M4 Carbines, a Diamond Back DB-15, a DPM Panther Arms A-5, a Sig Sauer 522, a Bushmaster XM15-e2s, and a Sig Sauer SIGM400).

119. *See id.*; *see also* Jason Miles, *Half Dozen Guns Stolen from Walmart*, WMC ACTION NEWS 5 (updated Feb. 14, 2014, 4:03 AM), <http://www.wmcactionnews5.com/story/24721323/half-dozen-guns-stolen-from-walmart> (reporting “six ‘assault’ rifles were swiped from one of the glass displays, plus a seventh weapon” on February 11, 2014).

report, a manager told officers that the gun [display] case was new and the keys were stuck to the back of the gun case.”¹²⁰ As any merchant can well attest, including without a doubt Walmart, shoplifting is highly foreseeable.¹²¹

Burglaries of gun stores are also common. An internet search for “gun store burglaries” turned up several incidents. A break-in at a gun store in Salina, Kansas resulted in the loss of more than 100 guns and a large quantity of ammunition.¹²² Thieves took forty guns in a burglary of a Mississippi gun store.¹²³ A gun store in Dacula, Georgia was “cleaned . . . out” hours after a shipment of sixty-five guns had arrived and were put on display.¹²⁴

In 2012, FFLs reported 16,667 stolen or lost firearms.¹²⁵ Hand-guns were the most common type of firearm reported stolen or lost.¹²⁶ The 2012 data showed 377 burglaries involving the theft of 4,340 guns, and 662 larceny incidents involving the theft of 1,304 firearms.¹²⁷ The actual figures are likely much higher because stolen or missing guns often are not discovered unless and until ATF inspects the records of an FFL.¹²⁸ Historically, ATF has inspected only a small percentage of FFLs on an annual basis due to inadequate funding by Congress and

120. *Did They Use A Key? 9 Guns Stolen from Walmart Gun Safe*, LOCALMEMPHIS.COM (updated Feb. 27, 2014, 11:08 PM), <http://www.localmemphis.com/story/d/story/did-they-use-a-key-9-guns-stolen-from-walmart-gun/61243/dlCYfBmYhka6AcBJwTVvyQ>.

121. The National Association for Shoplifting prevention offers these statistics: annual shoplifting losses exceed \$13 billion, one in eleven Americans is a shoplifter, and more than ten million people have been caught shoplifting in the past five years. *The Shoplifting Problem in the Nation*, NAT'L ASS'N FOR SHOPLIFTING PREVENTION, <http://www.shopliftingprevention.org/what-we-do/learning-resource-center/> (last visited Dec. 21, 2014).

122. Salina Staff, *Large Number of Guns and Ammo Taken in Burglary*, SALINA POST (Apr. 15, 2014), <http://salinapost.com/2014/04/15/large-number-of-guns-and-ammo-taken-in-burglary/> (reporting that “100–120 handguns, 8–20 semi-automatic rifles, 8–12 knives, and nearly \$5,000 in ammunition” were stolen from Cleve’s Marine and Sporting).

123. Angela Williams, *2 Charged in Gun Store Burglary*, WATP NEWS, <http://www.wapt.com/news/central-mississippi/2-charged-in-gun-store-burglary/27610462#!bNSHYH> (last updated Aug. 19, 2014, 8:12 AM) (describing the arrest of two men for burglarizing a gun store in Kosciusko, Mississippi, and including an embedded video showing the men prying open locked glass cases).

124. Kristi Reed, *\$75,000 Worth of Guns Stolen During Big Gun Armory Burglary*, DACULA PATCH (Jan. 1, 2013), <http://patch.com/georgia/dacula/75-000-worth-of-guns-stolen-during-big-gun-armory-burglary#.VASQ3tF0ycx> (explaining that the burglars entered the store by breaking the front door glass and reaching through the bars to unlock the door, but also quoting the owner as stating that he had a double-keyed lock on the door until the fire marshal required him to replace the inside lock with a twist lock).

125. 2012 ATF STOLEN GUNS REPORT, *supra* note 117.

126. *Id.*

127. *Id.* at 9–10 tbl.3.

128. *Id.* at 2; see also Fred Schulte, *ATF’s Struggle to Close Down Firearms Dealers; Modest Resources, Restrictive Rules Allow Troubled Outlets to Stay Open for Years*, CTR. FOR PUB. INTEGRITY (last updated May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2013/02/01/12117/>

other hindrances.¹²⁹ A report by the Justice Department's Office of the Inspector General found that between 2007 and 2012, more than 58% of FFLs had not been inspected for five or more years.¹³⁰ In 2012, ATF inspected fewer than one in five FFLs.¹³¹

By definition, all stolen guns go directly to criminals. Not surprisingly, stolen guns are a primary source of guns used in crime.¹³² In interviews with incarcerated felons, 32% of the participants said they acquired their most recent firearm through theft.¹³³ The felons who reported stealing guns had stolen, on average, about thirty-nine guns each.¹³⁴ Analyzing data pertaining to how criminals obtain guns, criminologist Gary Kleck and a co-researcher concluded that “[t]heft is central to criminal gun acquisition.”¹³⁵

Guns are profitable, desirable items for thieves. Stolen guns are untraceable, making them valuable to those who intend to use them in crime.¹³⁶ They are also attractive to people who are legally prohibited from purchasing guns from licensed dealers.¹³⁷ As a result, they are prime candidates to enter the secondary illegal gun market. Given the foreseeability of gun thefts from retail sellers and the magnitude of the risk created by having a large number of guns collected in one location, rational risk-utility analysis commands the exercise of an extremely high amount of care on the part of commercial sellers to secure guns from theft both during and after business hours.

atfs-struggle-close-down-firearms-dealers (detailing incident in which 3000 firearms were found missing during an inspection of a Pennsylvania gun store in 2010).

129. See Schulte, *supra* note 128 (explaining how congressionally imposed limitations on funding and inspections of firearms dealers hinder ATF's ability to inspect and shut down law-breaking firearms licensees).

130. EVALUATION & INSPECTIONS DIV., OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF ATF'S FEDERAL FIREARMS LICENSEE INSPECTION PROGRAM, at ii (2013).

131. *FFL Compliance Inspections*, ATF.GOV (Feb. 2013), <https://www.atf.gov/publications/factsheets/factsheet-ffl-compliance.html> (stating that ATF conducted 13,100 compliance inspections of 69,000 FFLs in 2012).

132. See generally JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* (expanded ed. 1994).

133. *Id.* at 183 tbl.9.1 (citing data from the authors' study based on interviews with two thousand prisoners).

134. *Id.* at 198.

135. Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233, 1293 (2009).

136. *Valentine v. On Target, Inc.*, 727 A.2d 947, 956 (Md. 1999) (“Stolen guns are particularly attractive to people who intend to commit violent crimes with handguns because they are untraceable, an important characteristic to felons, and enjoy a potentially quick turnover.”).

137. *Id.* (noting that “under federal and state law, felons are unable to buy handguns legitimately from a licensed retail merchant”); see also 18 U.S.C. § 922(g)(1) (2012) (listing categories of prohibited gun purchasers, which include any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year”).

Nevertheless, only nine states and the District of Columbia have laws imposing security requirements on gun retailers.¹³⁸ California, for example, requires that during non-business hours gun sellers must store firearms in a secure facility that is part of the premises, protect firearms with a locked hardened steel rod or cable through the trigger guard of the firearm that is shielded from the use of a bolt-cutter, or store firearms in a locked fireproof safe or vault on the licensee's business premises.¹³⁹

Acknowledging it is well-known that thieves target gun stores searching for vulnerabilities,¹⁴⁰ ATF makes extensive recommendations to FFLs for properly securing and handling guns.¹⁴¹ These include detailed recommendations for structural security, inventory security, employee screening, safe business practices, customer safety, and disaster preparedness.¹⁴² But none of ATF recommendations

138. ALA. CODE § 13A-11-79 (LexisNexis 2012); CAL. PENAL CODE §§ 26820, 26890(a) (2012); CONN. GEN. STAT. § 29-37d (2009); D.C. CODE § 7-2504.07 (2008); MASS. GEN. LAWS ch. 140, § 123 (2014); MINN. STAT. ANN. § 624.7161 (West 2009); MINN. R. 7504.0200–7504.0400 (2000); N.J. STAT. ANN. § 2C:58-2(a) (2010); N.J. ADMIN. CODE §§ 13:54-3.11, 13:54-6.1 to -6.5 (2014); 18 PA. CONS. STAT. ANN. § 6113 (West 2000); R.I. GEN. LAWS § 11-47-40 (2002); W. VA. CODE § 61-7-10(a)(1) (2010).

139. CAL. PENAL CODE § 26890 (West 2012).

140. “Experience has shown that in many instances, thieves spend a considerable amount of time evaluating these businesses to determine and capitalize on their vulnerabilities.” BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUSTICE, SAFETY AND SECURITY INFORMATION FOR FEDERAL FIREARMS LICENSEES 8 (2010).

141. *See id.* at 8–15 (offering detailed recommendations for securing firearms in retail establishments).

142. The ATF guidance includes recommendations regarding *Structural Security* (evaluate business location, door and window locks, windows and doorjamb, other unsecured openings such as window air conditioner openings, walls and ceilings, exterior lighting and surrounding structures, shrubs and trees, and front windows and entrance; obtain and evaluate an alarm system and protect alarm codes; evaluate need for a video camera system, installation of a remotely activated electronic security entrance, and store layout during business hours and after business hours, including a “best practices” recommendation “to remove all firearms from display cases and racks and place them in a gun vault at night”); *Inventory Security* (conduct periodic physical inventories, accurately record physical inventory, require two-party inventories, protect inventory records, keep timely acquisition and disposition records, examine firearms shipments to determine accuracy, and keep display cases locked at all times); *Employee Screening* (institute an employee background screening, require proof of identity, and discuss questions with local police or ATF); *Safe Business Practices* (show only one firearm at a time to a customer, disable display firearms, do not leave a customer who is handling a firearm unattended, keep ammunition stored separately from firearms and out of reach of customers, do not meet with customers after hours or off site, and wipe down all countertops and doors each night (because it is easier to capture fingerprints from a clean surface in the event of a break-in), do not leave counter and safe keys in the cash register at night, ship firearms in a way that requires signatures or recording of transfers, provide safety and security training for employees, familiarize employees with firearms laws, record description of suspicious persons and their vehicles, post theft warning notices in conspicuous locations, request assistance of local law enforcement authorities, strictly control firearms at gun shows, and do not advertise that business is unprotected, such as by leaving a sign or voicemail message that business is closed); *Customer Safety* (insist on complete firearms

have the force of law. They merely provide “guidance” and “ideas.”¹⁴³

A comparative indicator of how society tolerates conduct by firearms dealers that increases the risk of guns being stolen or otherwise diverted to criminal users can be found by examining Colorado’s laws regarding recreational marijuana. While the federal government and forty states (including Colorado) have declined to mandate security measures for retail gun dealers, the Colorado constitution and regulations adopted pursuant thereto require security measures for recreational marijuana retailers.¹⁴⁴ While ATF only recommends conducting background checks on employees of federal firearms licenses,¹⁴⁵ Colorado requires them for all owners and employees of marijuana retailers.¹⁴⁶ Colorado also imposes an inventory control model known as MITS (Marijuana Inventory Tracking System) in which legal marijuana must be tracked from “seed to sale” to prevent diversion of legal marijuana into the illegal market.¹⁴⁷

safety, recommend safe storage methods, provide customers with ATF Publication 3312.8, Personal Firearms Record, so they can record information about their firearms in the event of theft or loss); *Disaster Preparedness* (prepare a disaster plan to protect business inventory and the public from the risk of firearms theft in the event of an impending disaster). *Id.*

143. *See id.* at 8.

144. Part 5 of Amendment 64, which legalized recreational marijuana, addresses the “Regulation of marijuana” and requires the Department of Revenue to develop safety regulations in several categories, including “(IV) Security requirements for marijuana establishments” and “(V) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one.” CO. CONST. art. XVIII, § 16(5) (West, Westlaw through Nov. 2013 amendments); *see also* COLO. CODE REGS. § 212-2.305 (2015) (imposing security standards for retail and cultivation marijuana facilities, including continuous alarm monitoring, minimum lock standards, limited access areas, and perimeter fencing).

145. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 140, at 11 (discussing ATF recommendation for background checks for employees of FFLs).

146. COLO. CODE REGS. § 212-2.201(E)(1) (2015) (stating that license applicants “must be comprised of individuals . . . [w]hose criminal history background checks establish they are all of Good Moral Character”).

147. COLO. CODE REGS. § 212.2.309 (2015) (specifying that it is “essential to regulate, monitor, and track all Retail Marijuana to eliminate diversion, inside and outside of the state, and to ensure that all marijuana grown, processed, sold and disposed of in the Retail Marijuana market is transparently accounted for”). Colorado also imposed a vertical integration business model as a way to prevent illegal diversion of legal marijuana, which required retailers to grow at least 70% of the marijuana they sell. Jacob Sullum, *Pot Goes Legit: What the End of Prohibition Looks Like in Colorado*, REASON.COM (Nov. 2013), <http://reason.com/archives/2013/10/14/pot-goes-legit>. The “70/30” rule was controversial. *Id.* Opponents argued it was anticompetitive, conveying monopoly power on a select group, while excluding others. *Id.* Supporters argued that it prevented the illegal diversion of legal marijuana to minors or out of state. *Id.* (quoting Norton Arbelaez, co-owner of two medical marijuana dispensaries and a board member of the Medical Marijuana Industry Group, arguing that “a vertically integrated, closed-loop regulatory framework” is needed to deter diversion). In July 2014, the state began accepting applications for licenses from those not involved in growing marijuana. *CO Welcomes New Rec Applicants*,

Guns result in more than 30,000 deaths annually.¹⁴⁸ A 2014 study by German researchers claimed to have documented “the first [two] cases of fatal cannabis smoking.”¹⁴⁹ Other evidence shows little threat of physical harm from marijuana use.¹⁵⁰ For a variety of reasons, it makes good sense to impose security requirements on the marijuana industry to prevent theft and the diversion of marijuana into the criminal market, but good sense, as well as risk-utility balancing, also command mandatory security requirements in the distribution and sale of firearms to prevent access by illegal users.

It is hard to imagine anyone, except perhaps irresponsible gun sellers, arguing that a retail gun store should not have to exercise the highest degree of care to protect their dangerous inventories from thieves, but currently, except in the nine states imposing security requirements on dealers, retailers have no legal incentive to safeguard firearms. In addition to the absence of mandatory restrictions, the Protection of Lawful Commerce in Arms Act¹⁵¹ has been construed to bar tort claims for negligent security against gun stores where firearm thefts lead to harm.¹⁵²

Prepares to End Vertical Integration Rule, MARIJUANA BUS. DAILY (July 1, 2014), <http://mmj-businessdaily.com/colorado-welcomes-new-rec-entrepreneurs-abandons-vertical-integration/>.

148. See MURPHY ET AL., *supra* note 3 and accompanying text.

149. Benno Hartung et al., *Sudden Unexpected Death Under Acute Influence of Cannabis*, 237 FORENSIC SCI. INT'L, at e11 (2014).

150. See Daniel Fuster et al., *No Detectable Association Between Frequency of Marijuana Use and Health or Healthcare Utilization Among Primary Care Patients Who Screen Positive for Drug Use*, 29 J. GEN. INTERNAL MED. 133, 136 (2013) (concluding there is no association between frequency of marijuana use and healthcare utilization and stating the study results “suggest that the frequency of marijuana use among patients who screen positive for drugs in primary care may not be associated with identifiable negative health outcomes”); see also *Get the Facts: Overdose*, DRUGWARFACTS.ORG, <http://www.drugwarfacts.org/cms/Overdose> (last visited Dec. 22, 2014) (“An exhaustive search of the literature finds no deaths induced by marijuana. The US Drug Abuse Warning Network (DAWN) records instances of drug mentions in medical examiners’ reports, and though marijuana is mentioned, it is usually in combination with alcohol or other drugs.”). To die from marijuana alone, one would have to ingest 1000 times the normal dose. Robert S. Gable, *The Toxicity of Recreational Drugs*, 94 AM. SCIENTIST 206, 207 (2006).

151. See *supra* notes 10–12 and accompanying text (discussing the PLCAA).

152. *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386, 393 (Alaska 2013) (holding that “[a] plain reading of [the PLCAA] supports a prohibition on general negligence actions—including negligence with concurrent causation” and that “[t]heft of a firearm does not support liability under claims excepted from the PLCAA”).

V. MICROSTAMPING TECHNOLOGY

At crime scenes where firearms are involved, police often are faced with insufficient evidence to investigate the crime.¹⁵³ Most homicides involve firearms, and nearly 40% of these cases go unsolved.¹⁵⁴ In some situations, the primary evidence at a shooting scene comes in the form of spent shell casings ejected from a semiautomatic weapon.¹⁵⁵ But a shell casing by itself does not help lead police to either the gun that shot the bullet or the person who fired it. Ballistics technology enables law enforcement to match a spent cartridge with the gun that fired it only if the agency has both the casing and the gun.¹⁵⁶

A feasible technology exists, however, that would allow police to match a bullet cartridge to the particular semiautomatic handgun from which it was fired: microstamping. Microstamping uses laser technology to etch a tiny identifying code, such as the gun's serial number, onto the firing pin or other internal parts during the manufacturing process.¹⁵⁷ When the gun is fired, the code is stamped onto the bullet cartridge.¹⁵⁸ If a microstamped cartridge were retrieved at a crime scene, law enforcement would be able to trace it back to at least the original purchaser of the gun and perhaps the assailant who used it.¹⁵⁹

The technology might also deter straw purchasers, one of the primary conduits for crime guns.¹⁶⁰ Straw purchases involve a purchase of a firearm or multiple firearms by one person with the intent of

153. Adam Cohen, *The Latest Crime-Solving Technique the Gun Lobby Doesn't Like*, TIME (June 18, 2012), <http://ideas.time.com/2012/06/18/the-latest-crime-solving-technique-the-gun-lobby-doesnt-like/>.

154. *Id.*

155. *See id.*

156. *See* Dorothy Kenney, Note, *Firearm Microstamp Technology: Failing Daubert and Federal Rules of Evidence 702*, 38 RUTGERS COMPUTER & TECH. L.J. 199, 200-03 (2012) (explaining traditional firearms ballistics testing).

157. *Id.* at 203-04.

158. *Id.* at 204.

159. A student note-writer summarized the process and goal of microstamping as follows: "The basic theory behind the technology is that a firearm's firing pin or other internal parts could bear microscopic codes unique to the firearm that could imprint the codes on fired cartridge cases. The codes then contain information like the gun's make, model and serial number. This acts much like a fingerprint on the bullet. If the gun is then used in any crime, this allows law enforcement officials to enter the found shell casing codes into a database to determine not only the manufacturer of the gun, but even the licensed dealer who sold it, and ultimately the owner. 'The goal is to provide an improved piece of trace evidence for forensic investigators, so that they can track a firearm without having to recover it.'" *Id.* (citations omitted).

160. *See* BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF TREASURY, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS, at xi (2000).

transferring the guns to others.¹⁶¹ They occur in situations where the actual purchaser is legally prohibited from purchasing or possessing a firearm because, for example, he is a convicted felon, or where the purchaser wants to conceal his identity because he is an illegal gun trafficker or for other reasons. An ATF report analyzing 1530 firearms trafficking investigations from 1996–1998 determined that straw purchases were the most common means used to divert guns from firearms dealers to the illegal market, comprising nearly 50% of the investigations.¹⁶² It stands to reason that potential straw purchasers who are knowingly buying guns for criminals or for diversion into the criminal gun market would be deterred if they knew the guns could be easily traced back to them if used in a criminal shooting. Even if they were not deterred from making the purchase, a straw purchaser to whom a crime gun was traced could in many cases provide information as to the actual purchaser's identity.

Getting tough on criminals who use guns is one of the most-repeated mantras of the gun-rights movement.¹⁶³ Microstamping technology would facilitate cracking down on gun criminals. So everyone supports it, right? Guess again. Even though microstamping technology would enhance the ability to solve gun crimes without infringing anyone's Second Amendment rights, the gun industry and gun-rights advocates vigorously oppose it.¹⁶⁴

Currently, only California¹⁶⁵ and the District of Columbia¹⁶⁶ have laws that require guns to incorporate microstamping technology. California's law has been on the books since 2007 but did not take effect until the Attorney General certified, in 2013, that the technology was available without previously existing patent protection.¹⁶⁷ At least two gun manufacturers, Ruger and Smith & Wesson, have refused to sell new semiautomatic pistols in California to which the law would

161. *Id.* at 1 & n.4.

162. *Id.* at 10–11.

163. See *The NRA: It's Not Pro-Gun, It's 'Anti-Crime,'* NEWSWEEK (Dec. 5, 1993, 7:00 PM), <http://www.newsweek.com/nra-its-not-pro-gun-its-anti-crime-190702>.

164. Adam Cohen, *supra* note 153.

165. CAL PENAL CODE § 31910(b)(7) (West 2012).

166. D.C. CODE §§ 7-2504.08, 7-2505.03 (2012).

167. Bob Egelko, *Gun Industry Balks at California's New Micro-stamping Law*, SFGATE (last updated Jan. 26, 2014, 10:55 PM), <http://www.sfgate.com/news/article/Gun-industry-balks-at-California-s-new-5177440.php>. The District of Columbia law was to take effect on January 1, 2013, but an emergency bill was passed that postponed the law taking effect until 2016. Emily Miller, *Smith & Wesson to Stop Selling Guns in California Due to Microstamping Law*, WASH. TIMES (Jan. 22, 2014), <http://www.washingtontimes.com/news/2014/jan/22/smith-wesson-stop-selling-guns-california-due-micr/>.

apply.¹⁶⁸ In January 2014, the National Shooting Sports Foundation filed a lawsuit to enjoin the law.¹⁶⁹ The lawsuit does not claim that the law violates the Second Amendment but that compliance with the law is not possible.¹⁷⁰

Gun makers and gun-rights groups have raised several objections to microstamping. One of the most prominent is that the technology is not full-proof.¹⁷¹ It is true that microstamping requires more testing and refinement. A 2012 study funded by the U.S. Department of Justice said “legitimate questions exist related to both the technical aspects, production costs, and database management associated with microstamping that should be addressed before wide scale implementation is legislatively mandated.”¹⁷² Tests of microstamping technology have reached mixed results in terms of the readability of the stamp on the cartridge, durability of the stamp on the firing pin or other internal gun part, and the ability of criminals to thwart the technology by defacing the microstamp.¹⁷³ Other objections are the potential cost of the technology (estimates range wildly from 50 cents to \$200 per gun),¹⁷⁴ the fact that many criminals use guns acquired on the black market (in which case the gun could not be traced back to them),¹⁷⁵ and the fear that the technology would result in the creation of a database of law-abiding gun owners.¹⁷⁶ Some have advanced the unusual argument that criminals might steal cartridges from a gun

168. Egelko, *supra* note 167.

169. Miller, *supra* note 167.

170. Egelko, *supra* note 167.

171. *Id.*

172. L.S. Chumbley et al., *Clarity of Microstamped Identifiers as a Function of Primer Hardness and Type of Firearm Action*, 44 AFTE J. 145, 146–47 (2012).

173. Kenney, *supra* note 156, at 205–09 (discussing tests of the reliability of microstamping technology, which reached results ranging from excellent to mixed).

174. See Erica Goode, *Method to Track Firearm Use is Stalled by Foes*, N.Y. TIMES, June 12, 2012, at A1; Robert Verbruggen, *The NYT on Microstamping*, NATIONAL REVIEW (June 13, 2012, 11:24 AM), <http://www.nationalreview.com/corner/302681/nyt-microstamping-robert-verbruggen>.

175. See Deane Calhoun et al., *The Supply and Demand for Guns to Juveniles: Oakland's Gun Tracing Project*, 82 J. URB. HEALTH: BULL. N.Y. ACAD. MED. 552, 554 (2005) (discussing the cumbersome gun-tracing procedure ATF is forced to rely on due to the lack of national gun registration and noting that crime gun tracing “only allows tracing to the initial retail purchaser”). Tracing crime guns back to the point of initial sale could still provide crucial information investigation, such as whether the gun was obtained in a straw purchase or stolen from an initial purchaser who did not report the theft. *Id.*

176. *Micro-Stamping & Ballistic “Fingerprinting,”* NRA-ILA, <https://www.nra.org/issues/micro-stamping-and-ballistic-fingerprinting/> (last visited May 13, 2015).

range and sprinkle them at a crime scene to, for reasons never explained, frame the person at the gun range.¹⁷⁷

If both sides were operating in good faith to find common ground, gun makers and the gun lobby would reasonably be calling for more research and testing to enhance microstamping technology and offer suggestions for improving its implementation. But that is not the approach they have adopted. Their efforts have been aimed at advancing a parade of horribles with the goal of forestalling microstamping until, as so often happens in the gun debate, they wear down proponents with the result that the idea gets shelved. As a consequence, a technology that has great potential to advance a goal everyone favors—identifying and prosecuting gun criminals—remains stalled.

CONCLUSION

This article has explored five proposals asserted to be reasonable common ground positions in the firearms policy debate. As a reader, what is your verdict? If you are a proponent of more gun regulation, perhaps the proposals fall far short of what you wish would happen. Perhaps you support extreme positions such as banning guns. Give that up. Not only are gun bans unconstitutional and politically unfeasible, but in a nation with 300 million estimated guns, we are far beyond the point where that would be an effective strategy for combatting gun violence. Calls for extreme measures simply help perpetuate the slippery slope argument from the gun-rights side. The goal here is for compromise on measures that both sides, acting honestly and in good faith, could agree are reasonable and have the potential to be effective.

If you are a gun-rights proponent, test yourself. Set aside, or try to set aside, slippery slope and “unreasonable demand for perfection” arguments, as well as any unconscious bias against the very idea of gun regulation. Put yourself behind a Rawlsian “veil of ignorance.” In *A Theory of Justice*,¹⁷⁸ John Rawls suggested that the justness of societal rights and obligations could be tested by imagining a group of persons meeting to form a new society.¹⁷⁹ Essential to this undertaking is that the society-formers have no knowledge of their own station

177. David Muradyan, *Firearm Microstamping: A “Bullet with a Name on It,”* 39 *McGEORGE L. REV.* 616, 624 (2008).

178. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

179. *Id.* at 11.

or situation in life.¹⁸⁰ This “veil of ignorance”¹⁸¹ ensures that principles are chosen neutrally, preventing self-interest from tainting the decision-making. In our case, that entails imagining yourself as one untainted by knowledge of whether you may benefit from possessing guns or suffer harm from guns.

Whichever side of the debate you are on, analyze each proposal for reasonableness, balancing the potential of the measure to contribute positively to reducing gun deaths and injuries against the burden on gun owners and the Second Amendment. If one or more of the proposals pass this self-test, be open to the possibility that reasonable common ground may in fact exist in our national gun debate.

180. *Id.* at 12.

181. *Id.*

ESSAY

Good Cop-Bad Cop: Police Violence and the Child's Mind

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INTRODUCTION

Police violence against citizens lately has gripped the nation's attention because of recent cases in Ferguson, Missouri; Staten Island, New York; Cleveland, Ohio; Baltimore, Maryland; and elsewhere. Children in those communities and nationwide have been directly and indirectly exposed to these well-publicized incidences of police killings and the aftermath of those killings.

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Exposure to police violence may cause children physical, cognitive, emotional, and social trauma. Moreover, the exposure may negatively influence children's mindsets regarding the criminal justice system and police.

Undoubtedly, these events of late are not the first and only instances in which children have been exposed to physically aggressive and violent law enforcement action. And they are unlikely to be the last instances in which youth will be subjected to police violence. They are, however, a call for action.

Federal law enforcement officials already devote significant resources to the widespread problem of children's exposure to violence. However, their efforts have been impoverished because they have failed to account for police violence and the negative impacts stemming from that violence. To thoroughly tackle the problem of children's exposure to violence, officials addressing the issue should collaborate with others focusing on reform of police-citizen interactions. Their concerted effort must then prioritize data collection respecting, and research regarding, the impact of police violence on children from infancy through late adolescence. Additionally, their work must generate evidence-based programming sensitive to youths' developing perspectives on the legal system and legal actors.

I. CHILDREN'S EXPOSURE TO VIOLENCE HAS ATTRACTED FEDERAL ATTENTION AND RESOURCES

In 2010, United States Attorney General Eric Holder launched the Defending Childhood Initiative aimed at addressing children's exposure to violence.¹ As part of the initiative, Holder established a national task force.² Two years later, in December 2012, the task force issued a national report,³ which serves as "a blueprint for

1. *Defending Childhood: About the Initiative*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/defendingchildhood/about-initiative> (last updated Oct. 22, 2014). In 1999, Deputy Attorney General Eric Holder launched his first effort to attend to this issue when, as Deputy Attorney General, he began the Safe Start Initiative. See U.S. DEP'T OF JUSTICE, CHILDREN'S EXPOSURE TO VIOLENCE: THE SAFE START INITIATIVE (2001), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/fs200113.pdf>.

2. *Defending Childhood: Task Force on Children Exposed to Violence*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/defendingchildhood/task-force-children-exposed-violence> (last updated Oct. 16, 2014).

3. U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE (2012) [hereinafter TASK FORCE REPORT], available at <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>. In other years, the United States Department of Justice has issued more focused reports on the topic. See U.S. DEP'T OF JUSTICE, CHILDREN'S EXPOSURE TO VIOLENCE: A COMPREHENSIVE NATIONAL SURVEY (2009),

preventing children's exposure to violence and for reducing the negative effects experienced by children exposed to violence . . . across the United States."⁴ In the report, violence is defined as "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation."⁵ More particularly, the report focuses on children who experience sexual or physical abuse, witness intimate partner or inter-familial violence, and experience or witness violence in community spaces.⁶ Thus, a child may be directly exposed to violence—as when the child is the target of the violence—or indirectly exposed—as when the child witnesses or observes the use of violence or "has lost a loved one to violence."⁷

As explained in the report, children who are exposed to violence can be traumatically affected in their immediate development and might face difficulties as they transition to adulthood.⁸ Among the litany of negative outcomes specifically identified are, in no particular order, physical illness, cognitive impairments, emotional and mental health problems, impaired interpersonal relationships, deviant sexual behavior, feelings of powerlessness, self-blame, hypervigilance, use of violent behavior, normalization of violent behavior, and criminal association and activity.⁹ Further, it is contended that juveniles who suffer negative outcomes can have short-term and long-term impacts on, and interactions with, public and private human services agencies and programs.¹⁰

In addition to identifying and explaining the problem of children's exposure to violence, the task force offered many recommendations. In short, it proposed the development of a nationalized effort to end children's exposure to violence, consisting of federal involvement, youth inclusion, data collection and research, and development

available at <https://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf>; U.S. DEP'T OF JUSTICE, CHILDREN'S EXPOSURE TO VIOLENCE AND THE INTERSECTION BETWEEN DELINQUENCY AND VICTIMIZATION (2013), available at <http://www.ojjdp.gov/pubs/240555.pdf>; CHILDREN'S EXPOSURE TO VIOLENCE: THE SAFE START INITIATIVE, *supra* note 1.

4. *Defending Childhood: Task Force on Children Exposed to Violence*, *supra* note 2.

5. TASK FORCE REPORT, *supra* note 3, at 210–11 (quoting the World Report on Violence and Health) (quotation marks omitted).

6. *See id.* at 31–33.

7. *Id.* at 211 (defining the term "violence exposure").

8. *See id.* at 3, 29–31.

9. *Id.* at 29–34.

