

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

# THE CRIMINAL LAW PRACTITIONER

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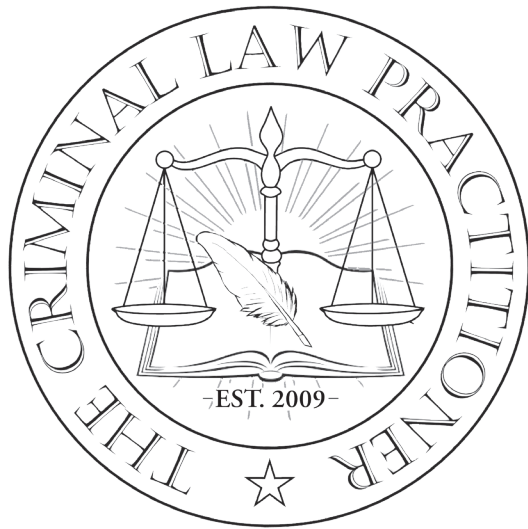
## Articles

*Presumption of Credibility*

E. Bordelon

*The Firearm That Isn't: Silencers and  
the 'Loud Bang Theory'*

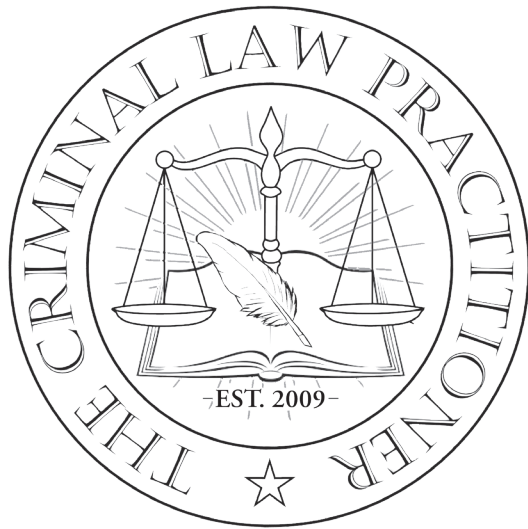
Thomas L. Chittum, III



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THE CRIMINAL LAW  
PRACTITIONER



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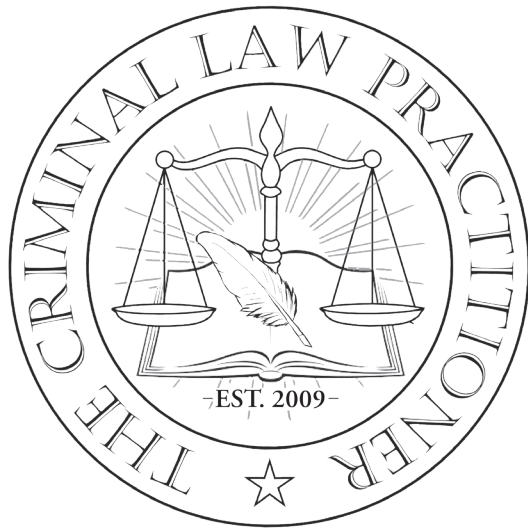
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# Letter from the Editor

Davis Hayman, The Criminal Law Practitioner

Dear Readers,

Thank you for your interest in The Criminal Law Practitioner. This Fall 2025 Issue marks the first in the 16th Volume of our publication. This journey has been one characterized by academic and professional curiosity, cross-discipline collaboration, and collective creativity. As always, I want to give a big shout out to our entire staff. Their hours of tireless dedication has made this experience rewarding and fulfilling for everyone on our Editorial Board, and I believe this commitment is reflected in the intriguing articles.

“Presumption of Credibility” analyzes the role of law enforcement credibility within the early stages of a criminal proceedings, that often rely heavily, if not solely, on officer testimony. This piece uses 4th amendment jurisprudence and an applied example of the Commonwealth of Virginia magistrate system to illustrate the function and effect of these presumptions. Finally, E. Bordelon provides strategies for judicial officials to evaluate these early testimonies with a more critical eye.

In the next article, “The Firearm that Isn’t: Silencers and the ‘Loud Bang Theory’”, Thomas L. Chittum, III provides a chronology of the silencer through historical, legal, and constitutional lenses. This piece then analyzes the tool’s unique jurisprudence compared to similar equipment to fully understand the silencer’s place in the law. Mr. Chittum’s expertise shines through to create a truly engaging piece on this often-overlooked type of “Firearm”.

These pieces not only stand as unique, novel pieces of criminal legal scholarship, but also represent months of collaborative work between the Criminal Law Practitioner, its staff, and the faculty and staff of American University Washington College of Law. This experience truly is a labor of love, and I’d like to thank each member of this process for their support and dedication.

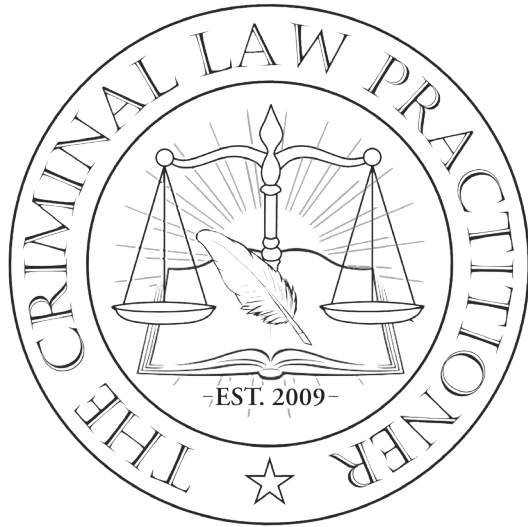
I hope this issue serves as a catalyst for meaningful, cutting-edge academic and legal discussion. My time as Editor-in-Chief has been rewarding, affirming, and informative. I hope this piece communicates the dedication, passion, and care that went in to getting it in your hands. As always, please contact us at [clp@wcl.american.edu](mailto:clp@wcl.american.edu) if you have any comments or questions.

Very Respectfully,

*Davis Hayman*

Davis Hayman

*Editor-in-Chief*





# PRESUMPTION OF CREDIBILITY

By E. BORDELON<sup>1</sup>

## ABSTRACT

In the earliest stages of a criminal proceeding, a single sworn statement can justify a search of a home, the seizure of a body, or the detention of a person. These foundational moments—where judicial officers evaluate probable cause and set bail—significantly depend on law enforcement testimony. If an officer can show probable cause in a pre-trial proceeding, the individual subject to the search or arrest will face critical consequences. As such, the omission of material facts or misrepresentation of events can profoundly impact the legal outcomes for the accused. This is not a theoretical risk, as studies have uncovered the expansive nature of officer perjury, with the behavior being so rampant as to spawn the term “testilying.” Despite these findings, courts extend a presumption of credibility to officer testimony, particularly in pre-trial proceedings, where evidentiary safeguards are less stringent.

This article examines the judicial presumption of police officer credibility and how the presumption is applied in probable cause and bail decisions. Using Fourth Amendment jurisprudence, the article traces how a presumption of police credibility has developed in response to challenges to search warrants, ultimately demonstrating that courts often assess officer affidavits as reliable absent meaningful scrutiny.

To illustrate the consequences of this presumption on people accused of committing a crime, the article then examines the Commonwealth of Virginia’s magistrate system as a case study, highlighting how the presumption operates in practice. This case study also provides valuable perspective on the presumptions impact on the judiciary. For instance, if an officer provides dishonest testimony that results in a probable cause finding, the judiciary has been defrauded, decreasing its credibility with the general public.

With these consequences, the article concludes by proposing strategies for judicial officers to more critically evaluate officer testimony in pre-trial proceedings. These strategies address practical issues, like magistrate retention, as well as legal issues regarding presumptions and standards of proof. By proposing these strategies, the article aims to promote greater accountability and safeguard the legitimacy of the legal system during its most foundational stages.

