

THURGOOD MARSHALL LAW REVIEW

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NUMBER 1

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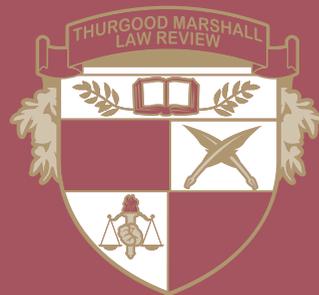
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SYSTEMATIC BIAS IN THE GRAND JURY SYSTEM: PROSECUTORIAL MISCONDUCT AND A NEED FOR CRIMINAL JUSTICE REFORM IN AMERICA

Gabrielle Davis

INTRODUCTION

The prevalence of police brutality and aggression have increased the need to reassess the sources and origins of injustice. Activists, such as those partaking in the Black Lives Matter movement, have once again become proactive in seeking racial justice and demanding answers as to why police officers are escaping criminal charges when there has been a clear abuse of power. The policing tactics have been made more visible, and now, the public is requiring answers as to why innocent African Americans are being gunned down. The grand jury has failed to indict a significant number of hostile officers, and its aspects have forced the public into the dark. The public needs answers, yet the preservation of the secrecy requirement is not conducive to this need. Grand jury proceedings are protected; thus, testimony, witnesses, and evidence revealed remain concealed. Prosecutorial misconduct comes into play as the prosecutors are able to sway the grand jurors in a way that produces an unfavorable outcome: no indictment.

In the wake of a demand for more transparency, America has experienced a decline in trust and reliability of police. Knowing that the prosecutor, who works so closely with the police in investigations, has the reigns in grand jury proceedings does not repair the trust or remedy the problem. This calls for reform and reassessment of the need to maintain the secrecy aspect of the grand jury system. The policy preservation and justification for retaining the secrecy component is to be balanced against the more severe need for transparency and accountability, which this paper explores.

The history of the American grand jury system and how it has furthered the divide between public trust and the criminal justice system is also evaluated. Additionally, this paper offers proposals for reform and suggestions on how to ultimately restore public confidence in the police and the integrity of the criminal justice system.

GRAND JURY PRACTICE IN AMERICA

The grand jury system is usually comprised of a cross section of the general public, which is supposed to reflect what the community looks like. The grand jury is formed this way to ensure that the decision of whether to indict an accused is one that the general public would support. The honorable Judge Learned Hand even called the grand jury “the voice of the community,” and the grand jury is an opportunity for lay persons to have a hand in the criminal justice system without being of legal expertise.¹ A grand jury is usually comprised of 12 to 15 people, with eight, nine, or a majority vote required to indict an accused.²

The dual function of the grand jury is to investigate crimes and secure the grand jury indictment.³ Under federal law, it is mandated that before a defendant be charged with a crime, the defendant is entitled to have their case presented before a grand jury and be indicted. There are two separate grand jury systems: federal and state. In the federal system, the Supreme Court has considered the grand jury indictment to be a vital right, and a deprivation would be to not guarantee the accused the liberty warranted under the United States Constitution.⁴ In the state system, the right is akin to that of the federal system. However, only certain categories of crimes require an indictment, such as felony cases.⁵ The grand jury is charged with finding probable cause, not adjudicating guilt.⁶ The grand jury’s primary role is to formally accuse through a finding of probable cause. Probable cause exists when a crime has in fact been committed, which means that elements of a crime are satisfied, and that the defendant is the person who committed the crime. If it becomes evident that a crime has in fact not been committed, then, the grand jurors may enter a no bill, and there will be no indictment. Otherwise, a true bill might be

¹ Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2340 (2008).

² John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 *OKLA. L. REV.* 341, 383 (2005).

³ Nicole D. Valente, *Quiet No Longer: Opening the Door for Empowered Juries and Transparency*, 35 *REV. LITIG.* 135, 140 (2016).

⁴ Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 *AM. CRIM. L. REV.* 1 (2004).

⁵ Decker, *supra* note 2, at 354.

⁶ Nicole S. Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 *DICK. L. REV.* 1, 20 (2018).

entered, and the defendant is then officially charged with an offense. It is against the law for a grand jury to deny an indictment where probable cause is found.⁷ Not only does the grand jury decide if probable cause exists to indict, but they also have the power to “charge a greater offense or a lesser offense, numerous counts or a single count, and a capital offense or a noncapital offense.”⁸ There are two unique aspects of the system, which have helped it sustain its independency over time: secrecy and investigative functions.

SECRECY PRONG

A long-standing tradition of the grand jury is that the proceedings are secret. The grand jury prosecutor is in charge of presenting the grand jurors with the facts of a case and laying the foundation for the grand jurors to understand what is required to indict. The prosecutor presents evidence to the grand jurors, and the jurors are charged with keeping this information confidential. The secrecy requirement was intended to be a strength of the proceedings. However, it has, over time, become a weakness. Citizens are unable to monitor and actually address the problems because they are unable to get to the root of the problems, which is shielded by a requirement that proceedings be kept secret.⁹ If a grand juror violates the duty of confidentiality and keeping the proceedings secret, then, they might be subject to punishment.¹⁰

The real function of the secrecy requirement is to insulate the grand jury proceedings and hide what actually takes place behind those walls from the eyes of the public, which might later scrutinize the practice.¹¹ The secrecy also makes prosecutors less accountable for their decisions, which might be viewed as unsound in terms of professional responsibility.¹²

At the origin of the secrecy requirement is the desire to protect those individuals who could come forward and tell the truth. Without it, many people would have been hesitant to come forward, and the

⁷ Washburn, *supra* note 1, at 2350.

⁸ Valente, *supra* note 3, at 143.

⁹ Futrell, *supra* note 6, at 6.

¹⁰ *Id.*

¹¹ Futrell, *supra* note 6, at 20.

¹² Decker, *supra* note 2, at 366.

truth may have never been discovered.¹³ It was also implemented and maintained to protect the rights of the accused.¹⁴ Secrecy prevents the accused from interfering with the investigative process by destroying evidence, tampering with witnesses and grand jurors, and fleeing the jurisdiction.¹⁵ Moreover, grand jury secrecy protects the individual jurors and the decision making process from public criticism or personal retaliation.¹⁶ Violation of the secrecy requirement is said to “frustrat[e] the ends of justice.”¹⁷ However, these historical justifications have not borne plenty fruit. If a grand juror violates the duty of confidentiality and secrecy, they might be subject to punishment.¹⁸

The secrecy requirement was established to preserve the independence of the grand jury. The requirement has transitioned into a place of dependency whereby the jurors are dependent on someone who is also dependent on someone—the police.¹⁹ The Supreme Court has stated that this requirement is “indispensable” and foundational for the grand jury system.²⁰ Non-disclosure is strictly enforced because police are the subject of the grand jury investigation.

The dilemma we are facing as a society is determining if there is a continuous, greater need for non-disclosure or if the need for non-disclosure is outweighed by the interest of disclosure. If the latter is the case, which has been the issue in recent events, then the secrecy aspect should no longer be so strictly enforced.²¹ Instead, the countervailing interest and need to disclose should become the predominant angle. This would help redress some of the problems resulting from the secrecy requirement in the grand jury system.

INVESTIGATIVE PRONG

Another unique prong of the grand jury system comprises of the investigative prong. This is instrumental in the evidence gathering process. In *Bank of Nova Scotia*, the Court determined that it was

¹³ Futrell, *supra* note 6, at 21.

¹⁴ *Id.* at 24.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Valente, *supra* note 3, at 152.

¹⁸ Futrell, *supra* note 6, at 30.

¹⁹ *Id.* at 28.

²⁰ Valente, *supra* note 3, at 151.

²¹ Decker, *supra* note 2, at 384.

within the prosecutor's power to conduct investigation in the name of grand jury.²² The investigation process includes summoning records via subpoenas, reviewing those documents and deciphering what is important for presentation, contacting witnesses and officers to determine true facts and calling those witnesses to testify before the grand jury, and ultimately drafting grand jury indictments for presentment.²³ Subpoenas are an especially useful tool for the grand jurors and prosecutors. Subpoenas are used to demand physical evidence such as documents and compelling testimony.²⁴ While the subpoena itself might not be sufficient to make someone testify or produce documentation, there are sanctions associated with interfering with an investigation. The courts have the power to step in and enforce the sanctions as the grand jury has a right to "every man's evidence."²⁵

The notion that the grand jury preserves its independence through its investigative function is merely a legal fiction.²⁶ The grand juror may "inquire into all information that might possibly bear on its investigation."²⁷ It is then up to the prosecutor to further conduct investigations and find out the truth in order to present to the grand jurors. Instead of the jurors using the prosecutor for information, it turns on the prosecutor using the grand jurors for information, which steers the prosecutor's investigation by juror inquiry.²⁸

PROSECUTORIAL MISCONDUCT

Prosecutors might violate ethical standards of the profession in various ways. It is misconduct for a grand jury prosecutor to "denigrate a witness" who asserts the Fifth Amendment privilege, comment on a witness' retention of counsel or motives of counsel, suggest to the grand jury how to interpret certain evidence, comment on the credibility of a witness, and discuss the defendant's unproven prior criminal activity."²⁹ During the entire pre-trial investigation or

²² *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

²³ Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 3 (1999).

²⁴ Kuckes, *supra* note 4, at 35.

²⁵ *Id.*

²⁶ Kuckes, *supra* note 4, at 7.

²⁷ Kuckes, *supra* note 4, at 25.

²⁸ Kuckes, *supra* note 4, at 26.

²⁹ R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 44 (2005).

upon pending presentment to the grand jurors, the prosecutors have control over what they investigate. While investigating cases, they work alongside police agencies, which are often fonder of the system than the criminal defendant. In the presentation room, it literally becomes the officer's word against the victim's word. The officers, as workers for the State, are better situated to have their case favorably heard by the jurors, although, the prosecutors should be presenting the facts in the most neutral way possible. This leads to the possibility of prosecutorial misconduct because they are in charge of the proceedings. Usually, they are able to determine what evidence is relevant to proving probable cause, which is necessary for an indictment or charging a defendant with the crime. The rules are designed in a way that favors the prosecution and allows them to place what has come to be known as a "rubber stamp" on charges.³⁰

While the prosecutor is charged with being neutral in presenting this evidence, this is hardly the case. The prosecutor is presenting evidence to lay people, who lack the legal knowledge to draw legal conclusions. They do not know the law nor how to apply it.³¹ The grand jurors lack legal training, and they do not know what witnesses to call even if they were to exercise their subpoena power.³² They completely rely on the prosecutor's given information and do not realize if information or key witnesses to the defense's case are being left out.³³ Again, the presentation of evidence and investigation is within prosecutor discretion, so it could easily be seen how prosecutors might sway the facts in favor of a no bill.³⁴ It has been said many times that a skillful prosecutor can maneuver the grand jurors and get them to "indict a ham sandwich."³⁵ This shows just how vulnerable the grand jurors can be in their inexperience. They are naïve to the law for the most part, and many people view the entire process as a joke—namely a "laughingstock."³⁶

³⁰ DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 16 (1st ed. 2012).

³¹ JOY ANN MCDUGALL & ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 6 (2007).

³² *Id.* at 26.

³³ See Futrell, *supra* note 6, at 25.

³⁴ See Henning, *supra* note 23, at 3.

³⁵ Washburn, *supra* note 1, at 2352.

³⁶ *Id.*

A prosecutor might decide to call a witness and have them testify for the State to the grand jurors. However, there is no judge or defense attorney present at the time of the presentation. Therefore, there is room for irrelevant evidence to be heard by the grand jurors as well as any other illegal evidentiary basis.³⁷ If the grand jurors determine that probable cause does in fact exist to charge the defendant with the crime by majority vote, then the prosecutor signs the indictment. The prosecutors are selective as to who they choose to go before a grand jury in presenting their case, which most likely will not favor a defendant. This has led to a significant number of true bills. The prosecutors have become more and more overbearing depriving the grand jurors of their independence.³⁸ Because of the secrecy requirement, prosecutors are able to abuse their power and overreach their discretionary bounds.

INDEPENDENCY

The grand jury is supposedly an independent body from the courts and executive. While the grand jury system is intertwined in some ways with the courts, such as needing a presiding judge's involvement to enforce subpoenas, the investigations remain separate from the courts in functioning day to day. The prosecutors act independently, and the grand jury's efforts are way out of the oversight of judges, defense lawyers, and the media.³⁹ For this reason, prosecutors and police agencies are more prone to abuse their presenting power. What was intended to be unique has become a source of abuse. The proceedings of the grand jury are private, and the person being charged in the indictment has no right to appear before the grand jury before the indictment. Thus, exculpatory evidence may or may not be presented.

A source of prosecutorial misconduct is the subpoena issuing investigative power. With the subpoena, the prosecutor can compel witnesses to testify even if they are not the suspect of the investigation.⁴⁰ This means that prosecutors can pretty much call everyone to try to get as much information as possible, whether it be

³⁷ Kuckes, *supra* note 4, at 35.

³⁸ Kuckes, *supra* note 4, at 8.

³⁹ MEDWED, *supra* note 30, at 16.

⁴⁰ Decker, *supra* note 2, at 349.

irrelevant or not. This can become cumbersome to grand jurors who are already crowded with information from the heavy caseload that they hear every day. Witnesses who refuse to cooperate with the prosecutor may be forced to appear before a judge and face sanctions.⁴¹

NEED FOR REFORM: SOURCE OF INJUSTICE

The grand jury system as it exists in America has been commonly overlooked as the source of criminal injustice. Oftentimes, this is due to the fact that the grand jury system is only the starting point of seeking justice. Furthermore, many people are left without answers as to why criminal charges are not filed due to the secrecy aspect of the grand jury system. In fact, the system has lowered visibility and kept the investigations and answers largely concealed.⁴² Many scholars have proposed abolishing the grand jury system as a whole because it has become either useless or because it is a problematic source.⁴³ The government now has a real need to conform to the new and transforming needs of society and to mend the current state of the criminal justice system.⁴⁴

Once we are able to see the close-knit connection the police officers and the grand jury prosecutors share, it becomes more evident why officers responsible for senseless killings are not being indicted at the outset of a case. There seems to be a tendency to not indict when the subject of the case is a police officer who works side by side with the prosecutors in the investigation.⁴⁵ The investigation starts in the grand jury where the police are in charge of disseminating information to the prosecutors to aid in the investigation. The numbers have proven this to be true, as many Texas cases in Houston and Dallas since 2002 had over 60 cases no billed.⁴⁶ In fact, Houston's local grand juries have failed to indict at a significantly higher level since 2002.⁴⁷ The prosecutor may be more persuaded to present the facts in a biased way as to produce a no bill.⁴⁸

⁴¹ *Id.* at 349.

⁴² Futrell, *supra* note 6, at 4.

⁴³ Washburn, *supra* note 1, at 2336.

⁴⁴ Valente, *supra* note 3, at 156.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 5-6.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 26.

Technology has really advanced the need for grand jury reform. Technology has shifted the way we view the police and the way that they do their jobs.⁴⁹ Many senseless police killings have been captured and made aware to the public via social media, and the time has come for a change.⁵⁰ To name a very popular few, Eric Garner was killed in 2014 by officers who arrested him for selling loose cigarettes, and those officers were never even indicted. John Crawford III was murdered in 2014 by police officers, and a grand jury failed to indict on murder, and on reckless or negligent homicide. Michael Brown was murdered by Missouri police officers after blocking traffic; the officers in that case were also not indicted by a local grand jury.⁵¹ This all prompted and has intensified the Black Lives Matter Movement and need to disclose grand jury proceedings.

People of color have been victimized at a significantly higher rate than any other ethnic group. They have been subjected to police violence, and the families seeking justice have to stand by and watch the aggressors walk free. This shows that there is still some racial dimension underlying the failure to indict police violence.⁵² American citizens have made an outcry and are desperate for public answers. They have become more aware and infuriated by the lack of control and abuse by police. The highly publicized instances of officers taking the lives of innocent African Americans has deepened the need for reform. Police officers have been able to hide behind the legal system and are not being held accountable for what they do in the name of the badge and self-defense. Despite past efforts to remedy racial discrimination, the criminal justice system has survived loopholes that allow racial tension to persist—one of which lies in the grand jury system. As officers of the state, citizens are supposed to resort to police, not shy away from them. Many people are afraid of police encounters because they know there is a strong possibility that they

⁴⁹ Brian A. Jackson, *Respect and Legitimacy- A Two Way Street: Strengthening Trust Between Police and the Public in an Era of Increasing Transparency*, 1-2 (2015),

https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE154/RAND_PE154.pdf.

⁵⁰ See Futrell, *supra* note 6, at 3.

⁵¹ *Id.* at 15-16.

⁵² *Id.* at 6.

might not come out alive, and furthermore, that their families will not see justice if they are innocently killed.

The problem that arises is that so many officers are not being indicted. The standard for indictment, being probable cause, is the lowest legal standard to meet, which begs the question as to why it is not being shown when so many innocent victims are being killed. Essentially, the grand jurors are supposed to make the decision, not the prosecutor, and the grand jurors are expected to act independently of the prosecutor.⁵³

REFORM

There are a series of reform options that should be given serious consideration. Proposals for reform include increase in oversight, providing more grand jury administrative staff or independent legal counsel, evidentiary reforms in allowing exculpatory evidence to be introduced, allowing the suspect to appear before the grand jurors to testify, harkening down on evidence rules in regards to permitting hearsay as there is no judge there to rule on inadmissible evidence, eliminating the secrecy requirement altogether, not allowing the prosecutor to represent a case before a grand jury following a decline to indict, and not allowing the prosecutor so much discretion as to what witnesses he or she calls and evidence he or she presents.⁵⁴ Furthermore, proposals should be strongly considered as the time, money, and energy invested in the grand jury system does not yield any benefits, despite being funded by taxpayers.⁵⁵ If a person is subpoenaed and is scheduled to testify, they should at least be given a 72 hour notice.⁵⁶ Jurors should be informed of their duties and powers.⁵⁷ Prosecutors should also be required to be more considerate to those who might invoke a privilege.⁵⁸ Specifically, this might include those invoking a privilege on self-incrimination grounds.⁵⁹

Limiting subpoena power can help reduce prosecutorial misconduct. As mentioned above, prosecutors use the subpoena as a tool to compel people to either testify or produce documents. Also,

⁵³ MCDUGALL & DAVIS, *supra* note 31, at 26.

⁵⁴ Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2336-2337 (2008).

⁵⁵ Decker, *supra* note 2, at 366.

⁵⁶ Decker, *supra* note 2, at 383.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

prosecutors can typically do this without restraint to aid in their investigation. One proposal for reform would be to place a limit on subpoena powers. This may include having some reasonableness requirement.⁶⁰ Prosecutors should not be able to issue a subpoena without a reasonable justification for requesting one.⁶¹ Although in *United States v. Calandra*, the Court reiterated the notion that a grand jury's subpoena *duces tecum* not be, "far too sweeping in its terms to be regarded as reasonable," there is no real limit on what is to be considered "reasonable."⁶² In *Hale*, the Court found that a grand jury could proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by a court had been committed.⁶³

OVERSIGHT

One of the ways that the grand jury system can be reformed is by increasing the degree of judicial oversight.⁶⁴ By doing this, courts would become more involved in grand jury proceedings. The Supreme Court has essentially made the Court's hand in the grand jury process completely "off limits."⁶⁵ The Court's position on the matter was solidified in 1992 through case law where it stated, "the grand jury is an institution separate from the courts, over whose functioning the courts do not preside."⁶⁶ The grand jury indictment remains untouchable by the courts who are not permitted to amend an indictment once the grand jury has handed down an indictment by a finding of probable cause.⁶⁷ There is a lack of oversight in the grand jury proceedings, so more likely than not, the prosecutor will get the case indicted.⁶⁸ This is consequential for the defendant being charged because the grand jurors are supposedly lay citizens who only have a very basic understanding of the law and rely on the prosecutor to tell them what is required to indict a crime. The abuses by the government

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *United States v. Calandra*, 414, 414 U.S. 338 (1974).