10. *See id.* at 28.

of evidence-based programming.¹¹ More specifically, this nationalized effort would encourage (1) identification, assessment, and treatment of children exposed to violence; (2) prevention of in-home exposure through the creation of safe, nurturing homes; (3) reduction in community violence through identification of community challenges, resources, and strategies, the involvement of men and boys as well as law enforcement and schools, and putting an end to bullying; and (4) reformation of the juvenile justice system for violence-exposed youth.¹²

II. THE FEDERAL APPROACH TO CHILDREN'S EXPOSURE TO VIOLENCE IS DOUBLY DEFICIENT

Although comprehensive in its approach to the identified issue, the task force report is lacking in two respects. First, the task force should have included police violence among the types of violence that youth may be exposed to and traumatized by. Furthermore, task force officials failed to recognize that children exposed to violence—especially police violence—may be negatively socialized to distrust the criminal justice system and avoid law enforcement.

A. Omits Police as a Source of Violence

The task force report fails to acknowledge that children—including young children—are subjected to violent acts committed by law enforcement against citizens. The perpetrators of violence with whom the report is concerned include family members as well as community members such as peers, teachers, coaches, community leaders, gang members, and others engaged in criminal activities.¹³ The report does not recognize police officials as a source of violence—whether in homes or public spaces—and so law enforcement violence is seemingly excluded from consideration.¹⁴ This absence should be rectified. Children are subjected—personally and otherwise—to many different forms of violent police action in a variety of settings, and all encounters can be trauma inducing.

Police behavior that commonly would be viewed as violent encompasses a wide array of conduct. While recent national attention

11. *Id.* at 9–11.

12. *Id.* at 11–23.

13. *Id.* at 107–110, 141–145 (describing violence in homes and families and by community members).

14. *See id.* (describing violence in homes and families and by community members).

has focused on police killings of citizens, police violence should be broadly interpreted to include actual and threatened physically aggressive policing behavior. On one extreme police violence should embrace harassment or threats of serious bodily injury or death and on the other extreme it should include homicide of an individual. Examples along the spectrum between the extremes include, in no particular order, rough hand-cuffing; rough frisking; frisking under clothes; strip searching; tasing; pepper spraying; firing, pointing, or brandishing of a weapon; deployment of police dogs; pulling or pushing; stepping on; kicking; hitting with or without a physical object; and use of the chokehold.¹⁵

Children learn about these violent police behaviors in many different ways and settings. Children, in their homes, experience police officers executing warrants or responding to emergency calls.¹⁶ Children observe police officers interacting with and arresting other individuals in public.¹⁷ Children themselves encounter police on the street or in school for investigatory or arrest purposes.¹⁸ While any of

15. Recent events in Baltimore, Maryland, are notoriously exemplary of the problems that may arise due to physically aggressive policing. In response to Freddie Gray's death while in Baltimore police custody, law enforcement presence and shows of force generally were ratcheted up throughout the city. One weekday afternoon, Baltimore police converged on the area near Mondawmin mall and Frederick Douglass High School, based on what was believed to be a credible threat of a "purge" to occur after school let that afternoon. Numerous police were in the area wearing riot gear, carrying batons and shields, and physically corralling the youth. Police helicopters swirled above. Eventually, youth and police directly and violently clashed. See Sam Brodey and Jenna McLaughlin, *Eyewitnesses: the Baltimore Riots Didn't Start the Way You Think They Did*, MOTHERJONES, Apr. 28, 2015, <http://www.motherjones.com/politics/2015/04/how-baltimore-riots-began-mondawmin-purge>.

16. See Susan D. Phillips & Jian Zhao, *The Relationship Between Witnessing Arrests and Elevated Symptoms of Posttraumatic Stress: Findings from a National Study of Children Involved in the Child Welfare System*, 32 CHILD. & YOUTH SERVICES REV. 1246, 1249 (2010); Ryan Sit et al., *Meet the NYPD Officers with the Most Lawsuits over the Past Decade*, N.Y. DAILY NEWS (Feb. 16, 2014, 2:30 AM), <http://www.nydailynews.com/new-york/meet-nypd-4-sued-officers-decade-article-1.1616033> (describing lawsuit against New York City Police Department officer alleging wrongful arrest and harassment of mother in front of her 10-year-old daughter); Anthony Advincula, *Children Who Witness Parent's Immigration Arrest May Suffer Lifetime Health Consequences*, REPORTING ON HEALTH, <http://www.reportingonhealth.org/children-who-witness-parents-immigration-arrest-may-suffer-lifetime-health-consequences> (last visited Mar. 26, 2015).

17. See Jenny Anchondo, *Arrest at Roysse Outrages Parents*, FOX 4 NEWS (Mar. 2, 2015), <http://www.fox4news.com/story/28243285/arrest-at-roysse-city-father-daughter-dance-outrages-parents>.

18. See CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 13 (2012) (providing statistics and anecdotes of stops and frisk by juveniles of New York City Police Department); Ryan Devereaux, *'We Were Handcuffing Kids for No Reason': Stop-and-Frisk Goes on Trial*, THE NATION, Mar. 28, 2013 (describing officer's testimony admitting illegal stops and frisks of juveniles by New York City Police Department); Conor Friedersdorf, *The City Where Blacks Suffer Under 'Stop and Frisk on Steroids'*, THE ATLANTIC, May 30, 2014, <http://www.theatlantic.com/national/archive/2014/05/where-blacks-suffer-under-stop-and-frisk-on-ster>

these interactions or observances may be relatively uneventful, violence can occur during these interactions and children can be exposed. Children are personally victims of police violence.¹⁹ In real-time, children observe others victimized by police.²⁰ Even if they do not personally experience or witness police violence, children can overhear adult conversations regarding police violence.²¹ Finally, the 24-hour news stream, internet, and social media make it possible for children to repeatedly view and discuss video and photographic images of police violence and any aftermath.²²

It stands to reason that children exposed to all manner of police violence, whether directly or indirectly through those they know, may suffer many of the cognitive, emotional, and social harms earlier itemized in relation to other forms of violence to which children may be subjected. But even children who are far removed from the actual events and become aware of the violence through traditional media, social media, or conversation can be negatively impacted. Secondary trauma, also known as compassion fatigue, can result when a child learns about the traumatic experiences of others, including by watching news stories or images after the events have occurred.²³ For these

oids/371869/ (reporting on stop and frisk practices in Miami Gardens, Florida, that included stopping children on playgrounds and identifying a 5-year-old child as “suspicious”).

19. See Wesley Lowery, *Tamir Rice Family Attorney Says ‘Unbelievable’ that City of Cleveland Court Filing Blames Tamir for His Own Death*, WASH. POST (Mar. 2, 2015), <http://www.washingtonpost.com/news/postnation/wp/2015/03/02/tamir-rice-family-attorney-says-unbelievable-that-city-of-cleveland-court-filing-blames-tamir-for-his-own-death/> (reporting on lawsuit filed by Rice family against Cleveland as a result of police officers killing 12-year-old Tamir Rice who was playing with toy gun at time of shooting); Steve Visser, *Governor Interested in Results of Habersham Raid Investigation*, ATLANTA JOURNAL-CONSTITUTION (June 2, 2014), <http://www.ajc.com/news/news/breaking-news/surgery-delayed-for-baby-wounded-by-habersham-gren/ng-CCf/> (describing execution of search warrant at a house while toddler present leaving toddler on life support).

20. See *Video Shows Police Kill Man With Hands Up In Front of Witnesses, Children—What Happened?*, INQUISITR, (Feb. 11, 2015), <http://www.inquisitr.com/1833556/video-police-shoot-man-hands-up/>; *3 Kids Witness Police-Involved Shooting from Back of Fleeing Car*, NBC CHICAGO (Jan. 5, 2013), <http://www.nbcchicago.com/news/local/3-Kids-Witness-Police-Involved-Shooting-from-Back-of-Fleeing-Car-185740902.html>; cf. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES, Aug. 24, 2014, at A1 (describing parents shielding their children from observing Michael Brown’s body in the street after he was killed by law enforcement).

21. See Rachel L. Swarns, *A Conversation About the Police a Mother Didn’t Want to Have*, N.Y. TIMES, Dec. 8, 2014, at A20.

22. See *Talking with Kids about News: Age-by-Age Insights*, PUB. BROAD. SYS. <http://www.pbs.org/parents/talkingwithkids/news/agebyage.html> (last visited Mar. 26, 2015). Internet searches on Google and Youtube for “police beating people” result in both still images and videos worldwide.

23. See *Secondary Traumatic Stress*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/resources/topics/secondary-traumatic-stress> (last visited Mar. 28, 2015); *Tips for Media Covering Traumatic Events*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/resources/topics/secondary-traumatic-stress>

reasons, exposure must be broadly understood to include not just personal or semi-personal experience but larger awareness of societal events.

B. Overlooks the Effects of Police Violence on Children's Legal Socialization

In keeping with the report's failure to include exposure to police violence among its concerns, the report also neglects to consider the impact of police violence on children's development of trust in and respect for the law and law enforcement. More specifically, children exposed to police violence may develop a negative perception of law enforcement and the criminal justice system.²⁴ In turn, this negative perception can affect their behavior toward law enforcement when young and later in adulthood.²⁵ The report, however, does not consider this significant concern, and it should.

Children are developmental sponges, soaking up all manner of knowledge and norms during their formative years.²⁶ Society wants children to trust in and respect the law, including legal enforcers such as the police. Thus, socialization into legal norms and the legal system begins in the earliest years of childhood.²⁷ Public education campaigns—such as Officer Friendly²⁸ and McGruff the Crime Dog²⁹—endeavor to teach children from as young as three years of age that

www.nctsn.org/resources/audiences/for-the-media/tips-for-covering-events (last visited Mar. 28, 2015).

24. See Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police Among Inner-City Youth*, 50 *SOC. Q.* 235, 241 (2009).

25. *Id.*

26. Lawrence A. Hirschfield, *Why Don't Anthropologists Like Children?*, 104 *AM. ANTHROPOLOGIST* 611, 615–16 (2002).

27. See Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 *SOC. JUSTICE RESEARCH* 217, 217–219 (2005) (explaining that the development of children's ties to law and legal actors begins in early childhood).

28. See Maureen O'Donnell, *Thomas J. Loftus, Nation's First 'Officer Friendly.'* *Dead at 75*, *CHI. SUN TIMES* (Jan. 12, 2015, 11:59 PM), <http://chicago.suntimes.com/obituaries/7/71/286411/xloftus13> (describing Chicago's creation of first Officer Friendly program in nation); Lucille deView, *'Officer Friendly' Teaches Kids to Beware of Strangers*, *CHRISTIAN SCI. MONITOR* (June 17, 1982), <http://www.csmonitor.com/1982/0617/061768.html> (describing Jacksonville's Officer Friendly program); see also *Officer Friendly Program*, *CHI. POLICE DEP'T*, <https://portal.chicago.police.org/portal/page/portal/ClearPath/Communities/Crime%20Prevention/School%20Programs> (last visited Mar. 28, 2015) (providing a modern expression of Officer Friendly programs and describing components of Officer Friendly school visitation program in Chicago).

29. See *About McGruff*, *NAT'L CRIME PREVENTION COUNCIL*, <http://www.npc.org/about/about-mcgruff> (last visited Mar. 28, 2015) (describing the National Crime Prevention Council's McGruff the Crime Dog program). Children can visit a website containing videos, games, and educational information featuring McGruff the Crime Dog. See *McGruff the Crime Dog*, <http://www.mcgruff.org/> (last visited Mar. 28, 2015).

law enforcement is charged with protecting and serving the community, and children should call the police for help. Long-standing efforts to develop positive relations between children and the police include police visits to schools, mentoring programs and community-based programs.³⁰

Notwithstanding, children can be legally socialized to characterize law enforcement as a negative, not a positive.³¹ More pointedly, youth subjected to police violence may label law enforcement as the bad guys.³² At an early age, children become sophisticated learners able to handle complex information and experiences.³³ Further, from an early age, children can discern negative interactions between individuals, and begin to categorize individuals and emotions positively and negatively.³⁴ Consequently, even a young child who observes or learns of a police officer behaving in an aggressive manner may group law enforcement with other bad actors, characters or scenarios with which the child is familiar.

Moreover, police violence is probably especially likely to socialize children of color to be wary of police. Regardless of age, the victims of police brutality are overwhelmingly Black and brown.³⁵ As com-

30. Many law enforcement agencies, especially larger ones, have youth outreach programs. See, e.g., *Community Affairs: Youth Services Section*, N.Y. POLICE DEP'T, http://www.nyc.gov/html/nypd/html/community_affairs/youth_programs.shtml (last visited Mar. 28, 2015); *Lessons/Programs*, N.Y. POLICE DEP'T, http://www.nyc.gov/html/nypd/html/school_safety/school_safety_community_outreach_curriculum.shtml (last visited Mar. 28, 2015); *Police Kids and Youth Education Programs*, CITY OF CLEVELAND, http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/PublicSafety/Division%20of%20Police/Community_Services (last visited Mar. 28, 2015); *Youth Programs*, L.A. POLICE DEP'T, http://www.lapdonline.org/youth_programs (last visited Mar. 28, 2015). An example of a non-governmental program is Drug Abuse Resistance Education (D.A.R.E.). See D.A.R.E., <http://www.dare.org/about-d-a-r-e/> (last visited Mar. 28, 2015).

31. See *The 12 Core Concepts: Concepts for Understanding Traumatic Stress Responses in Children and Families 2012*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/resources/audiences/parents-caregivers/what-is-cts/12-core-concepts> (last visited Mar. 28, 2015) (challenges to the social contract, including legal and ethical issues, affect trauma response and recovery).

32. See ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 21 (2014) (describing gritty versions of cops and robbers played by Black boys as young as 7 years who live in an impoverished, heavily-policed, urban neighborhood in Philadelphia, PA).

33. See HIRSCHFELD, *supra* note 26.

34. See generally Seth D. Pollak & Pawan Sinha, *Effects of Early Experience on Children's Recognition of Facial Displays of Emotion*, 38 DEVELOPMENTAL PSYCHOL. 784 (2002) (studying maltreated children's abilities to accurately identify facial expressions of anger).

35. See Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white>; see also Rich Juzwiak and Aleksander Chan, *Unarmed People of Color Killed by Police, 1999-2014*, GAWKER, (Dec. 8, 2014, 2:15 PM), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349>.

pared to whites, Blacks are more likely to have indirect exposure to policing as a result of conversations with family, friends, and neighbors.³⁶ Accordingly, children of color are more likely to become actual victims of police violence than white children, and children of color are more likely to be exposed to police violence perpetrated on people who look like them, whether friends or family or community members.

In addition to developing perceptions of law enforcement as illegitimate, research indicates that juveniles who have had negative exposure to the law interact with police in ways that affect safety and security.³⁷ Adolescents who negatively view police make significant efforts to avoid them, including by flight if possible.³⁸ In turn, law enforcement may chase the fleeing child and use physical force to subdue the child.³⁹ Kids who cannot avoid interacting with the police may refuse or ignore police commands, verbally resist orders, or in the most extreme instances, physically resist.⁴⁰ Finally, juveniles who have been victimized refuse to call the police for assistance.⁴¹ Any of these types of law enforcement-citizen interactions—or lack of interaction—manifests a breakdown in trust and respect and can put the lives of citizens and police at risk.

III. FEDERAL EFFORTS TARGETING CHILDREN'S EXPOSURE TO VIOLENCE CAN BE STRENGTHENED

To address the identified inadequacies of the task force report, several steps should occur. As a preliminary matter, from a structural perspective, a coordinated response should be undertaken. Future government efforts targeted toward alleviating children's exposure to violence should work in tandem with those government efforts target-

36. See Weitzer & Brunson, *supra* note 24, at 249–50.

37. See *id.* at 241, 243, 245–46 (stating youth holding negative perceptions of law enforcement avoid interactions with police, refuse to report victimization to police, and overtly resist police during interactions).

38. See GOFFMAN, *supra* note 32, at 23–29 (describing the “art of running” from police by young Black men in an impoverished, heavily-policed, urban neighborhood in Philadelphia, PA); Weitzer & Brunson, *supra* note 36, at 237 (mentioning flight as a response to distrust of police).

39. Weitzer & Brunson, *supra* note 24, at 242 (describing incident in which juvenile running from law enforcement was caught and shot).

40. *Id.* at 243–46 (describing instances in which juveniles did not report criminal activity or their own victimization).

41. *Id.* at 243; see also Jennifer Fratello, et al., Vera Inst. of Justice, *Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications 2* (2013) (finding 6 out of 10 juveniles subject to stop-and-frisk by New York City Police were unlikely to call the police if in trouble).

ing the reform of police behavior. For instance, the Defending Childhood Initiative might implement the findings and recommendations of, as well as work with programs resulting from, the President's Task Force on 21st Century Policing, which President Obama created in response to the national uproar over citizen killings by police in Ferguson, Staten Island, and Cleveland to "provide an effective partnership between law enforcement and local communities that reduces crime and increases trust"⁴² Once government officials have coordinated their work, they should then partner with non-governmental institutions to address this problem.

After the collaborative structure is created, two goals should be established: evidence collection and analysis, and programming creation. Present and future efforts to gather data from children on violence exposure exist, yet those efforts should be expanded to capture information regarding children's exposure to police violence. Further, the collection process should utilize the broad definition of police violence and capture the variety of means of exposure described herein. Slight efforts on this front have already begun. The President's Task Force on 21st Century Policing heard testimony from five individuals regarding their interactions with and resulting perceptions of law enforcement when young.⁴³ In light of these anecdotal reports, the interim report recommended that children's voices be included in efforts to reform police-citizen interactions.⁴⁴

While the information obtained by the Task Force on 21st Century Policing is enlightening with respect to children's responses to police interactions, it merely touches the surface. Researchers must

42. See Establishment of the President's Task Force on 21st Century Policing 79 Fed. Reg. 76865, 76865 (Dec. 23, 2014), available at <https://www.federalregister.gov/articles/2014/12/23/2014-30195/establishment-of-the-presidents-task-force-on-21st-century-policing>. For descriptions of its mission and process, as well as interim reporting, see U.S. DEP'T OF JUSTICE, INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, 1-3 (2015). On March 2, 2015, the President's Task Force on 21st Century Policing issued its interim report. *Id.* at 71 (recommending federal law enforcement agencies review the report recommendations and adopt those that can be implemented at the federal level).

43. On February 13, 2015, the 21st Century Policing Task Force held a listening session on Community Policing and Crime Reduction during which it heard testimony from youth concerning their experiences with law enforcement. U.S. DEP'T OF JUSTICE, *Listening Session on Community Policing and Crime Reduction*, <http://www.cops.usdoj.gov/Default.asp?Item=2770> (last visited Mar. 26, 2015). During the Task Force's investigation phase, several other witnesses also commented on the impact—both negative and positive—on youth of law enforcement behavior. See INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 42 at 9, 14.

44. See INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 42, at 14-15, 49.

undertake systematic and critical data gathering and analysis.⁴⁵ More specifically, centers and programs for childhood studies are ideal institutions in which to conduct this intensive study of children's exposure to police violence. Childhood studies is an emerging field of research in American institutions. Whether multi- or inter-disciplinary in nature, childhood studies incorporates both humanistic and social science approaches to studying children and their lives.⁴⁶ These programs bring together researchers in different disciplines to coordinate, leverage, and sometimes integrate knowledge and efforts to address the problems of children.⁴⁷

With this new research in hand, reformers should then incorporate this information into innovative, data-driven programming that positively educates children about police, fosters positive youth-police relationships and, in a developmentally appropriate manner, helps children understand the complexities of law enforcement work.⁴⁸ Existing, traditional one-dimensional police characters and fleeting police-youth education and mentoring programs apparently have proven to be insufficient to overcome the problems resulting from children's exposure to police violence.⁴⁹ Consequently, officials should aim to develop novel, evidence-based programming promoting a culture in which children and police are mutually understood, respected, and trusted, not maligned, feared, and endangered.

Community-based programs will be helpful to gathering data as well as developing and implementing novel programming. One promising private program already in existence—Strategies for Youth

45. This proposed goal is consistent with the recommendation in the interim report of the President's Task Force on 21st Century Policing that a nationalized system of data collection police-citizen interactions be established. *See id.* 19–20.

46. The Department of Childhood Studies at Rutgers University represents a multidisciplinary model. For information on the department, visit <https://childhood.camden.rutgers.edu/>. The Child Studies program at Vanderbilt University identifies itself as interdisciplinary. For information on the program, visit http://peabody.vanderbilt.edu/departments/psych/med_in_child_studies/index.php.

47. *See* NAT'L ACAD. OF SCIS., *Facilitating Interdisciplinary Research* 26-30 (2004) (defining multidisciplinary and interdisciplinary research).

48. *See generally* Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Participation in the Federal Reform of Local Practices*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008). In several instances, the Interim Report of the President's Task Force on 21st Century Policing recommended the development of youth-centered interactive programming for youth and police. *See* INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 42, at 14, 47, 49–50.

49. *Cf.* Renee Graham, *For African-American Children, There's No 'Officer Friendly'*, BOSTON GLOBE (Dec. 1, 2014), <http://www.bostonglobe.com/opinion/2014/12/01/ferguson-other-incidents-show-that-for-african-american-children-there-officer-friendly/4xDLb16ygEWNvziH6LOJ6M/story.html>.

(SFY)—is well-positioned to assist with the proposals made herein and serves as an example of the type of organization that may target this issue.⁵⁰ SFY is a national organization with the mission of improving police-youth relations by training law enforcement officers regarding juvenile development, mental health, and perceptions of police, as well as providing support for community efforts to develop positive law enforcement-juvenile relations.⁵¹ Currently, it provides general training to law enforcement on how to interact with youth when approaching them in public for questioning or investigation, when arresting them, or when arresting their parent.⁵² SFY also offers specialized training on how law enforcement should interact with children who have been chronically exposed to familial or community violence.⁵³ Pedagogically, SFY uses juveniles from the relevant community to assist in the training.⁵⁴ Thus, SFY grasps the importance of trauma exposure and prior police interactions as a factor influencing children's responses to police. Also, SFY recognizes that citizens—including youth—can play a role in training law enforcement.⁵⁵ For these reasons, SFY is ideally suited to gather information from children and other interested adults regarding the effect of police violence on children and transmit this knowledge to researchers and the larger community.⁵⁶ Moreover, expansion of SFY's current training slate to attend to the effect of police violence on children's perceptions of and responses to law enforcement is not untenable in light of its history and experience.

50. Attorney General Eric Holder also presents an opportunity to address this matter. He has mentioned to those who know him that after he leaves the Department of Justice he is interested "in establishing a center to continue his work on restoring trust between law enforcement and minority communities." Jerry Markon & Juliet Eilperin, *Attorney General Eric Holder to Step Down*, WASH. POST (Sept. 25, 2014), http://www.washingtonpost.com/national/attorney-general-eric-holder-to-step-down/2014/09/25/9b1dbb7a-44c3-11e4-b47c-f5889e061e5f_story.html. Work of the nature suggested herein would fit comfortably within that goal.

51. See *About*, STRATEGIES FOR YOUTH, <http://strategiesforyouth.org/about/> (last visited Mar. 30, 2015).

52. See *Model Guidelines*, STRATEGIES FOR YOUTH, <http://strategiesforyouth.org/for-police/model-guidelines/> (last visited Mar. 30, 2015).

53. See *Courses, Policing Youth Chronically Exposed to Trauma & Violence*, STRATEGIES FOR YOUTH, <http://strategiesforyouth.org/for-police/training/courses/> (last visited May 16, 2015).

54. See *Training Principles of Policing the Teen Brain*, STRATEGIES FOR YOUTH, <http://strategiesforyouth.org/for-police/training/> (last visited Mar. 30, 2015).

55. The Interim Report of the President's Task Force on 21st Century Policing recommended community participation in law enforcement training. See INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 42, at 53–54.

56. Strategies for Youth (SFY) has also already developed a training delivery model that may facilitate research and future implementation. See Lisa Thureau, *Not Your Older Brother's MBTA Police*, STRATEGIES FOR YOUTH, <http://strategiesforyouth.org/news-events/our-publications/not-your-older-brothers-mbta-police/> (last visited Apr. 28, 2015).

Good Cop-Bad Cop

In closing, reformers focused on children's exposure to violence fail to account for the impact of police violence on children. This shortcoming must be redressed. Children exposed to police violence face physical, social, emotional, and cognitive harms similar to children exposed to other forms of violence from other sources. Moreover, they also can be legally socialized to mistrust the police. These negative effects can impede children's abilities to become healthy productive citizens who participate fully in society and receive its benefits. Rather, they may become fearful, suspicious, and avoidant. But it need not be this way. A collaborative government-backed effort involving childhood studies researchers, children's advocates, and police reformers can help children learn to trust the police and train the police to more effectively serve their youngest constituents and the larger community.

ESSAY

Should the American Grand Jury Survive Ferguson?

ROGER A. FAIRFAX, JR.*

The grand jurors deliberated in secret, as the masses demanded the indictment of the would-be defendants. Ultimately, the grand jury would refuse to indict, enraging the many who believed justice had been denied.

This is a story inspired not by recent events in Ferguson and Staten Island, but by the seventeenth century royal prosecutions of Stephen Colledge and the Earl of Shaftesbury, who had grappled with King Charles II over religious influence.¹ The London grand jurors' resistance of the monarchy established the grand jury's reputation as a robust check on governmental power.² By the time the grand jury crossed the Atlantic and was used to resist loyalist prosecutions of American colonists, it had earned the prestige worthy of enshrinement in the Bill of Rights.³ That was then.

Today's grand jury is the target of tremendous criticism. Typecast by competing narratives of pliant ineffectiveness and unaccountable power, the grand jury has long been a frequent whipping boy within

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1. See Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 9 (1996); see also Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 721–22 (2008).

2. See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 409 (2006).

3. See *id.* at 410–12; Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 345–46 (2010).

the legal profession and academic circles.⁴ Recent cases now have thrust the grand jury squarely into the American public consciousness.

On November 24, 2014, St. Louis County Prosecuting Attorney Robert P. McCulloch held a press conference to announce that the grand jury in that case had declined to indict Officer Darren Wilson in the shooting death of an unarmed African-American teenager, Michael Brown.⁵ A little over a week later, a grand jury in Richmond County, New York likewise declined to indict Officer Daniel Pantaleo in the asphyxiation death of an unarmed forty-three-year-old African-American Staten Island man named Eric Garner.⁶ In the latter case, the tragic encounter between police and the victim had been caught on video.⁷

As a result of widespread outrage in the wake of these two high-profile cases, politicians, pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States.⁸ This

4. See, e.g., Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 1–2 (2004); Phyllis L. Crocker, *Appointed but (Nearly) Prevented from Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289, 289–90 (2004); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261, 263 (1995); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973). See generally 2 JEREMY BENTHAM, *RAZIONALE OF JUDICIAL EVIDENCE* (London, Hunt & Clarke 1827).

5. Chico Harlan et al., *Ferguson Police Officer Won't Be Charged in Fatal Shooting*, WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html.

6. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

7. Ken Murray et al., *Staten Island Man Dies After NYPD Cop Puts Him in Chokehold* –, N.Y. DAILY NEWS (July 17, 2014), <http://www.nydailynews.com/new-york/staten-island-mandies-puts-choke-hold-article-1.1871486>.

8. See, e.g., Jason Hancock, *Missouri Lawmaker Wants to Abolish Grand Jury System*, KANSAS CITY STAR (Jan. 19, 2015), <http://www.kansascity.com/news/government-politics/article/7632827.html>; Rachel Van Cleave, *Time to Abolish the 'Inquisitorial' Grand Jury System*, THE RECORDER (Dec. 31, 2014), <http://www.therecorder.com/printerfriendly/id=1202713700114>; James C. Harrington, *Abolish Grand Jury System*, SAN ANTONIO EXPRESS-NEWS (Dec. 21, 2014), <http://www.mysanantonio.com/opinion/commentary/article/Abolish-grand-jury-system-5969702.php>; George E. Curry, *U.S. Should Abolish Grand Jury System*, PHILA. TRIBUNE, (Dec. 10, 2014), http://www.phillytrib.com/commentary/u-s-should-abolish-grand-jury-system/article_f5fe10e1-ca23-5adb-a9cc-4d0cdeee4423.html; LaDoris Hazzard Cordell, *Grand Juries Should Be Abolished*, SLATE (Dec. 9, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_garner_and_michael_brown.html; Caleb Pilgrim, *Let's Abolish the Grand Jury System*, NEW HAVEN REGISTER (Dec. 9, 2014), <http://www.nhregister.com/opinion/20141209/caleb-pilgrim-lets-abolish-the-grand-jury-system>. Indeed, California recently passed a law prohibiting grand juries from involvement in most cases involving law enforcement killings of arrestees or detainees. See Melanic Mason, *Gov. Brown Signs Law Barring Grand Juries in Police Deadly Force Cases*, L.A. TIMES (Aug 11, 2015), <http://www.latimes.com/local/political/la-me-pc-brown-grand-juries-20150811-story.html> (noting that

movement for abolition of the American grand jury is not a new phenomenon.⁹ After all, even Mother England abandoned the grand jury in the 1930s.¹⁰ However, attempts to bring about a similar fate for the American grand jury have fallen short for a number of reasons—including constitutional edict and path dependency.¹¹

The Ferguson and Garner cases have renewed the debate over the usefulness of the grand jury and have spawned many thoughtful arguments for its abolition.¹² Furthermore, these arguments seem to have garnered *popular* support among the many Americans frustrated and saddened by the outcomes of the grand jury processes in those two cases. However, the grand jury decisions not to indict Darren Wilson and Daniel Pantaleo, while raising troubling issues, do not represent an appropriate rationale to do away with the grand jury.

Many laypeople, unsurprisingly, lack a thorough understanding of what the grand jury is and what it does. While the petit, or trial, jury is readily observed in action in public courthouses as well as in durable television serials such as *Law and Order*, the grand jury is rarely seen or depicted.¹³ That the grand jury labors in the shadows, shielded by secrecy rules from scrutiny, frustrates popular comprehension of its already enigmatic character.¹⁴

Simply put, the grand jury, in the federal system and in about half of the states, is designed to act as a check on the prosecutor's ability to

the bill's sponsor, Sen. Holly Mitchell, was motivated by the experiences with the Ferguson and Staten Island grand juries).

9. See, e.g., Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 33 (1979); James P. Whyte, Jr., *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 461 (1959); George Lawyer, *Should the Grand Jury System be Abolished?*, 15 YALE L.J. 178, 187 (1906); Sol Wachtler, *Grand Juries: Wasteful and Pointless*, N.Y. TIMES, Jan. 6, 1990, <http://www.nytimes.com/1990/01/06/opinion/grand-juries-wasteful-and-pointless.html?pagewanted=print>.

10. See Richard D. Younger, *The Grand Jury Under Attack* (pts. 1–3), 46 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 26, 37, 217 (1955); Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. & CRIMINOLOGY 623, 623 (1934).

11. Fairfax, *The Jurisdictional Heritage*, *supra* note 2, at 428–30.

12. See *supra* note 8 and accompanying text.

13. Although popular culture depictions of the grand jury in action are relatively rare, there were storylines related to the grand jury in episodes of popular cable and network television series *The Wire* (HBO), *The Sopranos* (HBO), *The West Wing* (NBC), and *Empire* (FOX).

14. A key aspect of grand jury practice is the secrecy of the proceedings. See Fed. R. Crim. P. 6(e)(2). Grand jury secrecy performs a number of functions, including guarding against reputational harm to targets of the investigation, protecting the identity and safety of grand jurors and witnesses, and preventing the obstruction of, and flight to avoid, justice. See Fairfax, *Grand Jury Discretion and Constitutional Design*, *supra* note 1, at 748. This secrecy is sometimes in tension with other important goals, such as transparency, as one Ferguson grand juror's recent lawsuit illustrates. See Elias Isquith, "Not the Way We Do Democracy!" *Why Is a Ferguson Grand Juror Being Silenced?*, SALON (Jan. 15, 2015), http://www.salon.com/2015/01/15/not_the_way_we_do_democracy_why_is_a_ferguson_grand_juror_being_silenced/.

bring serious criminal charges to trial.¹⁵ At minimum, the prosecutor has to demonstrate to these lay people (typically numbering between 12 and 23 individuals) that there is at least probable cause to believe that the crime was committed and that the particular target committed it.¹⁶

However, probable cause is a modest threshold to reach relative to the ‘proof beyond a reasonable doubt’ standard at trial.¹⁷ When meeting that lesser burden before the grand jury, the prosecutor may present a case unencumbered by most of the evidentiary, procedural, and constitutional rules that govern the petit jury’s consideration at trial.¹⁸ Furthermore, the grand jury’s robust subpoena power can be utilized to compel testimony and the production of evidence, and the prosecutor alone typically decides which witnesses will testify and what evidence will be presented to the grand jury.¹⁹

In other words, the deck is stacked in favor of the government and if, even with all of these advantages, the government cannot produce enough evidence to establish probable cause before the grand jury, then the accused is not required to endure the legal, financial, and reputational slings and arrows of formal criminal accusation and trial.