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<sup>1</sup> J.D., George Mason University School of Law, 2022. M.A., George Washington University, 2019. The views expressed herein are solely those of the author and do not necessarily reflect the views of any affiliated institution or organization.



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INTRODUCTION

Magistrates were once known as “Keepers of the Peace.”<sup>2</sup> Today, magistrates are asked to guard the rule of law in the earliest stages of a proceeding. They conduct hearings related to searches, arrests, temporary detentions, and other civil processes.<sup>3</sup> In these hearings, magistrates are to maintain neutrality and order in highly charged circumstances. They will engage with law enforcement, mental health professionals, community members, and inmates, many of whom not having their best day.<sup>4</sup> In these sensitive situations, the magistrates will be asked to make difficult and nuanced decisions. Magistrates also serve 24/7, working long and unusual hours.<sup>5</sup>

With this framework, pretend you are a judicial officer, serving an overnight shift. You sit at your desk, in an office with an attached window where law enforcement officers can approach and seek process. Early in the morning, an officer approaches to submit a search warrant affidavit. You are tasked with reviewing the affidavit and deciding whether there is probable cause to grant the search warrant.

As a preliminary matter, you place the offer under oath, having him swear that the information provided in the affidavit is true. Once done, you start reading. The affidavit requests a search warrant to authorize the collection of a blood sample, citing the misdemeanor crime of driving under the influence.<sup>6</sup> The affidavit states that the accused

<sup>2</sup> Hon. Mark S. DesNoyer, *Magistrates are Guardians of the Law*, VA. ST. BAR (June 2025); <https://virginialawyer.vsb.org/articles/magistrates-are-guardians-of-the-law>.

<sup>3</sup> See *infra* Part III.

<sup>4</sup> DesNoyer, *supra* note 2.

<sup>5</sup> *Agency Detail (5002), Magistrates Office*, FAIRFAX CNTY., <https://www.fairfaxcounty.gov/contact/AgencyDetail.aspx?agId=5002> (last visited Dec 24, 2025).

<sup>6</sup> For the elements of the crime, see Va. Code Ann. § 18.2-266.



individual was operating a vehicle at the time they were stopped by the officer. When the officer approached, he observed slurred speech, glassy eyes, and the odor of alcohol. The officer also observed multiple clues while conducting field sobriety tests,<sup>7</sup> including the accused's difficulty following instructions. The affidavit concludes by stating that the accused refused a blood test, resulting in the officer seeking the search warrant.

Based on the information in the affidavit, is there enough evidence to support probable cause? Probably, as there are facts to support that the accused individual was under the influence while operating a vehicle. As such, you decide to issue the search warrant, and the officer briefly leaves to execute it. When the officer returns, he provides additional paperwork for your review, including the results of a breath test conducted thirty minutes prior to the officer submitting the affidavit. The breath test shows that the accused's blood alcohol content (BAC) was measured at .01. Under state law, an individual with a BAC of .01 is presumed not to be intoxicated.<sup>8</sup> You recall that the officer did not mention any breath test in his affidavit, and you know he is not required to provide every fact.<sup>9</sup> Yet the excluded fact is pertinent to the outcome, as it raises new questions regarding the accused's behavior. For instance, does the accused have any health problems that could impact speech or balance? Such questions have the potential to impact the legal outcome for the accused. What do you do?

The scenario above is an all-too-common occurrence, underscoring a systemic issue that merits further discussion.<sup>10</sup> While there is a large body of scholarship discussing police lies,<sup>11</sup> existing literature rarely examines the treatment of officer testimony in pre-trial

<sup>7</sup> The HGN, the walk and turn, and one leg stand comprise the Standardized Field Sobriety Test. HGN refers to "horizontal gaze nystagmus" test which, as consumption of alcohol or certain drugs hinders the brain's ability to control eye muscles, is meant to identify abnormal eye movements. See generally National Traffic Law Center, *Horizontal Gaze Nystagmus: The Science and The Law*, NAT'L DISTRICT ATT'Y ASSOC. (Feb. 2021), <https://ndaa.org/wp-content/uploads/HGN-The-Science-and-The-Law.pdf>.

<sup>8</sup> VA Code Ann. § 18.2-269 ("If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood or 0.05 grams or less per 210 liters of the accused's breath, it shall be presumed that the accused was not under the influence of alcohol intoxicants at the time of the alleged offense.").

<sup>9</sup> *Jaben v. United States*, 381 U.S. 214, 231 (1965). As law enforcement officers are not required to provide every fact, honesty is critical.

<sup>10</sup> I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 836 (2008); *Fallout From LAPD Scandal*, CBS NEWS (Jan. 31, 2000), <https://www.cbsnews.com/news/fallout-from-lapd-scandal/> (noting that planting evidence "happens thousands of times..."). "This tendency to lie pervades all police work... and it has the power to ruin lives." Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, SLATE (Aug. 4, 2020), <https://slate.com/news-and-politics/2020/08/police-testifying.html>. See *Barnes v. Commonwealth*, 279 Va. 22, 29 (2010) ("[Detective Hickman] stated that it's just his matter of principle that he doesn't put exculpatory evidence [into] affidavits for search warrants."). Additionally, intentionally excluding information that can change the outcome is largely considered a lie. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 491 (1999) ("police officers lie... by omitting or misrepresenting facts."). See *United States v. Taylor*, 63 F.4th 637, 656 (7th Cir. 2023) ("the affidavit's selective quoting... is also misleading."); *Commonwealth v. Tucker*, 81 Va. Cir. 300, 307 (2010) (applying the exclusionary rule to combat selective editing of affidavits), Christopher Slobogin, *Testifying: Police Perjury and What to Do about It*, 67 U. COLO. L. REV. 1037, 1037 (1996).

<sup>11</sup> E.g., Rachel Moran, *Scofflaw Law Enforcement*, 69 WAYNE L. REV. 31 (2023) (discussing officers who openly disregard the law, including by lying); Rinat Kitai-Sangero, *Extending Miranda: Prohibition on Police Lies Regarding the Incriminating Evidence*, 54 SAN. DIEGO L. REV. 611 (2017) (discussing lies told during interrogations); Tom Barker & David Carter, *Fluffing up the Evidence and Covering Your Ass: Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAV. 61 (1990); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996) (discussing pattern of perjury in New York City).



proceedings.<sup>12</sup> This article aims to fill that gap by showing how the Supreme Court has created a presumption of police officer credibility in such proceedings,<sup>13</sup> despite police perjury being “an open secret.”<sup>14</sup> The article then applies the presumption to probable cause and bail decisions, analyzing the impact the presumption has on the judicial system<sup>15</sup> and on accused individuals in pre-trial proceedings.<sup>16</sup>

To accomplish this analysis, this article will proceed in four parts. Part I will analyze Supreme Court precedent which creates or assumes a presumption of police officer credibility.<sup>17</sup> This discussion will largely ignore case law and scholarly debates around the exclusionary rule, instead focusing on Fourth Amendment cases where the Court analyzed the reliability of information provided in search warrant affidavits. This approach provides a novel foundation for analyzing police officer testimony, as Fourth Amendment case law considers the same question as judicial officers in pre-trial proceedings. After all, pre-trial proceedings are largely not concerned with procedural rules. Instead, the question posed to judicial officers is much simpler. Is there sufficient, reliable information to support a finding of probable cause? Fourth Amendment cases on what constitutes reliable information are

<sup>12</sup> Anjelica Hendricks, *Exposing Police Misconduct in Pre-Trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 181 (2021). See Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 27 (2010) (every affidavit is presumed to be truthful, regardless of how far-fetched its content). For discussion on structural factors that “bake police lies” into cases, see Adam M. Gershowitz & Caroline E. Lewis, *Laundering Police Lies*, 2023 WIS. L. REV. 1187 (2023). For a discussion on how the judiciary treats police expertise, see Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017). Pre-trial proceedings include the initial charge, any appearance before a magistrate, bail hearings, and determination of pre-trial release conditions. *Pre-Trial in Virginia Study Highlights*, VA. ST. CRIM. COM. (Jan. 2019), <https://vscc.virginia.gov/VSCC%20Pre-Trial%20Highlights%20FINAL.pdf>.