⁶³ *Hale v. Henkel*, 201 U.S. 43, 43 (1906).

⁶⁴ Henning, *supra* note 23, at 6.

⁶⁵ *Id.* at 7.

⁶⁶ Decker, *supra* note 2, at 356.

⁶⁷ Kuckes, *supra* note 4, at 13.

⁶⁸ Henning, *supra* note 23, at 4.

have led to a need for the judiciary to take a more proactive role in the indictment process without compromising on the underlying existence of the grand jury.⁶⁹ There is sufficient evidence that indictments are often approved by grand jurors.⁷⁰ The Court in *Costello* found that, “[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge of the merits.”⁷¹ There is no Constitutional provision that provides for nothing more, not even the Fifth Amendment.⁷² Not surprisingly, this is because the grand jurors often do not know exactly how to interpret the law, so if a prosecutor tells them that probable cause exists, then it does because they usually trust the prosecutors when they say the law is what it is and that a crime has been committed. Furthermore, these people do not want criminals potentially getting away with crimes, so they would rather indict the case and have it later dismissed before a judge rather than not indict the case when a crime may have truly been committed. With the significant number of indictments, it is clear that there is an abuse of power, and defendants are not being afforded their right to have their case presented neutrally. The rate is exponentially alarming, though nevertheless an assumption, because of the secrecy aspect of the grand jury system. The courts could serve as additional legal counsel.⁷³

The courts have taken some steps in lifting this lack of oversight burden. In *Douglas Oil Co. v. Petrol Stops Northwest*, the Supreme Court justified the secrecy requirement as a means of maintaining the integrity of the grand jury system and the process itself.⁷⁴ However, the Court also noted that there are times where there might be a need to ease that burden if the need can be shown.⁷⁵ This particularized “need” standard has carried weight for many other state and federal court cases. Particularized need is met if petitioners can show that the information should be disclosed because it is necessary to avoid a possible injustice in another judicial proceeding and that the

⁶⁹ Robert G. Johnston, *The Grand Jury- Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIM. 157, 166 (1974).

⁷⁰ Henning, *supra* note 23, at 5.

⁷¹ *Costello v. United States*, 350 U.S. 359, 363 (1956).

⁷² *Id.*

⁷³ Washburn, *supra* note 1, at 2354.

⁷⁴ *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 222 (1979).

⁷⁵ Futrell, *supra* note 6, at 30.

need for disclosure is greater than the need for continued secrecy.⁷⁶ This involves a balancing of interests: the secrecy of the grand jury against the public interest in disclosure. Ultimately, it was held to be within the trial court's discretion to determine whether to sustain the requirement or not. In the event that a trial court determines that the public interest in disclosure is outweighed by the secrecy requirement, then the Court might do away with the requirement.⁷⁷

Grand jury indictments remain beyond the reach of the courts in an effort to protect the investigative function from outside interference aside from the officers, witnesses, and prosecutors involved. Many of these assumptions might be eliminated with the proper reform.

LIMITS ON PROSECUTORIAL PRESENTING POWER

One proposal to remedy prosecutorial misconduct is to reform the grand jury process by limiting some of the prosecutor's discretion as to what evidence is presented. Prosecutors might be required to present certain evidence, perhaps the defendant to testify before the grand jurors as to have his or her case heard before the case is indicted. This would give the defendant an opportunity to present exculpatory evidence and have his or her case thrown out sooner instead of allowing it to proceed. Courts have previously found that a defendant did not make an effective argument when the defendant alleged that by the "prosecutor fail[ing] to present exculpatory evidence to the [grand] jury," the defendant was entitled to dismissal in federal court.⁷⁸ This would save financial resources and time, and it would expedite the judicial process.⁷⁹ In *United States v. Williams*, the Court rejected the opportunity to "require federal prosecutors to present exculpatory evidence to a grand jury."⁸⁰ The Court's move was an effort to not interfere with the grand jury's independence and to establish that the

⁷⁶ LYNN FARREL, *THE FEDERAL GRAND JURY* 28 (SUSAN BORIOTTI ET AL. EDS., 2002).

⁷⁷ Futrell, *supra* note 6, at 32.

⁷⁸ Decker, *supra* note 2, at 357.

⁷⁹ Henning, *supra* note 23, at 5.

⁸⁰ Henning, *supra* note 23, at 22.

proceedings were to be completely hands off.⁸¹ Allowing the defendant an opportunity to be heard would not only coincide with his Constitutional right to be heard as incorporated through the Fourteenth Amendment of the Due Process Clause, but it would also improve the transparency that society begs. Prosecutorial misconduct has stemmed from “the suppression of, or failure to, disclose exculpatory evidence.”⁸² These are all rights ensured by the due process guarantee of the Constitution.⁸³ Not only does this frustrate the grand jury proceedings and availability of evidence, but it also is very hard to prove once a case has ended.⁸⁴ Neither the accused nor counsel can access the evidence because it is protected in the case of grand jury proceedings.⁸⁵

Oftentimes, hearsay is heard in grand jury testimony by witnesses. The Supreme Court has made this legal through its 1956 decision in *Costello v. United States*.⁸⁶ “In that case, the Court [found] that an indictment based solely on hearsay evidence did not infringe on the defendant’s [Fifth] Amendment Constitutional right.”⁸⁷ Reform might include limiting the information that the grand jurors hear to evidence that is not hearsay. The rules of evidence should be fully applied during these proceedings. Only admissible evidence should be heard by the grand jurors as it would be heard by the courts where there is a judge to rule on objections and the admissibility of evidence. While this might be more time consuming and investigative intensive on the behalf of the prosecutor, it would be worth the outcome. The information that the grand jurors receive instantly becomes more credible, and the facts might become more accurate.⁸⁸ Today, the grand jury can compel witnesses by subpoena and “it need not comply with the ‘technical procedural and evidentiary rules governing the conduct of criminal trials.’”⁸⁹ This proposed reform would surely help aid in this problem.

⁸¹ Ric Simmons, *Re-Examining the Grand Jury: Is there Room for Democracy in the Criminal Justice System?* 82 B.U.L. REV. 1, 112 (2002).

⁸² J. Thomas Sullivan, *Brady-Based Prosecutorial Misconduct Claims, Buckley, and the Arkansas Coram Nobis Remedy*, 64 ARK. L. REV. 561, 563 (2011).

⁸³ *Id.*

⁸⁴ Sullivan, *supra* note 77, at 330.

⁸⁵ *Id.*

⁸⁶ *Costello v. United States*, 350 U.S. 359, 364 (1956).

⁸⁷ Decker, *supra* note 2, at 356.

⁸⁸ Washburn, *supra* note 1, at 2356.

⁸⁹ Decker, *supra* note 2, at 349.

REINSTATING WITNESS AND DEFENDANT'S RIGHTS

Other changes that could be made in limiting the prosecutor's presenting power might include reinstating some of the defendant's currently deprived constitutional rights. The Supreme Court has held that various rights that would otherwise be protected are not protected in the grand jury proceedings.⁹⁰ This includes: the right to have counsel present in the grand jury room, the right to receive various warnings, the right to receive transcripts, as well as the regulations involving the type of evidence a prosecutor must and must not present.⁹¹

Because witnesses can be compelled to appear and testify before a grand jury, they should be able to have a right to counsel while testifying.⁹² This right could be instituted constitutionally or statutorily.⁹³ Much like grand jurors, witnesses are usually not well informed about the law and are at the disposal of the prosecutors, relying on them for information on the law. Even though witnesses have no constitutional right or statutory right to counsel in the grand jury room, they are nevertheless subject to criminal charges if they perjure themselves.⁹⁴ This might also be the case if they commit contempt of court or obstruct justice. Witnesses are very vulnerable to criminal charges and are required to take an oath without counsel present to legally advise them.⁹⁵ If we really inquire into what the witness faces when forced to testify, the need for reform is evident. A lay witness does not realize when legal issues arise, and they usually do not know how to assert those rights or privileges.⁹⁶ Although counsel can be present outside the room, this is not very effective in asserting those rights because their counsel is not in the room with them at the time of the testimony.⁹⁷ It is seemingly unfair to the witnesses to be forced to testify against their will. Going back to the

⁹⁰ Decker, *supra* note 2, at 367.

⁹¹ *Id.*

⁹² Decker, *supra* note 2, at 368.

⁹³ *Id.*

⁹⁴ Decker, *supra* note 2, at 369.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

bigger picture, this would most likely persuade the presenting prosecutor away from engaging in misconduct.⁹⁸

There could still be limits placed on the attorney who is present in the grand jury room. Without undue delay, the witness should be permitted to make small comments quietly to his attorney. However, neither the witness nor the attorney would be permitted to make loud objections, address the grand jurors, or actively participate in the proceedings.⁹⁹ The interaction would be extremely minimal and quiet as to not disrupt the flow of the presentation to the grand jurors nor to stop efficiency or to possibly turn the proceeding into a mini trial. At minimum, the attorney should be allowed to attend and take notes as a “standard legal procedure.”¹⁰⁰ This would aid the attorney in representing the witness because they would know exactly what was said in the proceeding without having to rely on the witness’s memory or the prosecution. Having to rely on the witness to convey material information can become problematic because witnesses are often nervous during testimony. They also might make comments or statements that they cannot remember. They may make statements that could be detrimental to them in the long run. Permitting attorneys to sit in on the proceedings could also be an additional check on this loosened secrecy requirement by the Court stepping in to intervene if attorneys become too disruptive, cause undue delay, unnecessary comments are being made, cumbersome litigation, or breaches in the secrecy component.¹⁰¹ Some states have implemented the statutory right to counsel, but not most. Even so, the right is still so limited, requiring admonishments or privately retained.¹⁰²

EMPOWERING JURIES

Because the prosecutors have relinquished much of the power that grand jurors historically possessed, the system might be reformed by giving them those powers back.¹⁰³ The grand jurors have more power than they realize and usually do not put their power to good use during the grand jury proceedings. Instead, they follow the prosecutors lead since they are better suited to know the law. Prosecutors would be

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Decker, *supra* note 2, at 371.

¹⁰¹ *Id.* at 369.

¹⁰² *Id.* at 370.

¹⁰³ Valente, *supra* note 3, at 157.

charged in ensuring that the grand jurors fully understand their role as grand jurors. This means requiring them to tell the jurors to participate fully in the proceedings by questioning witnesses when they are testifying before the grand jury.¹⁰⁴ This would be beneficial to both the prosecutors and to the investigation. It would perhaps bring out more exculpatory evidence that might not have otherwise been revealed had the grand juror not fully participated in the process. Getting the grand jurors to be more engaged would be a great start for reform.

ELIMINATING THE SECRECY REQUIREMENT

Eliminating the secrecy requirement would virtually be eliminating the grand jury system entirely. This is so because there are only two prongs to the system: the secrecy and the investigative aspect. However, the time has come to seriously reconsider how the system is structured. The secrecy requirement has not been conducive to transparency and sustaining public trust. Instead, it has produced tension and a hostile relationship with police. If the grand jury system were to be reformed in this way, it could lead to a “corrective process promoting more informed, independent grand jury decisions as a result of public criticism.”¹⁰⁵ This is not to say that the entire investigation is to be made public as there are still some parts of investigations that must remain confidential to the public.¹⁰⁶ However, this does not mean that all investigations are to remain concealed.

If not entirely eliminating the secrecy requirement, perhaps the government could allow the proceedings to be revealed at a later date once the case has been settled.¹⁰⁷ This would give the public some ground for understanding why a case ended the way it did and what took place early in the investigation process. This would improve the transparency of the government and would be a step towards restoring the trust that the public has in the criminal justice system, especially to the African American community who has suffered many senseless police killings without justification for not indicting officers. It would also be presented to the public at a time that would be least detrimental to the investigative process or to interfering with justice. If the

¹⁰⁴ *Id.* at 158.

¹⁰⁵ Futrell, *supra* note 6, at 6.

¹⁰⁶ Futrell, *supra* note 6, at 10.

¹⁰⁷ Valente, *supra* note 3, at 158.

proceedings remain secret throughout the entirety of the case and are only made public following the conclusion, then there is nothing to interrupt or threaten. Exact information does not have to be released such as identification, which should always remain protected.¹⁰⁸

What is going to be crucial to restoring public trust is detecting problems at the core of investigations.¹⁰⁹ Internal review processes would help lower the risk associated with secret investigations and would be essential in getting citizens to trust the police to do what they are charged to do as agents of the state.¹¹⁰ Citizens are concerned with objectivity, treatment, and procedural justice in exploring the question of public trust and determining if internal investigation processes are suitable for a trustworthy police force.¹¹¹

DISSOLUTION OF THE GRAND JURY SYSTEM

Because of the time, money, and energy invested in the grand jury system, reform might amount to complete dissolution. The system is somewhat repetitive in terms of what is being determined. In some states, such as Texas, a grand jury makes a probable cause finding as well as a magistrate judge. It becomes redundant. Eliminating the grand jury system and allowing a probable cause hearing to be heard before a judicial officer would not only strip the prosecutors of some of their power in persuading the lay persons, but it would also cut back on time and resources.¹¹² Grand jurors who report approximately two to three times a week, depending on the state, will not have to be housed, fed, or take off from work. They are also paid a small stipend, so that money could be allocated to some other need. Because of their extreme dependence on the prosecutor, grand jury jurors are hardly exercising their primary function of finding probable cause. The prosecutor has so much control, and it can hardly be said that the jurors are qualified to even assess probable cause because of their lack of

¹⁰⁸ Valente, *supra* note 3, at 159.

¹⁰⁹ Brian A. Jackson, *Respect and Legitimacy- A Two Way Street: Strengthening Trust Between Police and the Public in an Era of Increasing Transparency*, 1-2 (2015),

https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE154/RAND_PE154.pdf.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Decker, *supra* note 2, at 366.

legal understanding.¹¹³ For this reason, dissolution might be the best reform option.

CONCLUSION

The senseless police shootings have triggered the need for criminal justice reform. The brutality that America has witnessed almost first-hand demands a need for reform. While reformation in the grand jury system will not solve all the problems that exist in the American criminal justice system, it is a start at becoming more transparent and restoring American trust in its officers and the integrity of the system. The recent decline will not be repaired without some sort of improvement, which might even require virtually eliminating the secrecy aspect of the grand jury system. After all, keeping information secret that might later become public serves no function at all. It only forestalls the information and the answers that Americans deserve.

¹¹³ ROGER A. FAIRFAX, JR., *GRAND JURY 2.0: MODERN PERSPECTIVES ON GRAND JURY* 241 (2011).

CELEBMARKS: THE BATTLE OF TRADEMARKS BETWEEN CELEBRITIES AND SMALL BUSINESS OWNER AND HOW WE PROTECT THE LITTLE GUYS

Dreu Dixon

I. INTRODUCTION

Beyoncé Giselle Knowles-Carter has owned the past few decades as one of the music industry's most recognizable stars. Her business empire encompasses fashion, music streaming services, entertainment, and various other lucrative avenues. Forbes magazine previously named Beyoncé one of its Most Powerful Women citing that her On the Run Tour II, along with husband Jay-Z, grossed roughly \$5 million per night, raking in over \$250 million.¹ With a track record of endless success, it comes as no surprise that the Beyoncé empire protects their personal brand. In the same boat lies Kimberly Kardashian who is a reality star and one of the world's largest fashion and social media influencers. Kardashian is a registered owner of numerous trademarks in different forms of her name.² These are just two of the world's largest entertainers who constantly look after their brand persona and stand to profit from it.

Celebrities are adamant about defending their brands and names which are essentially their livelihoods. An author on trademark law interviewed trademark owners and discussed how they consciously compare their brand to their "baby."³ Trademark law gives them protection from imitators and other names or logos that are confusingly similar.⁴ For years, courts have struggled to balance what it means to use a name or likeness commercially and which aspects of that person's likeness are protected against appropriation. Beyoncé, through her company, BGK Trademark Holdings, LLC, owns

¹ See Forbes, Beyoncé Knowles Profile, FORBES (Jan. 1, 2020), <https://www.forbes.com/profile/beyonce-knowles/#103cef043ce7>.

² See Kim Kardashian West, Registration No. 4,978,865.

³ See JESSICA SIBLEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERY DAY INTELLECTUAL PROPERTY 156-60 (2015).

⁴ 15 U.S.C. § 1125a (2012).

multiple trademarks related to various products and services, ranging from clothing and accessories to cosmetics and charitable services.⁵ For example, the trademark of her name alone covers “photographs, posters, stickers, clothing, and entertainment services in the nature of live performances by a female entertainer.”⁶ In addition to this mark, Beyoncé has trademarked her children’s names and has entered into a legal dispute over the name of her eldest daughter, Blue Ivy Carter.

But can names really be trademarks? Has society deemed celebrity children names or other marks ‘worthy’ to not be imitated or duplicated for commercial use? Since today’s culture is fully encompassed with becoming famous based off one’s brand and monopolizing from that, these questions may be difficult to answer. However, it is presumed that one is entitled to use their name for branding. In this Note, I will refer to these marks as Celebmarks. In a time where individuals become overnight celebrities with social media and where people make substantial profits from their personal brands, we should consider the reasons we have to not protect the individual persona as a trademark. Laura Heymann frequently notes the ways in which brands are conceptualized as personalities by both marketers and customers.⁷ Some people deem celebrities as greedy and selfish when profiting from avenues that are not quite commercial uses. If noncelebrities may have the same opportunity, why shouldn’t normal citizens be able to prevent imitators from profiting off their individual persona? Is the industry running out of trademarks?

Today, society places emphasis on influencers. An industry which is the business of paying ordinary individuals and famous people to use or promote a brand; influencing is one of the hottest trends. The use of Instagram, Twitter, and YouTube has created streams of revenue for people with a large following to endorse and earn profits from their likeness. The entire objective of an influencer is to magnify the values their brand stands for, which means trademarks are their calling card.⁸

⁵ See BGK Holdings, Registration No. 91234467.

⁶ *Id.*

⁷ See Laura A. Heymann, Naming, Identity, and Trademark Law, *Ind. L.J.* 381, 384 (2011).

⁸ See Forbes Coaches Council, 14 Personal Branding to Help You Grow Your Influence, *FORBES* (Jan. 2, 2020),

Many people, such as Stacey Dogan, who is a professor of law and leading scholar in intellectual property, have explored the thin line between personal brand publicity and trademark publicity. Dogan states, “the right of publicity gives people the right to control the use of their names and likenesses for commercial purposes.”⁹ Dogan deems a problematic claim when it comes to trademarks, involves false endorsements where the use of one’s likeness draws attention away from the celebrity and amplifies their reputation and association with the particular use.¹⁰ Courts have properly limited the use of one’s likeness in regard to plausible justifications concerning the First Amendment considerations.¹¹ Section 43(a) of the Lanham Act creates a civil cause of action against any person who identifies his or her product in such a way as to likely cause confusion among consumers or to cause consumers to make a mistake or to deceive consumers as so association of the producer of the product with another person.¹² The scope of 43(a) also permits celebrities to vindicate property rights in their identities against allegedly misleading commercial use by others.¹³

On the other hand, celebrities and influencers have attempted to trademark everyday phrases or phrases that have been in use for years. Advocates for free speech have grown increasingly vocal about the prevalent trademarking of everyday words. Recently, LeBron James submitted an application to trademark the phrase “Taco Tuesday” and failed.¹⁴ James shared viral videos of his family’s taco nights on Instagram which featured ‘guests’ such as teammate, Anthony Davis, and he even coined “Taco Tuesday” t-shirts. He sought to monetize the videos and phrases by filing trademark applications, but the U.S. Patent and Trademark Office (USPTO) turned down his attempt by stating the phrase was “a commonplace

<https://www.forbes.com/sites/forbescoachescouncil/2018/03/20/14-personal-branding-tips-to-help-you-grow-your-influence/#5e74925f7ab7>.