Critics complain that the grand jury is far too willing to indict; that prosecutors rarely, if ever, are rebuffed in their attempts to bring a case forward to trial.²⁰ Recent statistics on the federal level show only a handful of indictments are formally rejected by grand juries each year.²¹ The truth is that prosecutors do have significant control

15. See Fairfax, *Grand Jury Discretion and Constitutional Design*, *supra* note 1 at 743–45.

16. See Fed. R. Crim. P. 6(a)(1) (describing the number of grand jurors required); Fairfax, *Grand Jury Discretion and Constitutional Design*, *supra* note 1, at 719–20 (discussing the probable cause standard).

17. See Fairfax, *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, *supra* note 3, at 343 n.20 (“[T]he grand jury is not determining proof beyond a reasonable doubt; it is merely screening the government’s allegations for probable cause.”).

18. R. Michael Cassidy, *Toward A More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 363 (2000).

19. See *id.* at 362 (citing *Blair v. United States*, 250 U.S. 273, 282 (1919)).

20. Fairfax, *Grand Jury Innovation: Toward A Functional Makeover of the Ancient Bulwark of Liberty*, *supra* note 3, at 342 (“A grand jury, the famous saying goes, will ‘indict a ham sandwich.’”).

21. See, e.g., BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2010 – STATISTICAL TABLES 12 (Dec. 2013) (showing that federal grand juries declined to indict in only eleven cases in 2010); Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVE THIRTY EIGHT (Nov. 24, 2014), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> (“U.S. attorneys prosecuted 162,000 federal cases in 2010 Grand juries declined to return an indictment in 11 of them.”).

over grand jury proceedings and, therefore, can engineer outcomes if they desire.²²

However, given the low evidentiary standard and the limited purpose of the grand jury's preliminary scrutiny of criminal allegations, high rates of indictment should not be remarkable. Also, when one considers the fact that a prosecutor likely will only ask the grand jury to vote on an indictment once she is confident that the grand jurors are satisfied that they have seen enough evidence to establish probable cause, the grand jury may not be as permissive as the indictment statistics may suggest.²³

Nevertheless, if the story were to end there, the grand jury's necessity would be questionable at best. After all, a judge could test a potential case for probable cause at a preliminary hearing, as is the regular practice in half of the states.²⁴ Furthermore, the legislature could transfer the grand jury's investigative power to compel testimony and the production of evidence directly to the prosecutor.

However, much of the grand jury's value lies in what it represents and its capabilities. A lay entity, the grand jury can function as the voice and conscience of the community.²⁵ Our constitutional system's view of the jury prefers the wisdom of common citizens to the professional competence of judges and prosecutors.²⁶ By having its say in what charges might be visited upon an accused,²⁷ the grand jury preserves the popular perspective in the administration of criminal jus-

22. See, e.g., Roger A. Fairfax, Jr., *Time for U.S. to Junk Grand Juries? Evidence Shows System Needs Mending, Not Ending*, ORLANDO SENTINEL, Dec. 26, 2014, at A24. Indeed, after the aforementioned seventeenth century London grand jurors declined to indict Stephen Colledge, another grand jury simply was drawn from Crown-friendly Oxford and dutifully approved the charges. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 9 (2002). See also Kadish, *supra* note 1, at 9–10.

23. See Fairfax, *Grand Jury Innovation*, *supra* note 3, at 342–44.

24. See *id.* at 345; Kuckes, *supra* note 4, at 59;

25. See generally Susan W. Brenner, *A Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67 (1995) (arguing that “we should pursue simple measures to enable grand juries to achieve their potential role as an important voice of the community”); Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY (Roger A. Fairfax, Jr. ed., 2011) (arguing for a more robust and representative local grand jury). Recognition of the community representation function of the grand jury was at the heart of the efforts to fight racial discrimination in the selection of grand juries. See Roger A. Fairfax, Jr., *Batson's Grand Jury DNA*, 97 IOWA L. REV. 1511, 1514, 1518, 1530 (2012).

26. See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2052–60 (2008).

27. See, e.g., Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1283–84 (2006).

tice—particularly given that most criminal cases today result in a guilty plea and are never presented to a trial jury.²⁸

More than serving as a mere filter for probable cause, however, the grand jury can function as a sounding board of sorts for the political structure.²⁹ Indeed, early American grand juries did much more than review criminal charges; they approved public works projects, oversaw tax policy, and inspected the conditions of prisons and other public institutions.³⁰ There is nothing to prevent today's grand jury from being employed to advise and hold government officials accountable.

Perhaps the grand jury's enduring value is best captured by the benefits received by the grand jurors themselves. Alexis de Tocqueville, the great nineteenth century observer of American political and civic institutions, once remarked that the jury acts as a "free school" for those citizens who, through their jury service, are educated about the inner-workings of government and the power it wields.³¹ If Tocqueville's musings are valid with regard to the petit jury, it is certainly the case that *grand* jurors are positioned to bolster their civic identity and understanding of the broader political system.³²

To be sure, the grand jury is a flawed feature of a flawed criminal justice system. As a central player in both the Ferguson and Staten Island cases, the grand jury deservedly has been the subject of intense scrutiny.³³ However, as one of the last remnants of popular participation in criminal justice, the grand jury is worth preserving. Of course, reforms designed to enhance the grand jury's independence and effectiveness—particularly in cases such as Ferguson and Staten Island—

28. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (holding the Sixth Amendment's protections to include adequate assistance of counsel at plea bargaining and noting that "plea bargains have become so central to the administration of the criminal justice system"); see also Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1150 (2001).

29. See, e.g., Fairfax, *Grand Jury Innovation*, *supra* note 3, at 364–67; Fairfax, *Grand Jury Discretion*, *supra* note 1, at 755–56.

30. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 221–23 (1999); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 *B.U. L. REV.* 1, 4, 10–11 (2002); Kadish, *supra* note 1, at 10–11.

31. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (Arthur Goldhammer trans., Library of America 2004) (1835).

32. See Fairfax, *Grand Jury Innovation*, *supra* note 3, at 353.

33. See, e.g., Letter from Sherrilyn A. Ifill, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., to Judge Maura McShane, 21st Judicial Circuit, Clayton, MO (Jan. 5, 2015), available at http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Open%20Letter%20to%20Judge%20Maura%20McShane.pdf; Goodman, *supra* note 6.

should be considered seriously and perhaps implemented.³⁴ But rather than calling for the grand jury's abolition, we should consider both what the institution has been, and what it might yet become.

34. Indeed, the chief judge of New York's highest court, The Honorable Jonathan Lippman, has made a number of bold proposals in this vein. See JONATHAN LIPPMAN, *ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY, THE STATE OF THE JUDICIARY 2015*, at 2–4 (Feb. 17, 2015); see also Jesse McKinley, *Head of New York's Top Court Says Judges Should Oversee Grand Juries in Deaths Involving Police*, N.Y. TIMES, Feb. 17, 2015, <http://www.nytimes.com/2015/02/18/nyregion/head-of-new-yorks-top-court-says-judges-should-oversee-grand-juries-in-deaths-involving-police.html>. One of Chief Judge Lippman's more controversial proposals is to have a judge preside over grand jury proceedings in homicide cases involving a police defendant. LIPPMAN, *supra*, at 2. Some of Chief Judge Lippman's other proposals echo some of the reforms urged by others in the wake of the Ferguson and Staten Island cases. Included among these are relaxing grand jury secrecy requirements to permit disclosing transcripts of witness testimony and legal instructions given to the grand jury to ensure greater transparency in police killing cases, and the appointment of a special prosecutor in cases in which police officers are defendants in criminal cases. See *id.* at 3–4; Steven M. Witzel, *Grand Jury Practice, Protests and Reform*, N.Y. L.J. (Jan. 15, 2015), <http://www.newyorklawjournal.com/id=1202715176527/Grand-Jury-Practice-Protests-and-Reform>; German Lopez, *Grand Juries Usually Don't Indict Police Officers. Should They Be Changed?*, VOX (Dec. 31, 2014), <http://www.vox.com/2014/12/31/7468775/grand-jury>. It should also be noted that a number of broader reform recommendations have come out of these events, focused on policing and racial and community relations in Ferguson and in the United States more generally. See U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 90, 102 (Mar. 4, 2015); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING* 1–4, 69–70 (May 2015).

ESSAY

Status, Race and the Rule of Law in the Grand Jury

KRISTIN HENNING*

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INTRODUCTION

Rarely has the grand jury process garnered as much public attention as it did when the grand jury was convened in Ferguson, Missouri after Officer Darren Wilson shot and killed an unarmed African American teenager, Michael Brown. Much of the attention has focused on St. Louis Prosecutor Robert McCulloch's apparent bias and motives in convening a grand jury instead of appointing a special prosecutor.¹ Other critique has centered on the prosecutors' presentation of evidence to the jurors, including their decision to allow Wilson to testify for hours without rigorous cross-examination.

United States Senator Cory Booker refused to criticize the grand jury outcome, saying "The rule of law is something that we have to put our faith in. There was a grand jury, they went through a process, evidence was presented for a jury and they came to that conclusion. I

* Professor of Law, Georgetown Law. Thank you to Roger Fairfax and Paul Butler for their helpful comments. Thank you to Lauren Dollar for her invaluable research.

1. Jim Salter, *Lawmaker Calls for Investigation of Ferguson Prosecutor McCulloch*, KANSAS CITY STAR, Dec. 19, 2014, available at <http://www.kansascity.com/news/state/missouri/article4675482.html>.

respect that conclusion.”² The problem, of course, is that as much as we want to respect the jurors’ decision in the face of information they received, we have to recognize that the rule of law can be subverted through the state’s arbitrary enforcement of law and procedure across race and class and through the differential application of the law to police officers like Darren Wilson.³

The events of Ferguson force us to talk about what our rule of law should be and refuel a long-standing debate about the grand jury’s current utility as a safeguard against arbitrary and unwarranted prosecution for the vast majority of defendants who are not law enforcement officers. Thus, for a moment, I want to contrast the prosecutors’ strategies for managing Wilson’s grand jury with those typically employed in other criminal cases and to consider reforms that would bring uniformity and integrity to the process for all defendants.

I. THE UNUSUAL PROCESS

One of the grand jury’s basic tasks is to hear evidence and determine whether there is probable cause to believe the grand jury’s target committed some identified crime. With this responsibility, the grand jury ideally stands as a “shield” between the government and the accused, screening out cases with weak or insufficient evidence and preventing arbitrary and unfounded prosecution.⁴ As the Supreme Court stated in 1962:

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.⁵

2. Terrence T. McDonald, *Cory Booker Declines to Condemn Grand Jury for Ferguson Decision*, THE JERSEY J., Nov. 25, 2014, available at http://www.nj.com/hudson/index.ssf/2014/11/booker_declines_to_condemn_grand_jury_to_ferguson_decision.html.

3. Allan C. Hutchinson, *The Rule of Law Revisited: Democracy and Courts*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 196, 196 (David Dyzenhaus ed., 1999); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protecting After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1087 (1997) (citing *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974)).

4. Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2–3 (2004). Another key function of the grand jury is to investigate criminal conduct. Sarah Sun Beale et al., GRAND JURY LAW AND PRACTICE § 1:7, 1–31 (discussing dual functions of the grand jury as both a “shield” and “sword”).

5. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

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Today, many critics contend that the grand jury has become little more than a “rubber stamp” for the prosecution’s case, providing the accused with little if any protection against arbitrary or overzealous prosecution.⁶ To guide the grand jury in its investigative function, the prosecutor decides what documents to obtain, which witnesses to subpoena, and what questions to ask during witness examinations. Legally, other than the exclusion of privileged testimony, there are no real limits on what evidence the grand jury can hear. The prosecutor can introduce hearsay and rely on evidence that has been illegally obtained by police.⁷ In practice, the prosecutor typically presents only that evidence which supports a finding of probable cause⁸ and generally denies the suspect access to and often even knowledge that s/he is a target of an investigation.⁹ Without defense counsel to challenge the state’s evidence, the prosecutor routinely accepts the word of the complainant and the accusing officers without close examination or deep probing into contradictions or other shortcomings in the case. Because the standard of probable cause is so low, it is quite unusual for a grand jury to decline an indictment.¹⁰

Yet, Robert McCulloch and the team of prosecutors in Ferguson took a radically different approach in Wilson’s case. The prosecutors, who readily engaged with their target, presented the grand jury with volumes of evidence, encompassing more than 70 hours of testimony on 25 separate days over three months. Jurors heard from about 60 witnesses, including three medical examiners and experts on blood, toxicology and firearms. McCulloch claims to have presented “all available evidence” in the case,¹¹ including evidence that both supported and contradicted a finding of probable cause. Commentators on both sides of the Ferguson debate will agree that McCulloch’s team

6. See, e.g., *United States v. Dionisio*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (“[C]ommon knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.”); Kuckes, *supra* note 4, at 2.

7. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1172, 1182 (2008).

8. Kuckes, *supra* note 4, at 19, 21–22, 27 (discussing practical incentives for prosecutors to limit scope of evidence presented to the grand jury, including desire to avoid creating impeachment evidence for the defense).

9. Hoffmeister, *supra* note 7, at 1181.

10. Hoffmeister, *supra* note 7, at 1176 n.29 (noting 2000 Department of Justice (DOJ) testimony that 99% of the cases brought before federal grand juries resulted in indictments).

11. David Zucchini, *Prosecutor’s Grand Jury Strategy in Ferguson Case Adds to Controversy*, L.A. TIMES, Nov. 25, 2014, available at <http://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html>.

presented more information than is typical for most grand juries—information that worked to Wilson’s advantage.

Even more unusual, and garnering even more criticism, was the prosecutors’ decision to allow Darren Wilson to present his own version of events at great length. Although the Supreme Court held in *United States v. Williams*, 504 U.S. 36 (1992), that grand jury targets do not have a Constitutional right to testify or have exculpatory evidence presented to the grand jury,¹² the prosecutors in Ferguson allowed Wilson to testify for hours with little cross-examination; they called witnesses who clearly supported Wilson’s claim of self defense; and they vigorously pointed out discrepancies among witnesses who claimed that Wilson acted without justification. Unlike other prosecutors who typically highlight their best evidence for prosecution, the Ferguson team created an opportunity for jurors to *doubt* probable cause. Through the grand jury screening function, the prosecutors afforded Wilson a degree of due process protection that far exceeded that which is typically granted to thousands of defendants who are prosecuted in our criminal justice system every day.

So why then was this favor shown to Darren Wilson (and why don’t other defendants get the same benefit)? The answer likely lies first in Wilson’s status as a police officer. Many who are outraged by McCulloch’s failure to convince the grand jury to indict contend that McCulloch was biased from the outset. Highlighting the fact that McCulloch’s own father was killed in the line of duty by an African American man, commentators questioned McCulloch’s ability to evaluate Wilson’s account objectively and to present evidence fairly to the jury.¹³ Darren Wilson’s case is not unlike other police shooting cases.¹⁴ Police officers have a difficult job, and even those prosecutors

12. While some prosecutors will voluntarily introduce evidence that is clearly and substantially exculpatory, such disclosures are not constitutionally required or judicially enforced. Beale et al., *supra* note 4, at § 4:17 (citing UNITED STATES ATTORNEYS’ MANUAL § 9-11.233, § 9:28 (1990)). See also Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 23 (2002) (noting that an “overwhelming majority of states and the federal government do not give the defendant any right to testify on his own behalf”).

13. Pema Levy, *Ferguson Prosecutor Robert McCulloch’s Long History of Siding with the Police*, Newsweek, Aug. 29, 2014, available at <http://www.newsweek.com/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357>; Dana Milbank, *Bob McCulloch’s Pathetic Prosecution of Darren Wilson*, WASH. POST, Nov. 25, 2014, available at http://www.washingtonpost.com/opinions/dana-milbank-bob-mccullochs-pathetic-prosecution-of-darren-wilson/2014/11/25/a8459e16-74d5-11e4-a755-e32227229e7b_story.html.

14. William Fitzpatrick, the president-elect of the National District Attorneys Association is reported to have said that it is not unusual in a police-involved shooting for a prosecutor to lay

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and jurors who intend to be fair-minded may be predisposed to give an officer the benefit of the doubt. In other cases, the benefit of the doubt flows in the opposite direction. The arresting officer and investigating detectives are given the benefit of the doubt in their allegations *against* the grand jury's target, and jurors who recognize how much time and money the state is spending to investigate may presume the target's guilt.¹⁵

Implicit bias may further explain the disparity in how prosecutors evaluate and present non-police involved offenses to the grand jury.¹⁶ African American men, who accounted for 27.5% of all arrests in the United States in 2010, are disproportionately over-represented in the criminal justice system.¹⁷ Media portrayals and popular perceptions of African Americans lead many to believe that African Americans are violent, aggressive, and prone to crime.¹⁸ Prosecutors are not immune from implicit bias.¹⁹ Even when prosecutors strive to be fair, they are largely dependent on police officers to investigate and collect evidence and are thus captive to the officers' bias. From an administrative perspective, disparate approaches to police-shooting and non-police involved offenses may be the product of time constraints that require prosecutors to preserve limited grand jury resources for high profile police shootings and prevent them from presenting all grand juries with the same volume of evidence that was presented in Wilson's case. Whatever the rationale, disparities in prosecutors' grand jury strategies erode public confidence in the process and severely undermine the rule of law.

out all the evidence and not ask the grand jury for a specific criminal charge. Zucchini, *supra* note 11.

15. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 773 (2011) (contending that there is no presumption of innocence at the grand jury phase).

16. See Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005) (summarizing study on implicit bias in juries).

17. Federal Bureau of Investigation, FBI Uniform Crime Reports by Race, Gender, & Age, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43> (last visited March 3, 2015). U.S. Census data shows that African Americans made up 13% of the population in 2010. SONYA RASTOGI ET AL., 2010 CENSUS BRIEFS, THE BLACK POPULATION: 2010 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

18. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1550–53 (2005) (discussing ways in which local news causes viewers associate criminality with African Americans).

19. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 804–05 (2012).

II. THE NEED FOR GRAND JURY REFORM

Public outrage about the grand jury's decision in Ferguson provides us with an important opportunity to consider how we might reform the grand jury process to make it more meaningful and equitable for all defendants. Over the years, advocates for grand jury reform have recommended policy and legislation that would regulate the type of evidence the grand jury can hear and create opportunities for a target to be involved in the grand jury process. In 1976, 1978 and again in 1985, Congress convened a series of hearings to consider proposals that would ensure grand jurors understood the scope of their independent investigatory power and grant potential defendants the right to present exculpatory evidence.²⁰ More recently, the National Association of Criminal Defense Lawyers and the American Bar Association issued a joint Grand Jury Bill of Rights 2000.²¹ If adopted, the Bill of Rights would require prosecutors to present exculpatory evidence to the grand jury, give suspects the right to testify, preclude the prosecutor from introducing evidence he or she knows to be inadmissible by law, and require the prosecutor to give meaningful instructions on the record regarding the power and duties of the jury. Unfortunately, to date few of these reforms have been implemented.

Exculpatory evidence. Basic fairness should require the presentation of exculpatory evidence in all cases. The decision to charge a suspect is an enormous moment in the life of a criminal case, and the grand jury's screening should not be perfunctory or one-sided. An indictment gives the government permission to proceed with a prosecution that is likely to impose significant economic, personal, familial, psychological, and reputational costs on the defendant. Exculpatory evidence gives the jury a meaningful opportunity to evaluate the sufficiency of the evidence and effectively reduce errors in charging and unwarranted prosecutions. Exculpatory evidence also likely disrupts the jurors' natural presumptions of guilt and begins to challenge the jurors' implicit bias. Requiring the prosecutor to identify and introduce exculpatory evidence may similarly unsettle the prosecutor's own biases and help him or her recognize the flaws and weaknesses in a case. At a minimum, the requirement should lead prosecutors to

20. Roger A. Fairfax, *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 346–47 (2010).

21. COMMISSION TO REFORM THE FEDERAL GRAND JURY & NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FEDERAL GRAND JURY REFORM REPORT & BILL OF RIGHTS (2000) [hereinafter NACDL FEDERAL GRAND JURY REFORM REPORT].

investigate allegations more thoroughly at the outset, identify charges more carefully for the grand jury, and on occasion decline to proceed with a case that appears to be inadequate.

The prosecutors' decision to introduce exculpatory evidence in Darren Wilson's case had a profound impact on the outcome. It was the exculpatory evidence that led jurors to find a credible claim of self-defense. Twelve citizens, three African Americans and nine Caucasians in a county that is 25% African American, undoubtedly felt the pressure to indict from the growing racial tensions and international media spotlight but still concluded that there was no probable cause for homicide. Imagine if every prosecutor were required to introduce all of the available exculpatory evidence in every grand jury case. Maybe we would reduce—even by some small percentage—the number of black and brown men who face the irrevocable stigma and financial costs that inevitably accompany an indictment. More importantly, maybe the public would have had greater confidence in the grand jury's decision in Ferguson.

Defense testimony and the right to counsel. Closely tied to the need for exculpatory evidence is the need for notice to the grand jury's target and the target's right to testify with defense counsel present. In Ferguson, Wilson's testimony was significant not only because it allowed him to present his own defense, but also because it allowed him to consult with defense counsel early, investigate the facts, and collect evidence before it was tainted. It also allowed him to make reasoned decisions about whether to testify or suggest other witnesses to testify. Of course, as a police officer with significant knowledge of the criminal justice system, Wilson already had a significant advantage over other grand jury targets. He knew he was a target from the outset and had ample time to consult with an attorney and prepare his testimony. For suspects who are not similarly situated, notice of the grand jury investigation would allow them to make an intelligent decision about whether to seek legal assistance and provide the prosecutor with exculpatory information.

The reality is that most targets will not opt to testify even when they do receive notice of grand jury proceedings. Under current rules governing the grand jury, defense counsel is not allowed to accompany a target into the grand jury room and prosecutors have considerable freedom in what they can ask the target on cross-examination. As a result, few targets trust the grand jury process, and many attorneys would advise a target against testifying to preserve the privilege

against self-incrimination.²² On the rare occasions when a target does testify, “most prosecutors will take advantage of the opportunity, while the individual is under oath, to probe inconsistencies between his or her testimony and his or her prior statements as well as other evidence in the case.”²³ Ironically, Robert McCulloch’s team has been criticized for failing to vigorously cross-examine Darren Wilson, further demonstrating the lack of consistency in the use of the grand jury.

Yet, the grand jury proceeding is not a full trial, and the anticipated administrative costs of engaging the target and defense counsel in the process may lead many judges, prosecutors, and legislators to reject these proposals. Others may be concerned about the risk of flight and witness intimidation by the target. Nonetheless, we cannot maintain the present system of grand jury review that treats potential defendants like Darren Wilson differently from other defendants. Other strategies, including stiff penalties for witness intimidation and careful timing of the grand jury notice, can address concerns about witness safety and help the criminal justice system strike an appropriate balance between effective law enforcement and the protection of individual rights.

Notice to the target, the presentation of exculpatory evidence, and the presence of defense counsel during a target’s testimony are all low cost strategies that would allow the grand jury to meaningfully evaluate the sufficiency of allegations against a suspect. New York and Colorado have implemented some of these recommendations without the cost and inefficiencies that were anticipated by opponents of these reforms. For example, in New York, grand jury rules allow the target to testify and recommend additional witnesses.²⁴ In Colorado, rules allow defense counsel to accompany a target into the grand jury as an advisor when the target is testifying.²⁵ Permitting defense counsel to enter, even in this limited context, may enhance the transparency of the grand jury process and improve public confidence in the integrity of the proceedings. Although grand jury secrecy serves a

22. Roger A. Fairfax, Jr., *Grand Jury Discretion & Constitutional Design*, 93 CORNELL L. REV. 703, 755 (2008).

23. Ruth Steinhardt, *Missouri Grand Jury Declines to Indict Police Officer in Fatal Shooting*, GW TODAY, Nov. 26, 2014, available at <http://gwtoday.gwu.edu/missouri-grand-jury-declines-indict-police-officer-fatal-shooting> (transcribing an interview with George Washington University Law School professor, Roger Fairfax).

24. NACDL FEDERAL GRAND JURY REFORM REPORT, *supra* note 21, at 7.

25. *Id.* at 6–7.

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number of important functions,²⁶ society has come to expect some degree of transparency.²⁷ Some modifications to the rules of secrecy—such as limited access for defense counsel and the release of transcripts that contain jury instructions, as discussed below—would strike a useful balance between the benefits of secrecy and the need for prosecutorial oversight and accountability.

Jury instructions and affirmative defenses. Additional reforms would improve the way prosecutors educate grand jurors on the law of a case. As evident from the proceedings in Ferguson, prosecutors profoundly shape the way jurors interpret and evaluate the evidence they receive. As a legal advisor to the grand jury, prosecutors use jury instructions not only to advise jurors of the basic function of the jury, but also to educate jurors on the elements of a particular offense and any affirmative defense that might apply. In theory, we expect prosecutors to provide neutral, accurate, and complete legal advice. In practice, this does not always occur. The prosecutor may instead frame or narrow the legal question to focus the jurors' attention on those issues that are most likely to ensure a finding of probable cause.

In a homicide case, a prosecutor need simply ask the grand jury whether there is probable cause to believe the target shot the decedent without adequate justification. In Ferguson, the prosecutors seemed to flip that legal question on its head to focus the jurors' attention squarely on the affirmative defenses or “justifications” for the shooting. Specifically, the prosecutors told the jurors:

And you must find probable cause to believe that Darren Wilson did not act in lawful self-defense and you must find probable cause to believe that Darren Wilson did not use lawful force in making an arrest. If you find those things, which is kind of like finding a negative, you cannot return an indictment on anything or true bill unless you find both of those things. Because both are *complete defenses to any offense and they both have been raised in his, in the evidence.*²⁸

By framing the legal question in this way, the prosecutors shaped the jurors' understanding of their own role in weighing and evaluating

26. The benefits of secrecy include protecting the grand jury from outside influence and fear of retaliation, preventing perjury and tampering with witnesses who may testify before the jury, and protecting innocent targets from the embarrassment of a public accusation and the expense of trial. Hoffmeister, *supra* note 7, at 1181 n.61 (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958)).

27. Fairfax, *supra* note 22, at 748.

28. Transcript of Grand Jury at Vol. XXIV, 140, *Missouri v. Wilson*, 2014 WL 6660755 (Mo. Cir.) (2014) (No. GJ2014-1121) (emphasis added).

the evidence. The prosecutors' charge to the jury not only highlighted the availability of the affirmative defense, but also shifted the burden to the state to disprove Wilson's claim of self-defense. Although the prosecutor's statement of the law is accurate in this regard, her particular *emphasis* on the affirmative defenses certainly provides ammunition for those who believe McCulloch's team intentionally framed the law and evidence to exonerate Wilson of his responsibility in Brown's death. It is widely accepted in most courts that the government bears the burden of proving beyond a reasonable doubt (after a preliminary showing by the defendant) that the defendant did not act in self-defense. My own critique of the prosecutors' instruction on self-defense in Ferguson is not that they advised the jury of the defense, but that Wilson received a benefit that so many others do not. Again, let's imagine a system in which all prosecutors employed strategies that actively challenged the jurors' presumption of guilt and encouraged jurors to meaningfully consider the defendant's account of events.

Unfortunately, not all of the jury instructions were accurate in Darren Wilson's case. Commentators have described the instructions regarding the officer's right to use deadly force as "confusing at best," if not wrong, and have criticized prosecutors for failing to ask the jurors to indict on a specific charge.²⁹ By their own admission, McCulloch's team initially advised the jurors with an outdated version of Missouri law regarding an officer's right to use deadly force against a fleeing defendant.³⁰ Unlike most cases in which the instructions are protected by rules governing grand jury secrecy, portions of the transcripts in Ferguson were released to the public after the prosecutors corrected their own legal error. Concerns about erroneous and confusing jury instructions have led some advocates to recommend revisions to the Federal Rules of Criminal Procedure that would require prosecutors to provide defendants with a transcript of the legal instructions given to the grand jury and allow defendants to seek a dis-

29. Steinhardt, *supra* note 23.

30. See Cassandra Rules, "Shocking Mistake" Exposed in Darren Wilson Grand Jury, THEFREETHOUGHTPROJECT.COM, Nov. 28, 2014, <http://thefreethoughtproject.com/shocking-mistake-prosecutorial-misconduct-mike-brown-case/> (highlighting excerpts from grand jury transcript, including Prosecutor Kathy Alizadeh's original statement of law on September 16, 2014 regarding Missouri statute 563.046 and revised statement of law on November 21, 2014 acknowledging that the Missouri statute was overturned by the U.S. Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985)).

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missal when there are errors.³¹ Such proposals are important to ensure that the grand jury process is fair and meaningful for all defendants, not just law enforcement officers like Darren Wilson.

CONCLUSION

Corey Booker is right not to blame the grand jury for the conclusion it reached after reviewing the evidence in Darren Wilson's case, but we cannot say the rule of law was followed. In many ways, McCulloch's manipulation of the jury in Ferguson confirms the narrative that contemporary grand juries are now little more than a pawn of the prosecutor's own agenda. If his critics are correct and McCulloch never intended the grand jury to indict Wilson, his strategies certainly advanced that goal. Ironically, many of the protections afforded to Wilson—the introduction of exculpatory evidence, the right to testify, and an emphasis on Wilson's affirmative defense—are the very protections that advocates have been demanding for all grand jury targets. Reform is essential not only because prosecutorial manipulation has helped exonerate police officers in the killing of black and brown men, but also because the grand jury has been used so unevenly across race, class, and professional status and has failed to provide even the most basic due process protections for most criminal defendants who are disproportionately people of color. Reform is essential to restore the rule of law and enhance public confidence in grand jury outcomes like the one in Ferguson.

31. Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1448 (2001).

ESSAY

Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males

SHERRI LEE KEENE*

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INTRODUCTION

In the summer of 2014, a police officer shot and killed Michael Brown, an eighteen-year-old, unarmed, African American teenager in Ferguson, Missouri.¹ A grand jury subsequently decided not to indict

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1. See Mark Berman & Wesley Lowery, *Ferguson Police Say Michael Brown Was a Robbery Suspect, Identify Darren Wilson as Officer Who Shot Him*, WASH. POST (Aug. 15, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/15/ferguson-police-releasing-name-of-officer-who-shot-michael-brown/>.

the police officer.² These events prompted a public outcry and months of protests across the United States, and even as far away as England.³ To many, however, the killing of Michael Brown, was yet one more horrible event in a longer series. Prior to Brown's killing, the 2013 shooting death of another unarmed, African American teenager, seventeen-year-old Trayvon Martin, and the subsequent acquittal of his shooter, a neighborhood watch volunteer, reignited racially-charged debates and brought attention to a number of societal issues, including public perceptions of African American males.⁴ Since Brown's shooting, a number of other shootings of unarmed, African American men and boys, now acknowledged in the media, have continued to garner attention. In each of these cases, an all too familiar pattern has emerged—unarmed, African American males are shot and killed by individuals with real or purported police authority, and the shooter is either not charged or not convicted.⁵

Naturally, much of the public discussion surrounding these events has focused on the relationship between police officers and members of the African American community, and broader issues regarding the role that race plays in the American legal system. Public opinions vary widely along racial lines regarding the extent to which race may have played a role in the jury decisions in these cases, with African Americans being significantly more likely than White Americans to express the belief that these cases raised issues about race.⁶ It is not

2. See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

3. See *id.*; Ben Quinn, *Ferguson: Protest at US Embassy in London Over Killing of Michael Brown*, GUARDIAN (Nov. 26, 2014, 2:32 PM), <http://www.theguardian.com/us-news/2014/nov/26/london-protests-against-michael-brown-killing-in-united-states>; Ellen Wulfhurst, Daniel Wallis, & Edward McAllister, *Protests Spread to Other Cities; 400 Arrested*, COLUMBUS DISPATCH (Nov. 27, 2014, 5:29 AM), http://www.dispatch.com/content/stories/national_world/2014/11/27/protests-spread-to-other-cities-400-arrested.html.