<sup>13</sup> A focus on pre-trial proceedings is vital. “As soon as a person is suspected of a crime,” the government has vast authority to intrude on a person’s life. If an officer can show probable cause in a pre-trial proceeding, a person may be subject to arrest and incarceration. Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1345 (2018) [hereinafter *Contesting Police Credibility*]; Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 795 (2013) (probable cause is the “gatekeeper between individuals and [] unwarranted intrusions.”); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 300 (2016) (“police exercise power over the public...through citations, arrests, and criminal prosecutions.”). Arrests and any resulting charges come with social stigma, regardless of pre-trial detention or the outcome of the case. *Thomson v. Clark*, 56 U.S. 36, 59 (2022) (“...a prosecution can be very damaging even if the victim is never detained.”); They can also result in a criminal history, which impacts employment and housing options. See Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins – Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 UC IRVINE L. REV. 711, 724 (2015) (felony drug convictions limit housing opportunities).

<sup>14</sup> Capers, *supra* note 10, at 837; Wilson, *supra* note 12, at 26; Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L. J. 1311, 1311-12 (1994).

<sup>15</sup> “A judicial system that...permits lies – no matter how small or infrequent – is no system at all.” Larry Cunningham, *Taking on Testilying: The Prosecutor’s Response to In-Court Police Deception*, 18 CRIM. JUST. ETHICS 26, abstract (1999); see also Laurie L. Levenson, *Whose Rights Matter More - Police Privacy or a Defendant’s Right to a Fair Trial?*, 54 LOY. L.A. L. REV. 495, 511 (2021). When a police officer lies in a pre-trial proceeding, “the judicial system itself has been defrauded” and courts must act to address “misconduct occurring within [its] own house.” *United States v. Cortina*, 630 F.2d 1207, 1214, 1217 (7th Cir. 1980) (discussing lies in an affidavit). There is also the added concern that a perception of favoritism makes people less likely to engage with the legal system. Capers, *supra* note 10, at 839, 843.

<sup>16</sup> The initial stages of a proceeding may be the primary interaction the accused has with the legal system. Many defendants accept plea deals and never challenge the allegations in court. Wilson, *supra* note 12, at 29-30.

<sup>17</sup> See *infra* Part I:A. To mirror Supreme Court jurisprudence, this article uses “reliability” and “credibility” interchangeably.



best suited to answer this question.<sup>18</sup>

After going through the cases, Part II will shift to the consequences of the presumption, analyzing whether it has a sufficient impact to warrant concern. With the ultimate conclusion being yes, Part II will outline the history of police lies. While evidence is largely anecdotal, the scope of evidence indicates that police lies are common, particularly in pre-trial proceedings.<sup>19</sup> After establishing the history of police lies, Part III will present a case study of pre-trial proceedings in the Commonwealth of Virginia, analyzing an expansive magistrate system that applies the presumption.<sup>20</sup> This case study provides the opportunity to analyze how the presumption works in practice, not just in theory.

With the presumption and its ensuing impact isolated, Part IV will discuss how a judicial officer should act when confronted with police officer testimony. To address this question, Part IV will discuss existing issues surrounding the presumption. These issues include practical limitations, like the magistrate's inability to conduct investigations, as well as theoretical problems, like an officer's response to a credibility determination. By advocating for more rigorous scrutiny of officer testimony in pre-trial proceedings, this article aims to provide a deeper understanding of how the presumption operates in practice and how it can be challenged to promote a more just and equitable legal system.

## I. PRESUMPTION OF CREDIBILITY

Any discussion of pre-trial procedure requires a review of court precedent. As such, this section will show how the Supreme Court's search warrant jurisprudence creates a presumption of police officer credibility. The section will then briefly conclude with Virginia case law adopting the presumption.

### A. HISTORY OF SEARCH WARRANT AFFIDAVIT REQUIREMENTS

This section will provide an overview of Supreme Court precedent on the type and quality of information provided in search warrant affidavits, as this shows the Court's view of officer testimony.

#### 1. MORE THAN MERE AFFIRMATION

In 1933, the Supreme Court held in *Nathanson v. United States* that a search warrant affidavit must contain more than a "mere affirmation" of belief.<sup>21</sup> In *Nathanson*,

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<sup>18</sup> While the case law deals with search warrants, the same analysis is required when determining whether there was sufficient evidence for an arrest. This question would arise when officers make a warrantless arrest and appear before the magistrate to show probable cause. *People v. Petralia*, 464 N.E.2d 424, 426 (N.Y. 1984).

<sup>19</sup> See generally Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 268 (2010) [hereinafter *Improbable Cause*] (discussing how most perjury is found in search warrant affidavits).

<sup>20</sup> DEPARTMENT OF MAGISTRATE SERVICES, MAGISTRATE MANUAL 5-38 (2024) [hereinafter MAGISTRATE MANUAL].

<sup>21</sup> *Nathanson v. United States*, 290 U.S. 41, 47 (1933). See also *Berger v. Commonwealth*, 213 Va. 54, 55 (1972) ("[the magistrate] must be presented with sufficient allegations of material fact or circumstance from which he can determine probable cause...").



an officer sought a search warrant, providing an affidavit that stated that he “under his oath [had] cause to suspect and does believe” that J.J. Nathanson had illegal liquors in his house.<sup>22</sup> The defendant challenged the search warrant as lacking sufficient facts to support probable cause.<sup>23</sup> The Court agreed with the defendant, stating that the affidavit relied on “a mere affirmation of suspicion and belief without any statement of adequate supporting facts.”<sup>24</sup> An affidavit must provide sufficient “facts or circumstances...under oath or affirmation” for a valid probable cause determination.<sup>25</sup> An officer’s conclusive statement of criminal activity is not enough.<sup>26</sup> The officer must relay sufficient facts for the judicial officer to independently conclude there is probable cause.<sup>27</sup>

## 2. PREFERENCE FOR SEARCH WARRANTS

Over a decade after *Nathanson*, the Court added to this foundation by expressing a preference for warrants in *Johnson v. United States*.<sup>28</sup> In *Johnson*, officers received information that “unknown persons” were smoking opium in a hotel.<sup>29</sup> Upon arrival at the hotel, law enforcement officers identified the odor of burning opium, and isolated one room as its source. When the occupant opened the door, officers entered the room and stated, “I want you to consider yourself under arrest because we are going to search the room.”<sup>30</sup> The search resulted in officers finding evidence of opium use, and the occupant was charged under federal law.<sup>31</sup>

The Court was tasked with deciding whether the search was lawful. In reaching its holding, the Court stated that “[t]he point of the Fourth Amendment, which is often not grasped by zealous officers, is [] that it...require[s] that [] inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”<sup>32</sup> Even if there was sufficient evidence to support probable cause, a warrantless search may still be invalid,<sup>33</sup> as to rule otherwise would nullify the purpose of the Fourth Amendment’s warrant requirement.<sup>34</sup> Consequently, the Court held the search to be unconstitutional because it was conducted

<sup>22</sup> *Nathanson*, 290 U.S. at 44.

<sup>23</sup> *Id.* at 45.

<sup>24</sup> *Id.* at 46.

<sup>25</sup> *Id.* at 47. See also *Draper v. United States*, 358 U.S. 307, 325 (1959) (Douglas, J., dissenting) (“No magistrate could issue a warrant on the mere word of an officer, without more.”).

<sup>26</sup> See *Henry v. United States*, 361 U.S. 98, 102 (1959) (“good faith on the part of the arresting officer is not enough”).