⁹ See Stacey L. Dogan & Mark C. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 STAN. L. REV. 1161, 1191-93 (2006).

¹⁰ *Id.*

¹¹ *Id.*

¹² 15 U.S.C. § 1125a (2012).

¹³ See *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003).

¹⁴ See ESPN, LeBron’s ‘Taco Tuesday’ trademark filing denied, ESPN (Sept. 11, 2019), https://www.espn.com/nba/story/_/id/27596576/lebron-taco-tuesday-trademark-filing-denied.

term, message or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment.”¹⁵ Additionally, the PTO noted the similarity of “Taco Tuesday” to “Techno Taco Tuesday,” a trademark already in existence held by an entertainment company in Las Vegas.¹⁶ The office stated that “merely omitting some of the wording from a registered mark may not overcome a likelihood of confusion.”¹⁷ This discussion is the tip of the iceberg in the topic of trademark congestion and whether there are enough marks to go around.

Trademark law continues to expand to include new types of endorsements by celebrities as well as social media influencers. In this Note, I will explore the moral undertones of money marks in the traditional trademark doctrine as well as the congestion of these trademarks. In Part II, I will explore what constitutes a Celebmark and its balance of personal identity and trademark identity, as well as the registration process of trademarks. Part III will discuss what exactly a Celebmark is and scenarios in which a celebrity has won a trademark dispute over a small business owner and vice versa. Finally, Part IV will discuss the moral undertones in granting or denying these types of marks.

II. WHAT CONSTITUTES A CELEBMARK?

A. TRADEMARKING PROCESS AND REQUIREMENTS

A trademark must meet three basic requirements to qualify for registration with the USPTO.¹⁸ First, the trademark must be used in commerce and not for the sole purpose of not allowing others to utilize the mark.¹⁹ Second, the trademark must be “distinctive as used on or in connection with the applicant’s goods in commerce, with proof of

¹⁵ See Mihir Zaveri, LeBron James Tried to Trademark ‘Taco Tuesday,’ but Got Swatted Away, ESPN (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/style/lebron-taco-tuesday-trademark.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 15 U.S.C. § 1051 (2012).

¹⁹ *Id.*

substantially exclusive and continuous use.”²⁰ Finally, the mark must not violate the Lanham Act.²¹ In short, the Lanham Act creates a civil cause of action against “any person who, on or in connection with any goods or services, words, terms, names, symbols, or devices used in commerce, identifies his or her product in such a way as to likely cause confusion among consumers or to cause consumers to make a mistake or to deceive consumers as so association of the producer of the product with another person.”²² “An express purpose of the Lanham Act is to protect commercial parties against unfair competition.”²³

There is no secret formula to creating the perfect trademark, nor is there a specific form required. There are registered trademarks that are moving images²⁴, phrases²⁵, sounds²⁶, scents²⁷, shapes that are three-dimensional²⁸, and even exteriors.²⁹

In order to protect either the already-registered mark or the celebrity attempting to own the mark, there are basic requirements for anything to be recognized as a trademark.³⁰ First, the trademark must be distinctive, meaning it is perceived by consumers as an indication of the source of a product or service.³¹ Second, the mark must be used

²⁰ 15 U.S.C. § 1052 (2012).

²¹ *Id.*

²² 15 U.S.C. § 1125a (2012).

²³ *See* *Waits v. Frito-Lay, Inc.* 978 F.2d 1093, 1097 (9th Cir. 1992).

²⁴ *See*, for example, Registration No.

4,129,188, in which the mark “consists of a moving image mark, consisting of an animated sequence showing a series of rectangular video screens of varying sizes, that fly inward in whirlwind fashion, as if from the viewer’s location, toward the center of the viewer’s screen, where they coalesce into the word ‘HULU.’ The drawing represents three (3) stills (freeze frames) from the animated sequence.” *Id.*

²⁵ *See, e.g.*, JUSTDOIT, Registration No. 1,875,307.

²⁶ *See*, for example, Registration No. 2,519,203, in which the mark consists of “the sound of a deep, male, human-like voice saying ‘Ho-Ho-Ho’ in even intervals with each ‘Ho’ dropping in pitch.” *Id.*

²⁷ *See*, for example, Registration No. 3,143,735, for office supplies, in which “[t]he mark consists of a vanilla scent or fragrance.” *Id.*

²⁸ *See*, for example, Registration No. 3,457,218, for the shape of the original iPhone.

²⁹ *See*, for example, Registration No. 1,045,615, for the exterior design of a McDonald’s restaurant.

³⁰ *See* J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 16:22 (5th ed. 2018).

³¹ *See* William McGeeveran, *SELFMARKS*, 56 HOU. L. REV. 333, 338-40 (2018).

in a commercially specific way.³² Finally, it must not violate the Lanham Act, which reflects the autonomy and privacy of trademarks.³³

B. DISTINCTIVENESS AND USE

Trademark law deems distinctiveness as a term used to describe one of the basic requirements for protection, that a potential mark is “used by a substantial number of people as a symbol to identify and distinguish our source” of commercial services or goods.³⁴ Some trademarks are considered presumptively distinctive, such as APPLE, GOOGLE, and AMAZON.³⁵ When it comes to false endorsement and trademark infringement cases circling around this distinctiveness requirement, Courts have concluded that the mark is the celebrity’s persona.³⁶ “A celebrity’s persona is neither descriptive of a good or service nor ‘fanciful’ within the meaning of trademark law.”³⁷ For example, the persona of Meadowlark Lemon³⁸ (Harlem Globetrotter), his image, name, and jersey number does not describe a good or service sold in commerce.³⁹ In today’s pop culture, an example would be either former football player Tim Tebow’s gesture trademark application or LeBron James’ “Taco Tuesday” phrase trademark application.

In 2012, Tim Tebow’s representatives trademarked his signature prayer stance, ensuring that no one would be able to profit from this common global gesture ever again, and coined the gesture to be called “Tebowing.”⁴⁰ This was a move where Tebow would go down on one knee and hold a clenched fist against his forehead while praying during football games.⁴¹ Tebow stated that his representatives filed on his behalf not for financial gains of commercial use but to control how it

³² 15 U.S.C. § 1052 (2012).

³³ *Id.*

³⁴ McCarthy, *supra* note 30, at 68.

³⁵ *Id.*

³⁶ See *Lemon v. Harlem Globetrotters Int’l, Inc.*, 437 F. Supp. 2d 1089, 1094 (D. Ariz. 2006).

³⁷ *Id.* at 1095.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Associated Press, *Jets’ Tebow trademarking ‘Tebowing’*, WASHINGTON POST (Oct. 20, 2012), <https://www.washingtonpost.com/news/2012/oct/20/jets-tebow-trademarking-tebowing/>.

⁴¹ *Id.*

is used and to make sure the use is proper⁴² This serves as an example of a Celebmark that is not necessarily distinctive but was a common gesture by people all over the world. So, why would the USPTO approve the mark's application? It does not seem fair for a public figure to control the use of a common gesture even if he does claim it is not for financial gain.

The other requirement for a trademark to be protected is that an owner demonstrates the mark's commercial use.⁴³ According to McCarthy, "Courts have uniformly extended this same use requirement to unregistered marks as well, both because use gives the public the opportunity to form an association between the mark and its source, and because a demand of use prevents competitors or opportunists from claiming bad-faith blocking marks that are not actually found in the market."⁴⁴

But what does it mean to use a Celebmark in commerce? Every day, we use our slang, names, and voices, and many of these uses could be viewed as commercial, especially if they are associated with our professional activities.

III. WHAT ARE CELEBMARKS?

A. CONTENT

The line between personal identities and trademark identities has become blurred in these new times of social media influence and multi-million-dollar celebrity endorsements. Celebrities are adamant about defending their names, including their children's names, which essentially writes their checks. In similar situations, celebrities capitalize on already-registered trademarks that are registered to small business owners who, in contrast, will not nearly make as many profits as the opposing celebrity. This most common scenario is where the line between personal brand publicity and trademark publicity comes into play. In litigation, Plaintiffs often plead overlapping violations of trademarks, unfair competition law, publicity rights, and privacy rights without much distinction between them.⁴⁵ Many publicity rights

⁴² *Id.*

⁴³ See McCarthy, *supra* note 34.

⁴⁴ *Id.*

⁴⁵ See *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 448 (S.D.N.Y. 2008).

statutes, such as that of New York, explicitly delineate the attributes of the personal identity they cover.⁴⁶ “Section 50 of the New York Civil Rights Law makes it a misdemeanor to use ‘for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person.’”⁴⁷ Generally, an individual’s name, picture, or voice, which constitute a trademark identity and are given publicity rights and are therefore, protected.

Publicity attributes to an individual’s name, picture, phrases, or voice and, more broadly, an individual’s unusual singing style.⁴⁸ Specifically, for this essay, I will delineate Celebmarks as those by celebrities or influencers, which somewhat attribute to their likeness, that “little guys” own the rights to. Examples include the trademark FEYONCE, and HE PUT A RING ON IT, by an online business selling clothing and merchandise for fiancés. Additionally, Beyonce’s attempt to trademark her eldest daughter, Blue Ivy’s name. Kylie Jenner’s attempt to trademark the phrase “rise and shine” after the viral video of her singing it to her daughter, Stormi. Finally, LeBron James’ attempt to trademark the “Taco Tuesday” phrase from the viral videos of his family’s taco nights.

B. WHAT MAKES A GOOD MARK?

When it comes to Celebmarks, what is considered a good mark? Many celebrities and influencers have applied to the USPTO to register marks that are confusingly similar to others already registered and live marks. These parties have tried to coin new words or phrases to avoid conflicts. Still, it is obvious that given the limits of communication and the new age of social media, the parties tweaking phrases and words by using shorter, more easily pronounced, and more familiar marks will enjoy a great competitive advantage over already registered marks owned by seemingly less-famous parties. These celebrities, small business owners, and other trademark applicants run into problems when considering the Lanham Act, citing trademark infringement. “To prove trademark infringement under [the Lanham Act], a plaintiff must satisfy a two-prong inquiry: first, the plaintiff

⁴⁶ *Id.* at 451.

⁴⁷ *Id.*

⁴⁸ *See* *Midler v. Ford Motor Co.*, 849 F.2d at 460, 463-64 (9th Cir. 1988).

must show that its mark is entitled to protection; and second, the plaintiff must show that ‘defendant’s use of the mark is likely to cause consumers confusion as to the origin or sponsorship of the defendant’s goods.’”⁴⁹ There is a vast selection of literature on choosing a good branding strategy, but none of the advice is consistent. There is an agreement on the general principles of making a “good” trademark.⁵⁰

The first principle is that unique brand names, phrases, or words are significantly more effective than those that lack uniqueness.⁵¹ A word or phrase may be unique in that only one person or business uses the name in commerce or is significantly different from any other phrase in the industry.⁵² The latter is the type of unique word or phrase on which marketing strategists typically focus.⁵³ A classic example of this type of mark is NIKE because if an imitator attempts to make a similar mark, it will be ineffective.⁵⁴ Owners of unique trademarks enjoy a considerable competitive advantage.

The second general principle is that common English words, when used arbitrarily, are more competitively effective than coined words.⁵⁵ If a coined word is used, it tends to be more useful when it recalls a brand-appropriate word more familiar to the consumer.⁵⁶ For example, INTEL makes consumers recall the word “intelligent;” VERIZON

⁴⁹ Knowles-Carter v. Feyonce, Inc., 347 F. Supp 3d 217, 224 (S.D.N.Y. 2018).

⁵⁰ See *Midler*, 849 F.2d at 463; see also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100–01 (9th Cir. 1992); see also *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 61–62 (2d Cir. 2001) (stating that a song could be capable of serving as a trademark representing an individual’s goods and services under the Lanham Act, but rejecting the claim in the case at hand).

⁵¹ See ELI ALTMAN, *DON’T CALL IT THAT* 73 (2d ed. 2016); ALEXANDRA WATKINS, *HELLO, MY NAME IS AWESOME: HOW TO CREATE BRAND NAMES THAT STICK* 24–25 (2014).

⁵² *Id.*

⁵³ See Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 112 Yale L. J. 218 (2012).

⁵⁴ *Id.*

⁵⁵ See Barton Beebe and Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HAR. L. REV. 948, 954 (2018).

⁵⁶ Sharon Begley, *StrawBerry Is No BlackBerry: Building Brands Using Sound*, WALL ST. J. (Aug. 26, 2002, 3:47 PM), <https://www.wsj.com/articles/SB1030310730179474675> [<https://perma.cc/327A-FC9Z>]; see also KIM ROBERTSON, *STRATEGICALLY DESIRABLE BRAND NAME CHARACTERISTICS*, J. CONSUMER MARKETING, Fall 1989, at 61, 63–65.

calls to mind “horizon,” and VIAGARA calls to mind “Niagara,” “aggression,” or vitality.”⁵⁷

Finally, the general principles state that shorter trademarks are more effective than their longer counterparts.⁵⁸ Baddeley, who is a psychologist known for his research on memory, emphasizes that recognition and recall are better for shorter words and shorter brand names.⁵⁹ A common rule of thumb is that trademarks should be no longer than two syllables or seven letters.⁶⁰ Baddeley emphasizes that this explains why marketing strategists use abbreviations that consumers try to simplify to make it easier to remember. For example, COKE for COCA-COLA, KFC for KENTUCKY FRIED CHICKEN, and WORD for MICROSOFT WORD.⁶¹

C. CELEBRITY WINS

Many celebrities succeed in registering their names as trademarks, including but not limited to Taylor Swift, Rihanna, Justin Bieber, Kylie Jenner, and many more. However, not only must the name act as a

⁵⁷ *Id.*

⁵⁸ See, e.g., ALAN D. BADDELEY, NEIL THOMSON & MARY BUCHANAN, *WORD LENGTH AND THE STRUCTURE OF SHORT-TERM MEMORY*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 575, 584 (1975) (finding when controlling for word frequency that five-syllable words are harder to recall than one-syllable words)

⁵⁹ See Baddeley at 582.

⁶⁰ Margot Bushnaq, *How to Choose a Business Name, Part 6: Length*, BRANDBUCKET (July 10, 2013), <https://www.brandbucket.com/blog/how-to-choose-a-business-name-length> [<https://perma.cc/9WCA-4388>]; Marty Zwilling, *10 Rules for Picking a Company Name*, FORTUNE (Dec. 15, 2011), <http://for.tn/2px3Bq2> [<https://perma.cc/ZD6Z-WZYA>]. But see ELI ALTMAN, *LONGER IS BETTER AND DON'T INVENT WORDS: PICKING THE RIGHT NAME FOR YOUR BUSINESS*, THE GUARDIAN (Aug. 22, 2017, 2:00 AM), <https://www.theguardian.com/small-business-network/2017/aug/22/longer-is-better-and-dont-invent-words-picking-the-right-name-for-your-business> [<https://perma.cc/2WYV-TWJN>] (“One of the most common requests branding professionals receive for new names is that they must be ‘short and memorable.’ This is a contradiction in terms. Short names are inherently less memorable. There’s less to grab onto. Longer names give you more freedom of expression; are easier to trademark and find URLs for; and are generally more memorable. Short names are . . . short. Look at the depth of feeling that can be created with slightly longer names: Comme Des Garçons, Outdoor Voices, Teenage Engineering, 23 and Me.”).

⁶¹ See Beebe at 957.

source identifier, but it cannot cause a likelihood of confusion with another already-registered mark.⁶² The USPTO usually refuses a celebrity's application if a celebrity's name causes a likelihood of confusion with another mark in an application or registration.⁶³

For example, in 2007, Paris Hilton got into a legal dispute with the Hallmark Company over a birthday card, including her signature phrase, "That's hot."⁶⁴ The Hallmark Company tried to bring a protected-speech argument, and the Court found in Hilton's favor.⁶⁵ Under California law, "when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as an affirmative defense that the work is protected by the First Amendment since as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."⁶⁶ The application of the defense depends upon "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."⁶⁷ The Court stated that Hallmark could not properly invoke this defense because Hilton's likeness was one of the very reasons the birthday card was created.⁶⁸ This serves as one example where the celebrity has protected their name and capitalized off of their brand.

D. 'LITTLE GUY' WINS

On the other hand, for example, Kylie Jenner submitted an application to the USPTO for the mark KYLIE JENNER for commercial use in clothing items and merchandise.⁶⁹ The application was refused due to the registered mark KYLEE, which was also for

⁶² 15 U.S.C. § 1051 (2012).

⁶³ *Id.*

⁶⁴ See Alex Heigl and Sophie Dodd, From Beyonce's Fight for 'Blue Ivy' to Kylie vs. Kylie: 10 Big Celebrity Trademark Battles, PEOPLE (Sept. 25, 2019), <https://people.com/celebrity/celeb-trademark-battles/>.

⁶⁵ See *Hilton v. Hallmark Cards*, 599 F.3d 894, 899 (9th Cir. 2010); THAT'S HOT, Registration No. 3,209,488.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Kylie Jenner, Registration No.

apparel items owned by Mimo Clothing Corp.⁷⁰ The USPTO explained that the different spellings of KYLIE and KYLEE were not sufficient enough to distinguish the marks because the terms are phonetically equivalent.⁷¹ Similarity in phonetics may be sufficient to support a finding that trademarks are confusingly similar.⁷² Additionally, the USPTO not only protects against the senior user being confused as the source of the junior user's mark but also protects against the junior user being perceived to be the source of the senior user's goods. The examining attorney explained that consumers could mistakenly believe that KYLIE JENNER clothing and KYLEE clothing originate from the same source when this is not the case.⁷³

IV. MORAL IMPLICATIONS OF CELEBMARKS – PROTECTING THE BRAND

Many consumers believe that celebrities are greedy and even selfish when it comes to making money based on clothing, merchandise, and other areas, including trademarks. To begin, we must challenge our current conception of moral rights as protecting a unique category of celebrities' and small business owners' interests. To dive deeper, we should explore a comparison between moral rights and trademark law. Trademark law should regulate and protect commercial goods, and on the other hand, moral rights regulate societal rights. A couple of principals that deal with moral rights in trademark law are the First Sale Doctrine and the Lanham Act.

A. TRADEMARK AND THE FIRST SALE DOCTRINE

As I previously stated, celebrities, influencers, and essentially all Americans are protective of their brands and their property, which is their livelihoods. Keeping this in mind, it is not surprising that Trademark law allows trademark holders to control the use of their marks if they are, in fact, distinct and the first type of that mark. The Courts have stated that an owner of a trademark, "by virtue of its

⁷⁰ See Alex Heigl and Sophie Dodd, *From Beyonce's Fight for 'Blue Ivy' to Kylie vs. Kylie: 10 Big Celebrity Trademark Battles*, People (Sept. 25, 2019 6:00 PM), <https://people.com/celebrity/celeb-trademark-battles/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

ownership, has a right to compound or change what it bought, to divide either the original of the modified product, and to sell it so divided.”⁷⁴ Thus, the First Sale Doctrine was coined.⁷⁵ Additionally, a trademark only gives the right to prohibit the use of it so far as to “protect [the owner’s] goodwill against the sale of another’s product as his.”⁷⁶ Celebrities and other trademark owners have the right to enjoin its use of its trademark because they have the right to protect their brand.⁷⁷ The First Sale Doctrine seems like a proper defense for the business owners who register trademarks before a celebrity or influencer applies to register the same phrase, image, or word as it relates to their brand. Recent cases have shown this defense is not absolute.