4. See Jonathan Capehart, *From Trayvon Martin to 'Black Lives Matter'*, WASH. POST (Feb. 27, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/>.

5. See *id.* It is worth noting that just prior to this article's publication, a young African American man named Freddie Gray died after being arrested and transported by Baltimore police officers. This case involved a different factual scenario, as Mr. Gray died from a fatal neck injury while in police custody and did not die as the result of a police shooting. In contrast to many other cases, a grand jury charged six officers in the death of Mr. Gray, and some officers are currently facing charges of second degree murder. See Ian Simpson, *Baltimore Grand Jury Indicts Police in the Death of Freddie Gray*, REUTERS (May 21, 2015), <http://www.reuters.com/article/2015/05/21/us-usa-police-baltimore-idUSKBN0O62P220150521>.

6. See *Big Racial Divide Over Zimmerman Verdict: Whites Say Too Much Focus on Race, Blacks Disagree*, PEW RESEARCH CTR. (July 22, 2013), <http://www.people-press.org/2013/07/22/big-racial-divide-over-zimmerman-verdict/> [hereinafter PEW I] (discussing a poll conducted by

possible to know the extent to which race played a role in these particular decisions. This essay will not seek to answer that question, but rather to shed some light on how matters of race can influence jury decisions in these types of cases. Specifically, this essay will focus on the role that stories play in jury decision-making, and the opportunities that they provide for racial attitudes to factor into jurors' assessments of cases.

I. DIVERSE PERSPECTIVES ABOUT THE ROLE OF RACE IN THE AMERICAN LEGAL SYSTEM

Research conducted in 1999 by the American Bar Association (“ABA”) shows that while most Americans consider the American justice system to be the best in the world, a substantial number of Americans also believe that the system does not treat all groups of people the same way.⁷ Among respondents to the ABA’s survey, only about one-third agreed that law enforcement try to give equal treatment to whites and minorities, and to wealthy and poor people.⁸ With

Pew Research Center on July 17 to 21, 2013, of 1,480 adults finding that 78% of black respondents thought the Trayvon Martin case raised important issues about race that need to be discussed, but only 28% of white respondents agreed with that statement); Darryl Fears, *After Zimmerman Verdict, A Racial Divide Lingers*, WASH. POST (July 27, 2013), http://www.washingtonpost.com/politics/after-zimmerman-verdict-a-racial-divide-lingers/2013/07/27/2d8cb316-f570-11e2-aa2e-4088616498b4_story.html; *Stark Racial Divisions in Reactions to Police Shooting*, PEW RESEARCH CTR. (Aug. 18, 2014), <http://www.people-press.org/2014/08/18/stark-racial-divisions-in-reactions-to-ferguson-police-shooting> [hereinafter PEW II] (discussing a poll conducted by the Pew Research Center on August 14 to 17, 2014, of 1000 adults finding that 80% of African Americans say that the shooting in Ferguson raises important issues about race meriting discussion, while only 37% of whites agree); David Lauter, *Wide Racial Gap in Perceptions of Ferguson, Mo., Unrest, Poll Finds*, L.A. TIMES (Aug. 18, 2014, 12:14 PM), <http://www.latimes.com/nation/la-na-ferguson-poll-20140818-story.html>; Michael Wines, *Reaction to Ferguson Decisions Shows Racial Divide Remains Over Views of Justice*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/2014/11/26/us/after-ferguson-announcement-a-racial-divide-remains-over-views-of-justice.html?_r=0.

7. *Study on the Perceptions of the U.S. Justice System*, AM. BAR ASS’N (Feb. 1999), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions_of_justice_system_1999_1st_half.authcheckdam.pdf [hereinafter *Perceptions 1st Half*]; *Study on the Perceptions of the U.S. Justice System*, AM. BAR ASS’N (Feb. 1999), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions_of_justice_system_1999_2nd_half.authcheckdam.pdf [hereinafter *Perceptions 2nd Half*]. In 1999, the ABA sponsored this “comprehensive nationwide survey” of 1000 adults to learn the perceptions of the general population about the criminal justice system. *Perceptions 1st Half*, *supra* note 7, at 3. Among those surveyed, 80% agreed or strongly agreed that “in spite of its problems, the American justice system is still the best in the world.” *Id.* at 6. Yet, many respondents expressed the belief that the system treats people belonging to different groups differently. *Id.* at 12.

8. *Perceptions 2nd Half*, *supra* note 7, at 65. Among respondents to the ABA’s survey, only 39% of the respondents agreed that law enforcement and police try to treat whites and minorities equally, and only 34% believed that law enforcement and police try to treat wealthy and poor people equally. *Id.*

respect to treatment by the courts, again, only about one-third of respondents expressed the belief that all racial or ethnic groups are treated equally, or that courts try to treat wealthy and poor people similarly.⁹ Among respondents, minorities, the poor, and women were more inclined to perceive unequal treatment than wealthy, white males, who expressed the most confidence in the system.¹⁰

While significant time has passed since the ABA survey was conducted, the ABA's findings appear to be in line with more recent statistics collected just over a week after Michael Brown's shooting. That study showed a great disparity in opinions concerning the Ferguson Police Department's handling of matters surrounding the Brown case. Nearly twice as many African Americans as White Americans expressed disagreement with the intense, military-style response of police officers in Ferguson to protests in the aftermath of Brown's shooting.¹¹ Moreover, according to the study, White Americans were three times more likely than African Americans to express confidence in the ongoing investigation of Brown's shooting.¹² Later studies showed a disparity in opinions regarding the grand jury's decision not to indict the officer who killed Brown, with African Americans being more than three times as likely as White Americans to be unsatisfied with that decision.¹³ These statistics suggest that African Americans and White Americans possess starkly different perspectives about a number of matters relevant to Michael Brown's case. These studies give some indication of how the public perceived the decisions in the Brown case and other similar cases; however, it is less clear what role jurors' perspectives actually played in the courtroom.

9. *Id.* Regarding court treatment, only 39% of respondents indicated that that all ethnic and racial groups are treated equally, and only 33% indicated that courts try to treat poor people and wealthy people equally. *Id.*

10. *Perceptions 1st Half*, *supra* note 7, at 75.

11. PEW II, *supra* note 6 (stating that 65% of African Americans thought the police response to protests in Ferguson had gone too far, while only 33% of whites agreed).

12. *Id.* (showing that only 18% of African Americans expressed at least a fair amount of confidence in the investigation of Brown's shooting, compared to 52% of whites).

13. *Sharp Racial Divisions in Reactions to Brown, Garner Dec* <http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/#survey-report>: *Many Blacks Expect Police-Minority Relations to Worsen*, PEW RESEARCH CTR. (Dec. 8, 2014), <http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/#survey-report> [hereinafter PEW III] (discussing a poll conducted December 3 to 7, 2014 of 1,507 adults showing that 80% of African Americans said that the grand jury made the wrong decision in not charging the officer in Brown's death, while only 23% of whites said this was the wrong decision); *See also* Pew I, *supra* note 6 (showing that 86% of African Americans were dissatisfied with the jury decision not to convict Trayvon Martin's shooter, while only 30% of whites were dissatisfied).

II. THE ROLE OF STORIES IN JURY DECISION-MAKING

To satisfy the constitutional guarantee of an impartial jury, the Supreme Court requires that jurors be selected at random from a “fair cross-section of a community,” and prohibits the systematic and intentional exclusion of people belonging to certain groups defined by factors such as race.¹⁴ However, the Court does not require that all groups be represented on a particular jury.¹⁵

Recent studies suggest, however, that jurors’ perspectives play a significant role in their assessments of a case. Our legal system reflects the long-held perception of jurors as passive decision-makers who decide cases through a nearly mechanical assessment of the evidence. Social scientists who study jury decision-making have more recently expressed the belief that jurors make decisions in large part by considering competing stories and then determining which story is most persuasive.¹⁶ According to these researchers, in or out of the courtroom, it is natural for listeners to place the information that they hear into a narrative context. As they hear asserted facts, listeners instinctively construct stories that help them to make sense of the information presented and to put it into a broader context.¹⁷ In a courtroom, however, jurors not only construct their own stories, but also hear stories that the attorneys put forth to frame the evidence in the

14. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”); See Mitchell S. Zulkie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 440–56 (1996) (describing Supreme Court cases applying the fair cross-section principle and discussing the Court’s treatment of impartiality as an absence of bias).

15. See *Taylor*, 419 U.S. at 538 (“[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”); *Batson v. Kentucky*, 476 U.S. 79, 85 n.6 (1986) (“[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.”); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (stating that the fair cross-section doctrine has never been invoked “to require petit juries, as opposed to jury panels or venues, to reflect the compositions of the community at large” . . . “[t]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly ‘representative’ petit jury.”) (citing *Batson*, 476 U.S., at 85–86); Meiring de Villiers, *The Impartiality Doctrine: Constitutional Meaning and Judicial Impact*, 34 AM. J. TRIAL ADVOC. 71, 77–78 nn.41–42 (2010).

16. See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 285–99 (2013) (discussing theories of social scientists who study juries).

17. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991) (concluding that the “central cognitive process in jury decision-making is story construction.”); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 57–59 (2008) (describing the fundamental nature of narrative as a means to understand the human experience).

case. While jurors are tasked with determining a case based on the evidence presented, this research suggests that jurors not only weigh the evidence to determine what probably occurred, but also consider the plausibility of the stories they construct and the competing stories that they hear.

While stories are integral to the court process, it appears that they also have the potential to distort the truth and mislead listeners.¹⁸ According to social scientists, a listener will tend to judge the validity of a story by matters that are independent of its truthfulness. Indeed, the familiarity of a given scenario may make it more believable to the listener. Listeners tend to believe stories that correspond with their understanding of how the world typically works.¹⁹ Thus, a story may appeal to its listener because it corresponds to the listener's sense of what could happen or typically happens—which may or may not be consistent with what actually happened.²⁰ It follows that as jurors hear stories in court, they may be more inclined to believe stories that align with their pre-existing expectations. Moreover, jurors may look beyond the facts of the case “to a store of background knowledge about these kinds of narratives—to a set of stock stories.”²¹ As such, a story may appear plausible not because it is necessarily truthful, but rather because it is similar to other narratives known to the listener and thus aligns with the listener's expectations.

According to social scientists, the believability of a story is also determined by its coherence – the story's consistency and completeness.²² To be believable, a narrative must be internally consistent, judged by how well the parts of the story fit together and the extent to which the structure of the story contains all of its expected parts.²³ At first glance this may appear to be a more objective consideration as

18. See Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on The Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63, 64 (2010) (describing and addressing potential pitfalls of storytelling, including concerns that matters, other than truth, can make a story believable; stories are always told from a particular point of view; and stories can appeal to emotions as well as logic).

19. See Rideout, *supra* note 17, at 66 (citing Pennington & Hastie, *supra* note 17, at 528).

20. *Id.* at 67 (citing W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*, at 50 (Rutgers U. Press 1981)).

21. *Id.*

22. *Id.* at 64–66.

23. *Id.* at 64; See Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ASS'N LEGAL WRITING DIRECTORS 229, 234 (2010) (“When a lawyer relates a client's story in court that pulls together disparate facts in a way that explains and justifies the client's behavior, the story is persuasive because it presents a version of events that rings true—regardless of what ‘actually’ happened according to another perspective.”).

the coherence of a story would necessarily depend to some degree on the relationship between the evidence available in a case and the framing story. Yet, a listener's assessment of a story's coherence may also be subjective as stories are rarely completely supported by explicit evidence. For a story to be deemed complete, the listener will often need to be willing not only to accept certain facts, but also to make certain inferences to fill in gaps in logic.²⁴ In drawing these inferences, jurors will again refer to established stock stories for guidance.²⁵

It follows that when choosing between competing stories of events, jurors “rely not only on ‘case-specific information acquired during the trial,’ but also on their own experiences and values and on ‘generic expectations about what makes a complete story.’”²⁶ Narrative “appeal[s] to preexisting models for human behavior,” and “assumed facts and structures supplement given information.”²⁷ If considered in this context, it would appear that when jurors enter the courtroom, they are already inclined to favor one story over another. Moreover, stories that align with more popular perspectives of what typically happens or that reflect more mainstream beliefs, even pervasive biases and prejudices, would seem to be inherently more persuasive to more people. It also follows that stories whose characters act in the same way that people like them are expected to act—including those whose characters' actions align with existing stereotypes—would be more easily believed.

III. STORIES ABOUT UNARMED AFRICAN AMERICAN MALES SHOT BY POLICE

Public perceptions of African American men have been widely studied in recent years. While many Americans now express the belief that race is no longer significant, and even that we live in a post-racial society, research shows that most, if not all, people possess implicit racial biases.²⁸ According to this research, a majority of Americans

24. *Id.* at 65 (citing Bennett & Feldman, at 44–45, *supra* note 20).

25. *Id.*

26. Griffin, *supra* note 16, at 294.

27. *Id.* at 287.

28. See L. Song Richardson & Phillip Attiba Goff (2012), *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, at 301–07 (describing studies by social scientists that identify implicit racial bias).

associate black men with criminality and violence, even if they do not acknowledge it.²⁹

The stories that have surrounded the fatal shootings of unarmed, African American males often bring to mind a number of familiar narratives that invoke prevalent racial stereotypes. In these cases, the narrative put forth by the shooter has often been that the victim acted violently and that the shooter was therefore reasonably fearful and thus legally justified in using deadly force; the victim is often characterized as being a criminal or otherwise associated with negative behavior. In Michael Brown's case, it appears to be undisputed that the encounter began when the police officer who shot Brown, Darren Wilson, saw Brown and a friend walking in the street and asked them to move to the sidewalk.³⁰ Immediately after the shooting, the story emerged that Wilson had brazenly shot Brown while Brown had his hands raised, suggesting that he was trying to surrender.³¹ The officer later told his version of events to the grand jury.

In his testimony, the officer described Brown's appearance and behavior in vivid terms that described him as large, angry, and violent: According to Wilson, after he told Brown and his friend to move to the sidewalk, Brown cursed at him in response and became enraged.³² Wilson, who was in his police vehicle at the start of the encounter, testified that he then attempted to open the vehicle door, but Brown responded with more cursing and slammed the door shut.³³ At that point, Wilson said that Brown was staring at him "almost like to intimidate me or to overpower me."³⁴ Wilson told the grand jury that during the encounter, Brown "had the most intense aggressive face" that made him "look like a demon."³⁵ Wilson claims that after Brown hit him in the face and grabbed for his gun, he then grabbed Brown.³⁶ According to Wilson, at that moment, he "felt like a five-year-old

29. *See id.* at 310 ("Blacks serve as our mental prototype (i.e., stereotype) for the violent street criminal.").

30. *See* Berman and Lowery, *supra* note 1.

31. *See id.*

32. *See* Terrence McCoy, *Darren Wilson Explains Why He Killed Michael Brown*, WASH. POST (Nov. 25, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/why-darren-wilson-said-he-killed-michael-brown/>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

holding Hulk-Hogan.”³⁷ After Wilson fired two shots, Wilson testified that Brown took off down the street, and he pursued Brown.³⁸ Wilson claims that when he got near to Brown, he warned Brown to “get back,” and Brown then reached into the waistband of his pants.³⁹ Wilson said that he then shot at Brown several times, all the while thinking that Brown would kill him if Brown got hold of his gun.⁴⁰ Wilson claims that as he shot at Brown, Brown continued to come towards him: “He was almost bulking up to run through the shots, like it was making him mad that I was shooting him.”⁴¹

While it is impossible to know the extent to which grand jurors considered race as they heard Brown’s case, it is easy to see how racial biases could influence the jurors’ assessments. Wilson’s story aligned with popular narratives and negative stereotypes of young, African American men. In the story, Brown was cast as a belligerent individual who relentlessly attacked a police officer and was unstoppable by anything other than a bullet. By contrast, Wilson was presented as a cool-headed and thoughtful police officer who had the misfortune of finding himself in a frightening situation. To accept the officer’s story, the jury had to believe what Wilson told them about Brown—that he was threatening and violent.

Other narratives may also have been invoked by the above story. Many citizens see police officers merely as protectors, who only have poor interactions with serious violators of the law. Members of the African American community often have a different perspective of the character and behavior of a typical police officer based on their different life experiences. African Americans may recall the all too common narrative of innocent African Americans being singled out by police officers and handled aggressively during these encounters or may have had the personal experience of being pulled over for “driving while black.” They may have learned to maneuver a complex relationship that exists between many African Americans and the police—they rely on police officers for protection, but also fear that a police encounter will result in their injury or death. Narratives of African American males as violent and criminal, however, are clearly

37. *Id.* At the time of the shooting, Wilson was described as nearly 6 feet, four inches in height, and over 200 pounds. *Id.* Brown was described as 6 feet, five inches tall and weighing approximately 300 pounds. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

more dominant in American society than these narratives that are more familiar to African Americans and other minority communities.

IV. ADDRESSING RACE IN THE COURTROOM

Stories can help jurors to make sense of the information that they receive in a case and are integral to our legal process. Yet the power of stories should not be underestimated. In cases involving the shootings of unarmed, African American men and boys, including Michael Brown, the evidence is naturally limited, or contradictory at best. Moreover, these cases not only require jurors to make an assessment of what actually happened as a purely factual matter, but also to consider the reasonableness of the shooter's actions. As jurors work to determine a shooter's perspective and motivation, there are many opportunities for varying perspectives to impact how the evidence is viewed and what inferences are drawn. It is in these difficult cases that stories become all the more significant, and jurors' perspectives and life experiences are likely to play a more decisive role.⁴² It is also in these circumstances that the storytelling model reveals the propensity for a verdict to be influenced by a shared sense among jurors based on a consensus of perspective, rather than the truth.

Although research has shown that jurors view evidence in a case through a prism of their own thoughts and experiences, the courts have not fully embraced this newly recognized reality. Courts tend to view jury impartiality through a lens of exclusion, rather than one of inclusion. Impartiality is equated with an absence of bias, rather than an opportunity for true consideration of varied perspectives and life experiences. While acknowledging the need for diversity among prospective jurors, courts have tended to focus their efforts on keeping bias out of jury decision-making by employing practices and procedures that are intended to reduce the risk of biased jury decision-making; this includes the practices of allowing for the exclusion of jurors through preemptory challenges, excluding evidence that is deemed to be unduly prejudicial, and giving jury instructions that tell jurors that decisions are not to be made based on their biases and prejudices. Yet, these safeguards do not seem to anticipate the full potential of stories to engage jurors' perspectives and life experiences, and tap into

42. See Mark Cammack, *In Search of the Post-Positivist Jury*, 70 *IND. L. J.* 405, 477 (1995) (asserting that decisions requiring jurors to make judgments about intention or motivation of others and the likelihood of actions that never materialized or were never witnessed, would seem to more often invoke assumptions that correspond with cultural communities.)

jurors' biases and prejudices at a fundamental level. Indeed, if one considers the way that stories can cause jurors to reference biases of which they may not even be aware, it is easy to reach the conclusion that these safeguards are prone to be insufficient in some cases.

The reality is that bias can never be completely removed from jury decision-making, and it appears unclear whether this is even a worthwhile goal. It would seem a better strategy for courts to impose procedures that acknowledge the role that jurors' perspectives play in their decision-making processes and to employ practices that encourage the selection of jurors who bring diverse perspectives.⁴³ Moreover, if jurors are made aware of their own biases and the roles that they can play in their evaluations of cases, they will be given an important tool that will allow them to realize how their own perspectives impact their assessments of competing narratives in the courtroom, and to better recognize and consider the perspectives of others.⁴⁴

The frustrations expressed by the African American community seem to stem from a growing awareness that the perspectives and life experiences of African Americans are not always represented in the court process and jury decisions. The storytelling model lends credibility to these concerns, as it demonstrates how stories that align with commonly held biases can be quite persuasive even if untrue, particularly to listeners who possess similar perspectives that go unchallenged. Many years ago, Justice Thurgood Marshall warned that "when any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."⁴⁵ Michael Brown's case demonstrates why it is important that courts continue to work to make sure that juries are diverse not only in theory but also in

43. See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 121–22, n.79 (1994) (discussing how some juror bias, described as interpretive bias is "important because the exercise of juror judgment entails interpretation and assessment of facts, evidence, witness demeanor, and even law . . . What is at issue in a discussion of general or interpretive bias among jurors is the differences in their intuition, common sense, and deep-seated hunches and judgments about social life.").

44. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1597 (2013) (stating that one "way race can be made salient is through jury instructions" and providing examples of a judge's jury instructions that tell jurors that they may have implied biases and they are not to rely on them in their decision-making).

45. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (plurality opinion) (Marshall, J., joined by Douglas, J. and Stewart, J.).

practice, and that minorities have a real opportunity for their stories to be heard.⁴⁶ If courts begin to take steps to better address the realities of how jurors make decisions, they will make much needed strides toward improving the quality of justice for individual litigants and improving public perceptions about the American legal system for all Americans.

46. See Brown, *supra* note 41, at 107, 121–22 n.79.

ESSAY

Poor, Black and “Wanted”: Criminal Justice in Ferguson and Baltimore

MICHAEL PINARD*

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INTRODUCTION

The killing of Michael Brown and the aftermath of this tragedy in Ferguson continue to resonate throughout the United States and even internationally, particularly as police killings of unarmed men, women and children of color have continued with frightening regularity in the short time since his death. Within the U.S., many have described and examined parallels between Ferguson and their own small towns, cities and neighborhoods that are majority Black and Latino. The relationships in these communities between law enforcement officers and the residents they have sworn to serve and protect are often intense, disconnected and antagonistic. These are communities that, as many have articulated, have dire need and demand for law enforcement, but

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not the type of law enforcement that stereotypes, generalizes, disrespects, interferes with without reason, harms and kills.¹ The string of killings that followed Michael Brown in cities such as Staten Island, Cleveland, Brooklyn, North Charleston and Baltimore and their after-effects have brought national focus to police-citizen encounters and have also raised desperate, crushingly sad concerns about the value of Black lives.

Thus, Ferguson lit a fuse that has ignited conversations, debates, passions, demonstrations, marches, advocacy, investigations, lawsuits and some reforms related to law enforcement, public safety and criminal justice. Many local, state and national stakeholders have taken lessons from Ferguson and beyond to call for measures to enhance law enforcement transparency, accountability and public trust. Such measures include proposals for officers to wear body cameras, receive training on unconscious biases and reside in the cities and neighborhoods they patrol.²

Some proposals are much broader. In December, 2014, President Obama signed an executive order that established the President's Task Force on 21st Century Policing.³ He created the Task Force to "strengthen community policing and trust among law enforcement officers and the communities they serve—especially in light of recent events around the country that have underscored the need for and importance of lasting collaborative relationships between local police and the public."⁴ He charged the Task Force with proposing a set of recommendations for best law enforcement practices.

1. See Charles Blow, *A Kaffeklatsch on Race*, N.Y. TIMES, Feb. 16, 2015, at A17 ("Minority communities want policing the same as any other, but they want it to be appropriate and proportional.").

2. For instance, the San Francisco Public Defender Office formed a Racial Justice Committee to make recommendations regarding policing in communities of color. The committee's ten recommendations include that officers receive at least twenty-four hours of training on implicit bias, annual performance evaluations that look at, inter alia, "documented history of racial bias excessive force, [and] unlawful search and seizure and false reports, providing financial incentives for officers to live in the communities they patrol, appointing a youth representative to the San Francisco Police Commission and "not detain, search or arrest children at school in the absence of an imminent threat of danger." SAN FRANCISCO PUBLIC DEFENDER, RACIAL JUSTICE COMMITTEE PLAN FOR POLICE REFORM, <http://sfpublicdefender.org/wp-content/uploads/sites/2/2015/03/Police-Reform-Plan.pdf>

3. Executive Order, Establishment of the President's Task Force on 21st Century Policing, December 18, 2014, <https://www.whitehouse.gov/the-press-office/2014/12/18/executive-order-establishment-presidents-task-force-21st-century-policin>

4. FINAL REP'T OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, iii (May, 2015), http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf [hereinafter 21ST CENTURY POLICING REP'T.]

To meet the President’s charge, the Task Force hosted listening sessions across the United States on issues related to policing and the criminal justice system. The Task Force then provided President Obama an expansive set of recommendations and action items for law enforcement and criminal justice reform.⁵ These recommendations and action items include, among many others, “review and evaluate all components of the criminal justice system”⁶; “establish a culture of transparency and accountability [among law enforcement agencies] in order to build trust and legitimacy”⁷; “initiat[e] positive nonenforcement activities to engage communities. . .[with] high rates of investigative and enforcement involvement with government agencies”⁸; consider and review policies regarding law enforcement techniques against “vulnerable populations—including children, elderly persons, pregnant women, people with physical and mental disabilities, limited English proficiency, and others”⁹; diversify police officer ranks (“including race, gender, language, life experience, and cultural background”)¹⁰; build relationships with immigrant communities¹¹; collaborate with communities to develop crime-reduction and trust-enhancing strategies in communities and neighborhoods “disproportionately affected by crime”¹²; develop publicly available use of force policies that include “training, investigations, prosecutions, data collection and information sharing”¹³; use of force training that “emphasize[s] de-escalation and alternatives to arrest or summons in situations where appropriate”¹⁴; develop best practices that eliminate bias from eyewitness identification procedures;¹⁵ “collect, maintain and analyze demographic data on all detentions (stops, frisks, searches, summons, and arrests). . .disaggregated by school and non-school contacts”¹⁶; establish “some form of civilian oversight” of law enforcement, with input from every community¹⁷; “refrain from practices requiring officers to issue a predetermined number of tickets, ci-

5. *See generally id.*
6. 0.1 Overarching Recommendation, *id.* at 7.
7. 1.3 Recommendation, *id.* at 12.
8. 1.5. Recommendation, *id.* at 14.
9. 1.5.4 Action Item, *id.* at 15-16.
10. 1.8 Recommendation, *id.* at 16.
11. 1.9 Recommendation, *id.* at 18.
12. 2.1 Recommendation, *id.* at 20.
13. 2.2 Recommendation, *id.*
14. 2.2.1 Action Item, *id.*
15. 2.4 Recommendation, *id.* at 23.
16. 2.6 Recommendation, *id.* at 24.
17. 2.8 Recommendation, *id.* at 26.

tations, arrests, or summonses”;¹⁸ adopt policies that prohibit “profiling and discrimination based on race, ethnicity, national origin, religion, age, gender, gender identity/expression, sexual orientation, immigration status, disability, housing status, occupation, or language fluency”¹⁹; “infuse [community policing]. . . throughout the culture and organizational structure of law enforcement agencies”²⁰; work with public schools “to encourage the creation of alternatives to student suspensions and expulsion”²¹; “affirm and recognize the voices of youth in community decision making”²²; “implement ongoing, top-down training for all officers in cultural diversity”²³; and “study mental health issues unique to officers.”²⁴

While these recommendations are thorough and desperately needed, they of course do not address all of the issues that impact cities such as Ferguson. The events that occurred there are not solely about the killing of Michael Brown, law enforcement practices and police-citizen relations. The encounter between Officer Darren Wilson and Mr. Brown was not an isolated circumstance devoid of context. The tragedy and the anger, hurt and desperation that followed took place in a segregated town, where the seats of power are disconnected from the majority of residents in every way imaginable and where the criminal justice system wears on Black, poor residents with unbearable weight and singular fury.

The Civil Rights Division of the United States Department of Justice (DOJ) has detailed the myriad ways in which the entirety of Ferguson’s criminal justice system marginalizes, trivializes and criminalizes Black lives.²⁵ The DOJ opened an investigation into Ferguson’s Police Department and municipal court system because of the events surrounding and following Mr. Brown’s death. The investigation revealed countless accounts of and insights into the ways in which Black residents were abused by law enforcement officers, arrested for trivial offenses or even no offenses at all, prosecuted en masse in municipal court and then remained embedded in the criminal justice sys-

18. 2.9 Recommendation, *id.*

19. 2.13 Recommendation, *id.* at 28.

20. 4.2 Recommendation, *id.* at 43.

21. 4.6.2 Action Item, *id.* at 48.

22. 4.7 Recommendation, *id.* at 49.

23. 5.9.1 Action item, *id.* at 58.

24. 6.1.2 Action item, *id.* at 63.

25. See generally U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEP’T (2014) [hereinafter DOJ INVESTIGATION] http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

tem because of their inability to pay the wild array of fines and court fees that attached to their offenses as well as to their participation in the court process.²⁶ The DOJ concluded that at each stage of the criminal justice system, Black residents suffered unbearably and unconstitutionally.²⁷ Specifically, it found that Ferguson’s Police Department engaged in patterns of Fourth Amendment violations stemming from unconstitutional stops, arrests and excessive force,²⁸ as well as First Amendment violations stemming from arresting and punishing individuals for engaging in “a variety of protected conduct: people are punished for talking back to officers, recording public police activities and lawfully protesting perceived injustices.”²⁹ It also found Ferguson’s municipal court to be disorganized and non-transparent; that it imposes “substantial and unnecessary barriers” to challenge or resolve municipal code violations, is overly punitive and places undue hardships on individuals charged with code violations.³⁰ The DOJ concluded that Ferguson’s law enforcement practices disproportionately harm Ferguson’s Black residents and are partly the product of racial bias.³¹ It also concluded that the unlawful police and court practices it detailed have eroded community trust in law enforcement and the criminal justice system and, thus, undermine public safety.³²

Ferguson’s law enforcement practices and court system are abhorrent and in shambles. There is much work to do in Ferguson. But there is much work to do everywhere. Ferguson is by no means alone in the ways in which Black lives are marginalized on the streets and in the courts. I have worked on criminal justice issues in Baltimore for the past thirteen years. As they have with many others across the country, the events in Ferguson have caused me to examine ways in which some underlying issues in Ferguson align with issues and undercurrents in Baltimore. This essay will draw some of these similarities.

The first part of this essay focuses on the ways in which poor, Black residents are entrenched in Ferguson’s and Baltimore’s criminal justice systems, in large measure because of the relatively minor offenses that flood lower courts. The second part looks at some ways in

26. *Id.*

27. *Id.* at 78.

28. *Id.* at 16–24, 28–41.

29. *Id.* at 24; *see id.* 24–28 (discussing the First Amendment violations).

30. *Id.* at 42–62.

31. *Id.* at 62–78.

32. *Id.* at 79–89.

which these residents remain stuck in the criminal justice system through warrants that courts issue when they do not appear in court for docket calls. To use an often repeated phrase, out of tragedy comes hope. In that spirit, the third part briefly discusses some reform measures or ideas that have stemmed from Michael Brown's death. The essay draws some potential lessons from these reforms.

I. THE TELLING OF TWO CITIES—DEMOGRAPHICS AND CRIMINAL JUSTICE

Aside from their sizes, Ferguson and Baltimore are remarkably similar demographically. Ferguson is a city-suburb that is part of the Greater St. Louis metropolitan area. It is home to approximately 21,000 residents, sixty-seven percent of whom are Black and nearly twenty-nine percent of whom are White.³³ It is a hardscrabble town, as 24.9% of Ferguson's residents live below the poverty line³⁴ and approximately sixty-eight percent of the schoolchildren qualify for free or reduced lunch.³⁵ These demographics, however, are not represented in Ferguson's seats of authority and power. Pathetically, at the time of the DOJ investigation, only four out of fifty-four police officers in Ferguson were Black.³⁶ Ferguson's mayor is White, as are six of the school board's seven members.³⁷ At the time of Michael Brown's death five of Ferguson's six city council members were White.³⁸

33. U.S. CENSUS BUREAU, FERGUSON (CITY), MISSOURI, available at <http://quickfacts.census.gov/qfd/states/29/2923986.html>.