<sup>27</sup> *United States v. Church*, 823 F.3d 351, 360 (6th Cir. 2016) (quoting *Whiteley v. Warden*, 401 U.S. 560, 564 (1971)).

<sup>28</sup> 333 U.S. 10 (1948).

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Johnson*, 333 U.S. at 13-14 (citing *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (magistrate-issued warrants are preferred over warrantless searches)). The Court also stated that magistrate warrants are preferable because warrantless searches make the Court rely on the caution of officers “acting under the excitement that attends the capture of persons accused of crime.” *Lefkowitz*, 285 U.S. at fn. 3.

<sup>33</sup> There are exceptions that permit warrantless searches. E.g., *Mitchell v. Wisconsin*, 588 U.S. 840, 849 (2019) (“[U]nder the exception for exigent circumstances, a warrantless search is allowed when ‘there is compelling need for official action and no time to secure a warrant.’”); *Smith v. Ohio*, 494 U.S. 541, 541 (1990) (“The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control.”).

<sup>34</sup> *Johnson*, 333 U.S. at 14.



without a warrant.<sup>35</sup>

### 3. PERSONAL KNOWLEDGE OR HEARSAY

A year after *Johnson*, the Court again reviewed a warrantless search in *Brinegar v. United States*, where, after observing Brinegar drive, two federal investigators searched his vehicle without a warrant.<sup>36</sup> While driving is mundane by itself, the investigators knew Brinegar had a reputation for “hauling liquor” and had personally seen him loading liquor into his vehicle on two prior occasions.<sup>37</sup> Based on this evidence, the investigators stopped Brinegar’s car. Upon being questioned on how much liquor he had in the vehicle, Brinegar initially responded, “Not too much.”<sup>38</sup> Yet Brinegar ultimately admitted to having twelve cases of liquor in the car.<sup>39</sup> As such, he was arrested and convicted of importing intoxicating liquor into Oklahoma.<sup>40</sup>

In reviewing the search, the district court and court of appeals determined that Brinegar’s confession was sufficient to support probable cause to search the vehicle.<sup>41</sup> In contrast, the Supreme Court focused on the investigators’ personal knowledge of Brinegar’s prior actions, finding that knowledge sufficient to support the search.<sup>42</sup> The investigators’ personal knowledge meant there was direct testimony, based on the observation of law enforcement officers, to support probable cause.<sup>43</sup> For probable cause determinations, “the facts derived from [the investigator’s] personal observations were sufficient in themselves...to sustain his conclusion.”<sup>44</sup> Consequently, an officer’s undisputed personal knowledge can provide sufficient facts for an independent finding of probable cause.

The Court further elaborated on this holding in *Giordenello v. United States*, where a federal officer submitted a complaint that did not clearly provide the basis of his knowledge.<sup>45</sup> The complaint stated, “...That on or about January 26, 1956...Giordenello did receive, conceal, etc., narcotic drugs...with knowledge of unlawful importation.”<sup>46</sup> When the agent executed the warrant, Giordenello was found carrying a bag containing heroin.<sup>47</sup> Giordenello challenged the search, arguing that the ensuing arrest was illegal because the complaint was based on hearsay and only recited the elements of the crime,

<sup>35</sup> This preference for warrants appears in other Supreme Court cases. In *United States v. Leon*, the Court stated that “we have expressed a strong preference for warrants and declared that ‘in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.’” 468 U.S. 897, 914 (1984) (quoting *United States v. Ventresca*, 380 U.S. 102, 106 (1965)).

<sup>36</sup> 338 U.S. 160, 162 (1949).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 163.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 161, 163.

<sup>41</sup> *Brinegar*, 338 U.S. at 163-64.

<sup>42</sup> *Id.* at 168.

<sup>43</sup> *Id.* at 168-70.

<sup>44</sup> *Id.* at 172; *Jaben*, 381 U.S. at 225.

<sup>45</sup> 357 U.S. 480 (1958).

<sup>46</sup> *Id.* at 481.

<sup>47</sup> *Id.* at 482.



not actual facts.<sup>48</sup> The Court focused on the latter argument, finding that the complaint did not make any allegation of personal knowledge or provide any other sufficient basis for the magistrate to find probable cause.<sup>49</sup> As statements are not presumed to be within the personal knowledge of the affiant, the affidavit was insufficient because it did not provide a clear basis for the information.<sup>50</sup>

Less than a year after *Giordenello* initially posed the question, the Court addressed whether hearsay could support probable cause in *Draper v. United States*, where an agent stopped and searched a man who fit the description given to him by an informant.<sup>51</sup> More specifically, the informant told the agent that Draper would travel by train and return with heroin.<sup>52</sup> While the agent had found the informant's information accurate in prior cases, the agent went to the train station to verify the information.<sup>53</sup> When the agent spotted a man fitting the informant's description of Draper, he stopped and searched him, ultimately finding heroin.<sup>54</sup>

In determining whether there was sufficient information to believe Draper had violated the narcotics law, the Court found that “[p]robable cause exists where ‘the facts and circumstances within [an arresting officer’s] knowledge and of which they had reasonable trustworthy information [are] sufficient’” to support finding probable cause.<sup>55</sup> With this approach, the informant's information was sufficiently reliable because he had previously provided accurate information and the agent was able to verify the information. When the agent observed an individual who matched Draper's description at the train station, he verified the information and gained personal knowledge.<sup>56</sup> Consequently, the agent's personal knowledge and the hearsay worked together to support probable cause, and the search was upheld.

Yet the question of how to treat hearsay was still unsettled, as *Draper* involved hearsay supported by an officer's personal knowledge. In *Jones v. United States*,<sup>57</sup> the Court addressed this nuance and held that hearsay alone could be sufficient to support a warrant—personal knowledge is not required so long as there is a “substantial basis for crediting the hearsay” used in the affidavit.<sup>58</sup> In *Jones*, a federal officer executed a search warrant to search Jones' apartment and found narcotics.<sup>59</sup> Jones moved to suppress the evidence, arguing that the affiant had not claimed personal knowledge, only claiming to receive information from an “unnamed” person about the presence of narcotics in the apartment.<sup>60</sup> In reviewing the affidavit, the Court found that hearsay alone can be the

<sup>48</sup> *Id.* at 484.

<sup>49</sup> *Id.* at 486.

<sup>50</sup> *Giordenello*, 357 U.S. at 486.

<sup>51</sup> *Draper v. United States*, 358 U.S. 307, 309-10 (1959).

<sup>52</sup> *Id.* at 310.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Draper*, 358 U.S. at 313 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

<sup>56</sup> *Id.*

<sup>57</sup> 362 U.S. 257 (1960).

<sup>58</sup> *Id.* at 269. The opinion also noted that there was no evidence suggesting that the Commissioner had doubted the facts as they were provided. If the Commissioner had objected to the “unnamed” person, then the detail in the affidavit would be more suspect.

<sup>59</sup> *Id.* at 258-59.

<sup>60</sup> *Id.* at 259, 268.



basis for a warrant.

Under *Draper* and *Jones*, hearsay can be the basis of a warrant if the statement is reliable. However, the Court had yet to address how a judicial officer can determine whether a hearsay statement is reliable. The Court initially addressed this question in *Aguilar v. Texas*<sup>61</sup> and *Spinelli v. United States*.<sup>62</sup> In *Aguilar*, the Court analyzed an affidavit where the affiant stated they had received information from a “credible person.”<sup>63</sup> The Court deemed the affidavit insufficient, as the magistrate must be informed of some of the facts supporting the affiant’s conclusion that the informant is credible.<sup>64</sup> While the magistrate does not need every specific fact, there must be sufficient information in the affidavit for the magistrate to conclude that the informant provided reliable information.<sup>65</sup> *Spinelli* supported this proposition, deeming a similar affidavit to the one in *Aguilar* insufficient. In *Spinelli*, federal agents propounded an affidavit saying they had received information from a “confidential reliable informant.”<sup>66</sup> As the agents provided no additional information,<sup>67</sup> the magistrate was unable to independently conclude the informant’s credibility.