This doctrine is not an absolute defense because the aftermarket activity can constitute trademark infringement due to a likelihood of confusion on the part of the trademark owners and the business of the imitated image, product, etc.⁷⁸ For example, in *Knowles-Carter v. Feyonce, Inc.*, the Court held that “the degree of similarity between marks is ‘a key factor in determining likelihood of confusion.’”⁷⁹ This case turned on trademark infringement and false endorsement. False endorsement in trademark law is when a product or service somehow implies that a celebrity endorses that product or service.⁸⁰

To assess the likelihood of confusion between the two marks, the Court looks at factors such as considering the strength of the senior mark, the degree of similarity between the two marks, the proximity of the products in the marketplace, the likelihood that the prior owner of the senior mark will bridge the gap, actual confusion, the presence of bad faith on the part of the defendant, the quality of the defendant’s products, and consumer sophistication.⁸¹

⁷⁴ See *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924).

⁷⁵ *Id.*

⁷⁶ See *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97-98 (1918).

⁷⁷ *Id.*

⁷⁸ 15 U.S.C. § 1051 (2012).

⁷⁹ See *Knowles-Carter v. Feyonce, Inc.*, 347 F.Supp. 3d 217, 225 (S.D.N.Y. 2018).

⁸⁰ See Anthony, *Celebrity Trademarks*, The Law Office of Vincent Lotempio Blog (Jan. 8, 2021), <https://www.lotempliolaw.com/2019/03/blog-2/celebrity-trademarks/>.

⁸¹ *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

These cases are just a few examples of how substantial alterations of an original name, image, or phrase may no longer be sold with the original trademark and is therefore not an absolute defense to the First Sale Doctrine.

On the other hand, there have been cases where the First Sale Doctrine has acted as a viable defense for trademarks that are already registered. For example, Beyoncé and her husband Jay-Z have been in a legal dispute with a wedding planner who uses the name Blue Ivy for her wedding planning business.⁸² In that suit, Beyoncé and Jay-Z have been attempting to trademark the name of their eldest daughter, Blue Ivy, but that name is already registered to a small business owner.⁸³ In that dispute, Beyoncé declared her daughter a “cultural icon” and expressed her desire to build a brand for her child.⁸⁴ Additionally, she coined her a “mini style star” with an extensive following as she is the eldest daughter of two of the biggest celebrity moguls of the century.⁸⁵ On the contrary, the wedding planner alleged that Beyoncé and Jay-Z had no intentions of using the Blue Ivy trademark for business purposes.⁸⁶ The wedding planner filed an opposition to the Carter’s suit claiming she had previously applied to trademark “Blue Ivy,” which is the name of her company, in 2012, before the birth of the Carters’ daughter.⁸⁷ The Carters have claimed that “consumers are likely to be confused between the wedding planning business and Blue Ivy Carter, the daughter of two of the most famous performers in the world, is frivolous and should be refused in its entirety.”⁸⁸ In the end, the First Sale Doctrine has worked in favor of the wedding planner

⁸² See Shanicka Anderson, *7 Revelations from Beyoncé’s Blue Ivy Lawsuit*, OK MAGAZINE (Sept. 25, 2019), <https://okmagazine.com/photos/7-revelations-from-beyonce-blue-ivy-lawsuit/>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Alex Heigl and Sophie Dodd, *From Beyoncé’s Fight for ‘Blue Ivy’ to Kylie vs. Kylie: 10 Big Celebrity Trademark Battles*, PEOPLE (Sept. 25, 2019 6:00 PM), <https://people.com/celebrity/celeb-trademark-battles/>.

⁸⁸ Alex Heigl and Sophie Dodd, *From Beyoncé’s Fight for ‘Blue Ivy’ to Kylie vs. Kylie: 10 Big Celebrity Trademark Battles*, PEOPLE (Sept. 25, 2019), <https://people.com/celebrity/celeb-trademark-battles/>.

because the already-registered mark preceded the birth of Blue Ivy, and therefore, her mark is the dominant one.

B. TRADEMARK CONFUSION AND THE LANHAM ACT

As previously stated, the Lanham Act creates a civil cause of action against any person who, on or in connection with any goods or services, words, terms, names, symbols, or devices used in commerce. The Act also identifies his or her product in such a way as to likely cause confusion among consumers or to cause consumers to make a mistake or to deceive consumers as to the association of the producer of the product with another person.⁸⁹ An “express purpose of the Lanham Act is to protect commercial parties against unfair competition.”⁹⁰ The “likelihood of confusion” standard is essential to prove trademark infringement in an action under the Lanham Act.⁹¹ The standard requires that an infringer cause “confusion, mistake, or deception with regard to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”⁹² Reframing the trademark owner’s intent from one of personal interests to trademark ones is used through the Lanham Act and the “likelihood of confusion” standard.⁹³ The Lanham Act also intertwines with false endorsement defenses. As stated previously, under Section 43 of the Lanham Act, using a mark that is “likely to cause confusion as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, or services,” may result in liability.⁹⁴ Thus, under federal law, using a mark that somehow causes the consumer to believe that a product or service sponsored or endorsed by a source when it is not can result in liability. Imagine spending thousands of dollars on perfecting a trademark along with the perfect brand, and your competitors can use your trademark on their product or merchandise and profit from these sales. This could hurt the goodwill or association that consumers have with your brand. In the

⁸⁹ See 15 U.S.C. 1125(a)

⁹⁰ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

⁹¹ See *Id.*

⁹² 15 U.S.C. § 1125(a)(1)(A) (2012).

⁹³ *Id.*

⁹⁴ *Id.*

Paris Hilton example previously stated, consumers were most likely purchasing the birthday cards believing they were associated with the Paris Hilton brand. This confusion in the commercial use of these trademarks is what the First Sale Doctrine and the Lanham Act work to protect.

Specific personal intent is the most commonly disputed intent when dealing with the protection of trademarks.⁹⁵ Commentators have argued that the idea of intent in regard to trademarks is irrelevant as if there were someone to regulate whether an image, word, or phrase is worthy of personal use or pecuniary use.⁹⁶ Intent is impossible to determine.⁹⁷ Then there is the idea of authorial intent, which speaks more to the Lanham Act.⁹⁸ The notion of lack of authorial intent makes sense because trademark owners and creatives mostly build on ideas that have been done before, and it can, and probably should be, open to all sorts of interpretations.⁹⁹ Intent is one of the main aspects the USPTO examines when reviewing trademark applications.¹⁰⁰ Deciphering between personal uses and actual commercial uses is difficult because there is no distinctive formula to determine the intent of a trademark or how it will do in commercial transactions. Small business owners who have already-registered marks such as in the Blue Ivy case previously stated, tend to lean on the defense that the celebrity will intend to use the Celebmark, not for commercial use, but mainly so that no one else will use or profit from the mark and make sure its use is proper in regard to their own standards. While the business owner stands to profit and make their livelihoods from the already-registered mark. The First Sale Doctrine and the Lanham Act stand to protect these already-registered trademark owners from those celebrities, influencers, and other trademark applicants from utilizing the mark.

IV. CONCLUSION

For decades, celebrities, entertainers, influencers, and various other people have used their names and their personal brand in

⁹⁵ See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 298 (2009).

⁹⁶ See *Id.*, supra note 4, at 277-78.

⁹⁷ See Adler at 298.

⁹⁸ See *Id.*

⁹⁹ See *Id.*

¹⁰⁰ *Id.*

commercial trade. However, the new era of Celebmarks lacks protection, wherein the disconnect was extremely noticeable in our social media culture. Trademark law continues to expand to include new types of endorsements by celebrities as well as social media influencers. Much of the work of protecting the interest of individuals in their Celebmarks or normal trademarks and consumers in their non-confusing use has been born outside of the formal trademark doctrine, such as through the appropriation tort, publicity rights, and false endorsement theories of the unfair competition laws. While these celebrities stand to capitalize off their personal brands, some of the aspects of their brand are registered to trademarks owned by smaller business owners.

Today's times have provided protection for these types of conflicts, but the protections are not absolute. The United States Patent and Trademark Office should work on perfecting the line of protection of these types of Celebmarks. This Note has explained the trademark registration requirements, explored what exactly a Celebmark is, considered the protections for both celebrity and small business owners in the constant dispute for trademarks relating to both of their likenesses, and discussed the moral implications behind celebrities taking over the marks. Through all of this, one message is clear: trademark law should constantly change to protect the pockets of both celebrities and smaller business owners.

THE AUTOMATIC ANSWER: HOW COMMON-SENSE GUN CONTROL LEGISLATION AND SUING THE GUN INDUSTRY CAN PREVENT MASS SHOOTINGS

Chelsey Johnson

INTRODUCTION

When people think of America, several things come to mind. Baseball, apple pie, and mass shootings. This dark and unfortunate American pastime has woven itself into the fabric and framework of American life. Several times a year, Americans across the country hold their breath as they hear, or witness news of another mass tragedy unfold in front of them. Twenty-two massacred inside of a Walmart in Texas.¹ Twenty-seven murdered in an elementary school in Connecticut.² Forty-nine slain in a nightclub in Florida.³ Fifty-eight killed outside a Las Vegas concert.⁴ Over the past decade, American mass shootings occur so frequently and regularly that the country has been identified and marred by them. Even though America experiences a high number of mass shootings, these tragedies have not received the national response and immediate attention that other epidemics have. Shootings repeatedly occur, and the reaction by Congress and other lawmakers remains anemic. Deemed the “thoughts and prayers” response, a capable Republican-controlled Senate and White House have refused to institute and implement major laws to help prevent or solve this major issue. Different policies have been suggested to ensure that these tragedies are prevented and occur less frequently. Yet, the power of the National Rifle Association (NRA) and gun manufacturers remains no match to the families, victims, and Americans’ cry for gun reform. Hiding under the veil of the Second Amendment, gun advocates are firm in their position that Americans have an unlimited right to guns and that laws and policies regulating gun rights will serve no use. Yet, several policies such as red flag laws, extensive background checks, and ceasing production of certain types of guns

¹ *Mass Shootings in the US Fast Facts*, CNN, Aug. 19, 2019, <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

and ammunition could drastically reduce these tragedies. Additionally, several families and victims of mass shootings not only have to grieve with loss, but also have to deal with the inability to receive justice. Families and victims of these mass shootings are given no legal recourse, as laws such as the 2005 Protection of Lawful Commerce in Arms Act (PLCAA)⁵ prevent most lawsuits against gun manufacturers. The inability to sue gun manufacturers gives them a license to release dangerous weaponry into the marketplace with impunity. The inability to hold gun manufacturers accountable allows access to guns for individuals who should not be able to have guns. Additionally, this leaves the families and victims no ability to seek or recover for their loss and no voice or power to advocate for themselves.

The obsession with gun culture, the influence of the gun industry, and the malfeasance of Congress requires a radical resolution to protect the lives of millions of Americans. To drastically reduce mass shootings, lawmakers need to pass common sense gun control policies that incorporate comprehensive protections and regulations, and gun manufacturers should be able to be sued to reduce the incidents of these types of shootings.

THE OCCURRENCE OF MASS SHOOTINGS

Many scholars have linked the rise of mass shootings with the rise of hate groups and propaganda. The upward trend of the shootings shows that a viable solution is needed to stop the massacres from occurring. In 2015, there were more mass shootings than days in a calendar year.⁶

Mass shootings are defined as any event in which four or more victims (not including the shooter) are murdered in a public location with firearms.⁷ The attacks are becoming far more frequent, and they are getting deadlier.⁸ “More than half of the shootings have occurred

⁵ Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2005).

⁶ Anthony W. Metzler, *Triggered: Mass Shootings, Smart Gun Technology and The Search For Solutions*, 19 J. HIGH TECH. L. 103, 116 (2018).

⁷ James Densley and Jillian Peterson, *Opinion: We analyzed 53 years of mass shooting data. Attacks aren't just increasing, they're getting deadlier*, L.A. TIMES, Sep. 1, 2019, <https://www.latimes.com/opinion/story/2019-09-01/mass-shooting-data-odessa-midland-increase>.

⁸ *Id.*

since 2000 and 33% since 2010.”⁹ The deadliest years yet were 2017 and 2018, and [2019] is shaping up to rival them, with at least 60 killed in mass shootings, 38 of them in the last five weeks.¹⁰ “The death count per shooting is also rising dramatically.”¹¹ “Sixteen of the twenty most deadly mass shootings in modern history occurred in the last twenty years, eight of them in the last five years, including the 2017 Las Vegas shooting that claimed an unprecedented fifty-eight lives.”¹² “For decades, the toll of mass shootings has risen steadily.”¹³ “During the 1970s, mass shootings claimed an average of 5.7 lives per year.” “In the 1980s, the average rose to fourteen.”¹⁴ It reached 21 in the 1900s and then increased to 23.5 in the 2000s.¹⁵ We have seen a sharp increase in this decade,¹⁶ with an average of 51 deaths per year.¹⁷

CURRENT LAWS AND CASES ABOUT GUN RIGHTS

Since America’s founding, there have been debates over the role of guns in American lives. During America’s evolution as a country, the debate about guns and the Second Amendment has remained a divisive topic. Ironically, the court case to discuss the Second Amendment came as a result from a massacre. In *United States v. Cruikshank*, the 1876 Supreme Court discussed the Second Amendment for the first time as a response to the Colfax massacre, a political conflict in Louisiana where a white militia used firearms to kill 100 African American men.¹⁸ Even during such violent times in America’s history, the Supreme Court did not establish the Second Amendment as an independent right, but a right that could not be infringed on by the federal government.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ James Densley and Jillian Peterson, *Opinion: We analyzed 53 years of mass shooting data. Attacks aren’t just increasing, they’re getting deadlier*, L.A. TIMES, Sep. 1, 2019, <https://www.latimes.com/opinion/story/2019-09-01/mass-shooting-data-odessa-midland-increase>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *United States v. Cruikshank*, 92 U.S. 542, 542 (1876).

Many gun advocates argue that the Second Amendment provides Americans the ability to fundamentally own guns. This position stems from their interpretation of the language of the Second Amendment in the Bill of Rights. The Second Amendment of the Bill of Rights reads, “a well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”¹⁹ The argument for guns as an individual right is contingent upon the belief that the 27 words in the amendment provide a constitutional right.²⁰ The Supreme Court stated that it was a fundamental right in *District of Columbia v. Heller*.²¹ The Court further stated, “Heller enumerates the right to bear arms under the Second Amendment at the federal level.”²² Justice Antonin Scalia, who wrote the opinion, stated that to “keep or bear arms” expressly means the Constitution grants the right to have the firearm in one’s possession.²³ “The Court turned to the Framers’ intent in drafting the Amendment and decided that the intent in arming the public was to form a ‘well-regulated militia’ to protect against a tyrant’s standing army.”²⁴ Additionally in *McDonald v. City of Chicago*,²⁵ the Court held that the right to gun ownership applies to the states. *District of Columbia v. Heller*²⁶ and *McDonald v. City of Chicago*²⁷ were two pivotal cases that served as transitions into the belief that the Second Amendment is an individual, fundamental right. With these two cases, a precedent was established about guns in the country.

Although the Supreme Court established gun rights as fundamental, the Court did establish that limitations could be set. Cases like *Hightower v. City of Boston* “assert that the States have discretion to decide who can maintain a license to own a firearm.”²⁸ “The Court ruled that states also have authority to establish the qualifications that a potential gun owner must possess.”²⁹

¹⁹ U.S. CONST. amend. II.

²⁰ Metzler, *supra* note 6, at 111.

²¹ Metzler, *supra* note 6, at 112.

²² Metzler, *supra* note 6, at 112.

²³ Metzler, *supra* note 6, at 112.

²⁴ Metzler, *supra* note 6, at 112.

²⁵ See *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²⁶ See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁷ See *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²⁸ See *supra* note 6, at 113-14.

²⁹ *Id.*

“Restrictions, such as prohibition of certain aftermarket modifications and models of firearms, have also been placed throughout the country over gun ownership.”³⁰ The Court has "recognized that the right to keep and bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”³¹ Mass shootings have provided an even greater need to place limitations upon gun rights.

CURRENT LAWS AND CASES ABOUT GUN MANUFACTURER LIABILITY

After a mass shooting, mass litigation follows. Many victims and families sue several different parties as defendants, including the city, building owners, or security. Several successful tort causes of action are asserted against these different defendants. However, despite the successful claims against these defendants, an almost impenetrable defendant to add to these claims are gun manufacturers. Despite the frequency and horrific nature of these mass shootings, families and victims of mass shootings have recently been unsuccessful in suing gun manufacturers. “Crime victims have sued firearms manufacturers under a variety of theories, including strict liability for abnormally dangerous activities, strict product liability, negligence, public nuisance, and deceptive trade practices.”³² “While some tort claims against firearms retailers for selling guns to criminals have been successful, almost all such claims against firearms manufacturers have failed.”³³ The theory behind many of the suits lies on the premise that gun manufacturers sell dangerous products to the masses and should be held liable for the dangers and products they produce, sell, and market. In particular, many of the suits against the manufacturers deal with the fact that the guns sold are high-capacity military assault rifles, the lack of background checks when selling the guns, and the questionable and controversial marketing. Throughout the last decade, gun manufacturers have been shielded from most

³⁰ *Id.*

³¹ *See Id.* at 125.

³² Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 6-7 (2000).

³³ Lytton, *supra* note 32.

litigation after these mass shootings with the aid of the Bush Administration's 2005 Protection of Lawful Commerce in Arms Act.

The PLCAA was enacted in 2005 following pressure from the firearms industry, including the NRA.³⁴ It came after a series of lawsuits were brought against major gun makers, including a groundbreaking 1999 case in Brooklyn federal court, . . . where a jury determined for the first time that more than a dozen gun manufacturers were liable in shootings due to negligent distribution practices.³⁵ In 2005, when gun-maker Sig Sauer, then known as Sigarms, pleaded with the Republican-controlled Congress to pass the PLCAA, it said it had been fighting for its “very survival” against a multitude of “junk and frivolous lawsuits” since 1998.³⁶ After then-President George W. Bush signed the law, the NRA's Wayne LaPierre said the Second Amendment is “probably in the best shape in this country that it's been in decades.”³⁷ Since then, the law has deterred families from targeting gun makers in court even when they feel the manufacturers were the biggest culprits in a loved one's death.³⁸ Families in mourning have many reasons for pursuing litigation after tragedies. A hunger for justice propels most of them.³⁹

Recent mass shootings have challenged the law, and families and victims are suing gun manufacturers under the law's six narrow exceptions. As these mass shootings have increased in frequency and severity, gun advocates are calling for a reformation of the Act to allow

³⁴ Melissa Chan, *Just About Everyone but the Gun Maker Gets Sued After a Mass Shooting*, TIME, Aug. 20, 2019, <https://time.com/5653066/mass-shooting-lawsuits/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

manufacturers to be able to use in order to curb the negligent behavior of the gun industry.

REASON FOR LACK OF GUN REFORMATION AND THE SOCIAL TREND FOR GUN CONTROL

The NRA continues to be the biggest and most powerful lobbying force against gun control. Beholden to the NRA and gun lobbyists, Republican lawmakers have been negligently resistant to any type of common-sense gun control or gun regulation. As these mass shootings occur, there continues to be more resistance towards gun control. The NRA's influence stems from its massive ability to market to its base and at one point change the framework of thinking many Americans have about guns. Many critics argue that the NRA, and not the Constitution, established the idea that gun ownership is a fundamental right. Through its massive political lobbying machine, the NRA has poured millions into the campaigns of Republicans and pro-gun law makers to eliminate any and all gun legislation. From the Background Expansion Act to the Brady Handgun Prevention Act, the NRA has successfully killed several legislations that attempted to regulate guns in America. The premise behind the NRA's actions stems from one motive. Protect the business of gun selling at all costs, no matter the consequences.