34. *Id.*

35. See Jessica Bock, *Ferguson-Florissant, Riverview Gardens, Among Schools Offering Free Lunches to All Students*, ST. LOUIS POST-DISPATCH, July 18, 2014, (approximately sixty-eight percent of children in Ferguson-Florissant school district received free or reduced lunch in the 2013–14 school year), http://www.stltoday.com/news/local/education/ferguson-florissant-riverview-gardens-among-schools-offering-free-lunches-to/article_c92d264b-4c18-5e8a-9ab7-1564e77c21f2.html.

36. DOJ INVESTIGATION, *supra* note 25, at 7. At the time of Michael Brown's death Ferguson's Police Department had fifty-three officers, three of whom were Black. Paulina Firozi, *5 Things to Know About Ferguson's Police Department*, USA TODAY, Aug. 19, 2014, <http://www.usatoday.com/story/news/nation-now/2014/08/14/ferguson-police-department-details/14064451/>.

37. German Lopez, *Why Ferguson's Government is So White*, VOX, Aug. 14, 2014, <http://www.vox.com/2014/8/14/6003793/why-is-fergusons-local-government-so-white/in/5757650>.

38. *Id.* Ferguson's City Council is now fifty percent Black, the result of city council elections in April, 2015, that brought two Black councilmembers into office. Stephen Deere, *High Vote Turnout in Ferguson Adds Two Black Council Members, for Three Total*, ST. LOUIS POST-DISPATCH, Apr. 8, 2015, http://www.stltoday.com/news/local/govt-and-politics/high-voter-turnout-in-ferguson-adds-two-black-council-members/article_422cb33f-c172-53de-a0c8-29386630ec72.html

Baltimore, by contrast, is a major city. It is the largest in Maryland, home to approximately 620,000 residents, sixty-three percent of whom are black and 31.6% of whom are white.³⁹ Grinding poverty and all that it brings is not hard to miss in many parts of the city, which has been studied, serviced and chronicled by researchers, agencies, service providers, journalists, filmmakers and television writers. Approximately one quarter of Baltimore’s population lives below the poverty line⁴⁰ and the overwhelming majority of schoolchildren—eighty-four percent—in Baltimore’s public schools are enrolled in a free or reduced lunch program.⁴¹ Unlike in Ferguson, Baltimore’s elected officials and police force are representative of Baltimore’s racial demographics.

As is true in towns and cities across the United States, entry into the criminal justice system is extraordinarily easy for Ferguson’s poor, Black residents. If they do not find the criminal justice system, often the criminal justice system finds them. Zero tolerance policies and a particular focus on driving offenses have flooded Ferguson’s traffic and criminal courts. As in other jurisdictions, these policies have allowed Ferguson’s police officers to stop, question, arrest and detain Black residents in large numbers.⁴² Symptomatic of Ferguson’s reflexive use of its criminal justice system was the wholesale arrest approach on display during the protests that followed Mr. Brown’s killing. Many individuals who were speaking, videotaping or standing in silence, including news reporters and photographers, were arrested and then released without being charged and without any paperwork—a practice known there as “catch and release.”⁴³

These law enforcement practices in Ferguson infiltrate its municipal court system, where Black residents are prosecuted in extraordina-

39. U.S. CENSUS BUREAU, *supra* note 33.

40. *Id.* (23.8% of persons in Baltimore lived below the poverty line from 2009 to 2013).

41. MARYLAND STATE DEP’T OF EDUCATION, SCHOOL AND COMMUNITY NUTRITION PROGRAMS, SCHOOL YEAR 2014–2015 (STATEWIDE SUMMARY) (2014).

42. For instance, Ferguson’s Police Department conducted 5,384 traffic stops in 2013—4,632 of which were of Black drivers. CHRIS KOSTER, VEHICLE STOPS REPORT (2013), <http://ago.mo.gov/divisions/litigation/vehicle-stops-report?lea=161>. During these stops Black drivers were twice as likely as Whites to be searched, given a citation or arrested even though they were “26% less likely to have contraband found on them during the search.” DOJ INVESTIGATION, *supra* note 25, at 4, 62, 65.

43. See Wesley Lowery, *In Ferguson, Washington Post Reporter Wesley Lowery Gives Account of His Arrest*, WASH. POST (Aug. 14, 2014), http://www.washingtonpost.com/politics/in-ferguson-washington-post-reporter-wesley-lowery-gives-account-of-his-arrest/2014/08/13/0fe25c0e-2359-11e4-86ca-6f03cbd15c1a_story.html.

rily disproportionate numbers and, literally, en masse.⁴⁴ From 2012 to 2014, Blacks constituted ninety-three percent of the arrests and ninety percent of the citations issued in Ferguson.⁴⁵ Given these percentages, it is not surprising that Blacks constituted the overwhelming majority of individuals charged with particular crimes. Nonetheless, the numbers are jarring. During this same two year time period, Blacks totaled ninety-five percent of individuals charged with “manner of walking,” ninety-four percent of individuals charged with failure to comply, ninety-two percent of individuals charged with resisting arrest, ninety-two percent of individuals charged with peace disturbance and eighty-nine percent of individuals charged with failure to obey.⁴⁶ In addition, Blacks were substantially more likely to leave municipal court with a conviction record, as they were sixty-eight percent less likely to have their charges dismissed.⁴⁷

As in Ferguson, relationships between Baltimore’s police force and its’ Black residents have been disconnected, strained and, at times, violent. Unlike in Ferguson, Baltimore’s police force is representative of the city’s racial demographics, although, as of 2013, more than seventy percent of Baltimore’s officers lived outside of the city.⁴⁸ In Ferguson’s wake came the disclosure by the Baltimore Sun that from 2011 until the Sun’s investigative report in September 2014, Baltimore had paid \$5.7 million in court judgments and settlements of over 100 police brutality and false arrest lawsuits.⁴⁹ Some settlements

44. Ferguson’s municipal court holds “three or four sessions per month, and each session lasts no more than three hours.” DOJ INVESTIGATION, *supra* note 25 at 9. Moreover,

It is not uncommon for as many as 500 people to appear before the court in a single session, exceeding the court’s physical capacity and leading individuals to line up outside of court waiting to be heard. Many people have multiple offenses pending; accordingly, the court typically considers 1,200-1,500 offenses in a single session and has in the past considered over 2,000 offenses during one session.

Id.

45. *Id.* at 62.

46. *Id.*

47. *Id.*

48. Mark Puente, *Some Baltimore Police Officers Face Repeated Misconduct Lawsuits*, BALT. SUN, Oct. 4, 2014, <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-police-repeaters-20141004-story.html#page=1>. This disconnection in Baltimore and elsewhere breeds misunderstanding and mistrust between departments and communities, as it does in other cities where most officers live outside of the communities they patrol. This issue did not go unnoticed by the President’s Task Force on 21st Century Policing. The Task Force recommended that “[l]aw enforcement agencies . . . institute residency incentive programs such as Resident Officer Programs,” so that officers live in the neighborhoods they patrol and protect. 21ST CENTURY POLICING REP’T., Action Item 1.5.2, *supra* note 4 at 15.

49. Mark Puente, *Undue Force*, BALT. SUN, Sept. 28, 2014, <http://data.baltimoresun.com/news/police-settlements/>. Issues involving violent encounters between law enforcement and Maryland’s Black residents is not confined to Baltimore, just as issues uncovered in Ferguson are

involved the same police officers, who remained on the force despite multiple instances of substantiated abuse.⁵⁰ In almost all of the criminal cases that followed the violent arrests, “prosecutors or judges dismissed the charges against the victims—if charges were filed at all.”⁵¹ Overall, from 2011 to the present—which includes the several months since October, 2014—Baltimore has paid approximately \$6.3 million to resolve these lawsuits.⁵²

Also as in Ferguson, Baltimore’s, criminal justice system bears down disproportionately on its Black residents, particularly for low-level criminal offenses. Baltimore officially adopted zero tolerance policing in 2000.⁵³ By 2005, the number of arrests jumped to over 100,000, approximately 76,500 of which were warrantless.⁵⁴ The Office of the State’s Attorney took issue with these mass arrests for minor crimes and did not file charges in approximately one-third of the cases that originated with warrantless arrests.⁵⁵ This process of bringing individuals into the criminal justice system is similar to Ferguson’s “catch and release” system that it utilized during the protests. However, in Baltimore this law enforcement approach has long been pervasive, so much so that it is referred to formally as an “arrest without charge” and known colloquially as a “walkthrough.” Through this mechanism, police officers arrest individuals, put them through the

not confined to that town but rather are symptomatic of larger issues in St. Louis County. See, e.g., Ryan J. Reilly & Mariah Stewart, *Fleece Force: How Police and Courts Around Ferguson Bully Residents and Collect Millions*, HUFFINGTON POST, March 26, 2015 (describing ways that several municipalities in St. Louis County impose fines, collect revenue and criminalize residents), http://www.huffingtonpost.com/2015/03/26/st-louis-county-municipal-courts_n_6896550.html. The ACLU of Maryland estimates that between 2010 and 2014, “at least” 109 individuals in Maryland died in police custody. Seventy five of the individuals who died were Black, thirty-six of whom were unarmed. ACLU OF MARYLAND, BRIEFING PAPER ON DEATHS IN POLICE ENCOUNTERS IN MARYLAND, 2010-2014 2 (2015), http://www.aclu-md.org/uploaded_files/0000/0623/md_deaths_police_encounters.pdf

50. Puente, *supra* note 48.

51. Puente, *supra* note 49.

52. Mark Puente & Doug Donovan, *Brutality Lawsuits Continue in Baltimore, Site of Freddie Gray Death*, BALTIMORE SUN, April 22, 2015, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-gray-police-lawsuits-20150422-story.html#page=1>.

53. ANTHONY W. BATTS, POLICE COMMISSIONER, BALTIMORE POLICE DEPARTMENT, “Preventing Harm”: Conduct in the Community, Oct. 14, 2014.

54. Amended Complaint, *Maryland State Conference of NAACP Branches, et al., v. Baltimore City Police Department, et al.*, Case No. 06-1863(CCB) 46–47, ¶ 264, <http://www.aclu-md.org/uploadedfiles/0000/0205/amendedcomplaint.pdf>. [hereinafter, Amended Complaint].

55. See Reed Collins, Note, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. POVERTY L. & POL’Y 419, 420 (2007); Justin Fenton, *With Fewer Arrests in Baltimore, Fewer Cases that Don’t Stick*, BALTIMORE SUN (July 5, 2011), http://articles.baltimoresun.com/2011-07-03/news/bs-md-ci-released-without-charges-20110703_1_fewer-arrests-drug-dealers-fewer-cases.

booking process, detain them in cramped, dirty cells and eventually release them from central booking. They are not formally charged and do not see a judge. This practice has been centralized in Baltimore, to the relative exclusion of the rest of Maryland, and used overwhelming against Black residents, young and old. In 2007, the Maryland State Conference of NAACP Branches, the Baltimore City Branch of the NAACP and several individuals filed suit against the Baltimore City Police Department and other municipal defendants based on the large numbers of arrests without probable cause.⁵⁶ The parties settled. As a result of the settlement, the department essentially ended zero tolerance policing.⁵⁷

Regardless of the label attached to law enforcement methods—whether or not certain practices are defined as “zero tolerance policing”—Baltimore’s black residents are introduced and reintroduced to the criminal justice system in great numbers and remain cemented in it. In 2014, Blacks constituted slightly over eighty percent of total arrests in Baltimore, while nearly seventeen percent of arrests were of Whites.⁵⁸ As these percentages dictate, Blacks also comprised the majority of arrests for specific crimes. For instance, Blacks made up ninety-two percent of arrests for loitering, seventy-nine percent of arrests for carrying an open container and nearly eighty-two percent of arrests for driving without a license, in contrast to White residents, who made up nearly eight percent of arrests for loitering and carrying an open container, and eleven percent of arrests for driving without a license.⁵⁹ The racial disparities for marijuana offenses have been particularly dramatic. According to an American Civil Liberties Union study, in 2010, Blacks constituted ninety-two percent of those arrested

56. Amended Complaint, *supra* note 54.

57. Stipulation of Settlement, *Maryland State Conference of NAACP Branches, et al., v. Baltimore City Police Department, et al.*, Civil Action No. 06-1863 (CCB) at 8 (“Within 30 days of the Effective Date of this Agreement, the Department shall issue a policy stating that the Department does not support a policy of Zero Tolerance Policing.”). In addition, prior to 2007, the walkthroughs were listed on criminal records maintained by law enforcement and it was incumbent upon individuals to file applications with the police department to remove the incidents from their records. In 2007, in large part because of the particular and disproportionate impact of walkthroughs on residents of Baltimore City, Maryland’s legislature enacted an automatic expungement provision, requiring that law enforcement commence the process necessary to expunge walkthroughs that occurred on or after October 1, 2007, within sixty days after release. MD. CRIM. PROC. § 10-103.1(b). However, individuals must still request expungement for walkthroughs that occurred prior to October 1, 2007. They have eight years to make the request. *Id.* at § 10-103(b).

58. Open Baltimore, <https://data.baltimorecity.gov> (last visited May 11, 2015) (containing statistical information about residents, businesses, and police activity in Baltimore, Maryland).

59. *Id.*

in Baltimore for marijuana possession.⁶⁰ During this same year, the arrest rate in Baltimore for marijuana possession was 1,136 per 100,000 residents, compared with Maryland overall, which had an arrest rate of 409 per 100,000 for this same charge.⁶¹

Thus, in both Ferguson and Baltimore, large numbers of Black residents have close, intimate, long-lasting, harmful and dangerous relationships with law enforcement. These relationships extend to the rest of the criminal justice system, as Black residents overwhelmingly fill the dockets that flood the courts in both jurisdictions.

II. STUCK IN THE SYSTEM: WARRANTS IN FERGUSON AND BALTIMORE

As easy as it is for Ferguson’s residents to enter the criminal justice system, it is even more difficult for them to exit and leave it behind. They remain stuck in it. This is especially the case with driving-related offenses, as Ferguson’s Black residents are arrested and convicted disproportionately—and overwhelming—of these offenses.⁶² For many, these cases do not go away. They plead guilty to the offenses but cannot afford to pay the fines and related municipal court fees. The municipality has relied upon these court fees, fines and other costs as a substantial and lucrative funding stream, bringing in approximately \$10 million dollars over the last five years.⁶³ In 2013, these fees and fines constituted a staggering twenty percent of the municipality’s revenues.⁶⁴ In Ferguson’s 2013–14 budget, the projected revenues from “fines and public safety” exceeded the projected reve-

60. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 20* (2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf>.

61. *Id.* at 14–15.

62. For example, Ferguson’s police department has charged Blacks with speeding “at disproportionately high rates overall,” and the “disparate impact of [these] enforcement practices on [Blacks] is 48% larger when citations are issued not on the basis of radar or laser, but by some other method, such as the officer’s own visual assessment.” DOJ INVESTIGATION, *supra* note 25 at 4-5. These issues are not specific to Ferguson, but rather reach municipalities throughout St. Louis County. See generally Rodney Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST, Sept. 3, 2014, (exploring, in-depth, these driving-related offenses, the fines and fees related to these offenses that individuals cannot afford to pay, the extent to which municipalities rely on these fines and fees as revenue sources and the impact of the warrants) <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty>.

63. Complaint at 34, *Fant v. City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015).

64. CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET, FISCAL YEAR 2014–15 50 (2014) (listing total revenues were \$12,761,614 while “Fines and Public Safety” revenues amounted to \$2,571,191), <http://fergusoncity.com/documentcenter/view/1701>.

nues from property taxes by nearly \$500,000.⁶⁵ The City Manager lauded the forty-four percent increase in municipal court revenues from FY 2010–11, which was “[d]ue to a more concentrated focus on traffic enforcement.”⁶⁶

The financial burdens imposed by Ferguson’s criminal justice system and borne by defendants are akin to the broad swath of court and punishment-related fees that have resulted in “offender-funded justice.”⁶⁷ These fees are used to help fund various municipal services, such as law enforcement and court functions, as well as to help support state budgets.⁶⁸ However, these fees and costs, imposed on the poorest of the poor, result in debts that, in some jurisdictions, have been outsourced to private companies.⁶⁹ In Ferguson, individuals have not appeared in court because they could not afford to pay the fines. They were scared of the legal consequences of their poverty.⁷⁰ The courts then issued warrants for their failures to appear. The DOJ found that almost every warrant issued by Ferguson’s municipal court stemmed from “a person miss[ing] consecutive court appearances,

65. CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET, FISCAL YEAR 2013–14 11 (2013), <http://www.fergusoncity.com/DocumentCenter/View/1609>.

66. *Id.* at vi.

67. *See, e.g.*, RAM SUBRAMANIAN ET AL., *Incarceration’s Front Door: The Misuse of Jails in America* 15 (2015) (“Many jails, courts and other criminal justice agencies charge for the services they provide, including jails that charge for clothing and laundry, room and board, medical care, rehabilitative programming, and even core functions such as booking.”), <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>. For descriptions of the various fees that are imposed through each phase of the criminal justice system *see generally* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014).

68. *See, e.g.*, ALICIA BANNON ET AL., *Criminal Justice Debt: A Barrier to Reentry* 4 (2010) (“Cash-strapped states have increasingly turned to user fees to fund their criminal justice systems, as well as to provide general budgetary support.”), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; REBECCA VALLAS & SHARON DIETRICH, *PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS* 29 (2014) (“These criminal justice debts act to compound the collateral consequences of a criminal record and transform punishment from a temporary experience into a long-term, even lifelong status.”), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

69. *See* Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit From Injustice?*, *THE NEW YORKER*, June 23, 2014 3, <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>.

70. *E.g.*, DOJ INVESTIGATION, *supra* note 25, at 48 (“Ferguson court staff members told [DOJ investigators] that they believe the high number of missed court appearance in their court is attributable, in part, to [the] popular belief” that “if they cannot immediately pay the fines they owe, they will be arrested and sent to jail.”); Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, *MOTHER JONES*, Sept. 12, 2014 (“It’s a common misconception among Ferguson residents—especially those without attorneys—that if you show up without money to pay your fine, you’ll go to jail.”), <http://www.motherjones.com/politics/2014/09/ferguson-might-have-break-its-habit-hitting-poor-people-big-fines>.

or . . . a person miss[ing] a single required fine payment as part of a payment plan.”⁷¹ These warrants, as well as the unpaid fines and court fees, have kept the residents wedded to the criminal justice system in extraordinarily large numbers. In fiscal year 2013, Ferguson’s municipal court issued warrants to slightly more than 9,000 individuals for over 32,000 offenses.⁷² Thus, the number of warrants constituted nearly one-half of Ferguson’s population, including children and babies. During this same year, ninety-two percent of the arrest warrants were issued for Black defendants.⁷³ As a result, many individuals and households in Ferguson, overwhelmingly Black, live in the shadows of the criminal justice system.

These warrants extend relationships with the criminal justice system indefinitely. The DOJ found that “the primary role of warrants [in Ferguson] is not to protect public safety but rather to facilitate fine collection.”⁷⁴ Thus, these warrants are not a law enforcement priority. They are simply a way to “coerce payment.”⁷⁵ According to the DOJ, “[c]ourt staff report that they typically take weeks, if not months, to enter warrants into the system that enables patrol officers to determine if a person they encounter has an outstanding warrant.”⁷⁶ Thus, the individuals—their bodies—are not “wanted” by law enforcement or the court; their money is. At times, however, when they do not have the money their bodies will do.⁷⁷

71. DOJ INVESTIGATION, *supra* note 25, at 55. Relevant to missing court appearances, the DOJ found that defendants in Ferguson often have very little information about the offense charged, the fine amount “or whether a court appearance is required or some alternative method of payment is available.” *Id.* at 45. The DOJ “also found evidence that in issuing citations, [Ferguson police] officers frequently provide people with incorrect information about the date and time of their assigned court session.” *Id.* at 46. Moreover, an arrest warrant is issued “[i]f an individual misses a second court date, . . . without any confirmation that the individual received notice of that second court date.” *Id.* at 47.

72. *Id.* at 55.

73. *Id.* at 62.

74. *Id.* at 56.

75. *Id.*

76. *Id.* This is not meant to suggest that individuals are not arrested in Ferguson on these warrants. Indeed, they are “with considerable frequency.” *Id.* Traffic stop data from the Ferguson Police Department reveal that from October 2012 to October 2014, 460 individuals were arrested in Ferguson solely because of an arrest warrant, ninety-six percent of whom were Black. *Id.* at 57.

77. Here, the DOJ concludes that “Ferguson’s practice of automatically treating a missed payment as a failure to appear—thus triggering an arrest and possible incarceration—is directly at odds with well-established law that prohibits ‘punishing a person for his poverty.’” *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 671 (1983)). Indeed, the Supreme Court has made clear the unconstitutionality of incarcerating an individual simply because of his or her poverty. *Bearden*, 461 U.S. at 671. In *Bearden*, the Court held that a person cannot be incarcerated solely because of the inability to pay a probation-required fine and restitution. *Id.* at 672–73. *See also*

Similarly, the relationships between Baltimore's residents and the courts are often long-lasting. This is in part because court-issued warrants also keep thousands of residents connected to the criminal justice system, in varying degrees. These warrants stem from failures to appear in court. In 2014, Blacks constituted nearly seventy-eight percent of the 5,709 arrests for failing to appear in court, with Whites making up nearly twenty percent of these arrests.⁷⁸

In addition, Baltimore's poorest residents also live under the stress of various punishment-related fees, particularly parole fees. In 2009, the Brennan Center for Justice reported that the overwhelming majority of Baltimore's formerly incarcerated individuals could not afford the then-\$40 monthly parole fee, particularly in light of other fees connected to parole, such as participation in various programs.⁷⁹ Debts that exceeded \$30 at the end of parole term were "routinely" referred to the Central Collection Unit (CCU) of Maryland's Department of Budget and management.⁸⁰ The CCU, in turn, added collection costs to the outstanding debt.⁸¹ Ultimately, if the debt and subsequent costs were not collected, one of two things could or did happen: If the debt was less than \$750, the CCU arranged to have state income tax refunds intercepted until it was paid.⁸² If the debt exceeded \$750, Maryland's Attorney General could file a civil action to secure a civil judgment, which could be enforced through wage garnishment and property liens, as well as end up on credit reports.⁸³

The Brennan Center's Report brought significant attention to the negative impact of these debts on parolees and helped lead to legislative changes in Maryland. While there were, and still are, possible exemptions from the parole fee,⁸⁴ individuals leaving prison were not informed.⁸⁵ As a result of the legislative changes, individuals exiting

Tate v. Short, 401 U.S. 395, 398 (1971) (holding that a person cannot be incarcerated solely because of inability to pay fines).

78. BPD ARRESTS, <https://data.baltimorecity.gov/Public-Safety/BPD-Arrests/3i3v-ibrt> (last visited Apr. 1, 2015).

79. REBEKAH DILLER ET AL., BRENNAN CTR. FOR JUSTICE, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 1 (2009), <http://brennancenter.org/sites/default/files/legacy/publications/MD.Fees.Fines.pdf>.

80. *Id.* at 19.

81. *Id.*

82. *Id.*

83. *Id.* at 20.

84. See MD. CODE ANN., CORR. SERVS. § 7-702 (d)(1)–(5) (West 2015) (lack of employment despite diligent attempts, school or vocational training enrollment, disability, support of dependents, or "other extenuating circumstances" could result in exemption, either in whole or in part).

85. See DILLER ET AL., *supra* note 79 at 1, 24–25.

detention must be given oral and written notice that sets forth the criteria that the Parole Commission may use in determining whether to exempt the fee.⁸⁶ The exemption application process must also be explained to them.⁸⁷ Despite these changes, individuals are wallowing in supervision-related debt. The “typical debts” that the CCU is responsible for collecting include those related to parole and probation “restitution,” supervisory fees and court costs accounts.⁸⁸ In 2011, the parole and probation supervision fees were increased to \$50 per month.⁸⁹

While the parole and related fees in Baltimore are very different than the vast network of fees and fines that capture so many Ferguson residents, the results are often the same. People are scared, stressed, funneled through different systems and remain heavily indebted to those systems. Thus, they remain connected to the criminal justice system. They are stuck.

For the last five years, I have teamed with Sharon Cole, a long-serving, dedicated, client-centered and community-focused attorney with the Maryland Office of the Public Defender, to conduct a presentation at Health Care for the Homeless, Inc. This is an organization headquartered in Baltimore that provides a wide range of services to underserved children and adults in several Maryland jurisdictions, including medical, mental health and housing-related services.⁹⁰ Our presentation focuses on the interconnections between warrants and criminal record expungement. Approximately forty to fifty individuals attend each presentation, very much interested in and engaged with the issues that impact them, their families or their friends. Ms. Cole provides information about warrants including how a person can find out if he or she has a warrant, the steps to be taken to deal with the warrant and the urgency of taking those steps. At each presentation she asks the audience how warrants interfere with their lives. Some of the most common answers are: *Nobody will hire or rent an apartment to someone with a warrant. It is always attached to me. I can be arrested at any time. I have to always watch my back. It is stressful.*

86. CORR. SERVS. § 7-702, *supra* note 84, at (j)(1).

87. *Id.* at (j)(2).

88. STATE OF MD., DEP’T. OF BUDGET & MGMT., STATEWIDE DEBT COLLECTION SERVICES, REQUEST FOR PROPOSALS (RFP) 27, SOLICITATION NO. F10B5400006 (Oct. 8, 2014), <http://www.dbm.maryland.gov/proc-contracts/Documents/ProcurementsInProgress/DebtCollection2015Amend2.pdf>.

89. CORR. SERVS. § 7-702, *supra* note 84, at (b).

90. HEALTH CARE FOR THE HOMELESS, INC., <http://hchmd.org/> (last visited Mar. 28, 2015).

It is paralyzing. Ms. Cole explains that these feelings and worries are common throughout the city because on any given day there are approximately 40,000 open warrants in Baltimore.⁹¹

Many warrants stretch back several years. Some individuals know about their warrants and live their lives on edge, not driving cars out of fear that a moving violation—one rolling stop—will result in arrest or constantly struggling because of the ways in which the warrants have interfered with housing, employment, mobility, freedom and peace of mind. Others, however, have absolutely no clue that a warrant is attached to their names. They have received no notice of the warrant and years, sometimes several, have passed with no contact from the court or police officers. They have no idea that they are still attached to the criminal justice system.

III. POTENTIAL REFORMS—LESSONS FROM FERGUSON

While the issues in Ferguson are vast and deeply-rooted, the extent to which poor and working-class Black men and women have financed the municipality through fines and court fees has received particular attention. Ferguson's reliance on these fees and fines as funding mechanisms and its use of warrants as a gateway to incarcerate poverty—turning its jail into a “modern debtors prison,”⁹²—has sparked anger, shock, sadness and outrage among residents, concerned citizens near and far, stakeholders and the bar. In response to some concerns, Ferguson's lawmakers and municipal court put in place a number of measures specific to warrants and the fees. The court set a warrant recall period from September 15, 2014, to October 14, 2014, which allowed individuals to speak with a court clerk about having their warrants recalled.⁹³ More than 600 hundred individuals reported to the court during this thirty day period.⁹⁴ Due to its success, the program has been extended indefinitely.⁹⁵ The court also established a special docket for defendants struggling to make their

91. See, e.g., MD. DEP'T OF LEGIS. SERVS., MD. GEN. ASSEMB., S.B. 266 FISCAL AND POLICY NOTE 2 (2014) (“Baltimore City advises that the city currently has 42,000 warrants.”), http://mgaleg.maryland.gov/2014rs/fnotes/bil_0006/sb0266.pdf.

92. Complaint at 3, *Fant v. City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015).

93. Aja J. Williams, *Ferguson Warrant Recall Program Begins*, KDSK.COM, (Sept. 16, 2014, 5:03 AM), <http://www.ksdk.com/story/news/local/2014/09/15/ferguson-warrant-recall-program/15690419/>.

94. Brett Blume, *Ferguson Warrant-Recall Program Extended Indefinitely*, CBS ST. LOUIS (Oct. 13, 2014), <http://stlouis.cbslocal.com/2014/10/13/ferguson-warrant-recall-program-extended-indefinitely/>.

95. *Id.*

monthly payments on fines.⁹⁶ Also, lawmakers abolished the \$50 warrant recall fee, eliminated the court fees previously imposed when defendants requested continuances, repealed the offense of failure to appear, and amended Ferguson’s fiscal year 2014–15 budget to cap fines and fees derived from municipal ordinance violations at fifteen percent of the city’s revenue.⁹⁷ Missouri’s legislature subsequently passed a bill to cap revenue from “fines, bond forfeitures and court costs for minor traffic violations” at 12.5% of general revenue of the municipalities that comprise St. Louis County (which includes Ferguson) and twenty-percent for the remaining parts of Missouri.⁹⁸ However, more substantial reforms may be forthcoming through investigation, litigation and oversight, the results of the DOJ’s findings as well as a class action lawsuit filed by individuals who have languished and suffered in Ferguson’s jails solely because of their inability to pay these fines and court related fees.⁹⁹

There are lessons to be drawn from Ferguson with regard to warrants. The ideas related to designated warrant recall periods and dedicated warrant court parts are sound. The recall periods are similar to the federal “fugitive safe surrender” program, which is overseen by the U.S. Marshal’s Service.¹⁰⁰ Through the program, jurisdictions around the country establish venues for individuals to return themselves on warrants for non-violent or misdemeanor offenses.¹⁰¹ Jurisdictions designate a time period, usually four days, during which individuals with warrants can return themselves to a designated neutral setting, such as a church. The surrender locations are staffed with judges, prosecutors, defense attorneys, probation personnel, various

96. City of Ferguson, *Monday Sept. 8 Statement: Ferguson City Council Announces New Programs to Reduce Community Concerns* (Sept. 8, 2014), <http://www.fergusoncity.com/DocumentCenter/View/1735>.

97. See FERGUSON CITY COUNCIL, BILL NO. 7060, ORD. NO. 2014-3564 (2014) (enacted), <http://mo-ferguson2.civicplus.com/DocumentCenter/View/1723> (eliminating warrant fee and court continuances fees); FERGUSON CITY COUNCIL, BILL NO. 7062, ORD. NO. 2014-3566 (2014) (enacted), <http://mo-ferguson2.civicplus.com/DocumentCenter/View/1725> (repealing the offense of failure to appear in Municipal Court); FERGUSON CITY COUNCIL, BILL NO. 7061, ORD. NO. 2014-3565 (2014) (enacted), <http://mo-ferguson2.civicplus.com/DocumentCenter/View/1724>.

98. S.B. 5, 98TH Gen. Ass., Reg. Sess. 8 (Mo. 2015), <http://www.senate.mo.gov/15info/pdf-bill/tat/SB5.pdf>.

99. See *Fant v. City of Ferguson*, *supra* note 92 at 1. No. 4:15-cv-253 (E.D. Mo. Feb. 8, 2015). A similar class action has also been filed against the City of Jennings, which neighbors Ferguson. See Complaint at 1, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015).

100. 42 U.S.C. § 16989 (2012).