To address the issue, the Court created a two-prong test. The first prong required that the affidavit include sufficient information to “apprise[] the magistrate of the informant’s basis” for the provided information.<sup>68</sup> The second prong required the affiant provide their basis for believing the informant.<sup>69</sup> This approach faced criticism,<sup>70</sup> as it shifted analysis away from the prior “common-sense standard articulated in *Jones*... and *Brinegar*.”<sup>71</sup> The Court reconsidered the two-prong test in *Illinois v. Gates*. In *Gates*, police officers received an anonymous letter stating that the Gates’ were selling drugs.<sup>72</sup> A detective was able to verify the information in the letter, confirming the Gates acted as the informant had described.<sup>73</sup> The detective then submitted an affidavit to a judge, who found sufficient probable cause. Upon the Gates’ challenge to the affidavit, the Court determined that the detective’s verification of the information was sufficient to support probable cause,<sup>74</sup> further clarifying that the prongs outlined in *Spinelli* should only be

<sup>61</sup> 378 U.S. 108 (1964).

<sup>62</sup> 393 U.S. 410 (1969).

<sup>63</sup> *Aguilar*, 378 U.S. at 109.

<sup>64</sup> *Id.* at 114.

<sup>65</sup> *Id.* at 115-16.

<sup>66</sup> *Spinelli*, 393 U.S. at 414.

<sup>67</sup> *Id.* at 416.

<sup>68</sup> *Illinois v. Gates*, 462 U.S. 213, 267 (1983).

<sup>69</sup> *Id.*

<sup>70</sup> “[L]ower courts soon began to clamor for more explicit guidance.” Eugene Cerruti, *The Demise of the Aguilar-Spinelli Rule: A Cause of Faulty Reception*, 61 DENV. L.J. 431, 443, 447-50 (1984) (providing a general critique of the opinions). See generally Joseph D. Grano, *Probable Cause and Common Sense: A reply to the Critics of Illinois v. Gates*, 17 U. MICH. J. K. REFORM 465 (1984) (arguing the *Spinelli* test failed to consider its practical results). But see David P. Mitchell, *Anticipatory Search Warrants: The Supreme Court’s Opportunity to Reexamine the Framework of the Fourth Amendment*, 44 VAND. L. REV. 1387, 1404 (1991) (“the *Gates* Court mischaracterized the *Aguilar-Spinelli* test as unduly rigid because structured criteria are needed for a magistrate to determine probable cause with greater accuracy”).

<sup>71</sup> *Gates*, 462 U.S. at 239.

<sup>72</sup> *Id.* at 225.

<sup>73</sup> *Id.* at 225-26.

<sup>74</sup> *Gates*, 462 U.S. at 227.



treated as considerations in a totality of the circumstance analysis.<sup>75</sup> A magistrate should not be confined to an overly technical test but, instead, use a common-sense approach to determine whether there was sufficient and reliable information to support a probable cause finding.<sup>76</sup>

With this common-sense approach, *Aguilar*, *Spinelli*, and *Gates* scrutinize affidavits that rely on hearsay from either a criminal or an unknown informant. There are circumstances, however, in which a law enforcement officer provides information to the affiant, who subsequently presents it to the magistrate. The Court addressed officer hearsay in *United States v. Ventresca*,<sup>77</sup> where the officer affiant stated that the information in the affidavit was based on his personal knowledge and information obtained by other officers.<sup>78</sup> While the district court upheld the warrant, the appellate court held that the affidavit was insufficient because it did not include information on how the unnamed officers gathered their information.<sup>79</sup>

The Supreme Court disagreed with the appellate court's analysis, stating that affidavits are to be evaluated in a common-sense way. Moreover, "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."<sup>80</sup> A "fellow officer" is considered credible,<sup>81</sup> thus making the affidavit sufficient for probable cause without the affiant providing any additional information.<sup>82</sup> With this holding, the Court's ruling emphasized that a common-sense approach to probable cause determinations accepts the collective knowledge of law enforcement officers as reliable and sufficient to establish probable cause.

## B. VIRGINIA APPROACH

The Commonwealth of Virginia has adopted the Supreme Court's presumption of police officer reliability in pre-trial proceedings. In *Saunders v. Commonwealth*, the Virginia Supreme Court stated that information relayed by law enforcement officers "to the officer-affiant are considered reliable and credible."<sup>83</sup> The Virginia magistrate system uses *Saunders* to teach magistrates that officer testimony is per se reliable.<sup>84</sup>

<sup>75</sup> *Id.* at 233.

<sup>76</sup> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of the knowledge' of person's supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238.

<sup>77</sup> 380 U.S. 102 (1965).

<sup>78</sup> *Id.* at 103.

<sup>79</sup> *Id.* at 104.

<sup>80</sup> *Id.* at 111.

<sup>81</sup> "[T]he police...are presumptively reliable..." *Gates*, 462 U.S. at 284 (Brennan, J. dissenting). Eyewitnesses are also considered presumptively reliable. *See generally* *United States v. Bell*, 457 F.2d 1231, 1238 (5th Cir. 1972); *Saunders v. Commonwealth*, 218 Va. 294 (Va. 1977) (an eyewitness is not motivated by self-interest); *Drumheller v. Commonwealth*, 292 S.E.2d 602, 604 (Va. 1982); *McNeill v. Commonwealth*, 191 S.E.2d 1, 3 (Va. 1972) (a willingness to testify provides "an aura of credibility").

<sup>82</sup> *Ventresca*, 380 U.S. at 108-10.

<sup>83</sup> 218 Va. 294, 301 (1977).

<sup>84</sup> MAGISTRATE MANUAL, *supra* note 20, at 5-41.



Additional guidance simply states that, “The magistrate accepts the facts as reliable unless the magistrate *knows* the officer is providing false or misleading information in the affidavit.”<sup>85</sup> This guidance does not cite any case law or statute in support of a “knowing” standard.

## II. POLICE LIES

This section will provide a brief overview of existing studies on police perjury and provide a list of examples where officers were caught engaging in dishonest behavior.

### A. STUDIES

“[B]lue lies have existed as long as there have been restraints on police activity.”<sup>86</sup> This does not mean that *all* officers lie, only that police officers can lie to suit their interests.<sup>87</sup> Indeed, there is a consensus that police officers regularly commit perjury,<sup>88</sup> with judges, prosecutors, and defense attorneys being well aware of this fact.<sup>89</sup> While recent data on the extent of police perjury is lacking,<sup>90</sup> several studies have analyzed police deception. An early study linked police dishonesty to the exclusionary rule imposed by *Mapp v. Ohio*.<sup>91</sup> After *Mapp*, the study found there was an increase in police officers stating that defendants had “dropped” contraband in front of the officer.<sup>92</sup> These “dropsy” cases were likely fabricated to circumvent the exclusionary rule outlined in *Mapp*.<sup>93</sup>

Yet the exclusionary rule is not the only restriction providing “incentive to lie.”<sup>94</sup> A 1992 study determined that 20-50% of police officers commit perjury in response to

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<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> Capers, *supra* note 10, at 868; see W. A. Purrington, *Frequency of Perjury*, 8 COLUM. L. REV. 67 (1908) (noting police perjury over 100 years ago).

<sup>87</sup> “Social science evidence indicates that ordinary people lie quite frequently.” Gershowitz & Lewis, *supra* note 12, at 1189. This does not have to mean that police lies are inevitable. See generally Julia Simon-Kerr, *Systemic Lying*, 56 WM. L. REV. 2175 (2015); L.B. Gilbert, *New “first-in-the-nation” policy limits Seattle police from knowingly lying*, MYNORTHWEST (Nov. 2, 2023), <https://mynorthwest.com/local/new-first-in-the-nation-policy-limits-seattle-police-from-knowingly-lying/3937395>.