Today's National Rifle Association is essentially a de facto trade association masquerading as a shooting sports foundation. So the NRA does the bulk of lobbying for the industry.⁴⁰ You know, you hear the NRA talking about their opposition to an assault weapons ban and their opposition to raising the age for the purchase of a long gun from 18 to 21 years of age.⁴¹ They try to frame it in terms of freedom and history and sort of the sacred nature of firearms.⁴² The reality is that it is bad for the industry to pass those laws.⁴³ If you ban

⁴⁰ *All Things Considered: How America's Gun Industry Is Tied To The NRA*, NATIONAL PUBLIC RADIO (Mar. 13, 2018 8:21 PM).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

assault weapons, that wipes out what they rely on as a recent profit center.⁴⁴ If you raise the age for purchase of a long gun, which includes assault rifles, then you add three more years to the timeframe before a young person can buy a gun.⁴⁵

The NRA's fight against gun control is completely centered around profit making. "Upon hearing of the Assault Weapons Ban, before being introduced to the Senate, the NRA went on the offensive with ads decrying gun control and arguing the best answer to gun violence in schools is to have armed guards or police on campus."⁴⁶

This lack of action by lawmakers is even more concerning, considering that the majority of Americans want common sense gun control. Polls taken just days after the Vegas shooting, and one month before the Sutherland Springs shooting, in October of 2017, placed gun control support at 60 percent.⁴⁷ However, polls taken the first week of March 2018, a month after the Parkland Shooting, and five months after the Sutherland Springs church shooting, showed numbers unseen since 1993.⁴⁸ Those in favor of stricter gun laws rose to 67 percent.⁴⁹ This trend towards gun control and regulation shows that the public has a strong belief that legislation should be implemented to prevent these tragedies.

PROPOSAL: A COMPREHENSIVE REFORM AND SOLUTION TO MASS SHOOTINGS: PREVENTATIVE MEASURES AND LEGAL RECOURSE OPTIONS

In order to provide families, victims, and the public with adequate and common-sense gun control, a comprehensive and holistic approach must be taken to prevent and eliminate mass shootings. Gun control should include a plethora of laws and policies

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See Id.*

⁴⁷ *See* Rachel Treisman, *Poll: Number Of Americans Who Favor Stricter Gun Laws Continues To Grow*, NATIONAL PUBLIC RADIO, (Oct. 20, 2019, 7:01 AM), https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow_

⁴⁸ *See Id.*

⁴⁹ *See Id.*

that protect the public and are created in their best interest. Additionally, allowing families and victims the ability to sue gun manufacturers would greatly influence the types of weapons and ammunition manufacturers release, and their behavior towards marketing to the public. By allowing families to sue and by creating a duty to the public, gun manufacturers will be more committed to protecting people and preventing these tragedies. The theory behind many of the suits lies on the premise that gun manufacturers sell dangerous products to the masses and should be held liable for the dangerous products they produce, sell, and market. In particular, many of the suits against the manufacturers deal with the fact that the guns sold are high-capacity military assault rifles, the lack of background checks when selling the guns, and the questionable and controversial marketing. To prevent mass shootings, a legislative proposal that contains background checks, red flag laws, assault weapons ban, and smart guns should be implemented to ensure the safety of the American public.

BACKGROUND CHECKS

A major and pivotal step in stopping mass shootings from occurring is requiring universal background checks. Mandatory and extensive background checks are critical in helping prevent mass shootings. These background checks ensure that guns do not get into the hands of those who should not have them. Whether it be due to criminal activity or mental health issues, these background checks need to be extensive enough that it provides enough information to determine if an individual is fit for a gun. Research by these scientists has shown that stronger firearm policies and stronger laws regulating permits have a direct correlation with decreased gun violence.⁵⁰ Even when background checks are performed, there are still several loopholes that allow mass shooters to obtain guns. One of the holes includes that state and local law enforcement, as well as mental health authorities, are not required by federal law to report prohibiting events

⁵⁰ Megan B. Mavis and Matthew D. Shapiro, Note, *Second Amendment Interpretation and a Critique of the Resistance to Common-Sense Gun Regulation in the Face of Gun Violence: This is America*, 46 W. ST. L. REV. 85, 118 (2019).

that would prevent an individual from gaining access to a firearm.⁵¹ Therefore, the prohibitions would not appear even if a background check were conducted.⁵² “In 2019, a man fatally shot seven people and wounded twenty-five others in West Texas.”⁵³ “The shooter previously failed a criminal background check when trying to purchase a gun, yet loopholes in our nation’s gun laws allowed him to bypass the background check system altogether and obtain the AR-style weapon used in his deadly attack from an unlicensed seller who wasn’t required to run a background check.”⁵⁴ Background checks must be fully comprehensive and allow data from law enforcement and medical professionals to ensure that only qualified individuals obtain them.

RED FLAG LAWS

The newest form of legislation that has shown progress in preventing gun violence is Red Flag Laws. Red Flag Law bill allows “a family member, law enforcement officer, or law enforcement agency may petition the court for an ‘Extreme Risk Protection Order’ (ERPO) that would require the subject of the petition to surrender his or her firearms to law enforcement for a period of time.”⁵⁵ There are several reasons as to how Red Flag Laws can prevent gun violence. “Most gun violence victims have close connections to the shooter and therefore generally consist of family members, spouses, or domestic partners.”⁵⁶ “FBI data indicated that 54% of mass-shootings in the United States involve domestic or family violence.”⁵⁷ “Furthermore, that same FBI study group indicated that 42% of these mass-shooters exhibited warning signs.”⁵⁸ “This combination would seem to indicate that family members could prevent gun violence if they were given the

⁵¹ *Background Checks*, GIFFORDS LAW CENTER, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Joseph Frydenlund, *Colorado’s Proposed “Red Flag” Gun Bill: Extreme Risk Protection Orders*, DENV. L. REV. F., July 28, 2019, <https://www.denverlawreview.org/dlr-online-article/colorados-proposed-red-flag-gun-bill-extreme-risk-protection-orders>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

ability to limit the potential shooter's access to firearms."⁵⁹ Red Flag Laws allow family, friends, and people within the community to report an individual to the authorities when there is a belief that they may harm themselves or others.

More than 80% of people who commit a mass shooting, in some way, declare their intent in advance.⁶⁰ Their family or their friends or their social media network are aware that something is going on. And that's where extremists protection orders have had their role.⁶¹ Laws like Red Flag Laws can help significantly by placing these individuals on police officer's radar and restricting their access to guns.⁶² Some argue that these laws violate due process laws and Second Amendment laws and infringe upon a person's constitutional rights.⁶³ Red Flag Laws, also known as extreme risk protection orders, mandate intervention to be taken on a case-by-case basis "where the risk of violence to others or to oneself is judged to be extraordinarily high," Wintemute said.⁶⁴

ASSAULT WEAPONS BAN AND LETHALITY OF GUNS MANUFACTURED

A pivotal piece of legislation for preventing mass shootings is the renewal of the 1994 Assault Weapons Ban. "More recently, automatic and semi-automatic rifles and pistols design for military combat, commonly referred to as assault weapon, have come in for special attention due to their devastating effect in the massacres of

⁵⁹ *Id.*

⁶⁰ Lauren Frias, *Which gun control policies could prevent mass shootings, according to a gun violence expert*, BUSINESS INSIDER, Sept. 14, 2019, <https://markets.businessinsider.com/news/stocks/gun-violence-expert-gun-control-policies-could-prevent-mass-shootings-2019-9-1028524550#extreme-risk-protection-orders-red-flag-laws-2>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

civilian, which has been demonstrated on a number of occasions.”⁶⁵ [T]he Assault Weapons Ban of 1994, was enacted under Title XI as a part of the Violent Crime Control Law Enforcement Act of 1994.”⁶⁶ “This provision banned for ten years the possession of nineteen named assault weapons in several dozen copycat models.”⁶⁷ “In the 1980s, several factors converged to build support for some kind of legal restriction on assault weapons (meaning firearms designed for military use), including spiraling crime rates, the increasing availability of these weapons and the belief that such weapons served no legitimate hunting or sporting purpose.”⁶⁸

A final phenomenon has been the appearance of two classes military style firearms semi-automatic assault gun and sniper rifle.⁶⁹ Historically, surplus military firearms have often found their way onto the civilian market period.⁷⁰ Semi-automatic assault weapons, however, are distinguished by their high ammunition capacity and by design features that facilitate rapid “spray” firing.⁷¹ Most semi-automatic assault weapons are slightly modified versions of guns designed for military use where it is desired to deliver a high rate of fire over a less than precise killing zone, a procedure often called hosing down area.⁷² These gun features include high capacity magazines capable of holding twenty to a hundred rounds and of ammunition and devices that make it easier to point (instead of carefully aim) the gun while rapidly pulling the trigger.⁷³

⁶⁵ Wilbur Edel, *Gun Control: Threat to Liberty or Defense Against Anarchy?* 48 (1995).

⁶⁶ ROBERT J. SPITZER, *THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW* 96 (2001).

⁶⁷ *Id.*

⁶⁸ *Id.* at 97.

⁶⁹ *SUING THE GUN INDUSTRY* 95 (Timothy D. Lytton eds., 2008).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The dangerous nature of the style of guns require that they be taken off the market to the public, due to their destructive ability. Researchers have also shown a correlation between the accessibility of these style of weapons and the destructive mass shootings.

When people in the US were allowed to start buying military-style firearms with high-capacity magazines (which enable shooters to discharge many rounds of ammunition in a short amount of time), the number of people killed in gun massacres — defined as shootings in which at least six people die — shot up 239%.⁷⁴ By contrast, after the 1994 ban on assault weapons went into effect, the number of gun massacre deaths decreased by 43%, as researcher Louis Klarevas reported in his book "Rampage Nation."⁷⁵ Most of the deadliest mass shootings in recent US history involved a military-style weapon with a high-capacity magazine.⁷⁶ "Nearly every mass shooting illustrates that large-capacity magazines can increase the death toll and that forcing a shooter to reload more frequently can provide opportunities for counter-attack by those around."⁷⁷ "Accordingly, a ban on high-capacity magazines is absolutely essential if one wants to reduce the loss of life from active-shooter scenarios."⁷⁸

⁷⁴ Aylin Woodward, *Gun control really works. Science has shown time and again that it can prevent mass shootings and save lives.*, BUSINESS INSIDER, Aug. 6, 2019, [https://www.businessinsider.com/gun-control-research-how-policies-can-reduce-deaths-2019-](https://www.businessinsider.com/gun-control-research-how-policies-can-reduce-deaths-2019-8?utm_source=msn.com&utm_medium=referral&utm_content=msn-slideshow&utm_campaign=bodyurl#after-congress-let-a-1994-ban-on-assault-weapons-expire-in-2004-gun-massacre-deaths-skyrocketed-9)

[8?utm_source=msn.com&utm_medium=referral&utm_content=msn-slideshow&utm_campaign=bodyurl#after-congress-let-a-1994-ban-on-assault-weapons-expire-in-2004-gun-massacre-deaths-skyrocketed-9.](https://www.businessinsider.com/gun-control-research-how-policies-can-reduce-deaths-2019-8?utm_source=msn.com&utm_medium=referral&utm_content=msn-slideshow&utm_campaign=bodyurl#after-congress-let-a-1994-ban-on-assault-weapons-expire-in-2004-gun-massacre-deaths-skyrocketed-9)

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

IMPROVING THE SAFETY OF GUNS AND DESIGN OF GUNS

As gun manufacturers, it is essential that the weapons they designed are created in a way that helps prevent mass shootings. Everything from the trigger to the magazine should be designed and crafted in a way that puts the public and the community's safety first. Similar to car manufacturers, the gun industry should actively think about mass shootings and criminal activity when designing and manufacturing.

All firearms are capable of killing and...virtually all firearms are designed to do so.⁷⁹ But not all firearms are capable of killing with equal efficiency. Specific design features affect lethality.⁸⁰ Differences in ammunition capacity, caliber (bullet size), and concealability among firearms translate into greater or lesser likelihood that a firearm will be present in an encounter and, if it is, a greater capability to deliver lethal force in terms of the number of wounds and their seriousness.⁸¹ In short, design affects lethality.⁸² Unlike many other consumer industries that grow along with population growth, the firearms industry in the United States has faced saturated, declining markets for at least the last twenty-five to thirty years.⁸³ The gun industry has used design change to stimulate its markets, and those changes have consistently been in the direction of greater lethality.⁸⁴ This deliberate enhancement of lethality contributes directly to the criminal use of firearms and to death and injury resulting from firearms use.⁸⁵ On the other hand, the industry has not been equally innovative in designing or as eager to incorporate safety devices such

⁷⁹ See *supra* note 69.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

as automatic load indicators, child-proof triggers, and magazine disconnects.⁸⁶

REFORMATION OF TORT LAWS AND THE PLLCA ACT TO HOLD GUN MANUFACTURERS LIABLE

Litigation is powerful and possess the ability to reshape and reframe society. From *Brown v. Board of Education* to *Obergefell v. Hodge*, the judicial system has changed and evolved societal thinking since the Founders constitutionally created the judicial branch. Not to be abused, the power to sue is a sacred right given to Americans that have legitimate legal issues. This right should neither be exploited nor abused. Gun litigation by families that have seen their loved ones murdered by these destructive rifles given to mass murderers is not abusive. It serves as justice. These lawsuits serve as tools to ensure that it never happens again. It ensures that when people walk into Walmart, concerts, restaurants, or schools, they no longer experience, or fear being involved in a tragedy. When products are deemed too dangerous, they are removed from public access. Weapons that have the ability to kill massive amounts of people in seconds should not be available to the public. Lawsuits against massive industries like the tobacco and gun industry work and are effective not because they appeal to their moral compass. Rather, they hit and attack the very element that caused them to produce such negligent and reckless products in the first place---money. This underlining greed is what controls these types of manufacturers, and they must be challenged legally to create effective change.

“The tort system can play an essential role in current efforts to regulate the firearms industry.”⁸⁷ “Tort liability can complement legislative regulation, providing gun sellers and manufacturers with incentives to take reasonable measures to prevent gun sales to criminals, instead of looking for legal ways to increase them.”⁸⁸

“Although guns in this country are exempt from most consumer product safety standards, they are subject to a body of laws

⁸⁶ *Id.*

⁸⁷ *See supra* note 32, at 5.

⁸⁸ *Id.*

regarding their sale.”⁸⁹ “These laws are intended to keep ‘lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price to pay in danger for us all.’”⁹⁰

“No one benefits from frivolous lawsuits.” “But holding manufacturers liable for the misuse of their products, experts say, would incentivize them to make firearms safer.”⁹¹ “If pillows caused fatalities at that level, those companies would be bankrupt.”⁹²

⁸⁹ Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & POL'Y 67, 104 (2002).

⁹⁰ *Id.*

⁹¹ Sean Gregory and Chris Wilson, *6 Real Ways We Can Reduce Gun Violence in America*, TIME 100, Mar. 22, 2018.

⁹² *Id.*

MUNICIPALITIES IN LAWSUITS

A new wave of city-suit litigation attempts to hold the gun industry accountable for the negligent design and distribution of its products and is forcing the industry to implement changes in the way it does business.⁹³ While these reforms are not a panacea, they mark an important first step towards altering the way gun manufacturers and retailers conduct their trade and demonstrate that the industry has the means to prevent the sale of guns to criminals and other prohibited purchasers.⁹⁴ The industry's abject failure to implement even the most basic of preventative measures is due in large part to the fact that the industry has been exempt from common law tort liability for too long.⁹⁵ Despite knowledge that it contributes to the underground criminal gun market, and despite the ability to implement design and distribution changes that would stem the tide of guns into this market, the industry has taken no action.⁹⁶ Since the rise of city suits against the gun industry, however, the special status enjoyed by the industry has begun to change.⁹⁷ Recent litigation by cities, municipalities, and one state, however, seeks to hold the industry accountable for failure to provide reasonably available safety devices that would save lives and failure to implement even minimal restrictions on the sale of its products to prevent easy access to guns by minors and criminals.⁹⁸

As calls for gun control increase from the public, new cases rise pointing towards relief for victims and families. In *Remington Arms Co v. Soto*, families and victims of the Newton mass shooting sued Remington Arms Co. under an exception to the PLLCA for its

⁹³ Bhowmik, *supra* note 89, at 122.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

advertising of the AR-15 rifle used in the shooting.⁹⁹ The plaintiffs in the lawsuit claim that Remington's controversial advertising of the gun caused and contributed to their injuries and the death of their loved ones.¹⁰⁰ In a fierce legal battle, the case was recently denied review by the U.S. Supreme Court, ultimately giving the families and victims the ability to sue in the lower courts.¹⁰¹

Many watched the Supreme Court hear oral arguments for *NYS Rifle and Pistol Ass'n v. New York*, a case involving a repealed New York City law that banned its citizens with a premise license from traveling with their handguns unless it was to a shooting range or to receive repairs.¹⁰² Many waited in anticipation as to whether the court would hear the case and provide more understanding for the interpretation of the Second Amendment.

CONCLUSION

Gun laws and litigation against gun manufacturers are crucial in stopping the atrocities of mass shootings. With legislation that encompasses several different policies and places proper restrictions on gun ownership and control, these tragedies can be less frequent and less severe. Additionally, suing the gun industry can provide a catalyst for change. Stopping these mass shootings is a national priority. These senseless acts of violence need to be addressed through policy and litigation.

⁹⁹ See *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2019).

GAMBLE-BOXES AND MICRO-THEFT-ACTIONS: WHY LOOT BOXES AND MICROTRANSACTIONS SHOULD BE BANNED FROM VIDEO GAMES

Wesley Okereke

ABSTRACT

The video game industry is one that has been in existence for nearly half a century. However, as the industry continues to expand in both scale and in revenue, the practice of game companies including “loot boxes” and other forms of predatory microtransactions into their games poses a new threat to the continued growth of the video game industry.

While the implementation of these microtransactions has yielded millions of dollars in revenue for companies like Electronic Arts (“EA”) and Ubisoft, the increasingly popular trend of companies including microtransactions in their games has done significantly more harm than good to the average consumer. The implementation of microtransactions allows gaming companies to release incomplete games at full retail price (usually \$60). The companies riddle the games with loot boxes and other exploitative microtransactions. This practice is, in turn, allowing game companies to exploit the emotions of their consumers and induce them to spend hundreds of dollars on these microtransactions. Due to the increasing prevalence of loot boxes and other microtransactions in multiple genres of gaming, the practice has now become one of the most hotly contested issues in the video game industry.

The purpose of this note is to discuss in detail why loot boxes and other exploitative microtransactions should be banned altogether, and this note is organized into five parts. Part I provides insight to the storied history of the video game industry and how it rose to its dominance in American culture today. Part II explains, in detail, what microtransactions are, the three types of microtransactions, and the largely negative effects that they have had on the gaming industry in recent years. Part III illustrates the connection between loot boxes and gambling, as well as why loot

boxes should be banned. Part IV presents case law that highlights the recent controversies over gaming companies' use of loot boxes and other microtransactions in their products. Lastly, Part V provides alternative ways for developers to monetize the additional content they provide, without the randomized use of loot boxes and other microtransactions with similar functions.