101. Offices of the United States Attorneys, *Fugitive Safe Surrender*, U.S. Dep’t of Justice, www.justice.gov/usao/priority-areas/violent-crime-prevention/fugitive-safe-surrender (last visited Mar. 24, 2015).

service providers and, in some instances, clergy members.¹⁰² Defendants have their matters heard at these locations. They have the opportunity to explain their circumstances and deal with the warrant and the underlying charge. Their voluntary return is deemed favorably and the vast majority of individuals who have surrendered in these were not arrested or sent to jail. A study of twenty-two safe surrender sites over a five year period found that slightly over than two percent of the individuals who surrendered with an open warrant were arrested.¹⁰³

While the surrender programs have yielded positive results they are confined to designated time periods that span a few days. They are also episodic. As a possible solution, all prosecutor offices should designate an attorney or team of attorneys to assume responsibility for the outstanding warrants in their particular jurisdiction. They would be tasked with taking steps to reduce the warrants by trying to resolve the underlying offenses. For instance, they would sift through the underlying cases to determine whether prosecution should continue or whether cases should be dismissed. They might decide that charges belonging to defendants who have had no subsequent interaction with the criminal justice system should be dismissed or they might determine that some charges can no longer be prosecuted given evidentiary weaknesses. Sorting the cases in these ways would allow prosecutors to separate strong cases from weak, to prioritize based on these assessments, and to get cases out of the system that no longer belong.

The Baltimore State's Attorney took steps in this regard. A few years ago, the office designated an assistant state's attorney to assume responsibility for the misdemeanor warrants cases. The assigned state's attorney had a significant role in Baltimore's Safe Surrender Program, weeding out cases prior to the surrender period that could

102. See, e.g., *N.J. Offers 'Fugitive Safe Surrender' Program to Those with Outstanding Warrants: Program Doesn't Offer Amnesty, But Fugitive Will Get Favorable Consideration*, CBS N.Y. (Nov. 6, 2013 10:00 PM), <http://newyork.cbslocal.com/2013/11/06/n-j-offering-fugitive-safe-surrender-program-to-those-with-outstanding-warrants/>.

103. DANIEL J. FLANNERY, WANTED ON WARRANTS: THE FUGITIVE SAFE SURRENDER PROGRAM 31–32 (2013). Mae Quinn, a Professor of Law at Washington University, formerly taught at the University of Tennessee College of Law. She represented clients in Knoxville who reported to amnesty events, which were focused on serving homeless individuals. She states that her clients frequently had their court-related debts forgiven at these events. E-mail from Mae Quinn, Professor of Law & Director, Juvenile Law & Justice Clinic, Washington University School of Law (Mar. 4, 2015) (on file with author).

no longer be prosecuted.¹⁰⁴ However, the state’s attorney’s role extended past the program to the day-to-day responsibility of trying to resolve these cases. On several occasions students in the Reentry Clinic that I teach contacted the state’s attorney to advocate on behalf of clients whose warrants reached back several years. The goal was to resolve the underlying charge. The students conveyed our clients’ stories to the state’s attorney—why they desperately needed and deserved to move past the circumstances—and the cases were resolved in ways that allowed both the state’s attorney to shrink the pile of cases, albeit ever so slightly, and the clients to move forward with their lives.

In addition to the steps that Ferguson’s municipal court and City Council have taken with regard to warrant-related issues, the DOJ has recommended to the City of Ferguson several additional warrant-specific reforms. It recommends that Ferguson “[c]ease practice of automatically issuing a warrant when a person on a payment plan misses a payment, and adopt procedures that provide for appropriate warnings following a missed payment.”¹⁰⁵ It also recommends that the municipal court only jail individuals who failed to appear or failed to pay the penalty for a municipal code violation if a series of steps have been followed, among which are enforcing the fines through alternative means (such as community service and modifying payment plans) and providing attorneys to individuals *prior* to the warrant being issued.¹⁰⁶ Last, it recommends that the municipal court make permanent its temporary (albeit indefinitely extended) warrant recall program.¹⁰⁷

The DOJ’s recommendations are necessary steps for Ferguson to take and for other jurisdictions to follow. Providing defense counsel to individuals as part of the warrant process (both prior to judges issuing the warrants and after they have done so) is critical to addressing and balancing the needs and concerns of courts, defendants and communities. The sheer numbers of warrants in cities such as Ferguson and Baltimore prove them to be ineffective and overly punitive. Counsel is necessary to individualize their clients—their situations and circumstances—so that courts can make informed decisions about whether a warrant is necessary in a particular instance and, after the

104. Jessica Anderson, *Hundreds Take Advantage of Safe Surrender Program: Residents with Nonviolent Crimes had 4 Days to Surrender*, *BALT. SUN* (June 19, 2010), http://articles.baltimore.sun.com/2010-06-19/news/bs-md-safe-surrender-20100619_1_deros-warrants-surrender.

105. DOJ Investigation, *supra* note 25 at 99.

106. *Id.* at 100.

107. *Id.*

warrant has been issued, whether it should be recalled. Indeed, “under longstanding practice [in Ferguson] once an attorney makes an appearance in a case, the court automatically discharges any pending warrants.”¹⁰⁸ This fact alone signifies the importance, and good fortune, of being represented by counsel in warrant-related matters.

However, more can be done. Defender officers, members of the private bar and law school clinics can develop workshops and related materials that educate communities about warrants. They can also work together to organize workshops for individuals seeking legal advice related to their warrants. The attorneys and clinic students can instruct attendees on the steps necessary to resolve the warrant and provide legal representation to those who are interested. These workshops would be similar to others that defender offices, affiliated attorneys and service providers hold on legal issues that directly impact individuals who have been through the criminal justice system, such as expungement workshops.

As in Ferguson, jurisdictions should repeal the offense of failure to appear. This offense and the related warrant are pasted on criminal records, which are easily accessible by employers, landlords and the general public. To employers and landlords, this charge connotes dishonesty, irresponsibility and evasion, labels that make it extraordinarily difficult to secure employment or housing. These labels and assumed character traits often run counter to the underlying narratives that lead to entry into the criminal justice system as well as the subsequent warrants. They tell stories that, in many circumstances, are simply not true. For many employers and landlords, the story begins and ends with the charge. The narrative and circumstances behind the charge are irrelevant. Thus, the charge should not be on the record. At the very least, it should come off the record once the warrant is resolved. Again, in many circumstances the warrants involve long-ago minor crimes. The long-lasting harms caused by failure to appear charges on criminal records far outlive the impact of the underlying charges.

Judges also have a significant role to play in reforming warrant-related practices. One of the searing impressions of Ferguson is the extent to which poor individuals are absolutely terrified of going to court because of their inability to pay fines and court-related fees. They are scared that their poverty will lead to their incarceration; in

108. *Id.* at 56.

essence, that their inability to pay these costs is a crime unto itself. Frightened at the prospect of going to jail, they do not show up to court and the municipal judge issues the warrants. In addition to the DOJ’s recommendations regarding the information that needs to be conveyed to individuals regarding fines, fees and warrants, judges need to explain to *all* individuals, orally and in writing, that their inability to pay fines and court-related fees *cannot and will not* be the basis of a subsequent arrest or incarceration.

Last, key stakeholders—judges, prosecutors, law enforcement personnel, elected officials and advocates—need to hear directly from the scores of individuals whose warrants keep them in the shadows of the criminal justice system. The DOJ did just that and its report is filled with stories of individuals who have suffered at each stage of Ferguson’s criminal justice system, including those burdened with warrants. Any attempts at instituting warrant-related reforms would be lacking without listening to, considering and incorporating the stories and experiences of individuals who have been through the criminal justice system, including the circumstances that led to their warrants and the impact the warrants have had on their lives. Their stories and experiences are primary sources for stakeholders to understand and consider. Their input and ideas are integral to the warrant-related reforms that are necessary to balance the needs of law enforcement, courts, defendants, families and communities.

EPILOGUE

I wrote this essay in early 2015, with the goal of drawing some similarities between the criminal justice systems of Ferguson, Missouri and Baltimore, Maryland. My aims were to illustrate that relatively minor crimes drive these respective systems and to explain the ways that court warrants keep individuals, overwhelmingly poor and Black, attached to these systems.

However, deep into the editing process, Freddie Gray died. A twenty-five year old lifelong resident of Baltimore, Mr. Gray died one week after police officers encountered him “alive and walking,”¹⁰⁹ chased, detained, searched, arrested, dragged and bound him, put him in a police van and drove him without safety belts through parts of Baltimore City, making multiple stops along the way to the Western

109. Paul Butler, *The Police Officers’ Bill of Rights Creates a Double Standard*, NY TIMES, Apr. 29, 2015.

Police District. According to the States Attorney of Baltimore City—who criminally charged the six officers involved in this incident—Mr. Gray requested and begged for medical attention, first when the arresting officers placed him in handcuffs and then throughout this ride, as he stated multiple times that he could not breathe.¹¹⁰ At one stop, the State’s Attorney alleges, Mr. Gray was unresponsive.¹¹¹ When the officers arrived at the Western Police District, “Mr. Gray was no longer breathing at all.”¹¹² Paramedics subsequently arrived, determined that Mr. Gray was in cardiac arrest¹¹³ and transported him to University of Maryland Shock Trauma, where he underwent two spinal surgeries, remained comatose and died one week later, with a nearly severed spine and a broken voice box.

The arresting officers claimed that they chased Mr. Gray because he “fled unprovoked” upon “noticing police presence.”¹¹⁴ Nothing else.¹¹⁵ They alleged that upon apprehending Mr. Gray one of the officers “noticed a knife clipped to the inside of his front pants pocket.”¹¹⁶ They stated that they “arrested him without force or inci-

110. Application for Statement of Charges, Edward Michael Nero, Defendant, District Court of Maryland for Baltimore City, May 1, 2015 (Officer Nero is one of the six officers charged).

111. *Id.*

112. *Id.*

113. *Id.*

114. Application for Statement of Charges, Freddie Carlos Grey [sic] Jr., Defendant, District Court of Maryland for Baltimore City, Apr. 12, 2015.

115. Many commentators have asserted that the chase preceding Mr. Gray’s arrest was lawful, relying on the United States Supreme Court’s holding in *Illinois v. Wardlow* that unprovoked flight in a drug-prone neighborhood gives rise to reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000). Justice Rehnquist, writing for the Court, stated that a person’s “unprovoked” flight from police officers in a “high crime” area, while “not necessarily indicative of wrongdoing, . . . is certainly suggestive of such.” *Id.* at 124. However, Justice Stevens, who concurred and dissented in part from Justice Rehnquist’s opinion, explained that “[a]mong some citizens, particularly minorities and those residing in high crime areas, there is . . . the possibility that the fleeing person is entirely innocent, but with or without justification, believes that contact with the police itself can be dangerous. . . .” *Id.* at 132. He continued, “these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.” *Id.* at 133. Following *Wardlow*, Maryland’s Court of Special Appeals also held that flight in a drug-prone neighborhood “justified the police chase and . . . subsequent detention.” *Wise v. State*, 132 Md. App. 127, 134 (2000). However, of particular note, in both *Wardlow* and *Wise* the officers alleged that they saw something else other than “unprovoked” flight. In *Wardlow*, the officers asserted that Mr. Wardlow was “standing next to [a] building holding an opaque bag” in a drug-prone location. *Wardlow*, at 121–22. He then ran upon seeing the officers. In *Wise*, the officer alleged that he saw Mr. Wise “walk into an alley in a neighborhood known for its drug dealing.” *Wise*, at 132. He then saw Mr. Wise “balling up a brown paper bag and placing it under a telephone book in a grassy area in the alley.” *Id.* Mr. Wise then made eye contact with the officer and ran. *Id.* In stark contrast, the officers who chased and arrested Mr. Gray did not allege that they saw him do anything or hold anything before or at the time they made eye contact. He simply ran.

116. Application for Statement of Charges, *supra* note 114.

dent,”¹¹⁷ although video recordings show a screaming Freddie Gray being dragged in the street and into the back of a police van, his legs seemingly not functioning. He was charged with possessing a switch blade, a non-violent misdemeanor offense.¹¹⁸ His death precluded him from challenging the initial encounter with the officers, the chase, the seizure, the search, the arrest and, indeed, the lawfulness of the knife.

Mr. Gray’s tragic death made the similarities between Ferguson and Baltimore even more stark and distressing. As with Michael Brown’s death in Ferguson, Mr. Gray’s death angered and saddened Baltimore’s residents, particularly those who live in the city’s Black communities, where poverty is concentrated and generations of residents have relationships with Baltimore’s Police Department and its’ criminal justice system that are marked by abuse, frustration, fear, disgust, anger, routine and familiarity. In the aftermath of Mr. Gray’s death, the United States Department of Justice opened a pattern or practice investigation into Baltimore’s Police Department that “will seek to determine whether there are systemic violations of the Constitution or federal law by officers of BPD.”¹¹⁹ Specifically, “[t]he investigation will focus on BPD’s use of force, including deadly force, and its stops, searches and arrests, as well as whether there is a pattern or practice of discriminatory policing.”¹²⁰

The events that transpired in Ferguson and Baltimore immediately after these tragedies put both cities on national and international display. The world has learned, through these tragic deaths, of the conditions and circumstances that have deteriorated police-community relations in communities of color, of criminal justice systems that capture, stigmatize and paralyze Black men, women and children, and of episodes of police violence that capstoned decades of indignity, frustration, marginalization, criminalization and force. The world—including communities in other parts of the cities, counties and states where these incidents have occurred—has also been exposed to the array of other issues and conditions that plague poor communities of

117. *Id.*

118. Statement of Charges, *State of Maryland v. Freddie Carlos Grey [sic] Jr.*, Case No. 6B02294074, Apr. 12, 2015.

119. UNITED STATES DEP’T OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, JUSTICE DEPARTMENT OPENS PATTERN OR PRACTICE INVESTIGATION INTO THE BALTIMORE POLICE DEPARTMENT, May 8, 2015, <http://www.justice.gov/opa/pr/justice-department-opens-pattern-or-practice-investigation-baltimore-police-department>.

120. *Id.*

color and connect both to police-community relationships and contact with the criminal justice system: concentrated poverty, joblessness, economic inequality, inadequate education, lack of meaningful opportunities, inadequate healthcare, food deserts, redlining, subprime mortgages, vacant homes and lower life expectancy, among other issues. Also, through these tragedies, the calls for law enforcement transparency and accountability have become louder, with ideas such as body cameras, placing officers on foot patrol and in other ways integrating officers into the communities they patrol becoming part of the national discourse.

This essay, in the context of these issues, is quite narrow. Indeed, the range of issues that has surfaced recently in response to the unarmed Black men, women and children who have been killed by police officers or died in police custody is vast and deep. In particular, the deaths of Michael Brown and Freddie Gray have exposed to the world the circumstances and conditions—historical, decades-long and current—that have impacted all aspects of life for individuals, families and communities within Ferguson and Baltimore. These issues are as present today as ever. While the criminal justice system is a focal point in both cities, the issues are much broader. Thus, holistic reform—reform that addresses the broad swath of circumstances and conditions that lead to over-involvement with the criminal justice system—must be the overarching goal.

Hopefully, this essay offers a couple of ways to move forward and contributes to the efforts currently undertaken by communities, individuals and families who have been impacted by police violence and the criminal justice system, clergy, activists, advocates, law enforcement leaders, scholars and lawmakers. As always, these are urgent times.

ESSAY

Body-mounted Police Cameras: A Primer on Police Accountability vs. Privacy

KAMI CHAVIS SIMMONS*

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INTRODUCTION

Immediately following the shooting death of Michael Brown in Ferguson, Missouri and the death of Eric Gardner at the hands of a New York Police Department officer, criminal justice advocates called for greater measures to hold police officers accountable for their actions.¹ For many observers, the failure to secure criminal indictments against the officers involved in each of these deaths of unarmed citizens suggested various shortcomings in the criminal justice system.² In the wake of these deaths and others, President Obama signed an order establishing the President's Task Force on 21st Century Policing, a body of scholars, practitioners, and policymakers that would examine ways to improve distrust between communities and police.³ Yet in the weeks following the release of the Task Force's report, a North Charleston police officer fatally shot Walter Scott in the back and protests erupted in Baltimore, Maryland after Freddie Gray died of injuries sustained while in police custody.⁴ These deaths have reignited many debates about myriad reform proposals that experts have discussed throughout history. For example, numerous advocates noted that local prosecutors face inherent conflicts of interest; for this reason, these advocates call for independent agencies or special prosecutors to prosecute these cases.⁵ Reformers urged for more training

1. More than a dozen states are considering legislation aimed at increasing police accountability following the deaths. Reid Wilson, *Police Accountability Measures Flood State Legislatures After Ferguson, Staten Island*, WASH. POST (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/>.

2. See, e.g., Katrina vanden Heuvel, *Fixing a Broken Justice System*, WASH. POST (Dec. 16, 2014), http://www.washingtonpost.com/opinions/katrina-vanden-heuvel-fixing-a-broken-justice-system/2014/12/16/76239b2e-8496-11e4-b9b7-b8632ae73d25_story.html.

3. Establishment of the President's Task Force on 21st Century Policing, 79 Fed. Reg. 246 (Dec. 23, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-23/pdf/2014-30195.pdf>; *President's Task Force on 21st Century Policing*, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DOJ, <http://www.cops.usdoj.gov/policingtaskforce> (last visited May 28, 2015).

4. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>; Reuters, *Marchers Protest Police Violence in Baltimore*, N.Y. TIMES (Apr. 29, 2015, 9:03 PM), <http://www.nytimes.com/reuters/2015/04/29/us/29reuters-usa-police-baltimore.html>.

5. It is argued by some that special prosecutors can dampen or eliminate real and perceived conflicts of interest that occur when a local office prosecutes a police officer. See, e.g., Editorial, *Police Abuse Cases Need Special Prosecutors*, WASH. POST (Dec. 6, 2014), http://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html.

for officers focused on de-escalation techniques and bias.⁶ Others called for greater statistical tracking to measure the breadth of the problem of officer-involved deaths.⁷ One of the most hotly contested reform proposals involves requiring police officers to wear body cameras.⁸ The NAACP, the ACLU, and The Lawyers' Committee for Civil Rights Under Law have supported initiatives requiring police to wear body cameras.⁹ In addition, President Obama announced that \$75 million of federal money would be made available for local law enforcement to purchase and train officers to use body cameras.¹⁰

Body-mounted cameras are not a new technology, and the number of police departments using them is increasing. However, a 2013 study conducted by the Police Executive Research Forum found that less than 25 percent of the 254 departments surveyed were using the cameras.¹¹ Even many of the agencies that are using the cameras are racing to develop sound policies for their use.¹² Similarly, a number of state legislatures have introduced bills to regulate the use of police body cameras. This essay highlights some of the emerging issues and policy implications with respect to body cameras and raises questions for future study.

A recurring theme throughout the discourse regarding the Brown shooting was that there were truly only two people who knew what occurred – Officer Darren Wilson and Michael Brown, who could no longer speak for himself.¹³ In either a criminal or civil case against

6. MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 10 (2014), <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.

7. LINDSAY MILLER, JESSICA TOLIVER & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 48 (2014), available at <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>.

8. See James S. Muller, *To Police the Police, Body Cameras are a Must*, L.A. TIMES (May 11, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-muller-body-camera-data-shows-unnecessary-force-20150508-story.html>. But see Janet Vertesi, *The Problem With Police Body Cameras*, TIME (May 4, 2015), <http://time.com/3843157/the-problem-with-police-body-cameras/>.

9. See *Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse*, NAACP, <http://www.naacp.org/press/entry/civil-rightscoalition-continues-to-urge-national-reforms-and-recommendation> (last visited May 30, 2015) (describing the Department of Justice's National Initiative for Building Community Trust and Justice and providing statements from the ACLU, Lawyers' Committee, and NAACP supporting the program).

10. Nolan Feeney, *Obama Requests Funds for Police Body Cameras to Address 'Simmering Distrust' After Ferguson*, TIME (Dec. 1, 2014), <http://time.com/3613058/obama-ferguson-police-body-cameras-funding/>.

11. *Supra* note 7, at 2.

12. *Id.* at 51.

13. Jonathan Cohn, *What We Still Don't Know About Ferguson – and Probably Never Will*, NEW REPUBLIC (Dec. 1, 2014), <http://www.newrepublic.com/article/120443/ferguson-prosecutor-and-witness-testimony-bias-and-lots-ambiguity>.

Darren Wilson, the officer who shot Brown, whether Wilson used reasonable or unreasonable force would always come down to the officer's word or that of any possible eyewitnesses.¹⁴ In that case, eyewitnesses were discredited before the grand jury, and the grand jury failed to indict Wilson for his actions.¹⁵ Many have argued that had Wilson been wearing a body camera, the footage of the incident would have settled this matter.¹⁶ Alternatively, many skeptics point to the video footage of Eric Garner's death, which, to the surprise of many, did not result in an indictment of the officer who applied the restraint that killed him.¹⁷ This particular case has caused critics to question the utility of requiring officers to wear body cameras.¹⁸ Perhaps the harshest criticism of body cameras is how and whether any possible benefit of these cameras could outweigh the substantial privacy concerns.¹⁹ Even though we, as a society, are increasingly subject to surveillance, these cameras pose intrusions, and thus privacy is a consideration that policymakers must address.²⁰ The central issue in this debate is whether citizens are willing to give up a bit of their privacy in order to reap the potential benefits of body camera technology.²¹

I. POTENTIAL BENEFITS OF USING BODY-MOUNTED CAMERAS

A. Body-Mounted Cameras Offer an Objective Basis for Determining Whether an Officer Used Excessive Force

There are several potential ways in which body-worn cameras promote police accountability and increase transparency. First, the cameras can help resolve factual disputes. Whether an officer has used a "reasonable amount of force" is a threshold question when deter-

14. *Id.*

15. Elisha Fieldstadt, *Should Every Police Officer be Outfitted With a Body Camera?*, NBC NEWS (Nov. 26, 2014, 3:30 PM), <http://www.nbcnews.com/storyline/michael-brown-shooting/should-every-police-officer-be-outfitted-body-camera-n256881>.

16. *Id.*

17. Eliot C. McLaughlin, *After Eric Garner: What's Point of Police Body Cameras?*, CNN (Dec. 8, 2014, 7:41 PM), <http://www.cnn.com/2014/12/04/us/eric-garner-ferguson-body-cameras-debate/>.

18. *Id.*

19. See Aamer Madhani, *States, Civil Liberty Advocates Collide Over Police Body Camera Policy*, USA TODAY (May 5, 2015, 10:17 PM), <http://www.usatoday.com/story/news/2015/05/05/police-body-camera-legislation-increases/26586739/>.

20. *Id.*

21. *Id.*

mining whether an officer has violated a suspect's Fourth Amendment right to be free of unreasonable seizure.²² If the use of force was determined to be reasonable, the possibility of criminal or civil liability is foreclosed. There are numerous factors relevant to the "reasonable" inquiry, such as the immediacy of the threat to the officer, the actions and demeanor of the subject, the proximity of weapons, and the extent to which the subject is restrained or has the possibility of escape.²³ Unfortunately, many cases of police brutality turn on the word of the police officer involved and the suspect who is harmed during the encounter.²⁴ It has long-been said that individuals who find themselves in the midst of a police seizure are not sympathetic victims and issues of credibility do not work in their favor.²⁵ It can be even more difficult to assess when the subject has died during, or as a result of, the use of force. Body-mounted police cameras, however, can resolve many factual disputes.²⁶ Footage from these cameras could objectively illustrate the proximity of the subject to the officer and whether the subject had a weapon or anything that could reasonably be construed as a weapon. Essentially, the footage could eliminate issues of credibility, or at least show one version of the event that reasonable jurors could interpret. This type of evidence is particularly important where witnesses tell very different versions of the same event.

B. Body-Mounted Cameras Serve as a Deterrent for Police Misconduct and Promote Officer Safety

There is a growing body of research that demonstrates that police body cameras can help deter police misconduct. One particular study, conducted in 2012 in Rialto, California, analyzed whether body cameras would impact officers' uses of force or the number of citizen com-

22. "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

23. *Id.* at 396.

24. See Laurie L. Levenson, *Police Corruption and New Models for Reform*, 25 SUFFOLK U. L. REV. 1, 19 (2001).

25. See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 798 (2000).

26. See Mary Knollenberg, *On-Body Cameras Will Protect Citizens and Police*, DETROIT FREE PRESS (Dec. 11, 2014, 10:42 AM), <http://www.freep.com/story/opinion/contributors/2014/12/11/police-body-cameras/20214223/>.

plaints against officers.²⁷ During the course of a year, the police department randomly assigned cameras to officers across various shifts. Within that year, there were twice as many use of force incidents on shifts without cameras than on shifts where officers were using cameras.²⁸ Overall, there was a 60 percent reduction in use of force incidents.²⁹ Similarly, there was an 88 percent decrease in the number of citizen complaints between the year the department instituted the camera program and the year following the issuance of the cameras.³⁰

A study in Mesa, Arizona yielded similar findings. In October 2012, the Mesa Police Department began a one-year pilot program in which it assigned 50 officers to wear the cameras, while the control group consisted of 50 officers who were not issued cameras.³¹ Eight months after the program began, researchers found that there were three times more complaints against the officers without cameras.³² Overall, there were 40 percent fewer total complaints for officers who wore the cameras and 75 percent fewer use of force complaints for officers who wore the cameras.³³ The reduced number of complaints could be attributed to several things, including increased professionalism of officers, and the fact that citizens are less likely to file unfounded complaints if they are aware that footage of the incident exists.

In addition to the deterrent effect, the body-mounted cameras may improve officer safety. Just as officers behave differently when wearing the cameras, members of the public may also alter their behavior if they know the cameras are capturing their actions. One police chief noted that his department encouraged officers to let people know that they are recording “[b]ecause we think it elevates behavior on both sides of the camera.”³⁴

27. Stav Ziv, *Study Finds Body Cameras Decrease Police's Use of Force*, NEWSWEEK, (Dec. 28, 2014, 2:31 PM), <http://www.newsweek.com/amidst-debate-study-finds-body-cameras-decrease-polices-use-force-295315>; see WILLIAM FARRAR, SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF-FORCE 9 (2013), available at <http://www.policefoundation.org/sites/g/files/g798246/f/201303/The%20Effect%20of%20Body-Worn%20Cameras%20on%20Police%20Use-of-Force.pdf>; see also *supra* note 7, at 5.

28. *Supra* note 7, at 5.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 6.

C. Body Cameras Can be a Powerful Training Tool and Can Correct Structural Problems Within a Police Department

As noted above, body cameras offer increased transparency and accountability to the general public. Yet the benefits of this transparency also extend to the internal structures within the police department. Even if officers display behaviors that are not actionable or subject to disciplinary proceedings, supervisors can use the footage to determine which officers may be in need of additional training, or whether the entire department might benefit from particular training. A Police Executive Research Forum survey found that 94 percent of the respondents use footage gleaned from body cameras to train officers and to assist them in administrative reviews.³⁵ Police cameras also help supervisors identify officers whose conduct may exhibit a lack of professionalism but does not yet rise to an actionable level, which may prevent serious abuses before they occur.

Although body-mounted cameras could deter multiple types of impermissible conduct, these cameras could be extremely helpful in deterring racial profiling. To highlight this point, it may be useful to refer to recent figures from Ferguson. During 2012 to 2014, in Ferguson, Missouri, data shows that although African-Americans constitute only 67% of Ferguson's population, they account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by the Ferguson police officers.³⁶ African-Americans were more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables, such as the reason the vehicle stop was initiated. However, they are found in possession of contraband 26% less often than white drivers. The U.S. Department of Justice noted that this data suggests, "officers are impermissibly considering race as a factor when determining whether to search."³⁷ Proponents of body cameras argue that if officers wore body cameras, it would be more difficult for them to engage in impermissible stops and searches of minorities because they could not hide their disparate choices.³⁸

35. *Id.* at 7.

36. CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP'T 4 (Mar. 4, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

37. *Id.*

38. See Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html?ref=NYregion> (discussing Judge Scheindlin's decision in *Floyd v. City of*

II. ADDRESSING THE SHORTCOMINGS OF BODY-MOUNTED CAMERAS

A. Critics Argument that Body-Mounted Cameras are Not an Adequate Accountability Measure and May Negatively Impact Community Policing

Despite the benefits of body-mounted cameras, like many policy proposals, the cameras do not represent a panacea. First, skeptics have noted that body-mounted cameras, unless they are set to run 100 percent of the time, tend to rely on an officer's discretion with respect to when a scenario is filmed.³⁹ In contrast, many police cars are equipped with dashboard cameras which, in many instances, automatically begin capturing footage when the lights and sirens are activated (or some other mechanism outside of the officer's discretion).⁴⁰ Thus, for accuracy, a police department should set forth specific guidelines as to what events an officer is expected to tape.⁴¹

Second, critics are right to be concerned that, if adequate internal regulations are not in place, valuable footage could be altered or destroyed. Thus, lawmakers and police officials must work to draft guidelines that help maintain the integrity of the footage. Some policies have particular stipulations regarding the chain of custody for the video or limit the officer's ability to access the tape.⁴²

Fierce critics of body cameras contend that they will, in fact, do very little to increase accountability.⁴³ Specifically, opponents have argued that despite the fact that the actions of the officers involved in the Eric Gardner death were on videotape, the grand jurors still failed to indict.⁴⁴ They claim that such an outcome does not deter officers

New York, in which she ordered the police use of body-worn cameras because they can provide an objective record of whether or not an officer has engaged in racial profiling).

39. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL (Mar. 2015), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>.

40. *Considering Police Body Cameras*, 128 HARV. L. REV. 1794 (Apr. 10, 2015), available at <http://harvardlawreview.org/2015/04/considering-police-body-cameras/>.

41. Christopher Mims, *What Happens When Police Officers Wear Body Cameras*, WALL STREET J. (Aug. 18, 2014, 5:28 AM), <http://www.wsj.com/articles/what-happens-when-police-officers-wear-body-cameras-1408320244>.

42. Radley Balko, *Police Cameras are Important, But They're Useless Without Policies to Ensure They're Used Properly*, WASH. POST (Aug. 19, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/08/19/police-cameras-are-important-but-theyre-useless-without-proper-policies-to-ensure-theyre-used-properly/>.

43. See Vertesi, *supra* note 8.

44. *Id.*

from acting with impunity.⁴⁵ However, one must recall that even though the grand jury in that case did not indict, the officers themselves were not wearing cameras. In that case, it was bystander video that captured the officers' actions. One cannot be sure, but it is possible that had the officers themselves been wearing body cameras, they would have behaved in a different manner, just as the research above suggests.

Finally, one of the under-analyzed issues with respect to requiring police to wear cameras is the potential impact on police-citizen relations. It is unknown what effect an officer's use of a camera has on the willingness of community members to engage in casual conversation with officers. These casual one-on-one encounters are the smallest building blocks of community policing, a model whose basic principles rely on establishing strong partnerships with community members. Thus, this is an area for future study. While the technology is not perfect, many agree that they can play a vital role in a police department's effort to increase accountability.⁴⁶

B. Privacy Concerns

By far, the fiercest opposition to body cameras has come from groups concerned about the implications these cameras have on privacy. The privacy concerns present complicated issues.

Unsurprisingly, there is a tension between balancing privacy and promoting police accountability. For instance, a bill introduced in the Florida Legislature contained a number of circumstances in which police body camera footage would be exempt from a public records law. Specific examples include "when the video is taken in a home; includes footage of someone under 14 or 18 if taken in a school; has information obtained at emergency scenes; describes events on property used by medical or social service agencies; or is recorded anywhere there is an expectation of privacy."⁴⁷ Several groups, including the Florida Chapter of the ACLU, withdrew support from this bill because they believed that these exceptions could serve to shield the

45. *Id.*

46. *Supra* note 7.

47. See Mitch Perry, ACLU, *Other Groups Withdraw Support of Police Body Camera Bill*, FLA. POLS. (Mar. 6, 2015), <http://floridapolitics.com/archives/10459-aclu-other-groups-now-oppose-police-body-camera-bill-in-tallahassee>.

police from releasing the video in many circumstances and was thus overbroad in terms of protecting privacy.⁴⁸

CONCLUSION

Policymakers and researchers should continue to study the empirical data with respect to body camera technology. Should officers turn off their cameras when talking to particular witnesses or victims? Should the officer turn her camera off if the witnesses or victims do not wish to be taped? Should the officers be allowed to film once they enter a residence? Should the video recordings be made public and for what purposes? Many draft body camera policies give an officer discretion as to whether or not to tape certain classes of victims, such as sexual assault victims. As the number of exceptions increases, one would expect the accountability benefits to decrease. All of these questions present areas ripe for future study and researchers should continue to study body-mounted camera technology and the implications for privacy. Body-worn cameras represent a potentially powerful tool in the efforts to increase accountability and transparency within law enforcement agencies. However, without addressing the cultural and organizational characteristics that contribute to police misconduct, these cameras will only continue to document the shortcomings of individuals within the organization rather than spur meaningful reform.