<sup>88</sup> *Improbable Cause*, *supra* note 19; Rachel Moran, *Brady Lists*, 107 MINN. L. REV. 657, 669 (2022) [hereinafter *Brady Lists*]. Perjury is more than simply telling an untruth. *E.g.*, Va. Code Ann. § 18.2-434 (willfully providing false testimony or statements under oath); NY Penal Laws § 210.15 (“swear[ing] falsely” about a material fact); Tx. Penal Code § (requiring intent to deceive and knowledge of the statement’s meaning).

<sup>89</sup> Capers, *supra* note 10, at 837; ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, xxi-xxii (1983).

<sup>90</sup> There is a persistent problem of getting data on police misconduct. See generally Rachel Harmon, *Why Do We (Still) Lack Data on Policing*, 96 MARQ. L. REV. 1119 (2013); Bary Friedman and G. Janszky, *Policing’s Information Problem*, 99 TEX. L. REV. 1 (2020).

<sup>91</sup> *Improbable Cause*, *supra* note 19, at 269. The exclusionary rule delivered in *Mapp* requires that “all evidence obtained by searches or seizures in violation of the Constitution [be]...inadmissible in...court.” William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 680 (2011).

<sup>92</sup> *Improbable Cause*, *supra* note 19, at 268-69; Capers, *supra* note 10, at 868; Cloud, *supra* note 14, at 1316.

<sup>93</sup> *People v. McMurty*, 314 N.Y.S.2d 194 (N.Y.C. Crim. Ct. 1970).

<sup>94</sup> “[A]s long as police officer’s use of power and fulfillment of responsibilities is reviewed...and as long as such reviewed are deemed by the officer as creating legal impediments to more immediate goals, [the officer] will have an incentive to lie.” Dorfman, *supra* note 10, at 461.



Fourth Amendment issues.<sup>95</sup> Perjury was frequently found in search warrant affidavits, which created the foundation for later perjury in court.<sup>96</sup> Another study revealed that 76% of police officers in the Chicago area believed that other officers misrepresent the facts to achieve a favorable probable cause determination.<sup>97</sup> Thus, even the low threshold of probable cause can still result officers lying to achieve their individual ends.

## B. EXAMPLES

With these limited studies, there are numerous examples of police officers lying.<sup>98</sup> This section will go through a series of examples to highlight the issue. The examples include instances where police were convicted of perjury as well as instances of corruption and dishonesty.

### 1. THE MOLLEN COMMISSION (1992)

In 1992, the New York City Mayor established the Mollen Commission in response to widespread concern about police corruption.<sup>99</sup> The Commission was tasked with examining the extent of corruption, existing policies and procedures to control corruption, and any proposed improvements to prevent corruption.<sup>100</sup> After a two-year investigation, the Commission revealed that corruption was so rampant in the New York Police Department (NYPD) that it spawned the term “testilying.”<sup>101</sup> Police lies were found in oral testimony and police records,<sup>102</sup> highlighting a troubling culture within the NYPD that impacted countless cases across the city.

### 2. MARK FUHRMAN AND THE O.J. SIMPSON TRIAL (1995)

Mark Fuhrman, a Los Angeles police detective assigned to investigate the death of Nicole Brown Simpson, provided testimony during the O.J. Simpson trial.<sup>103</sup> During his testimony, Fuhrman stated that he had never made racial slurs.<sup>104</sup> Recorded conversations

<sup>95</sup> *Improbable Cause*, *supra* note 19, at 272; Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992).

<sup>96</sup> *Improbable Cause*, *supra* note 19, at 272.

<sup>97</sup> Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1176 (2013).

<sup>98</sup> E.g., *Ex-Officer Guilty of Perjury, Obstruction for Role in Wrongful Murder Conviction Case*, ABC7 (July 16, 2024), <https://6abc.com/post/james-pitts-guilty-philadelphia-police-perjury-wrongful-murder-conviction/15063061/>; Bay City News, *OPD Officer Charged with Perjury, Threatening Witness: 125 Homicide Cases Under Review: DA*, ABC7 (April 25, 2023), <https://abc7news.com/oakland-police-officer-charged-opd-perjury-bribery-phong-tran/13187527/>.

<sup>99</sup> Hon. Harold Baer Jr., *The Mollen Commission Report: An Overview*, 40 NYLS L. REV. 73, 74 (1995).

<sup>100</sup> *Id.*

<sup>101</sup> Capers, *supra* note 10, at 836; Joseph Goldstein, *Testilying By Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>.

<sup>102</sup> Gabriel J. Chin & Scott C. Wells, *The Blue Wall of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234 (1998). This behavior was not unique to New York, as similar conduct was also found to occur in Los Angeles and Chicago. *Id.* at 235.

<sup>103</sup> Stefania Dazio, *California Law Bars Ex-LAPD Officer Mark Fuhrman, Who Lied at OJ Simpson Trial, From Policing*, AP (June 7, 2024), <https://apnews.com/article/mark-fuhrman-decertified-oj-simpson-trial3e3e691a5c6b5671d-d8aedf06b96b444>.

<sup>104</sup> *Id.*



between Fuhrman and an aspiring screenwriter, however, contradicted this testimony.<sup>105</sup> On the recording, Fuhrman could be heard repeatedly using the n-word and boasting about his racism.<sup>106</sup> Fuhrman was ultimately charged with perjury and pleaded no contest.<sup>107</sup> He was sentenced to three years probation.<sup>108</sup>

### 3. THE RAMPART SCANDAL (1990s)

The Los Angeles Police Department's Community Resources Against Street Hoodlums (CRASH) unit was created to combat a rise in violent crime and gang activity in west L.A., a primarily Latino neighborhood.<sup>109</sup> While the goal was to have CRASH officers "mix with gang members," the unit maintained an active "us versus them" attitude.<sup>110</sup> To join the CRASH unit, a current officer had to sponsor the new member,<sup>111</sup> creating an insular environment where multiple officers succumbed to the temptation to sell drugs. For instance, Officer Rafael Perez was arrested on suspicion of stealing cocaine.<sup>112</sup> He accepted a plea agreement, and an investigation was launched to investigate the unit for corruption.<sup>113</sup> The investigation ultimately determined that CRASH officers acted like a gang.<sup>114</sup>

In investigating the unit, the LAPD Board of Inquiry determined that poor leadership and oversight mechanisms led to a breakdown of integrity.<sup>115</sup> One captain of the unit had a reputation for being weak while other mid-level supervisors regularly fought superior officers.<sup>116</sup> This resulted in an environment where officers largely ignored authority. They either were not supervised at all<sup>117</sup> or lashed out at anyone who tried to change their behavior.<sup>118</sup> Ultimately, 156 felony convictions were dismissed because of the unit's corruption.<sup>119</sup>

<sup>105</sup> E. Alex Jung, *What Happened to Mark Fuhrman After the O.J. Simpson Trial*, VULTURE (Mar. 29, 2016), <https://www.vulture.com/2016/03/mark-fuhrman-what-happened-after-oj-simpson-trial.html>.

<sup>106</sup> Jim Newton, *How Rodney King Helped Exonerate O.J. Simpson*, LA TIMES (April 11, 2024), <https://www.latimes.com/opinion/story/2024-04-11/oj-simpson-rodney-king-lapd-nicole-brown-simpson-rongoldman>.

<sup>107</sup> Dazio, *supra* note 103.

<sup>108</sup> *Mark Fuhrman Fined for Perjury*, ROANOKE TIMES (Oct. 3, 1996), <https://scholar.lib.vt.edu/VA-news/ROA-Times/issues/1996/rt9610/961003/10030064.htm> (last visited December 24, 2025).