I. THE HISTORY OF VIDEO GAMES

The video game industry has not been around very long. The inception of video games dates back to the 1950s, but one of the most popular video games to ever be commercially released came in the 1970s. "Pong" released in 1972, and it was created by Allen Alcorn and the gaming company known as Atari¹. "Pong" made its initial appearance on a console known as the "Magnavox Odyssey," which was the world's first home gaming console.² Although "Pong" was a simple table tennis game on a large arcade machine, its existence was groundbreaking at the time, and the commercial success of the game helped establish what is now known as the video game industry.³

Riding on the success of "Pong," years after its release, Atari later released the Atari 2600 home console in 1977. This was not only one of the first gaming consoles in the video gaming era, but it was also one of the first consoles to have multi-colored games.⁴ Additionally, the release of the Atari 2600 boosted the popularity of home consoles even further, and its release ultimately helped usher in the next generation of gaming.⁵

From 1977 to 1982, the video game industry was a controlling force in pop culture, and newly formed gaming companies like Activision began to flood the video game market with hundreds of new games. Although some would argue that the games produced during this time period were low quality, consumers continued to purchase these games for their home consoles, and it appeared that the video game industry showed no signs of slowing down. However, in 1983,

¹ *Pong*, Wikipedia (Jan. 3, 2020)

https://en.wikipedia.org/wiki/Pong#Sequels_and_remakes.

² TOM CHATFIELD, *FUN INC.: WHY GAMING WILL DOMINATE THE TWENTY-FIRST CENTURY* 19 (Pegasus Books 2011).

³ MARK WOLF, *VIDEO GAMES AROUND THE WORLD* 593 (The MIT Press 2015).

⁴ History.com Editors, *Video Game History* (Jun. 10, 2019),

<https://www.history.com/topics/inventions/history-of-video-games>,

⁵ *Id.*

the video game industry experienced a major crash due to the surplus of low-quality, glitchy, and largely overhyped games that had been released in the years prior.⁶ The number of consumers that purchased video games back in the 1970s dropped dramatically. The 1983 crash ultimately forced a number of video game companies to file for bankruptcy, and for the next two years, the video gaming industry would become stagnant⁷. However, the industry experienced a major resurgence in the 1980s when a company known as Nintendo released both the “Nintendo Entertainment System” and the “Game Boy” in 1985 and 1989, respectively.⁸ After these consoles were released, the video game industry had re-asserted its dominance in pop culture, with games like “Super Mario Bros.” and “Street Fighter” receiving their own live-action adaptations in American theaters.⁹ Although most of the games released at this point were generally successful as two-dimensional games, video game developers and companies sought to “push the envelope” as to what a home console could do, flirting with the idea of developing fully three-dimensional (“3D”) games. This idea eventually came to fruition in 1995 with the release of both the “Sega Saturn” and “PlayStation,” as well as the “Nintendo 64” in 1996.¹⁰ Once the 21st Century rolled around in 2000, 3D gaming had become the norm, and for the next five years, the video game industry was reaching new heights. Fast forward to recent times, many experts believe that the era of “modern gaming” started in 2006, with the releases of the “Xbox 360,” “PlayStation 3,” and the “Nintendo Wii.”¹¹ By the time these three consoles were released, the video game industry had grown into a multi-billion-dollar industry, and unlike the 1980s, there were no signs of the industry slowing down in its growth. By the late 2000s, video games had now become a staple of American culture, with even the Supreme Court recognizing video games as a form of free speech that qualifies for First Amendment protection.¹²

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ History.com Editors, *Video Game History* (Jun. 10, 2019), https://www.history.com/topics/inventions/history-of-video-games_

¹² *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 788 (2011).

However, it is in this same era of gaming where one of the most hotly contested innovations in video games was introduced.

II. A CLOSER LOOK AT MICROTRANSACTIONS AND THEIR EFFECTS ON THE VIDEO GAME INDUSTRY

Back in late 2016, EA had announced that “Star Wars Battlefront II” was in development and that it would release towards the end of 2017. Around this time, Star Wars was considered to be a legendary franchise that was beloved by many, and once the trailer for the game released, it was the most talked about game among the gaming community.¹³ Although EA was a company that had built a reputation of being “money-hungry,” it appeared that the company was committed to developing a Star Wars game that lived up to the high expectations of the previous installment in the series. However, once the game was released in November 2017, consumers immediately discovered that the game was riddled with microtransactions and loot boxes.¹⁴ In fact, some of the most iconic Star Wars characters, such as Darth Vader and Luke Skywalker, who were present in the trailer, were locked behind microtransactions.¹⁵ Although both characters could be unlocked by playing the game normally, it was reported that gamers had to play upwards of at least 40 hours to unlock the special characters for free, and the only way to unlock the characters immediately was to purchase them separately.¹⁶ Due to the excessive use of microtransactions in the game, EA was met with severe backlash from a significant number of consumers and critics.¹⁷ In fact, the negative reception that Star Wars Battlefront II elicited was so severe, that it created a new movement to remove microtransactions from video games.¹⁸ The fallout from Battlefront II’s release could not have been more detrimental to EA, as their company stock dropped 8.5 percent, and the Battlefront franchise had officially fallen into obscurity.¹⁹ It was at this moment in gaming history when things began to take a significant shift, and the use of microtransactions became one of the most controversial topics in the video game industry.

¹³ PRATEEK AGARWAL, PAY TO WIN 3 (2018).

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

Before diving deeper into the history of loot boxes and the controversies that have arisen from them, it is imperative to define what microtransactions are as a whole, and how loot boxes rose to their level of popularity. A “microtransaction” is a type of in-game purchase that gives a player access to exclusive content in the game.²⁰ Microtransactions have also taken many forms over the years, but the most common types of microtransactions are in-game currencies, random chance purchases, such as loot boxes, and in-game items that can provide a significant advantage to a player.²¹ The cost of microtransactions are relatively varied, with some costing only 99 cents and others costing \$99 or more.²²

A. The Video Game Plateau of the Early 2000s

While the video game industry enjoyed a significant boom in the late 90s to early 2000s, things began to slow down, specifically from an economic standpoint. With the recent technological advancements in home consoles, game developers were now capable of producing games of a higher quality than ever before.²³ However, with this increase in quality, the costs of game development during this time had also grown significantly higher than ever before, and gaming companies were struggling to turn major profits on their game titles.²⁴ In fact, by 2008 it was estimated that over “80 to 90 percent” of video games released during this period were “economic failures.”²⁵ The only way that gaming companies could make a sizeable profit from their game was to release it on multiple consoles, which was a costly alternative that only worked for a handful of games.²⁶ Furthermore, while console games were struggling to turn a decent profit for gaming companies, massively multiplayer online (MMO) and mobile games

²⁰ Prateek Agarwal, *Economics of Microtransactions in Video Games*, *Intelligent Economist* (Nov. 19, 2017), <https://www.intelligenteconomist.com/economics-of-microtransactions/>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ CASEY B. HART, *THE EVOLUTION AND SOCIAL IMPACT OF VIDEO GAME ECONOMICS 2* (Lexington Books 2017).

²⁵ *Id.*

²⁶ *Id.*

were turning huge profits in a much smaller market.²⁷ Wanting to replicate the success of mobile and online games in the console realm while also seeking to avoid another crash in the video game industry, gaming companies began to come up with ways they could generate more revenue for their games. This is where the idea of microtransactions eventually began to take shape, and since the discovery of microtransactions, the video gaming industry has steadily grown in overall revenue each year.

B. “Downloadable Content” (DLC) Microtransactions

Downloadable Content (DLC) is a type of microtransaction that provides additional content for a game. This type of microtransaction typically comes in the form of an additional campaign, game mode, or cosmetic item. DLC microtransactions are typically used to prolong the overall lifespan of a video game, as well as to boost the overall sales of a game. One of the first notable DLCs that was released came from Bethesda Studios’ “Elder Scrolls IV: Oblivion.”²⁸ The microtransaction involved in this game was a \$2.50 DLC called the “Horse Armor Pack,” which was a cosmetic item that consumers could purchase for their horses in-game.²⁹ In retrospect, the release of this DLC would appear to be minor because it was only for a cosmetic item that had no effect on gameplay. However, because this DLC was one of the first of its kind, gamers were unsure as to how to react to the release of this content. As a result, the DLC was met with some resistance amongst fans of the game series, but the game was still a commercial success and numerous gamers still purchased the armor pack because of its low cost.³⁰ These types of microtransactions are considered to be the least controversial, because they are simply additions to the game. Furthermore, while gamers are still mostly opposed to the use of microtransactions, they are far less opposed to DLC because these types of microtransactions give them the choice of which additional content they want to add. Today, DLC have become somewhat of an expectation for gamers, particularly for big-name, triple-A gaming franchises like “Call of Duty” and “Borderlands.”

²⁷ *Id.*

²⁸ Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, USG (Oct. 11, 2017), <https://www.usgamer.net/articles/the-history-of-gaming-microtransactions-from-horse-armor-to-loot-boxes>.

²⁹ *Id.*

³⁰ *Id.*

C. “Online Pass” Microtransactions

Around the same time that DLC was introduced to the gaming community, gaming companies sought to address the lost revenue that came from the resale of used video games, particularly games with online multiplayer modes.³¹ To combat this, gaming companies created a microtransaction known as an “online pass.” This type of microtransaction came in the form of a one-time code that was present within the packaging of the game, and use of that code would allow the consumer to access the online functions of the game.³² If a consumer no longer wanted the game, and they sold it to a store or another individual, then that person would have to purchase a new online pass separately, which contained a different code than the one that came with the game originally.³³ The cost of this pass was usually around \$10, and it was most prevalent in EA-published titles such as “NCAA Football 11,” “NHL 11,” and “FIFA 11.”³⁴ Unlike DLCs, this type of microtransaction was met with harsh criticism, mainly because the online pass gave consumers access to modes that were normally included with the game without an additional cost.³⁵ In addition, consumers opposed the online pass because it prevented them from reselling their games to others, as well as renting the game for short periods of time.³⁶ Due to the backlash, EA discontinued online pass microtransactions three years after they introduced them to the industry.³⁷

D. “Season Pass” Microtransactions

Despite the failure of online passes, gaming companies still wished to seek out ways to monetize its games months after its release. In addition, gaming companies noticed that some consumers would not purchase certain DLCs that were separately released. To combat this, gaming companies created what is known as a “season pass,” which is

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, <https://www.intelligenteconomist.com/economics-of-microtransactions/>, (October 11, 2017).

³⁶ *Id.*

³⁷ *Id.*

a type of microtransaction that essentially allows a player to “pre-order” most or all of the future DLCs for a specific game.³⁸ With most console games today costing around \$60, season passes are generally priced at anywhere between \$20-\$30, with some season passes costing even more.³⁹ While consumers are usually given the option to purchase future DLCs separately, they may not know how much the DLC will cost if it were to be purchased on its own.⁴⁰ With this in mind, gaming companies deliberately market season passes in a way that convinces the consumer that they are getting a good deal by purchasing the season pass over individual DLCs.⁴¹ Like DLCs, season pass microtransactions are extremely common in today’s games, particularly ones with multiplayer modes.

E. “Loot Box” Microtransactions

Most of the controversy surrounding microtransactions in video games stems from a type of microtransaction known as “loot boxes.” Simply put, a loot box is an in-game item that gives a consumer certain items within a game. These items include things like costumes, skills, or other specific items within the game.⁴² Loot boxes are developed by using a system known as “random number generation” or “RNG.” With this system, random items are generated from the loot box with varied probabilities. The items generated from these loot boxes are typically separated by rarities, with common items having a higher chance of being obtained from the loot box, and rare items having a lower chance of being obtained.⁴³ In some games, consumers had the option of purchasing more expensive types of loot boxes in order to have a better chance of obtaining rare items. Also, in some games, consumers may have the option of purchasing multiple loot boxes at a discounted price. The overall premise that loot boxes were based upon was simple: spend a little bit of money for a chance to win something rare. This premise was inspired by trading card

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ David Zendle et. al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, 6 R. Soc. Open Sci, <https://royalsocietypublishing.org/doi/10.1098/rsos.190049>, (June 19,2019).

games that were heavily popularized in the 1990s.⁴⁴ The objective of these card games was to collect the rarest cards available, and such cards were primarily obtained via the purchase of card packs at local stores.⁴⁵ These trading card packs would contain anywhere from 5 to 12 cards.⁴⁶ Also, the exact contents of the pack were unknown to the buyer until they paid for and open the pack, adding another layer of mystery and surprise to trading card collecting.⁴⁷ Similar to loot boxes today, these card packs contained a random assortment of cards, with some packs occasionally containing one or more rare cards.⁴⁸ Trading card games eventually grew to be a multi-million-dollar enterprise, with games such as *Magic: The Gathering* and *Pokemon* enjoying the most commercial success.⁴⁹ Once trading card games lost their overall popularity in the 2000s, video game companies and developers sought to implement the randomly generated content that was present in trading card games into their own games.

F. The “Free-2-Play” Business Model

As previously stated, while the video game industry continued to expand exponentially with the release of the Internet and 3D gaming, some video game companies found themselves struggling to afford the increasing development costs of their games.⁵⁰ Due to these financial difficulties, some gaming companies were forced to either greatly reduce the production quality of their games, file for bankruptcy, or be bought out by bigger gaming companies.⁵¹ In order to combat rising costs while also not sacrificing game quality, developers came up with an idea to create games that would be distributed to consumers for free, while also including content that

⁴⁴ Steven Wright, *The Evolution of Loot Boxes*, <https://www.pcgamer.com/the-evolution-of-loot-boxes/>, (December 8, 2017).

⁴⁵ *Id.*

⁴⁶ *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46 (E.D.N.Y. 2000)

⁴⁷ *Id.*

⁴⁸ Wright, *supra* note 44.

⁴⁹ *Id.*

⁵⁰ David J. Castillo, *Unpacking the Loot Box: How Gaming’s Latest Monetization System Flirts with Traditional Gambling Methods*, 59 SANTA CLARA L. REV. 165, 167 (2019).

⁵¹ *Id.*

encourages consumers to spend real money.⁵² This is what is known as the “Free-2-Play” (F2P) business model, and it is one that is used by some of the biggest game developers in the world, particularly mobile game developers.⁵³ For example, *Clash of Clans*, one of the most popular F2P mobile games in the industry, boasted a player base of over 10 million users in 2016.⁵⁴

The idea of loot boxes in video games was first introduced in 2004 by a Japanese F2P game known as “MapleStory.”⁵⁵ In MapleStory, players could obtain an item known as a “Gachapon Ticket.”⁵⁶ This ticket, which was purchased with real money, could be used at a Gachapon machine within the game.⁵⁷ This would generate a random item for the player that varied in terms of rarity. In 2010, the first major Western game to introduce loot boxes to the American video game market was *Team Fortress 2*, another F2P game developed by Valve.⁵⁸ In this game, players could either earn loot boxes through normal progression, or via the purchase of “keys” that would grant them access to a loot box immediately.⁵⁹ The loot boxes introduced in *Team Fortress 2* greatly increased the size of the game’s player base.⁶⁰ This was primarily due to the fact that the content offered in the loot boxes were purely cosmetic and gave no unfair advantage to any player in the game.⁶¹ By the early 2010s, loot boxes proved to be a lucrative way for video game companies to increase their revenue, and the popularity of loot boxes only continued to rise, with games like *Overwatch* generating over 1 billion dollars in revenue from their loot boxes alone.⁶²

⁵² *Id.* at 168.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Loot Box*, Wikipedia, https://en.wikipedia.org/wiki/Loot_box, (last updated December 28, 2019).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Steven Wright, *The Evolution of Loot Boxes*, <https://www.pcgamer.com/the-evolution-of-loot-boxes/>, (December 8, 2017).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Kishan Mistry, *P(l)aying to Win: Loot Boxes, Microtransaction Monetization, and a Proposal for Self-Regulation in the Video Game Industry*, 71 RUTGERS U. L. REV. 537, (2018).

III. WHY LOOT BOXES AND MICROTRANSACTIONS ARE CONTROVERSIAL AND SHOULD BE BANNED PERMANENTLY

Much of the controversy surrounding loot boxes and other forms of microtransactions has many critics and opponents calling for them to be banned altogether, due to the exploitative and unfair ways in which they are implemented into today's video games. One of the main reasons why critics are calling for loot boxes and other microtransactions to be banned is because some believe that loot boxes in particular are a form of gambling that preys on and causes harm to its consumers, particularly adolescents.⁶³ Gambling is defined as the “staking [of] money on uncertain events driven by chance.”⁶⁴ Although gambling is driven primarily by chance, individuals who participate in gambling are particularly attracted to the probabilities of yielding a positive return on their investment.⁶⁵ However, with gambling being a highly addictive activity, some experts have theorized that continued gambling may cause an individual to build a financial and emotional dependence on gambling.⁶⁶ Specifically on the emotional aspect, experts have theorized that pleasure is one of the main bases of human learning.⁶⁷ Naturally, when one opens a loot box or pays money for a certain microtransaction, they may experience a slight rush of pleasure from finally receiving the rare or valuable item that they have been waiting for. Some gamers have even stated that the rush of pleasure or disappointment that comes from opening a loot box is highly addictive, and it may incline them to spend more money.⁶⁸ This type of behavior is also a close parallel to the emotions felt during

⁶³ Zendle, *supra* note 43.

⁶⁴ Sarah A. Hinchcliffe, *Defining the “Defined”—Problem Gambling, Pathological Gambling, and Gambling Disorder: Impact on Policy and Legislation*, 20 BARRY L. REV. 221, 232 (2015).

⁶⁵ *Id.* at 233.

⁶⁶ *Id.* at 242.

⁶⁷ James Paul Gee, *Good Video Games + Good Learning* 10 (Peter Lang Publishing 2007).

⁶⁸ Mistry, *supra* note 57 at 546.

traditional gambling. Once it rises to this level, the player may begin to feel very strong euphoria.⁶⁹

Critics of loot boxes have categorized this type of gambling as “problem gambling.” Problem gambling is a type of gambling that greatly affects one’s physical and mental processes, and could potentially lead to side effects such as depression, bankruptcy, and even suicide.⁷⁰ Due to the presence of loot boxes in video games, as well as adolescents being the primary consumer group of these games, these adolescents tend to be particularly more susceptible to problem gambling.⁷¹ With adolescents still being at the age of impressionability, things like loot boxes and microtransactions in their video games may inspire and introduce them to other forms of gambling, which could cultivate the creation of unhealthy habits and addictions.⁷²

With regard to mobile games, opponents of loot boxes have also argued that loot boxes prey on the younger children that these types of games are marketed towards.⁷³ In fact, Sen. Josh Hawley argued that popular mobile games like “Candy Crush” use loot boxes as a way to encourage addictive behaviors in children, including gambling.⁷⁴ Furthermore, as loot boxes have increased in popularity, developers have implemented numerous techniques that induce consumers to purchase loot boxes.⁷⁵ These techniques include special animations within the loot box when a rare item is potentially being drawn, dramatic music, prize-wheel spinners, and other functions that are designed to increase the suspense of opening a loot box.⁷⁶ While these techniques seem harmless in their application, they are intentionally included within games to entice players to spend more

⁶⁹ Kishan Mistry, *P(l)aying to Win: Loot Boxes, Microtransaction Monetization, and a Proposal for Self-Regulation in the Video Game Industry*, 71 RUTGERS U. L. REV. 537, 546 (2018).

⁷⁰ Zendle, *supra* note 43.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Kevin Webb, *A US Senator is Pushing a Bill to Stop 'Fortnite' and Other Games From Selling Loot Boxes' to Kids. Here's Why Loot Boxes are Causing So Much Panic* (May 9, 2019), <https://www.businessinsider.com/loot-boxes-gambling-illegal-2019-5>.

⁷⁴ *Id.*

⁷⁵ Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 Minn. J.L. Sci & Tech. 77, (2018).

⁷⁶ *Id.* at 87.

money on loot boxes, creating the illusion that the consumer's chances of winning something rare or valuable were higher than they actually were.