48. *Id.*

COMMENT

Impropriety of Last Resort: A Proposed Ethics Model for the U.S. Supreme Court

BRANDON A. MULLINGS*

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“The aim of every political constitution is . . . first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”¹

INTRODUCTION

In November 2001, Supreme Court Justice Antonin Scalia went pheasant hunting on a trip arranged by the dean of the University of Kansas School of Law, Stephen R. McAllister.² While this excursion might not initially appear unusual, the hunting trip occurred within weeks of Justice Scalia hearing two cases in which Dean McAllister was a lead attorney.³ Two weeks before the trip, Dean McAllister,

1. THE FEDERALIST NO. 57 (James Madison).
2. Richard A Serrano & David G. Savage, *Scalia Took Trip Set Up by Lawyer in Two Cases*, L.A. TIMES, Feb. 27, 2004, at A1.
3. *Id.* The cases involved public policy issues that were considered important to Kansas officials. *Kansas v. Crane* involved a challenge to the power of Kansas to continue holding convicted sex offenders after the completion of their prison terms. *McKune v. Lile* involved a Kan-

accompanied by Kansas' attorney general, appeared before the Supreme Court to defend a Kansas law.⁴ Two weeks after the trip, Dean McAllister once again appeared before the Supreme Court to lead in the state's defense of a Kansas prison program.⁵ Dubiously, Justice Scalia sided with the state of Kansas in both cases.⁶ Had Justice Scalia been a judge in a lower federal court, the pheasant-hunting trip would raise questions of whether his impartiality had been impaired.⁷ When a federal judge acts in a manner that calls into question that judge's impartiality, it is a violation of the Code of Conduct for United States Judges.⁸

Justice Scalia's conduct indicates how troublesome the lack of an ethics model for the Supreme Court is. The perception of a judge's impartiality and independence is central to the public's faith in the judicial system.⁹ The justices of the Supreme Court are "subject to the most public scrutiny, and their decisions have the widest impacts."¹⁰ Accordingly, protecting against the appearance of bias and partiality is of particular importance to the high court.¹¹ Allowing the Supreme Court to operate free of an ethical standard may undermine the Court's appearance of independence and impartiality.¹² Is it time for some measure of reform? A group of congressional lawmakers seem to think so.¹³

sas law requiring sex offenders to confess to past sex crimes as part of prison treatment or face discipline and extended incarceration. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2014). Canon 2 of the Code of Conduct for United States Judges requires a judge to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Commentary on the canon states that the appearance of impropriety occurs when "reasonable minds with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's . . . impartiality . . . is impaired." *Id.*

8. *Id.*; Stephanie Reid, *What Is the Code of Conduct for United States Judges?*, CHRON, <http://work.chron.com/code-conduct-united-states-judges-13830.html> (last visited Sept. 22, 2013).

9. *Tell Congress: Act Now on Judicial Ethics*, ALLIANCE FOR JUSTICE (Feb. 24, 2011), <http://www.afj.org/blog/tell-congress-act-now-on-judicial-ethics>. "We expect our courts to be impartial and independent – it's essential to the public's faith in the judicial system. That's why federal judges must adhere to a Code of Conduct that requires judges to 'act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary' and explicitly bans political activity." *Id.*

10. *Id.*

11. *About Ethics Reform*, ALLIANCE FOR JUSTICE, <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/about-ethics-reform.html> (last visited Sept. 21, 2013).

12. *Id.*

13. Nick Wing, *Supreme Court Ethics Act Proposed In Response To Controversial Behavior By Justices Scalia, Thomas*, HUFFINGTON POST (Aug. 1, 2013, 1:45 PM), http://www.huffingtonpost.com/2013/08/01/supreme-court-ethics-act_n_3689351.html.

On August 1, 2013, a group of congressional Democrats introduced The Supreme Court Ethics Act of 2013, legislation that would require the justices of the Supreme Court to adhere to an ethical standard¹⁴ instead of merely consulting one.¹⁵ Under the proposed legislation, the justices would be “subject to the Code of Conduct for United States Judges, which currently applies to all other federal judges in the country.”¹⁶ Had such a standard already been in place, it would have required justices to recuse themselves from certain matters—matters like the Kansas cases that were before Justice Scalia¹⁷ along with other “high-profile activities that have attracted scrutiny and demand for reform in the past few years.”¹⁸

Not only have lawmakers backed the initiative, it seems to have the support of the public as well.¹⁹ A petition at CredoMobilize.com²⁰ reflecting the Act’s call for the Supreme Court to adopt a stricter code of conduct has garnered over 131,000 signatures.²¹ However, even with its admirable objective and ample support, the Supreme Court Ethics Act of 2013 has one glaring flaw. The proposed legislation leaves one question unanswered. This question must be answered if the aspiration of binding the Supreme Court to an ethics model is to

14. *Id.* The Supreme Court Ethics Act of 2013 is the most recent in a series of legislative attempts to impose binding ethics rules on Supreme Court Justices. Senator Chris Murphy introduced similar legislation in 2011 when he was a congressman. Representative Louise Slaughter started advocating for the reform when she and a group of 19 other representatives called for scrutiny of apparent discrepancies in Justice Thomas’ income disclosure forms. Finally, a group of congressional lawmakers including Slaughter requested that Chief Justice Roberts voluntarily adopt the Judicial Code of Conduct. Such requests were succinctly repudiated. *Id.*

15. Chief Justice Roberts, *2011 Year-End Report on the Federal Judiciary*, available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>. In his year-end report, Chief Justice John Roberts stated that all members of the Supreme Court do consult the Code of Conduct for United States Judges while raising reasons why they are not bound by it. *Id.*

16. Wing, *supra* note 13; H.R. 2902, 113th Cong. (2013).

17. See Serrano & Savage, *supra* note 2.

18. Wing, *supra* note 13. In 2011, Supreme Court Justices Clarence Thomas and Antonin Scalia headlined a fundraiser for the conservative legal group, the Federalist Society. Scalia and Thomas also attended private political events hosted by Koch Industries, a multi-national corporation owned by a conservative family that has contributed millions of dollars to Republican interests. Virginia Thomas, the wife of Justice Thomas, drew media attention with her involvement as the leading members of Groundswell, a coalition of prominent right-wing activists and journalists that coordinates messaging and plots strategy for “a 30 front war seeking to fundamentally transform the nation.” *Id.*

19. *Id.*

20. CREDO Mobilize is an online platform that allows members to start and run their own campaigns. The platform provides users with the technology to start, run, and deliver their own campaigns. CREDO MOBILIZE, <https://www.credomobilize.com/> (last visited March 5, 2015).

21. Louise Slaughter, *Apply the Code of Conduct for United States Judges to the Supreme Court*, CREDO MOBILIZE, <http://www.credomobilize.com/petitions/tell-supreme-court-justice-john-roberts-apply-a-code-of-conduct-to-the-supreme-court> (last visited Mar. 5, 2015).

ever be deemed feasible. How is such an ethics model to be enforced? The Supreme Court Ethics Act of 2013 fails to provide for the disciplinary measures to be taken against justices who fail to abide by the code of conduct that the Act endeavors to bind them to.²² Without such a provision, the issue of binding the Supreme Court to an ethics model can never truly be resolved.

This Comment argues that binding the Supreme Court to an ethics model is feasible and practical by addressing The Supreme Court Ethics Act of 2013's lack of a disciplinary provision. In addressing this flaw, this Comment will take a comparative view of the disciplinary provisions of existing ethics models in the United States and ultimately propose a comparable disciplinary provision for an ethics model binding on the Supreme Court. Part I of this Comment will provide a background of the Model Code of Judicial Conduct.²³ It will also analyze the disciplinary measures provided by the Code. Part II will explore the ethics model of Congress. This section will determine how the House Committee on Ethics handles disciplinary violations by members of Congress. Part III will examine how the code of conduct for judges is enforced in the States. Part IV will take a look at ways Congress has already regulated the Supreme Court. This section will address concerns that disciplining Supreme Court justices raises issues regarding the authority of the legislature as well as separation of powers. Finally, Part V will propose an ethics model for the Supreme Court that includes a disciplinary provision comparable to those of the existing ethics models analyzed in this Comment.

I. THE MODEL CODE OF JUDICIAL CONDUCT

What follows is a look at the background of the Model Code of Judicial Conduct. First, a brief survey of the history of the code is given to provide an understanding of the purpose of its inception and

22. *See generally* H.R. 2902, 113th Cong. (2013) (requiring the Supreme Court to promulgate a code of ethics for the Justices of the Supreme Court that shall include the five canons of the Code of Conduct for United States Judges but failing to establish how the Act would be enforced).

23. The Model Code of Judicial Conduct, adopted by the American Bar Association, and the Code of Conduct for United States Judges are two distinct ethics codes. The Supreme Court Ethics Act of 2013 proposes to bind the Supreme Court to the Code of Conduct for United States Judges. This Comment discusses the Model Code of Judicial Conduct because the Code of Conduct for United States Judges is based largely off of the ABA model. "The ABA's adoption of a new model code traditionally sparks a similar movement in the federal judiciary." Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 *JUST. SYS. J.* 271, 271 (2007).

the current status of the code. Then, the substantive elements of the code are examined for the purpose of detailing the underlying policy considerations of the code.

A. History of the Code

The earliest rules governing the conduct of United States Judges were the Canons of Judicial Ethics.²⁴ The American Bar Association approved the Canons of Judicial Ethics in 1924.²⁵ The canons were primarily intended to serve as general guidelines for the states.²⁶ In 1969, the ABA began the process of reviewing, evaluating, and updating the judicial ethics canons.²⁷ This process resulted in the Model Code of Judicial Conduct, which the ABA adopted in 1972.²⁸ The new model code changed the style and form of the rules by replacing the original 36 canons with seven and cleaning up much of the language while maintaining the substance of the canons.²⁹ By 1990, the ABA adopted yet another revision to the Model Code, reducing the seven canons to five by combining certain rules as well as adding new details.³⁰ The ABA's most recent amendment to the Model Code took place in 2010.³¹

B. Elements of the Code

This section examines the major canons of judicial conduct. An understanding of these canons and the interests they attempt to further may help to inform how an entity that seeks to further similar interests for the United States Supreme Court should be structured.

24. *See About the Commission*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background.html (last visited Feb. 24, 2015) (detailing the inception and development of the Canons of Judicial Ethics).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. MODEL CODE OF JUDICIAL CONDUCT Canons 1–5 (1990). The revision combined all rules related to off-the-bench conduct, and the new details included a preamble explaining the Model Code and a terminology section to define certain words used in the canons. ABOUT THE COMMISSION *supra* note 24. Since its 1990 adoption, the Model Code has been amended three times: on August 6, 1997; August 10, 1999; and August 12, 2003. An additional appendix that summarizes those amendments and identifies their sources also was added in 2003. Two other appendixes are included: one containing information about the ABA Standing Committee on Ethics and Professional Responsibility, and the other correlating the provisions of the 1990 Model Code with those of the predecessor 1972 Code. *Id.*

31. *Model Code of Judicial Conduct*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (last visited Feb. 24, 2015).

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

The first canon of the code requires judges to remain independent and unbiased when they issue their decisions while still operating within the confines of the law.³² “Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges.”³³ That integrity and independence depends in turn on judges acting without fear or favor.³⁴ The encouragement of public confidence is the linchpin of this canon.³⁵ Further, a judge’s independence in deciding cases is never to be impinged when interpreting the Code.³⁶

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

The second canon requires judges to refrain from any activity or situation in which that judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.³⁷ This canon requires a judge to maintain a respect for the law, shun outside influence, and avoid membership in any organization “that practices invidious discrimination on the basis of race, sex, religion, and national origin.”³⁸

32. Reid, *supra* note 8.

33. MODEL CODE OF JUDICIAL CONDUCT Canon 1. “An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of [the] Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.” *Id.*

34. *Id.*

35. Reid, *supra* note 8 (“Judges must maintain the highest standards of personal conduct and practice integrity in every aspect of judicial practice. The crux of the first canon is to encourage public confidence in the judiciary and advance impartial rulings.”).

36. *Id.*

37. *Id.*; *See The Code, supra* note 30. The prohibition of impropriety applies to both professional and personal conduct. A judge must expect to be subject to constant public scrutiny and freely accept restrictions that might be viewed as burdensome by the ordinary citizen. Since it is not practicable to list all prohibited acts, the Code casts the prohibition in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. *Id.*

38. *The Code, supra* note 30, at Canon 2(C).

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The third canon sets out the manner in which judges are to carry out their duties.³⁹ “The duties of judicial office take precedence over all other activities,”⁴⁰ and a judge must maintain patience, dignity, and respect toward all litigants, jurors, witnesses and lawyers.⁴¹ This canon forbids comments about a pending case to the media and requires judges to manage judicial business officially.⁴² Canon 3 also requires a judge to disqualify him or herself in a proceeding in which that judge’s impartiality might be questioned.⁴³

Canon 4: A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office

Under the fourth canon, judges are permitted, encouraged even, to participate in charitable, educational, religious, social, financial, fiduciary, and governmental activities.⁴⁴ A judge may speak, write, and teach on legal and non-legal subjects.⁴⁵ However, this canon prohibits judges from participating in activities “that detract from the dignity of the judge’s office, interfere with the performance of the judge’s offi-

39. Canon 3(A) states the duties of a judge in general. *Id.* at Canon 3(A). Canon 3(B) states a judge’s adjudicative responsibilities, *Id.* at Canon 3(B), while 3(C) details the administrative responsibilities, *Id.* at Canon 3(C), and 2(D) cover the disciplinary responsibilities, *Id.* at Canon 2(D). 3(E) and 3(F) cover disqualification and the remittal of disqualification respectively. *Id.* at Canon 3(E), (F). Taken in its totality, Canon 3 establishes the frame within which a judges should carry out their duties and the penalties should they step outside of that frame. *Id.* at Canon 3.

40. *The Code*, *supra* note 30, at Canon 3(A).

41. *Id.* at Canon 3(B)(4).

42. *Id.* at Canon 3(B)(5). “A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.” *Id.* at Canon 3(B)(5) commentary.

43. *Id.* at Canon 3(E)(1).

44. *See id.* at Canon 4(A)–(G).

45. “Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.” *Id.* at Canon 4(A) commentary. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. *Id.* at Canon 4(B) commentary. To the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. *Id.* Subject to the same limitations, judges may also engage in a wide range of non-law-related activities. *Id.*

cial duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification."⁴⁶

Canon 5: A Judge Should Refrain From Political Activity

The fifth and final canon restricts a judge's participation in various political activities.⁴⁷ Canon 5 states that judges are not to participate in political activities, including making speeches for political organizations, donating to political candidates or organizations, purchasing a ticket to events sponsored by political candidates or organizations, or engaging in "any other political activity."⁴⁸ The activity of Justice Thomas and Scalia⁴⁹ arguably qualifies as activity that runs afoul of Canon 5.⁵⁰

II. CONGRESS' ETHICS MODEL

The United States House of Representatives has its own code of ethics and a bipartite system for addressing ethics violations. This system consists of the House Committee on Ethics and the Office of Congressional Ethics. The operative parts of this system provide some guidance on how a disciplinary provision for legislation binding the Supreme Court to an ethics model may work.

46. *The Code*, *supra* note 30.

47. Restricted activities include: acting as leader or holding an office in a political organization; publicly endorsing or opposing another candidate for public office; making speeches on behalf of a political organization; attending political gatherings; and soliciting funds for, paying an assessment to or making a contribution to a political organization or candidate, or purchasing tickets for political party dinners or other functions. *The Code*, *supra* note 30, at Canon 5(A)(1)(a)–(e).

48. *Id.*; Alliance for Justice, *The Code of Conduct for U.S. Judges Should be Applied to the Supreme Court*, available at <http://www.afj.org/wp-content/uploads/2013/11/code-of-conduct-full-report.pdf>. Canon 5 commentary (in the Code of Conduct for United States Judges) defines a political organization as a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office. *The Code*, *supra* note 30, at Canon 5 commentary.

49. *See supra* Introduction.

50. The justices' attendance at such a highly political event would almost certainly run afoul of Canon 5 if it applied. A primary purpose of the Koch retreats is to advance a specific political agenda, and advocate for the victory or defeat of political candidates. The 2011 Koch Industries retreat invitation – which attempts to woo would-be participants by making note of the past attendance of Justices Thomas and Scalia – explicitly stated that the retreat's purpose was planning how to "change the balance of power in Congress." ALLIANCE FOR JUSTICE, *supra* note 48; Charles G. Koch, *Understanding and Addressing Threats to American Free Enterprise and Prosperity* 1 (Sept. 24, 2010), <http://images2.americanprogressaction.org/ThinkProgress/secretkochmeeting.pdf>.

A. The House Committee on Ethics

1. History

Before the creation of the House Committee on Ethics (formerly the House Committee on Standards of Official Conduct), there existed no uniform structure for self-discipline in the United States House of Representatives⁵¹, similar to the Supreme Court's present circumstances. In 1958, a Code of Ethics for Government service was adopted because of a House investigation of presidential chief of staff Sherman Adams, who was alleged to have received gifts from an industrialist being investigated by the Federal Trade Commission.⁵² During the time preceding the creation of an ethics committee for the House of Representatives, investigations into alleged wrongdoing by the members and staff of the House were addressed in an ad-hoc fashion.⁵³ However, a movement toward developing a more uniform system of discipline began to emerge.⁵⁴

This movement culminated in 1966 after publicized allegations of misconduct by House Education and Labor Committee Chair Adam Clayton Powell.⁵⁵ House Representative Charles Bennett introduced House Resolution 1013 to create the Select Committee on Standards and Conduct.⁵⁶ The resolution created a 12-member panel, with six majority and minority Members each who were appointed by the Speaker of the House.⁵⁷ After several debates, and the introduction of more than 100 resolutions similar to House Resolution 1013, a permanent Committee on Standards of Official Conduct came into be-

51. JACOB STRAUS, CONG. RESEARCH SERV., 98-15, HOUSE COMMITTEE ON ETHICS: A BRIEF HISTORY OF ITS EVOLUTION AND JURISDICTION 2 (2011).

52. *Id.*; H.R. Con. Res. 175, 85th Cong. (1958); *see also* 103 CONG. REC. 16297 (1957); 104 CONG. REC. 13556 (1958). Adams was forced to resign in 1958, when a House subcommittee revealed Adams had accepted a vicuña overcoat and oriental rug from a textile manufacturer who was being investigated for Federal Trade Commission violations.

53. STRAUS, *supra* note 51; *see* Richard Baker, *The History of Congressional Ethics*, in REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS 4 (Bruce Jennings & Daniel Callahan, eds., 1985).

54. STRAUS, *supra* note 51.

55. *Id.* at 3.

56. *Id.*; 112 CONG. REC. 21738 (1966).

57. STRAUS, *supra* note 51 at 3. The Committee had two responsibilities. They were to: (1) recommend to the House, by report or resolution such additional rules or regulations as the Select Committee shall determine to be necessary or desirable to insure proper standards of conduct by Members of the House and by officers or employees of the House, in the performance of their duties and the discharge of their responsibilities; and (2) report violations, by a majority vote of the Select Committee, of any law to the proper Federal and State authorities. *Id.*; H.R. Rep. No. 89-2338, at vii (1966).

ing.⁵⁸ In 2011, the House renamed the Committee to the House Committee on Ethics in the 112th Congress.⁵⁹

B. Jurisdiction and Function

The House Committee on Ethics derives its jurisdiction from authority under House Rules and federal statutes⁶⁰ including the Ethics in Government Act, which designates the Committee as “the ‘supervising ethics office’ for the House of Representatives.”⁶¹ The House Committee on Ethics primarily functions as an advisory and enforcement body of ethical standards of conduct for the House of Representatives.⁶² These functions include: agreeing on a set of rules that regulate what behavior is considered ethical for members; conducting investigations into whether members have violated these standards; making recommendations to the whole House on what action, if any, should be taken as a result of the investigations; and providing advice to members before those members take action, so as to avoid uncertainty over ethical culpability.⁶³ Consistent with carrying out these functions, the House Committee on Ethics has also established the Office of Congressional Ethics, an outside enforcement entity “based

58. STRAUS, *supra* note 51, at 4.

59. *Id.* at 6.

60. *Jurisdiction*, COMM. ON ETHICS (last visited Mar. 05, 2015), <http://ethics.house.gov/jurisdiction>. For example, House Rule XI, clause 3 states:

A) Recommend administrative actions to establish or enforce standards of official conduct. B) Investigate alleged violations of the Code of Official Conduct or of any applicable rules, laws, or regulations governing the performance of official duties or the discharge of official responsibilities. Such investigations must be made in accordance with Committee rules. C) Report to appropriate federal or state authorities substantial evidence of a violation of any law applicable to the performance of official duties that may have been disclosed in a Committee investigation. Such reports must be approved by the House or by an affirmative vote of two-thirds of the Committee. D) Render advisory opinions regarding the propriety of any current or proposed conduct of a Member, officer, or employee, and issue general guidance on such matters as necessary.

Id.

61. 5 U.S.C.A. § 101 (2006); *Jurisdiction*, COMM. ON ETHICS (last visited Mar. 05, 2015), <http://ethics.house.gov/jurisdiction>.

62. *See generally Rules*, COMM. ON ETHICS (last visited Mar. 05, 2015), <http://ethics.house.gov/sites/ethics.house.gov/files/Committee%20Rules%20for%20113th%20Congress.pdf> (detailing the rules of conduct for Congress and the committee’s role in enforcing them). According to the House Committee on Ethics’ website, the rules are intended to provide a fair procedural framework for the conduct of the Committee’s activities and to help ensure that the Committee serves the people of the United States, the House of Representatives, and the Members, officers, and employees of the House of Representatives. HOUSE COMMITTEE ON ETHICS, <http://ethics.house.gov/about/committee-rules> (last visited Feb. 28, 2015).

63. *See generally* STRAUS, *supra* note 51 (exploring the evolution of the Committee’s jurisdiction and procedure).

on examples in state legislatures and private entities,”⁶⁴ which will be covered in detail below.

C. House Office of Congressional Ethics

1. History and Purpose

Historically, Congress has used its ethics power infrequently and circumspectly⁶⁵, occasionally “tighten[ing] its ethics codes and procedures for dealing with misconduct.”⁶⁶ Since 1951, numerous proposals have been before Congress pushing to create an independent ethics advisory body that would assist the House Committee on Ethics with investigations or enforcement.⁶⁷ The House established the Office of Congressional Ethics (OCE) through a simple resolution in 2008 during the 110th Congress⁶⁸ with the purpose of reviewing complaints and, when appropriate, referring findings of fact to the House Committee on Ethics.⁶⁹ The OCE is the first independent body charged by Congress to investigate complaints against members and refer such complaints to the House Committee on Ethics.⁷⁰ The OCE was intended to serve the House by assuring the integrity of the chamber.⁷¹ As will be explored in further detail, the OCE carries out this service by providing a way for groups and individuals to bring attention to alleged misconduct by members, officers, and employees of the House

64. STRAUS, *supra* note 51, at 16.

65. See JACOB STRAUS, CONG. RESEARCH SERV., R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES 1 (2013).

66. Don Wolfensberger, *Punishing Disorderly Behavior in Congress: The First Century*, Woodrow Wilson International Center, (2007) available at <http://www.wilsoncenter.org/events/docs/ethics-essay-drw.pdf>. Wolfensberger further notes:

It is clear from the first century of the U.S. Congress that Congress did not exercise its power to punish Members either arbitrarily or frequently. . . . It was not until the latter half of the 19th Century that more attention was paid by Congress to charges of corruption. . . . Congress has periodically tightened its ethics codes and procedures for dealing with misconduct ever since. In addition to very detailed ethics statutes, rules, and regulations, House Members, officers and employees are held in their Code of Official Conduct to a higher, more general standard of conducting themselves, “at all times, in a manner that shall reflect creditably on the House.”

Id.

67. STRAUS, *supra* note 65, at 2.

68. H.R. Res. 895, 110th Cong. (2007). It is important to note here that the resolution establishing the House Committee on Ethics is unenacted. Thus, it is not a statute carrying the force of law.

69. See H.R. Res. 895; STRAUS, *surpa* note 65, at 2.

70. STRAUS, *supra* note 65, at 2; STRAUS, *surpa* note 51 at 2 (“In the period preceding the creation of the Committee on Standards of Official Conduct in 1967, investigations into alleged wrongdoing by Members and staff of the House were dealt with in an ad-hoc fashion.”).

71. STRAUS, *supra* note 65, at 2.

to an investigative body.⁷² The OCE endeavors to give the public a “window” into ethics enforcement in the House of Representatives.⁷³

2. Procedure & Composition

The OCE holds specific powers to conduct investigations, hold hearings, pay witnesses, and adopt rules.⁷⁴ Some of these powers are enumerated in the OCE’s authorizing resolution, and others are detailed in rules of conduct currently pending before the OCE.⁷⁵

The central charge of the OCE is conducting investigations in an independent and nonpartisan manner.⁷⁶ The investigations relate to allegations of misconduct against Members, officers, and staff of the House.⁷⁷ Following the investigation, the OCE must refer matters, when appropriate, to the House Committee on Ethics.⁷⁸ The OCE’s investigations are not retrospective to the extent that they are restricted to activities that occurred after March 11, 2008, where a violation of “law, rule, regulation, or other standard of conduct in effect at the time the conduct occurred and [were] applicable to the subject in the performance of his or her duties or the discharge of his or her responsibilities.”⁷⁹

To facilitate its responsibility of conducting investigations, the OCE is authorized to conduct meetings, hold hearings, meet in executive session, solicit testimony, and receive evidence necessary to conduct investigations.⁸⁰ Only the OCE, pursuant to House rules, has the

72. *See Id.*; *infra*, Part II.

73. *Welcome to the New Online OCE*, OFFICE OF CONG. ETHICS BLOG (last visited Oct. 6, 2013), <http://oce.house.gov/2010/03/welcome-to-the-oces-new-site.html>.

74. H.R. Res. 895, 110th Cong. (2008) (The [Office of Congressional Ethics] is authorized and directed to: . . . [U]ndertake a preliminary review of any alleged violation by a Member, officer, or employee of the House of any law, rule, regulation, or other standard of conduct applicable Hold such hearings as are necessary Pay witnesses appearing before the Office in the same manner as prescribed by clause 5 of rule XI of the Rules of the House of Representatives. Adopt rules to carry out its duties); STRAUS, *supra* note 65, at 16.

75. *Id.*

76. *Id.*

77. *Id.*

78. H.R. Res. 895 110th Cong. (2007) (“Notwithstanding any other provision of this section, upon receipt of a written request . . . that the board cease its review of any matter and refer such matter to the committee because of the ongoing investigation of such matter by the committee, the [Office of Congressional Ethics] shall refer such matter to the committee and cease its preliminary review . . . of that matter and so notify any individual who is the subject of the review.”); STRAUS, *supra* note 65, at 16.

79. *Id.*; *See generally* OCE RULES FOR THE CONDUCT OF INVESTIGATIONS (2015).

80. H.R. Res. 895 110th Cong. (2007). (“The [Office of Congressional Ethics] shall meet at the call of the chairman or a majority of its [board] members pursuant to its rules. The [Office of Congressional Ethics] is authorized and directed to: . . . Hold such hearings as are necessary and sit and act only in executive session at such times and places and solicit such testimony and

authority to recommend House discipline of members and staff.⁸¹ The OCE may accept information of alleged wrongdoing by members, officers, and employees of the House, but only the OCE board can initiate a review.⁸²

The OCE is composed of six board members, and at least two alternates, each of whom serves a four-year term.⁸³ The Speaker and the minority leader are each responsible for the appointment of three board members and one alternate.⁸⁴ The Speaker selects the chair and the minority leader selects a co-chair.⁸⁵ Current members of the House, federal employees, and lobbyists are not eligible to serve on the board.⁸⁶

The OCE's investigations have two stages: (1) a preliminary review, which must be completed in 30 days and (2) a second-phase review, which must be completed in 45 days, with the option of a 14-day extension.⁸⁷ Two board members may authorize a preliminary review if all available information provides a reasonable basis to believe that a violation may have occurred.⁸⁸ Three board members may authorize

receive such relevant evidence as may be necessary to carry out its duties.”); STRAUS, *supra* note 65, at 16.

81. *Id.* at 1.

82. H.R. Res. 895 110th Cong. (2007); STRAUS, *supra* note 65, at 18.

83. H.R. Res. 895 110th Cong. (2007) (“The Office shall be governed by a board consisting of six individuals of whom three shall be nominated by the Speaker subject to the concurrence of the minority leader and three shall be nominated by the minority leader subject to the concurrence of the Speaker.”); STRAUS, *supra* note 65, at 12.

84. H.R. Res. 895 110th Cong. (2007); STRAUS, *supra* note 65, at 12. H.R. Res. 895 seems to set particularly stringent standards for the individuals appointed to the board. It directs the Speaker and the minority leader to appoint individuals of exceptional public standing and specifically qualified to serve on the board by virtue of their education, training, or experience in one or more of the following fields: legislative, judicial, regulatory, professional ethics, business, legal, and academic.

85. H.R. Res. 895 110th Cong. (2007); STRAUS, *supra* note 65, at 12. In the absence of the chairman, the cochairman assumes the duties of chairman.

86. H.R. Res. 895 110th Cong. (2007) (“No individual shall be eligible for appointment to . . . the board who – is a lobbyist registered under the Lobbying Disclosure Act of 1995; engages in, or is otherwise employed in, lobbying of the Congress; is a Member of Congress; or an officer or employee of the Federal Government.”); STRAUS, *supra* note 65, at 10. This restriction on board membership seems to contemplate insulating the board members from the influence of those who are intended to investigate.

87. H.R. Res. 895 110th Cong. (2007) (“The board is authorized and directed to: [w]ithin 7 calendar days after receipt of a joint written request . . . initiate a preliminary review . . . [C]omplete a second-phase review with 45 calendar days or 5 legislative days, whichever is later, after the board commences such review. Extend the [second-phase review] period for one additional period of 14 calendar days upon the affirmative vote of a majority of its members, a quorum being present.”); OFFICE OF CONG. ETHICS, THIRD QUARTER 2013 REPORT 1 (2013).

88. H.R. Res. 895 110th Cong. (2007); OFFICE OF CONG. ETHICS, THIRD QUARTER 2013 REPORT 1 (2013).

a second-phase review if all available information provides probable cause to believe a violation may have occurred.⁸⁹

At the end of a second-phase review, the Board must make a recommendation to the House Committee on Ethics as to whether the matter warrants further review by the Committee or the Committee should dismiss the matter.⁹⁰ The general standard of proof necessary for the OCE to refer a matter to the House Committee on Ethics for further review is substantial reason to believe a violation may have occurred.⁹¹ It should be stressed that a “recommendation for further review does not constitute a determination that a violation occurred.”⁹² Similarly, a recommendation for dismissal does not mean that the OCE determined that a violation did not occur, “but only that the information available to OCE does not provide a substantial reason to believe a violation occurred.”⁹³ This would seem to indicate that the OCE’s recommendations are neither arbitrary nor frivolous in practice.

D. Applying Congress’ Ethics Model to the Supreme Court

Several aspects of the combined ethics enforcement models of the House Committee on Ethics and the Office of Congressional Ethics would work well if implemented in a comparable model for the Supreme Court, thus supporting the inference that such a model is indeed feasible and enforceable. The House Committee on Ethics

89. *Id.*

90. *Id.* at 2.