<sup>109</sup> Todd E. Bricker, *Rampart Scandal*, BRITANNICA (last updated Mar 7, 2025), <https://www.britannica.com/topic/Rampart-scandal>.

<sup>110</sup> Matt Lait & Jim Newton, *The 'Rampart Way': Macho, Insubordinate and Cliquish*, LA TIMES (Mar. 1, 2000), <https://www.latimes.com/archives/la-xpm-2000-mar-01-mn-4184-story.html>.

<sup>111</sup> Bernard C. Parks, *Rampart Area Corruption Incident*, 1, 62 (L.A. Police Dept. Mar. 1, 2000), [https://lapdonlinestrge-acc.blob.core.usgovcloudapi.net/lapdonlinemedia/2021/12/boi\\_pub.pdf](https://lapdonlinestrge-acc.blob.core.usgovcloudapi.net/lapdonlinemedia/2021/12/boi_pub.pdf).

<sup>112</sup> Damian Dovarganes, *LAPD Has Shed Corrupt Image, City Leaders Say*, NBC (July 26, 2009, 2:25 PM EDT), <https://www.nbcnews.com/id/wbna32156937>.

<sup>113</sup> *Id.*; See generally Peter J. Boyle, *Bad Cops*, NEW YORKER (May 13, 2001), <https://www.newyorker.com/magazine/2001/05/21/bad-cops> (discussing investigations into LAPD corruption).

<sup>114</sup> Dovarganes, *supra* note 112.

<sup>115</sup> Lait & Newton, *supra* note 110.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* The LAPD report found that there was little oversight over their work schedules, use of undercover vehicles, and many other police functions.

<sup>118</sup> A supervisor complained that the unit was hanging out instead of working in the field. "The supervisor was confronted about 'tattling on the CRASH officers' and two days later found the tires on his personal vehicle slashed." *Id.*

<sup>119</sup> Covey, *supra* note 97, at 1138.



## 4. THE TULIA SCANDAL (1999)

In 1999, Swisher County Deputy Sheriff Tom Coleman conducted a lone drug “sting,” arresting forty-six Tulia residents on allegations of drug dealing.<sup>120</sup> The vast majority of the arrestees were Black,<sup>121</sup> and the allegations relied solely on Coleman’s testimony.<sup>122</sup> He “claimed to have made more than 100 drug buys” while undercover,<sup>123</sup> bolstering his charges against Tulia residents. Yet Coleman did not conduct any audio or visual surveillance,<sup>124</sup> and there were no witnesses to the alleged criminal conduct.<sup>125</sup> Despite this shortcoming, Coleman was awarded Outstanding Officer of the Year by the Texas Department of Public Safety for his work.<sup>126</sup>

The scandal was compounded by excessive sentencing. The first defendant to go to trial was sentenced to 90 years, while another defendant received a sentence of 391 years.<sup>127</sup> This contrasted with a few defendants who were able to contradict Coleman’s word, raising skepticism about his overall claims.<sup>128</sup> A group of lawyers from across the nation, the Amarillo Chapter of the NAACP, and multiple media outlets also got involved.<sup>129</sup> At this point, troubling information about Coleman was revealed, including how Coleman had been charged with theft while undercover.<sup>130</sup> In April 2003, a Dallas judge dismissed thirty-eight drug convictions based on Coleman’s testimony.<sup>131</sup> A different Dallas judge would also call Coleman “the most devious, non-responsive law enforcement officer witness this Court has witnessed in 25 years...”<sup>132</sup> Coleman was ultimately found guilty of perjury.<sup>133</sup>

<sup>120</sup> Legal Defense Fund, *Bad Times in Tulia, Texas*, LDF (Sept. 29, 2000), <https://www.naacpldf.org/case-issue/bad-times-tulia-texas/> (last accessed December 24, 2025).

<sup>121</sup> Alex Hunt, *The Tulia Drug Bust of 1999: A Case of Racial Injustice and Legal Failures*, TEX. STATE HIST. ASS’N (May 4, 2022), <https://www.tshaonline.org/handbook/entries/tulia-drug-bust-of-1999>. About ten percent of Tulia’s black community was arrested.

<sup>122</sup> *Racist Arrests in Tulia, Texas*, ACLU (June 30, 2003), <https://www.aclu.org/documents/racist-arrests-tulia-texas>.

<sup>123</sup> Hunt, *supra* note 121. The local paper would also applaud the arrests, claiming that “garbage” was being cleaned from the streets. *Tulia Texas: A Story of Injustice and Mass Incarceration*, WAGNER & LYNCH, <https://seoklaw.com/tulia-texas-a-story-of-injustice-and-mass-incarceration-2/>. Another praised the sheriff for “rounding up the ‘scumbags’...”. Nate Blakeslee, *The Color of Justice*, TEX. OBSERVER (June 23, 2000), <https://www.texasobserver.org/611-the-color-of-justice/>.

<sup>124</sup> Legal Defense Fund, *supra* note 120.

<sup>125</sup> *Id.* There were no civilian or law enforcement witnesses to Coleman’s undercover buys.

<sup>126</sup> Hans Sherrer, *Tulia Undercover Deputy Tom Coleman Convicted of Perjury*, PRISON LEGAL NEWS (Nov. 2005), <https://www.prisonlegalnews.org/news/2005/nov/15/tulia-undercover-deputy-tom-coleman-convicted-of-perjury/>.

<sup>127</sup> Hunt, *supra* note 121 (some sentences were “enhanced due to alleged criminal activity in drug free school zones.”); Legal Defense Fund, *supra* note 120.

<sup>128</sup> For instance, one defendant presented times cards to contradict Coleman’s testimony. Hunt, *supra* note 120.

<sup>129</sup> *Id.*; Blakeslee, *supra* note 123. The New York Times author Bob Herbert wrote a series of “scathing articles” about the cases, bringing national attention to the scandal. There would eventually be television news coverage of the case, with 60 Minutes and 20/20 airing news stories. Hunt, *supra* note 121.

<sup>130</sup> Hunt, *supra* note 121.

<sup>131</sup> *Racist Arrests in Tulia, Texas*, *supra* note 122.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; Jim Wakins, *Texas Undercover Cop Convicted of Perjury*, NBC NEWS (Jan. 14, 2005); <https://www.nbcnews.com/id/wbna6827494> (found guilty of falsely saying he did not know about his theft charge until 1998).



### 5. THE SHEETROCK SCANDAL (1999)

In 1999, Dallas Police Department Officers Delapaz and Herrera arrested Enrique Martinez Alonso for possession of cocaine.<sup>134</sup> Alonso agreed to become their informant and would develop into the squad's "most prolific snitch."<sup>135</sup> Yet defense attorneys caught on to similarities in Alonso's claims,<sup>136</sup> with one even warning Officer Delapaz that his informant was "dirty."<sup>137</sup> Another attorney would raise similar concerns with a prosecutor, but such concerns were left ignored.<sup>138</sup> In presenting their cases, two defense attorneys sought lab tests, which showed that the cocaine their clients were accused of dealing was Sheetrock.<sup>139</sup> Despite this evidence, prosecutors sought eighty charges against about fifty defendants in cases that involved Officer Delapaz, Officer Herrera, and Alonso.<sup>140</sup> Most of the defendants were poor Hispanics, with many speaking little English.<sup>141</sup>

After the scandal broke, two officers were fired and the narcotics unit command changed.<sup>142</sup> A city-appointed panel also found that supervisors ignored multiple "red flags," including how the drugs were clearly fake.<sup>143</sup> Delapaz was federally indicted for five counts of deprivation of rights under color of law, and one count of making a false statement.<sup>144</sup> While he would ultimately be acquitted of the federal charges,<sup>145</sup> Texas would convict him of lying to obtain a search warrant.<sup>146</sup> Three confidential informants who worked with Delapaz would also plead guilty "to concocting the scheme."<sup>147</sup> Twenty-three officers were ultimately named in over 100 complaints to police internal

<sup>134</sup> Skip Hollandsworth, *Snow Job*, TEX. MONTHLY (Apr. 2002), <https://www.texasmonthly.com/articles/snow-job/>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; Paul Duggan, *Dallas Sniffs Police Scandal; Cocaine Tests Fake; Officers Suspended*, SEATTLE TIMES (Jan. 20, 2002); <https://archive.seattletimes.com/archive/20020120/dallas20/dallas-sniffs-police-scandal-cocaine-tests-fake-officers-suspended>.