On the other hand, gaming companies may argue that the use of loot boxes is not gambling because consumers are receiving in-game items instead of money. In fact, the Entertainment Software Rating Board (ESRB) has declined to classify loot boxes as gambling, stating that "While there is an element of chance in [loot box] mechanics, the player is always guaranteed to receive in-game content."⁷⁷ In making this statement, the ESRB also compared loot boxes to the function of trading card games, emphasizing that the consumer will not always get the item or card that they were looking for.⁷⁸ Critics argue that loot boxes are similar to gambling because it encourages the consumer to continuously pay money for an item they may not receive, despite the item being heavily marketed to them.⁷⁹

In addition to the concerns of gambling and exploitation, critics of loot boxes and microtransactions are so strongly opposed to them because it has inclined developers to release their games in "parts" and strip content that would normally be a part of the full game, in favor of making the consumer pay an additional cost to access the content.⁸⁰ This clearly predatory practice is designed for gaming companies and developers to greatly increase the revenue generated from their games.⁸¹ Lastly, critics of loot boxes and other microtransactions argue that they incentivize consumers to "pay their way to victory" by allowing them to spend an additional amount of money to acquire the same perks and items that another person may have spent hundreds of hours playing to obtain those same perks and items.⁸² It is fairly understood and recognized that not all loot boxes and microtransactions provide some sort of advantage to one player over another. However, the fear amongst critics and some consumers of these games are that microtransactions that provide significant

⁷⁷ Maddie Level, *Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.*, 68 U. KAN. L. REV. 201, 209 (2019).

⁷⁸ *Id.*

⁷⁹ Webb, *supra* note 73.

⁸⁰ Mistry, *supra* note 62 at 543.

⁸¹ *Id.* at 542.

⁸² *Id.*

advantages to certain players will become more commonplace in the industry as time passes, which would further expand the rift between consumers who purchase microtransactions, and those that do not. Overall, the continued use of loot boxes and microtransactions in games poses a serious threat to the future of video games.

Despite all of the controversy surrounding the use of loot boxes, the profits that they generate for gaming companies suggest that they may remain a common practice for years to come, with experts estimating loot boxes to generate over 50 billion dollars in revenue by 2022.⁸³ With the gaming market also set to exceed a net worth of over 160 billion dollars by 2022, gaming companies may be inclined to continue using loot boxes and other microtransactions for the foreseeable future.⁸⁴ Nevertheless, the use of loot boxes in video games continues to be a serious issue in the video game industry, and litigation that has taken place in recent years suggests that the issue of loot boxes will continue to grow in its severity, unless legislation is passed banning the continuation of such an exploitative practice.

IV. LEGAL DISPUTES REGARDING LOOT BOXES AND OTHER MICROTRANSACTIONS

As loot boxes and other forms of microtransactions have become increasingly more common in video games, so has litigation surrounding them. In 2015, a Maryland woman sued Machine Zone Inc., the developers of a game known as *Game of War: Fire Age* (“GoW”) for violation of both California and Maryland statutes, as well as on a theory of unjust enrichment.⁸⁵ GoW is a free-to-play mobile strategy game that is played in real time.⁸⁶ The objective of this game is to “conquer the world” by building resource plots, gathering troops, and leveling up your “hero.”⁸⁷ The amount of time it takes to obtain the items necessary for the game is considerable, but players seeking to advance within the game in a short time are given the option of purchasing in-game currency to speed up their progress.⁸⁸ The virtual currency purchased in the game is used at an in-game slot

⁸³ Level, *supra* note 77 at 209.

⁸⁴ Maddie Level, *Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.*, 68 U. KAN. L. REV. 201, (2019).

⁸⁵ *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d. 457, 459 (D. Md. 2015).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 460.

machine that randomly gives you an item after wagering a certain amount of currency.⁸⁹ The Maryland woman (“plaintiff”) sued Machine Zone Inc. (“defendant”) for her loss of money using the in-game slot machine, alleging that the use of the slot machine was unlawful.⁹⁰

Even though the plaintiff was not successful in her claim due to the court holding that she had suffered no injury, cases like these continued to grow in frequency. In 2016, an Illinois man and a group of others sued Sky Union regarding their game, *Castle Clash*, claiming that the game was based on “chance rather than skill.”⁹¹ *Castle Clash* is another F2P game that encouraged players to purchase “gems” in order to participate in the “Hero Rolls,” which required the player to use gems in order to have a chance to obtain one of the rare heroes within the game.⁹² Like the previous suit, the plaintiffs in this case alleged numerous statutory anti-gambling violations in their own respective states, arguing that the game operated a “slot machine” and that it engaged in unfair competition by encouraging players to spend money on the in-game currencies.⁹³ Similar to the outcome in the previous case, the court denied relief to the plaintiffs, except their reason for doing so was because the plaintiffs received nothing of monetary value in exchange for their in-game purchase, making the basis of their suits incompatible with the anti-gambling statutes that they claimed were violated.⁹⁴

Also in 2016, an Illinois woman sued Double Down Interactive for their online casino games, claiming that the games acted as “unlawful gambling devices.”⁹⁵ However, despite her contention, her case was dismissed because the court believed that the purchase of the microtransactions did not cause the plaintiff to lose anything of monetary value.⁹⁶ Overall, while these cases did not result in relief for the complaining party, they do help to illustrate the growing trend of

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 874 (2016).

⁹² *Id.* at 875.

⁹³ *Id.* at 874.

⁹⁴ *Id.* at 880.

⁹⁵ *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 741 (2016).

⁹⁶ *Id.* at 739.

individuals suing gaming companies for their exploitative use of microtransactions in their games. As loot boxes continue to increase in both popularity and in profit, courts will eventually become pressured to evaluate on a deeper level whether loot boxes and other microtransactions should be classified as an illegal form of gambling.

V. ALTERNATIVES TO LOOT BOXES AND OTHER MICROTRANSACTIONS

Although loot boxes and other forms of microtransactions continue to cause significant controversy, there is no denying that the use of them generates billions of dollars for the video game industry. There are a few possible alternatives that gaming companies can implement into their games without the use of loot boxes and other forms of exploitative microtransactions.

One alternative to the use of microtransactions that gaming companies could implement is one that is already in use. This practice involves making the consumer pay extra for a special edition of the game, except that the additional price that the consumer would pay would give them access to all future DLCs, loot boxes, and other additional content.⁹⁷ By giving consumers the option to purchase future microtransactions in a game ahead of time, it lessens the possibility of the consumer becoming addicted to and exploited by the pervasive use of loot boxes and other microtransactions within the game. Another potential alternative would be to allow companies to place their products within the game, which could generate revenue for the gaming companies.⁹⁸ Functioning in a similar fashion to a traditional advertisement, companies could have specific products placed within noticeable, yet discreet areas within the game.⁹⁹ If done correctly, the inclusion of this alternative would take very little away from the overall gaming experience, while also allowing gaming companies to generate a constant stream of revenue from their games.

⁹⁷ Hadlee Simmons, *7 Possible Alternatives to Loot Boxes in Gaming*, <https://memeburn.com/gearburn/2017/11/7-alternatives-lootboxes-gaming/>, (November 9, 2017).

⁹⁸ *Id.*

⁹⁹ *Id.*

CONCLUSION

Microtransactions have corrupted the integrity and innovation of the video game industry. In an industry that has experienced its fair share of ups and downs from a financial standpoint, microtransactions have served as a much-needed boost to the continued progression of the video game market. In fact, loot boxes and microtransactions have generated billions of dollars for video game companies.

The use of microtransactions in video games today has enabled developers to intentionally create and release games that are devoid of content. Meanwhile, content that would normally be in the original game is now locked behind a pay wall that sometimes costs just as much as the full game alone. While the use of microtransactions started off as a minor addition that only provided cosmetic advantages, it has grown into a predatory practice that has ruined numerous gaming franchises. Judging by how gaming companies have still opted to abuse microtransactions in their games in order to make a quick buck, it is evident that attempting to regulate the use of microtransactions in video games might not prevent gaming companies from employing such exploitative tactics. Thankfully, there are some countries that have taken it upon themselves to ban microtransactions altogether. In fact, Belgium and the Netherlands have already decided to lead the charge in this front, making it illegal for gaming companies to put microtransactions in their games.¹⁰⁰ However, with America being the world's global leader in the video game industry, loot boxes and other forms of microtransactions must be banned within the United States. If not, then we may start to see the beginning of the end for the video game industry.

¹⁰⁰ Webb, *supra* note 59.

IS CONGRESS'S DENIAL OF THE SECOND AMENDMENT RIGHT TO MEDICINAL MARIJUANA CARDHOLDERS SUBSTANTIALLY RELATED TO PREVENTING GUN VIOLENCE?

Joshua Taylor

I. INTRODUCTION

The Second Amendment provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹ Congress enacted, and the lower Courts decided the constitutionality of 18 U.S.C. § 922(g)(3), which states, "It shall be unlawful for any person 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.))"² These Courts applied intermediate scrutiny and also held that one's Second Amendment right is not violated under this statute.³ However, the United States Supreme Court has yet to hear a case on the issue of whether medicinal marijuana cardholders should be prohibited from obtaining a gun license. *McDonald* characterizes the Second Amendment right as fundamental, and direct invasions of fundamental rights are normally subject to strict scrutiny.⁴ Congress directly infringes on one's Second Amendment right by subjecting a marijuana cardholder or user as a felon under Federal law. This takes away an individual's choice of medicine and does not treat those in a similar situation—such as alcohol consumers and legally prescribed opioid users—alike.

In a brief filed with the United States Supreme Court on May 6, 2002, the Department of Justice argued the Second Amendment right to own and possess a firearm is subject to reasonable restrictions to prevent those who are unfit from owning a firearm and to also

¹ U.S. CONST. amend. II.

² 18 U.S.C. § 922(g)(3) (1996).

³ NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 484 (Saul Levmore et al. eds., 20th ed. 2019).

⁴ *Id.* at 483.

restrict possession of firearms normally used to commit criminal acts.⁵ Congress reasoned those who indulge in marijuana are more likely to commit violent crimes when they are under the influence. Congress made these accusations and concluded marijuana should be a Schedule I drug without scientific expert research and the users, legal or illegal have been punished ever since.

II. SAFE CONSUMPTION AND CULTIVATION OF MARIJUANA

A. EARLY USES OF MARIJUANA

Marijuana has played a prevalent role throughout the history of the world. Marijuana has been used in the world's society since at least the seventeenth century.⁶ Early colonists used marijuana as a resource to produce rope, sails, and even clothing.⁷ The use was so incredibly valuable that some of the new American states, such as Pennsylvania, allowed their citizens to use marijuana to pay a portion of their taxes.⁸ Even the Founding Fathers of America were no strangers to this cultivated plant. Thomas Jefferson was the first to receive a United States Patent for a machine, which would assist in the extraction process for cultivating marijuana.⁹ Benjamin Franklin earned a substantial wealth from his innovative ability to use marijuana as a raw material to advance his paper production company.¹⁰ Until 1883, 75-90 percent of all the paper in the world,¹¹ including the United States Constitution, originated from marijuana.¹²

B. EARLY MEDICINAL USES OF MARIJUANA

The early colonists understood marijuana's use could be extended beyond manufacturing and industrial uses. The early

⁵ LOUIS FISHER & KATY J. HARRIGER, *AMERICAN CONSTITUTIONAL LAW* 706 (Carolina Academic Press, 10th ed. 2013).

⁶ ROBERT DEITCH HEMP, *AMERICAN HISTORY Revisited* 13 (Alogora Pub., 1st ed. 2003).

⁷ *Id.* at 14.

⁸ *Id.* at 19.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 35.

colonists understood marijuana had medicinal qualities that could be used to treat pain and other illnesses. In America's early history, marijuana was one of the only medicines the colonists had, and their marijuana use was as common as today's use of aspirin.¹³ Even Thomas Jefferson documented in his diary he used marijuana as a remedy for his migraines.¹⁴

By 1850, the United States Pharmacopeia concluded and listed marijuana as a viable treatment for illnesses such as neuralgia, typhus, cholera, convulsive-inducing conditions, alcoholism, and opiate addiction.¹⁵ A decade later, the Ohio State Medical Committee on Cannabis Indica found the marijuana plant highly effective for other common illnesses such as stomach cramps, coughs, venereal disease, post-partum depression, epilepsy, and asthma.¹⁶ Medicinal marijuana has been used within our society for a significant amount of time, and there are records to prove marijuana has health benefits to those with extreme conditions.

C. AMERICA'S TURN TO ILLEGALITY OF MARIJUANA USE

Prior to the Federal government's first attempt to regulate marijuana in 1906, marijuana was similarly spread and used in America just as opioids and cocaine. Americans could purchase marijuana in any drug store to treat an illness without any trouble or consequences. Marijuana was an extremely common ingredient in patent medicines, including nonprescription formulas.¹⁷

Smoking marijuana leaf in cigarettes and pipes was not widely known in the United States until Mexican immigrants introduced the innovation marijuana use. The introduction generated an extreme

¹³ ROBERT DEITCH HEMP, *AMERICAN HISTORY REVISITED* 13 (Alogora Pub., 1st ed. 2003).

¹⁴ *Id.* at 26.

¹⁵ MARTIN BOOTH, *CANNABIS: A HISTORY* 113-114 (Thomas Dunne Books, 1st ed. 2003).

¹⁶ *Id.*

¹⁷ Stephen Siff, *Origins: Current Events in Historical perspective*, Vol. 7 Issue 8. *The Illegalization of Marijuana: A Brief History* (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history>.

reaction, which could be categorized with anti-Mexican xenophobia.¹⁸ The Federal government's first regulation of marijuana was passed in 1906 through the Pure Food and Drug Act.¹⁹ This Act included marijuana and other substances patent medicine companies were now required to list on labels so concerned consumers could avoid purchase.²⁰ After the Mexican Revolution of 1910, the floodgates opened leading to many Mexican immigrants relocating to America and introducing recreational use of marijuana.²¹ Following the flood of Mexican immigrants into America, marijuana became associated with Mexican immigrants, and a fear and prejudice of Mexican immigrants who used marijuana and committed terrible crimes formed.²²

Americans began to fear the use of marijuana because of the prejudice attributed to its use, and because of that fear, governmental and public concern rose.²³ Out of this fear and prejudice arose a flurry of research, which linked violence, various crimes, and socially abnormal behaviors with the use of marijuana by primarily racially inferior or underclass communities.²⁴ In 1931, 29 American states had outlawed marijuana use.²⁵ Although some states had outlawed the use of marijuana, the Federal government did not outlaw marijuana on a federal level until Harry J. Anslinger, the first commissioner the Bureau of Narcotics, strongly encouraged state governments to accept responsibility for the control of the marijuana problem.²⁶ Anslinger used America's prejudice to further the ban of marijuana. Anslinger

¹⁸Stephen Siff, *Origins: Current Events in Historical perspective*, Vol. 7 Issue 8. *The Illegalization of Marijuana: A Brief History* (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ PBS Marijuana Timeline,

<http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Jan 7, 2020).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

conflated marijuana use, race, and music.²⁷ Further, Anslinger claimed:

“Reefer makes darkies think they’re as good as White men.” He was quoted as saying, “There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz, and swing result from marijuana use. This marijuana causes White women to seek sexual relations with Negroes, entertainers and any others.”

These allegations led to the Uniform State Narcotic Act of 1932.²⁸ The marijuana propaganda led to Congress passing the Marijuana Tax Act of 1937, which criminalized possession of marijuana, and only enabled possession to individuals who paid an excise tax for certain medical and industrial uses.²⁹

In 1944, the New York Academy of Medicine conducted and released extensive research declaring the use of marijuana did not induce violence, insanity, sex crimes, or lead to addictions or other drug uses.³⁰ In the 1960s, political and cultural prejudice became more relaxed.³¹ Marijuana became more common in the White upper middle class, and reports commissioned by President Kennedy and Johnson concluded marijuana use did not induce violence nor lead to use of heavier drugs.³² Laws on marijuana eased until powerful lobby groups with the support of the Drug Enforcement Agency and the National Institute on Drug Abuse fought for stricter regulation, which soon led to the 1980s War on Drugs. However, despite the ample research conducted, the Federal Government continued to classify marijuana as a Schedule I drug in large part to propaganda lacking any scientific data to marijuana consumption causing violence. This false information, which connects violence to marijuana use has been used

²⁷ Laura Smith, How a racist hate-monger masterminded America’s War on Drugs, Timeline (Feb 27,2018), <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189>.

²⁸ *Id.*

²⁹ Siff, *supra* at 17.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

as a reason to pass laws such as 18. U.S.C. § 922(g)(3) to prevent marijuana users from owning or possessing a firearm due to the alleged violence caused by marijuana use.

D. WERE THERE RACIAL CONSIDERATIONS BEHIND BANNING MARIJUANA?

The War on Marijuana that the government waged has largely been a war on people of color.³³ Despite the comparable use of marijuana between Blacks and Whites, state and local governments have aggressively enforced marijuana laws selectively against Black people and communities.³⁴ Marijuana criminalization stemmed from racialized perceptions of users of color threatening public safety and welfare.³⁵ Racial prejudice prompted states and local government agencies to ban marijuana usage.³⁶ In Southern states with large African American populations, the fear of violent Black smokers led to marijuana laws.³⁷ Marijuana was scapegoated as prompting murder, rape, and mayhem among African Americans in the South, Mexican Americans in the Southwest, and disfavored White immigrants from laboring classes. Further, marijuana was blamed for White women being seduced by African American men and for violent crimes committed by minority groups.³⁸

America faced marijuana propaganda, and the debut of “*Reefer Madness*” only further fueled the hysteria about marijuana.³⁹ Most states outlawed the use of marijuana, and the Federal Government soon followed with the Marijuana Tax Act of 1937.⁴⁰ This statute effectively criminalized marijuana.⁴¹ The propaganda slightly subsided as time

³³ A.C.L.U., *The War on Marijuana in Black and White* 9 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white>.

³⁴ *Id.*

³⁵ Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. L. REV. 689, 690 (2016) (discussing the ban on marijuana).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Matthew Green, *Reefer Madness! The Twisted History of America’s Marijuana Laws*, KQED (Jan 5, 2018), <https://www.kqed.org/lowdown/24153/reefer-madness-the-twisted-history-of-americas-weed-laws>.

⁴⁰ Bender, *supra* note 35, at 691.

⁴¹ Green, *supra* note 39.

went on, and even the commissions of President John F. Kennedy and Lyndon B. Johnson reported marijuana usage did not induce violence nor was it a gateway drug.⁴² However, President Richard Nixon was determined to pass his anti-drug efforts, and in 1970, Congress passed the Controlled Substance Act.⁴³ This Act created different categories or schedules for different drugs based on their perceived public threat.⁴⁴ The Marijuana Tax Act was a precursor to Marijuana federal laws passed later designating marijuana as a Schedule I drug without medicinal use.⁴⁵

Including cannabis in this category was more a reflection of "Nixon's animus toward the counterculture with which he associated marijuana than scientific, medical, or legal opinion," Scott C. Martin, a history professor at Bowling Green State University, wrote in *Time* magazine. The Schedule I designation, he said, "made it difficult even for physicians or scientists to procure marijuana for research studies."⁴⁶

In 1972, a year after Nixon declared a War on Drugs, his commission presented findings to Congress noting marijuana was not a dangerous drug and had posed widespread danger to society.⁴⁷ Nixon rejected his commission's findings and in the following year Congress created the U.S. Drug Enforcement Agency.⁴⁸ In 1986, President Reagan signed the Anti-Drug Abuse Act, which required mandatory sentences for drug-related crimes.⁴⁹ The law increased federal penalties and sentences for all drugs including marijuana.⁵⁰ African Americans were and still continue to be arrested at significantly higher rates than Whites.⁵¹ The African American youth in America has been the target

⁴² Green, *supra* note 39.

⁴³ Green, *supra* note 39.

⁴⁴ Green, *supra* note 39.