91. OFFICE OF CONG. ETHICS, THIRD QUARTER 2013 REPORT 2 (2013). For an example of an OCE referral, see the OCE Referral Regarding Rep. Tim Bishop available at http://oce.house.gov/disclosures/Review_No_13-3308_Referral.pdf. In May 2012, Representative Bishop agreed to assist a constituent in obtaining the necessary approvals for a fireworks event at the constituent’s home. Representative Bishop communicated personally with public officials with certain oversight in the approval process and also directed his congressional staff to make communications to facilitate the necessary processes to the benefit of the constituent. Through an intermediary, Representative Bishop then requested a campaign contribution from the constituent. The request was made in an email after highlighting his performance of official acts, previously conducted. Representative Bishop continued to perform official acts and authorized requests for contributions. Representative Bishop’s congressional campaign committee also reported receiving the contribution thirteen days prior to the actual date of the constituent’s contribution. The report did not disclose the constituent’s company, or the constituent as the sole member of the company, as the source of the contribution. The Board of the OCE recommended that the Committee on Ethics further review the allegation concerning whether Representative Bishop sought a campaign contribution because of or in connection with an official act, because there is a substantial reason to believe that a violation of House rules, standards of conduct and federal law occurred. *See generally* OCE REFERRAL REGARDING REP. TIM BISHOP, <http://oce.house.gov/2013/09/september-11-2013---oce-referral-regarding-rep-tim-bishop.html>.

92. OFFICE OF CONG. ETHICS, THIRD QUARTER 2013 REPORT 2 (2013).

93. *Id.*

functions by agreeing on the ethics rules to be implemented, conducting investigations, making recommendations to the House on disciplinary actions to be taken, and advising members in situations of uncertainty as to ethical culpability.⁹⁴ An agency with similar investigatory and advisory powers would be a crucial part of an established ethics model for the Supreme Court, an ethics model that is not only feasible, but also enforceable. Statistics show that this approach has worked for Congress⁹⁵; this can be replicated for the Supreme Court.

Further, the non-partisan, independent, and external nature of the Office of Congressional Ethics is also worth considering. The OCE, *independent* of Congress, conducts investigations regarding allegations of misconduct against members of the House.⁹⁶ While an office with investigatory and advisory powers similar to those of the OCE would be an effective means for binding the Supreme Court to an ethics model, a non-partisan entity independent of the Supreme Court would enhance the efficacy of that means. The OCE's existence means that members are not left to police themselves.⁹⁷ An office with similar non-partisan qualities quashes concerns that political ideologies will play a role in its functions, furthering proving that this approach for the Supreme Court is feasible

Of course, not all aspects of the House Committee on Ethics and the Office of Congressional Ethics models are appropriate for an ethics model tailored to the Supreme Court. Specifically, the House Committee on Ethics recommends to the whole House what action is to be taken in the event of an ethics violation.⁹⁸ Such a procedure may work in the House of Representatives where there are 435 voting

94. See generally STRAUS, *supra* note 51 (exploring the evolution of the Committee's jurisdiction and procedure).

95. OFFICE OF CONG. ETHICS, THIRD QUARTER 2013 REPORT 2 (2013). The OCE releases a statistical summary of the board's actions on a quarterly basis. The statistical summary in the third quarter 2013 report shows that review extensions are infrequent and a majority of matters that warrant a preliminary review are resolved with some referral to the House. This seems to evince procedural model that operates smoothly.

96. STRAUS, *supra* note 65, at 16.

97. See *A Welcome Turnaround on the Office of Congressional Ethics*, WASH. POST, DEC. 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122903912.html> ("The office has the power, without having a lawmaker file an ethics complaint, to initiate investigations and conduct preliminary reviews. In addition, it brings some transparency to the black hole of the congressional ethics process; if the OCE refers a matter to the ethics committee for further action, the committee is required to make a public statement, within a relatively short time frame, about whether it will proceed.").

98. See generally STRAUS, *supra* note 51 (exploring the evolution of the Committee's jurisdiction and procedure).

members.⁹⁹ However, there are only nine justices on the Supreme Court.¹⁰⁰ With such a large number of members in the House of Representatives, it may be unlikely that a vote for which disciplinary measure to be taken against a member in violation of the ethics code will be influenced by a sense of camaraderie or familiarity. The converse may be true for the Justices of the Supreme Court. If it were left to eight of the Justices to vote on how one who violated the ethics code is to be disciplined, it is likely that lighter sanctions will be chosen instead of harsher and perhaps more appropriate sanctions. Therefore, an advisory office that would enforce an ethics model on the Supreme Court would not be effective if the choice of discipline was left in the hands of the Justices.

Further, the composition of the OCE would not work well in a similar approach for the Supreme Court. The Speaker of the House and the Minority Leader are each responsible for appointing three members of the six-person Board.¹⁰¹ Applying that approach to a similar office for the Supreme Court suggests that the Justices will appoint each of the board members. Again, the difference in scale between the House of Representatives and the United States Supreme Court indicates that such an approach is not ideal here. Having the membership of a board responsible for investigating misconduct of the nine Justices determined by those nine Justices would raise several issues concerning the legitimacy of the board's investigations. Ultimately, the purpose of the board would be defeated. Thus, the ethics model for Congress provides little guidance on what the membership of an enforcement body for the Supreme Court would consist of.

The House Committee on Ethics and the Office of Congressional Ethics provide starting points that lend support to this Comment's argument that an ethics model binding on the Supreme Court is feasible and enforceable. If there were to be an enforcement body, it would need to have the power to decide on rules, conduct investigations, and advise members in situations of ethical ambiguity. The efficacy and practicality of such an approach is evinced by the existence of the Office of Congressional Ethics. One may wonder how an ethics model

99. 2 U.S.C. § 2 (1929).

100. See 16 Stat. 44 (1869). This is an act that increased the size of the Supreme Court to nine justices, one for each of the judicial circuits established in 1866. *Id.*

101. H.R. Res. 895 110th Cong. (2007) ("The Office shall be governed by a board consisting of six individuals of whom three shall be nominated by the Speaker subject to the concurrence of the minority leader and three shall be nominated by the minority leader subject to the concurrence of the Speaker."); STRAUS, *supra* note 65, at 12.

would work and whether such an ethics model will be practical. An ethics model for the Supreme Court can work in much the same way as the House Committee on Ethics and the Office of Congressional Ethics. Congress could establish a non-partisan agency with similar investigatory, advisory, and enforcement powers. This model has worked for Congress¹⁰² and there does not appear to be anything that would suggest that this approach couldn't be duplicated for the Supreme Court to similar effect. This is not to say that the Congressional model is perfect and every aspect of it can be applied to the Supreme Court. But one of this Comment's main arguments, the feasibility of applying an ethics model to the Supreme Court, finds abutment in the real-world presence of Congress' ethics model. Thus, the argument of feasibility becomes less abstract.

However, the question still remains as to what the membership of that enforcement body will consist of and what kind of sanctions it should be able to impose. The House Committee on Ethics consists of members of Congress and members of Congress appoint the Office of Congressional Ethics' board.¹⁰³ For the same reasons mentioned above when discussing leaving the choice of disciplinary measures up to the Justices, having the enforcement body consist of the Supreme Court Justices would not be prudent. Ideally, an enforcement body for the Supreme Court would consist of individuals completely divorced of any relation with its nine justices. For guidance on who these individuals would be, how they would be selected, and what sanctions they would be able to impose, this Comment turns to the state practice in judicial ethics.

III. ETHICS MODEL OF STATE COURTS

Every state has adopted a judicial code of conduct.¹⁰⁴ The adoption of such codes is a relatively recent phenomenon in the United States.¹⁰⁵ In 1972, the American Bar Association revamped the Model

102. See *supra* note 95.

103. See *Committee Members*, COMM. ON ETHICS, <http://ethics.house.gov/about/committee-members> (last visited March 5, 2015).

104. See *State Judicial Ethics Resources*, AM. BAR ASSOC. http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/resources_state.html (last visited Oct. 26, 2013) (compiling judicial codes of conduct for all fifty states and the District of Columbia).

105. Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C.L. REV. 1951, 1955 (2013). "Prior to the twentieth century, there were no comprehensive judicial codes of conduct in the United States. In 1792, the Second Congress of the United States enacted a statutory disqualification provision for federal judges, but its scope encompassed only those judges

Code of Judicial Conduct to focus more on enforcement than admonishment.¹⁰⁶ This revamped version of the Model Code did not enforce the rules itself.¹⁰⁷ Instead, it encouraged state courts to implement an accountability structure for enforcing the rules expressed in the Model Code.¹⁰⁸ In response to the Model Code's call, states formed judicial discipline commissions and "other administrative structures that formalized a reporting and sanctioning regime to curb abuses by judicial candidates and sitting judges."¹⁰⁹ A state judicial commission typically controls disciplinary actions for an infraction of the rules of conduct by state judges.¹¹⁰ All states have established such an agency or commission¹¹¹ either by statute or by amendment to the state constitution.¹¹² A look at the powers and composition of these state judicial

who had a pecuniary interest in a matter or had previously served as an attorney for a litigant. Matthew Hale, an early American judge, summed up the views of his contemporaries in his own 'Rules for Judicial Guidance,' noting that judges should not remove themselves absent actual impropriety and urging them to 'lay aside personal passions while judging.' While there were several additions to the federal disqualification standards over the next century, the creation of a comprehensive judicial code of conduct came in response to a scandal that rocked the iconic sport of baseball." *Id.* at 1960–61.

106. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS vii, 3 (3d ed. 2000).

107. See *id.* at 3; Joe Cutler, Current Development 2003-2004: *Oops! I Said It Again: Judicial Codes of Conduct, the First Amendment, and the Definition of Impartiality*, 17 GEO. J. LEGAL ETHICS 733, 735 (2004).

108. Cutler, *supra* note 107, at 735; SHAMAN ET AL., *supra* note 106, at 3.

109. Cutler, *supra* note 107, at 735; see also SHAMAN ET AL., *supra* note 106, at 3–4.

110. See SHAMAN ET AL., *supra* note 106, at 3–4 (detailing the functions of State Judicial Discipline Committees). For example, Article V, Section 1-a of the Texas Constitution provides: "Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. Any person holding an office specified in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge." TEX. CONST. art. V, § 1-a.

111. See *Judicial Conduct Commissions*, AM. JUDICATURE SOC'Y, <https://www.ajs.org/judicial-ethics/judicial-conduct-commissions> (listing States and their respective judicial conduct commissions) (last visited Feb. 28, 2015).

112. See, e.g., N.Y. CONST. art. VI, § 22.

commissions provides guidance on how a similar enforcement entity for the United States Supreme Court would be composed and lends further credence to the feasibility of an ethics model for the high court. What follows is a survey of New York's version of such a commission.

A. New York State Commission on Judicial Conduct

As all states have established agencies or commissions on judicial conduct, it would be impractical to discuss every state's respective commission. All state commissions are established similarly and have authority and procedures that are roughly equivalent to each other. The New York State Commission on Judicial Conduct was chosen as a random sample. Much of what will be explored below can be said of the judicial conduct commissions of any state.

1. Brief History

For some time prior to the establishment of the New York State Commission on Judicial Conduct, New York judges were subject to professional discipline by discontinuous and inconsistent procedures.¹¹³ Said procedures relied on judges to discipline fellow judges and were found ineffective.¹¹⁴ In the century prior to the creation of New York's commission, *ad hoc* judicial disciplinary bodies dealt with judges who violated ethics rules.¹¹⁵ These *ad hoc* bodies had no staff or office to receive and investigate complaints against judges.¹¹⁶ In 1974, a change to the judicial disciplinary system created a temporary commission "with a full-time professional staff to investigate and prosecute cases of judicial misconduct."¹¹⁷ Large-scale endorsement by

113. See *Mandate & History*, N.Y. STATE COMM'N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

114. *Id.*

115. *Id.* This appears to be analogous to the early approach of Congress to addressing misconduct discussed *supra* Part II. It seems clear that inconsistent and *ad hoc* approaches to discipline for misconduct have been the impetus for more refined ethics models, the likes of which this Comment argues can be applied to the United States Supreme Court.

116. See *Mandate & History*, N.Y. STATE COMM'N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

117. See *id.*

the electorate made the commission permanent and expanded its powers through an amendment to New York's constitution.¹¹⁸

2. Overview of Powers and Authority

The State Commission on Judicial Conduct acts with the authority “to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings thereon, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges within the state unified court system.”¹¹⁹ The commission derives this authority from Article 6, Section 22, of the Constitution of the State of New York.¹²⁰ Under Article 6, §22(a) of New York's constitution, the commission may “receive, initiate, investigate and hear complaints with respect to the conduct of any judge or justice of the unified court system.”¹²¹ The commission may also determine that a judge or justice be admonished, censured or removed from office for cause.¹²² This broad authority to discipline judges addresses the concern of how the Supreme Court Justices are to be disciplined, which is the key exigency of the Supreme Court Ethics Act of 2013.

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial

118. See N.Y. CONST. art. VI, § 22; *Mandate & History*, N.Y. STATE COMM'N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

119. *Mandate & History*, N.Y. STATE COMM'N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014). Note the analogies to the power of the Office of Congressional Ethics, i.e., the power to receive complaints, conduct investigations and hearings, and the discretion to dismiss complaints. However, also note the key difference: the power of the Commission to discipline the judges itself.

120. N.Y. CONST. art. VI, § 22(a) (“The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his or her duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his or her judicial duties. The commission shall transmit an[y] such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved.”)

121. *Id.*

122. *Id.*

misconduct in New York State.¹²³ “[Its] objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide cases independently.”¹²⁴ The commission does not act as an appellate court as it has no authority to reverse a lower court decision or order a new trial.¹²⁵ The commission neither gives advisory opinions and legal advice, nor does it represent litigants.¹²⁶ Complaints may be referred to other agencies by the commission when appropriate.¹²⁷ The New York State Commission on Judicial Conduct acts as a forum for “citizens with conduct-related complaints, and by disciplining those judges who transgress ethical constraints.”¹²⁸ In doing so, “the commission seeks to insure compliance with the established standards of judicial ethics.”¹²⁹ As a result, public confidence in the integrity and honor of the judiciary is promoted.¹³⁰

If the commission determines that disciplinary action is warranted, it may impose one of the four aforementioned sanctions.¹³¹ The commission may choose to admonish a judge publicly, censure a judge publicly, remove a judge from office, or retire a judge for disa-

123. *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

124. *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014); see N.Y. CONST. art. VI, § 22(a).

125. See N.Y. CONST. art. VI, § 22(a) (“The commission shall transmit . . . such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission’s determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.”); *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

126. *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

127. N.Y. JUD. LAW § 44(10) (McKinney 2014) (“If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven and eight of this section, within the powers of . . . an applicable district attorney’s office or other prosecuting agency, the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.”); *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

128. *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

129. *Id.*

130. *Id.*

131. N.Y. CONST. art. VI, § 22(a).

bility.¹³² Within the constraint of its rules and when warranted by the circumstances, “the commission may also issue a confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint.”¹³³ This wide range of possible disciplinary measures should ensure that the sanction is proportionate to the ethical violation. If such authority were given to a disciplinary office for the Supreme Court, this would address concerns of arbitrary or ill-reasoned disciplinary measures.

3. Composition

The New York State Commission on Judicial Conduct consists of 11 members who each serve four-year terms.¹³⁴ The governor of New York appoints four members, the Chief Judge of the Court of Appeals appoints three, and each of the four leaders of New York’s legislature appoints one.¹³⁵ New York’s constitution requires that the commission consist of four judges, at least one attorney, and at least two laypersons.¹³⁶ The commission elects one member to be chairperson.¹³⁷ The Commission also “appoints an Administrator and a Clerk.”¹³⁸ The “Administrator hires staff and supervises staff activities subject to the Commission’s direction and policies.”¹³⁹

132. *Id.*

133. *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

134. N.Y. CONST. art. VI, § 22(b) (“The commission on judicial conduct shall consist of eleven members . . . [e]ach member of the commission shall be appointed thereafter for a term of four years.”).

135. *Id.* (“The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals.”).

136. *Id.* (“Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.”); *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

137. *Mandate & History*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm> (last revised Oct. 10, 2014).

138. *Id.*

139. *Id.*

B. Applying the State model to the Supreme Court

State judicial commissions, like New York's, provide several plausible answers to questions concerning the application of an ethics model to the United States Supreme Court. Specifically, the commissions provide clear guidance on how the membership and disciplinary power of equivalent entity for the high court may look as well as what sanctions such an entity may impose for ethics violations. This further affirms that a similar ethics model for the Supreme Court would not only be feasible, but also effective if implemented. These state commissions have been in place for a number of years and have proven effective for disciplining judges for ethics violations. This approach can be replicated for the Supreme Court for the following reasons.

1. Disciplinary Power

In New York, the judicial commission determines whether a judge or justice will be admonished, censured or removed from office for any misconduct.¹⁴⁰ This is in stark contrast to the House Committee on Congressional Ethics, which must make recommendations to the House on disciplinary measures to be taken.¹⁴¹ There is an advantage to be gained from the unilateral decision-making structure of state commissions being applied to disciplinary body for the Supreme Court. First, this approach will safeguard public confidence in the integrity of the judiciary by allowing the pursuit of discipline for misconduct without deterrence by external factors.¹⁴² Further, the unilateral

140. N.Y. CONST. art. VI, § 22(a).

141. *Jurisdiction*, COMM. ON ETHICS, <http://ethics.house.gov/jurisdiction> (last visited Mar. 5, 2015). House Rule XI authorized the committee to: “A) Recommend administrative actions to establish or enforce standards of official conduct. B) Investigate alleged violations of the Code of Official Conduct or of any applicable rules, laws, or regulations governing the performance of official duties or the discharge of official responsibilities. Such investigations must be made in accordance with Committee rules. C) Report to appropriate federal or state authorities substantial evidence of a violation of any law applicable to the performance of official duties that may have been disclosed in a Committee investigation. Such reports must be approved by the House or by an affirmative vote of two-thirds of the Committee. D) Render advisory opinions regarding the propriety of any current or proposed conduct of a Member, officer, or employee, and issue general guidance on such matters as necessary.” See generally JACOB R. STRAUS, CONG. RESEARCH SERV., RL 30650, HOUSE COMMITTEE ON ETHICS: A BRIEF HISTORY OF ITS EVOLUTION AND JURISDICTION (2015) (exploring the evolution of the Committee’s jurisdiction and procedure).

142. See James A. Helis, *Multilateralism and Unilateralism*, in THE U.S. ARMY WAR COLL. GUIDE TO NAT’L SEC. ISSUES: NATIONAL SECURITY POLICY AND STRATEGY, 186 (J. Boone Bartholomees, Jr. 4th ed., 2010) (“The essence of unilateralism is that we do not allow others, no matter how well-meaning, to deter us from pursuing the fundamental security interests of the United States and the free world.”).

approach provides maximum freedom of action.¹⁴³ With this freedom of action, an enforcement body for the Supreme Court would not be limited to the mere screening function that is characteristic of the Office of Congressional Ethics. Thus, it would be rendered more effective, as it will be capable of investigating allegations of misconduct as well as administering disciplinary measures. Therefore an enforcement body for the Supreme Court with freedom of disciplinary action is feasible, as evinced by state commissions that have such freedom of action. In addition, such an enforcement body would be effective, given the benefits inherent in having freedom of disciplinary action.

2. Composition

The state commissions are also instructive in their approach to member composition and appointment. In New York, the state commission consists of 11 members including judges, attorneys, and laypersons.¹⁴⁴ New York's governor, the Chief Judge of the state's court of appeals, and each of the four leaders of New York's legislature appoint the membership of the commission.¹⁴⁵ This diversity of membership and manner of appointment is illustrative of how an effective enforcement body for the Supreme Court can be composed. Having the membership consist of the Supreme Court Justices themselves, in an approach paralleling the composition of the House Committee on Ethics, is problematic from a political and practical standpoint. Allowing the membership to be appointed by the justices, similar to how members of Congress appoints the board of the OCE, raises similar concerns. An enforcement body for the Supreme Court would likely be rendered ineffective if membership were modeled after the House Committee on Ethics or the Office of Congressional Ethics. However, none of these concerns would arise if the approach of the New York State Commission on Judicial Conduct were to be replicated.

143. *See id.* at 186.

144. N.Y. CONST. art. VI, § 22(b) ("The commission on judicial conduct shall consist of eleven members [O]ne person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.").

145. *Id.*

A diverse membership consisting of judges, attorneys, and laypersons would render the enforcement body competent and potentially safeguard one of the key purposes of any judicial code of conduct. “Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.”¹⁴⁶ Having a portion of the membership consist of laypersons could potentially safeguard this public confidence. There is a belief that “judges and lawyers are more sympathetic to accused judges than laypeople are, and therefore that a commission dominated by judges will take disciplinary action less often than one that consists of laypeople.”¹⁴⁷ Having laypersons present in a similar enforcement body for the Supreme Court instead of solely judges and attorneys could safeguard public confidence by preventing preferential treatment of the justices. Conversely, an enforcement body consisting solely of laypeople would not be practical. It is important to have judges and lawyers on the commission so they can “rein in popular rage against a particular judge.”¹⁴⁸ Thus, an enforcement body for the Supreme Court with membership consisting of attorneys, judges, and laypersons would be rendered effective because it safeguards public confidence while maintaining practicality. Additionally, since the membership would neither consist of the Supreme Court Justices nor be appointed by them, issues of loyalty and questions regarding the legitimacy of the enforcement body’s decisions would not be raised in this regard.

This Comment argues that an ethics model for the Supreme Court is feasible and practical. Much like Congress’ approach,¹⁴⁹ the state approach to judicial ethics pulls this article out of the abstract and acts as a material example. Congress served as a structural paradigm and answered the question of feasibility. The states serve as a substantive paradigm and answer the question of practicality. By acting as an example of what the composition and disciplinary capabilities of a comparable model for the Supreme Court, the state judicial

146. *The Code*, *supra* note 30, at Canon 1 Commentary, http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf. “An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of [the] Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.”

147. Jonathan Abel, *Testing Three Commonsense Intuitions About Judicial Conduct Commissions*, 64 STAN. L. REV. 1021, 1034 (2012).

148. Abel, *supra* note 147, at n.72.

149. See *supra* part II.

commissions show that such a model is not only possible, but also useful.

Establishing an agency with disciplinary powers similar to those of a state commission would render it an effective way of applying an ethics model to the Supreme Court. The range of disciplinary action available to state commissions offers several advantages and is easily duplicated with similar agency for the Supreme Court. By allowing freedom of action, the unilateral decision-making approach will safeguard public confidence in the integrity of the judiciary since it allows the pursuit of discipline for misconduct without deterrence by external factors.¹⁵⁰ As a result, the disciplinary process is streamlined, as the agency would be able to investigate allegations of misconduct and administer the appropriate disciplinary measures.

Replicating the diverse membership of the state judicial commissions would have two notable benefits. First, the presence of laypersons would help to safeguard public confidence in the judiciary by acting as a preventative measure against the preferential treatment of judges who are being scrutinized;¹⁵¹ this is critical. The presence of judges and lawyers would act as a balancing factor by ensuring that a measure of legal expertise is attendant and preventing popular opinion against a particular justice from becoming paramount.¹⁵² Second, by having the membership appointed individuals who have nothing to do with the Supreme Court itself, issues of fidelity would be rare.

IV. SEPARATION OF POWERS AS A POTENTIAL ROADBLOCK

There are some arguments against the feasibility of requiring the Supreme Court to adhere to the same ethics model as lower federal courts. Chief Justice John G. Roberts believes the fact that the Code

150. Helis, *supra* note 142, at 186.

151. Abel, *supra* note 147, at 1034 (“There is a widespread belief that the composition of a judicial conduct commission dictates the amount of discipline it metes out. Throughout the country, commissions are composed of different combinations of judges, lawyers, and laypeople (defined as people who are not and have not been judges or lawyers). The intuition is that judges and lawyers are more sympathetic to accused judges than laypeople are, and therefore that a commission dominated by judges will take disciplinary action less often than one dominated by laypeople.”); See *The Code*, *supra* note 30, at Canon 1(A) Commentary, http://www.americanbar.org/content/dam/aba/migrated/judicialethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf (Deference to the judgments and rulings of courts depends upon public confidence in the integrity . . . of judges. The integrity . . . of judges depends in turn upon their acting without . . . favor.”).

152. Abel, *supra* note 147, at n.72.

of Conduct for United States Judges currently applies only to lower federal court judges is indicative of a “fundamental difference between the Supreme Court and the other federal courts.”¹⁵³ Chief Justice Roberts continues by stating that while Article III of the Constitution establishes the Supreme Court, it “empowers Congress to establish additional lower federal courts that the Framers knew the country would need.”¹⁵⁴ To this effect, Roberts says, Congress established the Judicial Conference for the administration of these lower federal courts.¹⁵⁵ Since the Judicial Conference is an “instrument for management of the lower federal courts”, Roberts argues, its committees cannot “prescribe rules or standards for any other body.”¹⁵⁶ With this, Roberts seems to hint at separation of powers being a bar to Congress imposing an ethics model on the Supreme Court. However, one need only turn to Congress’ authority to impeach and set compensation for the justices to see that this is a non-issue.

A. Impeachment

“Congress has a wide range of oversight tools available with respect to the Judicial Branch.”¹⁵⁷ These “tools can be exercised in a variety of contexts, including nominations, judicial discipline, and impeachment.”¹⁵⁸ Impeachment in the United States is an expressed power of Congress¹⁵⁹ that allows for formal charges against a civil officer of government for crimes committed in office. “The House brings impeachment charges against federal officials as part of its oversight and investigatory responsibilities.”¹⁶⁰ “Individual Members of the House can introduce impeachment resolutions like ordinary bills, or the House could initiate proceedings by passing a resolution authorizing an inquiry.”¹⁶¹ Congress has demonstrated its authority to im-

153. Chief Justice Roberts, *supra* note 15.

154. *Id.*

155. *See id.*

156. *Id.*

157. ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RL32935, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 26 (2005). However, Bazan notes that Congress’ ability to use these tools to investigate individual judges or Justices may be more limited since the exercise of congressional oversight outside of limited contexts could give rise to a violation of the separation of powers doctrine.

158. *Id.*

159. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.”)

160. *Impeachment*, UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Origins-Development/Impeachment/>.

161. *Id.*

peach a sitting justice of the Supreme Court with Justice Samuel Chase in 1804.¹⁶²

Representative John Randolph of Virginia “orchestrated impeachment proceedings against Chase.”¹⁶³ The House accused Chase of “refusing to dismiss biased jurors and of excluding or limiting defense witnesses in two politically sensitive cases.”¹⁶⁴ Its trial managers hoped to prove that Chase had “behaved in an arbitrary, oppressive, and unjust way by announcing his legal interpretation on the law of treason before defense counsel had been heard.”¹⁶⁵ Highlighting the political nature of this case, the final article of impeachment accused the justice of continually promoting his political agenda on the bench, thereby “tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan.”¹⁶⁶

B. Authority to Set Compensation

A joint resolution states that Congress authorizes salaries for federal judges and further states that any changes to the salary of a Supreme Court Justice is subject to congressional approval.¹⁶⁷ While Congress does not have broad latitude to freely alter the salaries of

162. REHNQUIST, WILLIAM H. GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); *History of the Federal Judiciary*, Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/tu_sedbio_chase.html (“[Samuel] Chase openly campaigned for the reelection of John Adams in 1800, and when the presidential election was thrown into the House of Representatives, he prevailed upon members of Congress to vote against Jefferson. After Chase used a grand jury charge to denounce Republicans for the repeal of the Judiciary Act of 1801, Jefferson suggested that Congress consider impeachment. The House of Representatives impeached Chase in March 1804, citing the partisan grand jury charge, Chase’s conduct in the trials of Fries and Callender, and his actions in Delaware when he ‘did descend from the dignity of a judge and stoop to the level of an informer.’ The only Supreme Court justice to be impeached, Chase was acquitted in the Senate trial. The closely watched proceedings, however, marked the end of such openly partisan behavior on the part of federal judges as well as the end of the brief Republican effort to remove unsympathetic judges.”).

163. *Senate Stories: 1801-1850*, UNITED STATES SENATE, http://www.senate.gov/artandhistory/history/minute/Senate_Tries_Justice.htm.

164. *Id.*

165. *Id.*

166. *Id.*

167. See 95 Stat 1183. (“Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: Provided, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court.”)

incumbent justices¹⁶⁸, it was vested with enough authority to determine their initial salary. Since Congress has the authority to determine how much the justices are paid without disturbing the separation of powers doctrine, requiring those justices to adhere to rules of conduct seems as if it should be a natural aspect of that authority.

C. The Separation of Powers Doctrine

In understanding that the congressional imposition of a code of conduct on the Supreme Court raises no issue regarding separation of powers, one should not think of separation of powers as a “broad based ‘constitutional policy’ or political philosophy divorced from the specific provisions in the text of the [Constitution].”¹⁶⁹ Instead, this conclusion can best be reached by moving away from an abstract understanding of separation of powers and focusing more on the doctrine’s constitutional moorings.¹⁷⁰ Burns and Markman argue that the three branches of government do have to operate in absolute independence; they can focus their powers on the same subject while remaining distinct.¹⁷¹ For example, Congress has the power “to define the jurisdiction of the judicial branch by virtue of its authority to ‘ordain and establish . . . inferior [federal] Courts;”¹⁷² while the judicial branch has “the power to declare legislative and executive acts unconstitutional.”¹⁷³ As Burns and Markman explain, the duties may require different branches to act upon the same circumstances but they remain discrete.¹⁷⁴ The legislature exercises its legislative power while the courts are exercising their judicial power. By requiring the Supreme Court to adhere to a code of conduct, Congress is not evoking the powers of another branch; it is merely exercising its vested legislative powers. Any resulting blending of power “relates only to the sharing of the sum of all national governmental power and the concurrent exercise of power by more than one branch.”

168. U.S. CONST. art. III, § 1. (“The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”).

169. Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 575 (1987), reprinted in GARY LAWSON, FEDERAL ADMINISTRATIVE LAW (6th ed.).

170. *Id.* at 576. Burns & Markman note that there is nothing strange about this take on the doctrine of separation of powers. They indicate that the Supreme Court Justices from virtually every generation of the Court have analyzed the doctrine in a similar manner. *Id.* n.2.

171. *See id.* at 581–82.

172. *Id.* at 582.

173. *Id.*

174. *Id.*

V. PROPOSED ETHICS MODEL FOR THE SUPREME COURT

Congress can best remedy the Supreme Court Ethics Act of 2013's lack of a disciplinary provision by establishing an administrative agency that would set the ethical standards the Court is to abide by and discipline the justices for any violation of that code. The structure of the agency would mirror that of Congress' ethics model. The agency's enacting legislation would give it the power to decide on ethics rules, conduct investigations of alleged violations, and advise justices in situations of ethical ambiguity. By virtue of it being an agency, it will be non-partisan and unaffiliated with any particular branch of government.

The substantive capabilities and composition of the agency will be similar to those of state judicial commissions. The membership of the agency will consist of laypersons, judges, and lawyers. The enabling legislation would authorize the agency to receive and review written complaints of misconduct against justices, initiate complaints on its own motion, conduct investigations, conduct formal hearings, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining justices. The agency's disciplinary authority will allow it to determine that a justice be admonished, censured, or removed from office for cause.

CONCLUSION

Requiring the United Supreme Court to adhere to a code of ethics is not only feasible; it is also practical. It is not some abstract principle without a real-world basis. Congress shows that such an endeavor is structurally possible. The efficacy of a non-partisan agency with rulemaking, investigative and advisory power is evinced by the existence of the Office of Congressional Ethics.¹⁷⁵ The state judicial commissions show that a similar agency for the Supreme Court can be substantively practical. The efficiency an agency with a diverse membership and broad disciplinary authority is reflected in the existence of state judicial commissions.¹⁷⁶ Moreover, Congress' authority to deal in other matters involving the Supreme Court indicate that separation of powers would not be a roadblock to establishing such an agency.¹⁷⁷

175. *See supra* Part II.

176. *See supra* Part III.

177. *See supra* Part IV.

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Thus, the approaches of Congress and the state commissions work conjunctively to show that applying an ethics model to the Supreme Court is possible and capable of working well.