⁴⁵ Bender, *supra* note 35, at 691.

⁴⁶ Green, *supra* note 39.

⁴⁷ Green, *supra* note 39.

⁴⁸ Green, *supra* note 39.

⁴⁹ Green, *supra* note 39.

⁵⁰ Green, *supra* note 39.

⁵¹ Green, *supra* note 39.

of the War On Drugs that was waged by the Federal Government.⁵² “African Americans and Latinos account for most arrests for marijuana despite their smaller population, and studies confirm that White youths use marijuana in the same percentage as African American and Latino youths.”⁵³ The Federal Government banned marijuana although there were multiple reports showing marijuana poses no threat to society. The Federal Government was aware of how heavy marijuana was used and imprisoned African American and Latino marijuana users for life, while giving most White marijuana users a slap on the wrist.

III. CAN CONGRESS CONCRETELY PROVE MARIJUANA USE LEADS TO VIOLENCE?

Congress passed 18 U.S.C. 922(g)(3) with the intent of keeping guns out the hands of persons classified as potentially irresponsible and dangerous.⁵⁴ Many jurisdictions have applied intermediate scrutiny when determining whether 18 U.S.C. 922(g)(3) infringes upon one’s Second Amendment right.⁵⁵ “Under intermediate scrutiny, the government has the burden of demonstrating that (1) protecting the community from crime by keeping firearms away from dangerous persons is an important governmental interest and (2) preventing those with medicinal marijuana cards from obtaining or possessing a firearm is substantially related to obtaining the governmental purpose of protecting the community from crime.”⁵⁶ For the government to successfully meet their burden, there should be some concrete evidence that marijuana use leads to an increase of either (1) gun violence, or (2) crimes in general. The Court in *Carter* stated the government may, in appropriate cases, sustain its burden by utilizing legislative text and history, empirical evidence, case law, and common sense.⁵⁷ The government is not required to use scientific evidence to prove that marijuana use leads to an increase of violence.

In past cases, the government did not use evidence that specifically led to a causal link of marijuana and gun violence or violence in general; but the Courts have allowed the government to

⁵² Bender, *supra* note 35, at 691.

⁵³ Bender, *supra* note 35, at 691.

⁵⁴ *United States v. Carter*, 669 F. 3d 411, 417 (4th Cir. 2012).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *United States v. Carter*, 669 F. 3d 411, 418 (4th Cir. 2012).

present broad evidence, which groups marijuana with all types of drugs. Ample scientific research confirms the connection between opioid use and violent crimes.⁵⁸ For example, nearly four times as many adults arrested for serious crimes used an illegal drug in the previous year than those who had not used an illegal drug.⁵⁹ Other scientific research indicates a substantial connection between opioid use and violence.⁶⁰ Although the government provides evidence that drug use may lead to an increase in violence or gun violence, the evidence presented is not specific to marijuana, but to other types of drugs. Evidence provided by the government fails to show that marijuana use alone leads to increased violence or gun violence. Marijuana has been erroneously grouped with other types of drugs, and thus, leads the Courts to believe that marijuana is a dangerous drug.

IV. ARE MEDICINAL MARIJUANA USERS TREATED AS THOSE WHO ARE SIMILARLY SITUATED AS REQUIRED BY THE FIFTH AMENDMENT TO THOSE WHO LEGALLY USE AN OPIOID DRUG TO TREAT PAIN OR OTHER ILLNESSES, OR THOSE WHO ARE ADDICTED TO OTHER SUBSTANCES SUCH AS ALCOHOL?

a. MEDICINAL MARIJUANA USERS ARE NOT TREATED ALIKE TO LEGALLY PRESCRIBED OPIOID USERS.

The Second Amendment right should not be stripped away from those who consciously choose to legally use marijuana within their respective state to treat any illnesses or pain one may experience during their lifetime. The Government chose to restrict marijuana users from obtaining or possessing a firearm but has failed to restrict those who are legally prescribed opioids, which, as a side effect, may lead to violence. In a previous study comprised of 151 Scottish prisoners and non-prisoners, it was shown that heavy opioid users committed crimes

⁵⁸ *United States v. Yancey*, 621 F. 3d 681, 686 (7th Cir. 2010).

⁵⁹ *Id.*

⁶⁰ *Id.*

significantly more frequently than marijuana users.⁶¹ Medicinal marijuana users should be similarly situated to those who are legally prescribed opioids to treat the same pains or illnesses.

Studies show that legally prescribed opioids may, in some cases, act as a gateway drug to harder substances such as heroin due to the fact that opioid medications produce the same neuropharmacological effects as heroin.⁶² Further, studies show that initial use of opioids to treat pain may shift to chronic use.⁶³ Prescription opioids are used to treat moderate to severe pain and can also give the user a “high” feeling.⁶⁴ Prescribed opioids can cause a tolerance in some people, which causes them to take higher and more frequent doses of the prescribed medicine.⁶⁵ This can lead to drug dependence, and these changes could lead to harmful behaviors by those who misuse the prescribed opioids.⁶⁶

The government excluded medicinal marijuana users from obtaining or possessing a firearm for safety reasons, however, legally prescribed opioids contain the same risk the government seeks to prevent by restricting possession of a firearm to medicinal marijuana cardholders. Both legally prescribed marijuana and legally prescribed opioids can produce psychological effects upon a user.⁶⁷ Medicinal marijuana users are treated as potentially irresponsible and dangerous people.⁶⁸ For Congress to deny medicinal marijuana users their Second Amendment right while permitting opioid users who potentially pose the same risk to the community, which Congress is seeking to prevent, is not treating both classes equally as required pursuant to the Fifth Amendment of the U.S. Constitution. Further, the government cannot

⁶¹ Richard Hammersley, et al., *The Relationship Between Crime and Opioid Use*, PUBMED (Sep. 1989), <https://www.ncbi.nlm.nih.gov/pubmed/2790266>.

⁶² RICHARD J. BONNIE, ET AL., *PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jul. 13 2017), <https://www.ncbi.nlm.nih.gov/books/NBK458661/>.

⁶³ *Id.*

⁶⁴ Prescription Opioids DrugFacts, NATIONAL INSTITUTE ON DRUG ABUSE (May 27 2020), <https://www.drugabuse.gov/publications/drugfacts/prescription-opioids>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*, also see Marijuana DrugFacts, NATIONAL INSTITUTE ON DRUG ABUSE (Dec. 24 2019), <https://www.drugabuse.gov/publications/drugfacts/marijuana>.

⁶⁸ Siff, *supra* note 17.

claim preventing medicinal marijuana users from obtaining or possessing a firearm is substantially related to protecting the community from crime if Congress refuses to treat legally prescribed opioid use as it treats illegally prescribed opioid use.

b. MEDICINAL MARIJUANA USERS ARE NOT TREATED ALIKE TO THOSE WHO CONSUME ALCOHOL.

Previous studies show alcohol consumption promotes aggressiveness.⁶⁹ Scientists and nonscientists alike have long recognized an association between alcohol consumption and violent or aggressive behavior.⁷⁰

Based on published studies, Roizen (3) summarized the percentages of violent offenders who were drinking at the time of the offense as follows: up to 86 percent of homicide offenders, 37 percent of assault offenders, 60 percent of sexual offenders, up to 57 percent of men and 27 percent of women involved in marital violence, and 13 percent of child abusers. These figures are the upper limits of a wide range of estimates. In a community-based study, Pernanen (4) found that 42 percent of violent crimes reported to the police involved alcohol, although 51 percent of the victims interviewed believed that their assailants had been drinking.⁷¹

Alcohol consumption may encourage violence or aggression through disrupting the ordinary brain functions.⁷² Furthermore, alcohol consumption weakens brain mechanisms that, in ordinary cases, restrain impulsive behaviors.⁷³ Lastly, alcohol consumption impairing information processes may lead a person to misjudge social cues and excessively react to a perceived threat.⁷⁴

⁶⁹ *Alcohol, Violence, and Aggression*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM (Oct. 1997), <https://pubs.niaaa.nih.gov/publications/aa38.htm>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Congress seeks to protect the community from crime,⁷⁵ but allows those who consume alcohol to exercise their Second Amendment right. How, then, can the government say preventing those with medicinal marijuana cards from obtaining or possessing a firearm is substantially related to obtaining the governmental purpose of protecting the community from crime,⁷⁶ when there are other legal substances, which provide the same risks and concerns of harm to the community by violence or by gun violence? Medicinal marijuana users are not similarly situated to those who heavily or moderately consume alcohol as they should be.

“Traditional equal protection principles require only those who are similarly situated should be treated alike.”⁷⁷ Medicinal marijuana users along with opioid users and those who consume alcohol all pose the same risks and concerns to the community because of how the substances effect the brain. The government has refused to infringe upon the Second Amendment right of opioid and alcohol users although there are many specific scientific studies, which show a causal link between opioid and alcohol use and violence. Medicinal marijuana users who are similarly situated to opioid and alcohol users are not treated alike, which also infringes upon a medicinal cardholder’s right to equal protection under the law pursuant to the Fifth Amendment.

V. DID THE LOWER COURTS ERR WHEN APPLYING AN INTERMEDIATE LEVEL OF SCRUTINY TO 18 U.S.C. §922(G)(3)?

The broad objective that Congress sought to accomplish with the enactment of 18 U.S.C. §922(g) was to suppress armed violence.⁷⁸ The Legislation’s plain language and legislative history make it clear Congress seeks to keep guns out of the hands of those who have demonstrated they may not be trusted to possess a firearm without becoming a threat to society.⁷⁹ An intermediate level of scrutiny has

⁷⁵ Siff, *supra* note 17.

⁷⁶ Am. Civ. Liberties Union, *supra* note 33.

⁷⁷ FELDMAN, *supra* note 3, at 777.

⁷⁸ *Yancey*, 621 7th Cir. At 686.

⁷⁹ *Dickerson v. New Banner INST.*, 460 U.S. 103, 112 (1983).

been adopted for 18. U.S. §922(g)(3) after the Fourth Circuit Court of Appeals deemed an intermediate approach appropriate when analyzing § 922(g)(9)⁸⁰ (preventing those convicted of a domestic violence misdemeanor from obtaining or possessing a firearm).⁸¹

Courts should not blanketly apply an intermediate scrutiny when ruling on 18 U.S.C. § 922(g). In some instances, the government may have a valid reason to apply an intermediate level of scrutiny, such as in cases involving § 922(g)(9). In such cases, individuals convicted have already been proved to be dangerous to society, and the strictest level of scrutiny should not be required for the government to infringe upon the Second Amendment rights of one convicted under § 922(g)(9). However, there is no valid argument to infringe upon the rights of a person who has legally obtained a medicinal marijuana card within their respective state to be punished and seen as a threat to society.

The Second Amendment by the Framers guarantees the individual right of law-abiding, responsible citizens to use arms in the defense of hearth and home.⁸² Those who legally obtain a medicinal marijuana card within their respective states are law-abiding citizens. Unless those who have legally obtained a medicinal marijuana card have been convicted of a felony, or have demonstrated dangerous tendencies and poses a risk to society, those individuals should be entitled to the strictest level of scrutiny before having their Second Amendment right stripped away. “A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.”⁸³ The Courts deciding an intermediate scrutiny approach appropriate when analyzing cases concerning citizens with a legally obtained medicinal marijuana card with no prior criminal records is an error. The United States Supreme Court should take this issue up for review. Cases dealing with individuals who legally obtained medicinal marijuana cardholders and possess and obtain a firearm, should require strict scrutiny. If medicinal marijuana is legal within a respective state, the rights of medicinal marijuana cardholders should be regulated by the state's police powers.

⁸⁰ *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

⁸¹ *Id.*

⁸² *D.C. v. Heller*, 554 U.S. 570, 652 (2008) (Stevens, J., dissenting).

⁸³ *Id.* at 634.

“The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties.”⁸⁴ A restriction may be justified on grounds it imposes less than a substantial burden on the exercise of a right, and therefore, does not unconstitutionally violate the holder’s right, though it is regulated.⁸⁵ In cases of those who have legally obtained a medicinal marijuana card, their Second Amendment right is substantially burdened due to the government automatically considering them as a threat to society with no evidence to support these medicinal marijuana cardholders are actually a threat. The strictest level of scrutiny should be applied before stripping legal medicinal cardholders of their Second Amendment Right. The lower Courts erred when deeming an intermediate level of scrutiny appropriate for deciding cases concerning those who have legally obtained a medicinal marijuana card in their respective states, have no prior criminal records, and pose no threat to society. The Court should hold there must be a compelling reason for Congress to restrict a law-abiding citizen of his Second Amendment Right.

VI. STATES SHOULD HAVE THE POWER TO DECIDE IF THOSE WHO HOLD A LEGALLY OBTAINED MARIJUANA CARD WITHIN THEIR STATE LINES SHALL HAVE THE RIGHT TO POSSESS A FIREARM.

The federal government depends upon the states as a practical matter to enforce marijuana prohibitions and other federal law but cannot require them to do so under the anticommandeering principle implicit in the federalist structure.⁸⁶ The federal government is only a two-bit player when it comes to enforcing marijuana regulations.⁸⁷ The states hold the upper hand by virtue of their law enforcement resources.⁸⁸ The federal ban may be strict, but without the

⁸⁴ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

⁸⁵ Eugene Volokh, Note, *Implementing The Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1454 (2009).

⁸⁶ FELDMAN, *supra* note 3, at 159.

⁸⁷ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1424 (2009) (discussing states' power under federal laws).

⁸⁸ *Id.*

wholehearted cooperation of state law enforcement, the federal government's impact on private behavior will continue to be limited.⁸⁹ Not all states agree with the federal government infringing upon the Second Amendment rights of those who have legally obtained a medicinal marijuana card. For instance, Oklahoma's House passed HB2612—a measure, which allows citizens who have legally obtained a medicinal marijuana card to also possess a gun within their state—by a vote of 93-5.⁹⁰ The Senate approved by a vote of 43-5, and the Governor signed the bill giving it clearance to go into effect.⁹¹ “While passage of HB2612 does not overturn the federal Gun Control Act of 1968, it does remove the state and local enforcement arm of that unconstitutional act as it applies to medical marijuana users in Oklahoma.”⁹² Oklahoma's legislation treats similarly situated individuals alike unlike the federal government. Oklahoma passing its own legislation to counteract §922(g)(3) is evidence the states may possess even more de facto power vis-à-vis Congress than is commonly perceived.⁹³

The states having control over whether their citizens may possess a firearm if they also possess a medicinal marijuana card changes the scenario which is currently faced. The states instead of the federal government would then have to prove why they should be allowed to enforce their police powers to prevent those who possess a legally obtained medicinal marijuana card from also possessing a firearm. The federal government should not have the exclusive power to speak for all states regarding possession or the ability to obtain a firearm while also possessing a medicinal marijuana card because it oversteps the boundaries of the individual states. This is a matter the state legislatures should control, not the federal government. Absent the federal government's strict regulation, states that have legalized marijuana would likely not prevent citizens with medicinal marijuana cards from possessing and obtaining a firearm.

⁸⁹ *Id.*

⁹⁰ Mike Maharrey, *Signed by the Governor: Oklahoma Law Prohibits Denial of Firearms Ownership Based on Medical Marijuana Use*, (Mar. 19, 2019).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Mikos, *supra* note 87, at 1425.

VII. INDIVIDUALS SHOULD HAVE THE RIGHT TO CHOOSE THEIR OWN MEDICATION AND NOT LOSE THEIR SECOND AMENDMENT RIGHT.

When Congress enacted §922(g)(3) it not only infringed upon the Second Amendment right of those who have legally obtained a medicinal marijuana card, but forced medical marijuana patients who also owned a firearm to medicate with opioids or become felons under federal law. In the 1970s, the federal government concluded marijuana was addictive and medically useless as heroin without a clear showing of this conclusion.⁹⁴ The federal government cultivates marijuana and distributes pre-rolled joints to patients who are seriously ill; yet continues to deny marijuana has legitimate medicinal use.⁹⁵

Today, a respectable minority of the modern medical field believes marijuana has a legitimate medicinal value.⁹⁶ “In fact, when a random sample of the American Society of Clinical Oncology was questioned about the value of marijuana, more than 1,000 oncologists responded, and 44 percent reported they had suggested marijuana use to at least one of their patients.”⁹⁷ Thousands of patients suffering from cancer, AIDS, and other diseases have reported to have obtained relief from smoking marijuana.⁹⁸ The government should allow patients to legally use marijuana within their respective states and maintain their Second Amendment right just as someone who was legally prescribed an opioid. Despite extensive research, there is little evidence of marijuana harming a healthy adult user, which is a claim that could hardly be substantiated about tobacco or alcohol, which are both legal in the U.S.⁹⁹ There have even been major players within the

⁹⁴ Joëlle A. Moreno, *Half-Baked: The Science and Politics of Legal Pot*, 123:2 PA. L. REV. 401, 411 (2019) (discussing the science of cannabis).

⁹⁵ Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLIN J. PUB. L. & POL’Y 117, 117 (1992) (discussing the illegalization of Marijuana).

⁹⁶ Matthew Segal, *Overdue Process: Why Denial of Physician-Prescribed Marijuana to Terminally Ill Patients Violates the United States Constitution*, 22:235 SEATTLE U. L. REV. 235, 246 (1998) (discussing the medical use of Marijuana today).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Marty Ludlum, Darrel Ford, *Katie’s Law: Oklahoma’s Second Puff of Medical Marijuana*, 41 OKLA. CITY U. L. REV. 169, 170 (2016) (discussing the safety of marijuana).

scientific community who agree marijuana may be useful to some patients. U.S. Surgeon General Dr. Vivek Murthy stated in 2015, “We have some preliminary data showing that for certain medical conditions and symptoms, that marijuana can be helpful. I think that we have to use that data to drive policymaking.”¹⁰⁰ “As far back as 1993, Bill Clinton’s Surgeon General, Joycelyn Elders—who now sits on the Drug Policy Alliance Honorary Board—advocated for the potential benefits of drug legalization when she said, ‘I do feel we’d markedly reduce our crime rate if drugs were legalized.’”¹⁰¹ Patients should not have to make the choice of whether to give up their Second Amendment right or be forced to take medicine that may not provide relief or could be harmful overall to their health. The government places ill patients who seek to exercise their Second Amendment right in a peculiar situation.

VIII. CONCLUSION

Despite multiple reports that marijuana poses no threat to society, the federal government continues to categorize marijuana as a Schedule I drug. Reports have shown that marijuana does not induce violence or lead to other drugs, yet the federal government treats marijuana just as it treats heroin or cocaine. Research conducted on marijuana indicates it does not lead to violence. How does preventing medical marijuana cardholders from possessing or obtaining a firearm substantially relate to the goal of preventing gun violence? The answer is simple; it does not. It is due to the personal, not scientific opinions of lawmakers that the Second Amendment rights of holders of legally obtained medicinal marijuana cards are infringed upon.

Congress’ denial of the Second Amendment right to medicinal marijuana cardholders is not substantially related to preventing gun violence, and there is no real justification nor real conclusive evidence

¹⁰⁰ Jag Davies, U.S. Surgeon General Says 'Marijuana Can Be Helpful', DRUG POLICY ALLIANCE BLOG (Feb. 3. 2015), <http://www.drugpolicy.org/blog/us-surgeon-general-says-marijuana-can-be-helpful>.

¹⁰¹ *Id.*

to allow the federal government to continue to infringe upon the Second Amendment rights of medicinal marijuana cardholders. The federal government's broad inclusion of marijuana with much harder drugs, such as heroin and cocaine, give marijuana a bad light and allows them to continue to infringe upon the Second Amendment rights of those who possess a medicinal marijuana card. Congress denying the Second Amendment Right to medicinal marijuana cardholders is not substantially related to preventing gun violence.