<sup>137</sup> Hollandsworth, *supra* note 134.

<sup>138</sup> *Id.* But see Susan Parrott, *Dallas Phony Drug Cases Examined*, MIDLAND DAILY NEWS (Mar. 15, 2002), <https://www.ourmidland.com/news/article/Dallas-Phony-Drug-Cases-Examined-7103565.php> (prosecutors claimed they discovered the discrepancy and informed police).

<sup>139</sup> Hollandsworth, *supra* note 134; Duggan *supra* note 136. "In as many as 24 cases...lab tests revealed fake drugs..." Matt Curry, *Drug Cases in Dallas Questioned*, AP (Jan. 9, 2022).

<sup>140</sup> WFAA-TV, *Fake Drugs, Real Lives*, PEABODY (2002), <https://peabodyawards.com/award-profile/fake-drugs-real-lives/>.

<sup>141</sup> Max Linksy, *The Longform Guide to Cocaine*, SLATE (June 1, 2013), <https://slate.com/humaninterest/2013/06/cocaine-dealers-and-users-the-longform-guide-to-blow-and-those-who-use-it.html>.

<sup>142</sup> Thomas Korosec, *Dallas Police Hammered for Fake Drug Scandal*, HOUSTON CHRON. (Oct. 21, 2004); <https://www.chron.com/news/houston-texas/article/Dallas-police-hammered-for-fake-drug-scandal-1486478.php>.

<sup>143</sup> Hollandsworth, *supra* note 134. ("any experienced narcotics officer should have been able to open a bag of ground-up Sheetrock...and know immediately from its texture and feel that it was not cocaine.").

<sup>144</sup> Delapaz v. State, No. 05-05-00660-CR (Tx. Ct. App., Mar. 28, 2007), <https://law.justia.com/cases/texas/fifthcourt-of-appeals/2007/05-05-00660-cr-6.html>; *Dallas Police Officer Indicted on Multiple Charges of Civil Rights Violations*, DEPT. OF JUSTICE (Apr. 25, 2003), [https://www.justice.gov/archive/opa/pr/2003/April/03\\_crt\\_256.htm](https://www.justice.gov/archive/opa/pr/2003/April/03_crt_256.htm). These claims were based on false statements made in police reports and to the FBI.

<sup>145</sup> Delapaz, *supra* note 144.

<sup>146</sup> *Another Reversal for Former Dallas Officer Delapaz in Fake-Drug Trials*, WFAA (Oct. 16, 2009), <https://www.wfaa.com/article/news/local/another-reversal-for-former-dallas-officer-delapaz-in-fake-drug-trials/287-411460843>. Delapaz would be sentenced to five years in prison, while Herrera would get one year probation. Jennifer Emily, *Dallas Officer Pleads Guilty in Fake-Drug Scandal, Gets Probation*, DALLAS NEWS (Mar. 11, 2009); <https://www.dallasnews.com/news/crime/2009/03/11/dallas-officer-pleads-guilty-in-fake-drug-scandal-gets-probation/>.

<sup>147</sup> Korosec, *supra* note 142. Delapaz would be sentenced to five years in prison. Emily, *supra* note 146.



affairs or the city's public integrity section.<sup>148</sup>

## 6. RONALD WATTS AND THE CHICAGO POLICE DEPARTMENT (EARLY 2000s)

Sergeant Ronald Watts and his team “terrorized” the residents of the Ida B. Well housing projects.<sup>149</sup> Watts ran a drug operation out of the housing project and arrested anyone who tried to protest, often by planting evidence.<sup>150</sup> He was supported by Kallat Mohammed and other officers on the Second District Tactical team.<sup>151</sup> Allegations of corruption led federal agencies to investigate Watts' conduct,<sup>152</sup> and he would eventually be arrested after he stole from a federal informant.<sup>153</sup> Further investigation into his conduct would reveal that his scheme was vast, and over 220 convictions were overturned.<sup>154</sup>

Like the Tulia Scandal and Rampart Scandal, Watts' conduct was largely overlooked or supported by the police department. For instance, “[w]hen corrupt police officers demanded a bribe from Ben Baker . . . [he] told the Chicago Police Department Office of Professional Standards . . . [Who] did nothing to slow down the criminals. Instead, it informed the corrupt officers about the complaint and named the source.”<sup>155</sup> Officers would ultimately arrest Baker and use perjured testimony to get multiple felony convictions.<sup>156</sup> This all occurred in a police department that claimed to have “‘absolutely zero tolerance for misconduct and/or illegal activity’ within the department.”<sup>157</sup>

Many people also submitted claims to the Cook County State Attorney's Office for review, claiming that Watts had framed them. While initial claims were reviewed and largely unopposed, many claims went unaddressed, with claimants going directly to court to seek redress.<sup>158</sup> Additionally, the Civilian Office of Police Accountability would not issue any recommendations or conclusions until 2021, seventeen years after

<sup>148</sup> Korosec, *supra* note 142.

<sup>149</sup> *Judge Tosses Eight More Convictions Linked to Disgraced Former CPD Sgt. Ronald Watts*, CBS (Oct. 3, 2022), <https://www.cbsnews.com/chicago/news/chicago-police-sergeant-ronald-watts-convictions-overtuned-corruption-framed/> [hereinafter *Judge Tosses Convictions*].

<sup>150</sup> *Watts Team Scandal*, EXONERATION PROJ., <https://www.exonerationproject.org/stories/watts-team-scandal/> (last visited Dec. 24, 2025).

<sup>151</sup> Matt Masterson, *15 Men Seek Exoneration in Lawsuit Claiming Chicago Police Corruption*, WTTW (Sep. 13, 2017), <https://news.wttw.com/2017/09/13/15-men-seek-exoneration-lawsuit-claiming-chicago-police-corruption>.

<sup>152</sup> See generally Jon Schuppe, *Dozens Who Say They Were Framed by Corrupt Chicago Drug Squad Demand Exoneration*, NBC (July 19, 2021), <https://www.nbcnews.com/news/us-news/dozens-who-say-they-were-framed-corrupt-chicago-drugsquad-n1274255>.

<sup>153</sup> Chip Mitchell, *Disgraced Ex-Chicago Police Sergeant Breaks His Decadelong Silence*, CHICAGO SUN TIMES (Feb. 14, 2023), <https://chicago.suntimes.com/2023/2/14/23598473/ronald-watts-cpd-police-department-wrongful-convictions-corruption-kim-foxx-blaze-tv>.

<sup>154</sup> Phil Rogers, *Dozens More Watts Convictions Overtuned, Bringing Total to 212*, NBC5 (Apr. 22, 2022), <https://www.nbchicago.com/investigations/dozens-more-watts-convictions-overtuned-bringing-total-to212/2814175/>.

<sup>155</sup> *People v. Glenn*, 106 N.E.3d 462, 463 (Ill. App. Ct. 2018).

<sup>156</sup> *Id.*

<sup>157</sup> Schuppe, *supra* note 152.

<sup>158</sup> *Id.*



the initial investigation,<sup>159</sup> and almost a decade after Watts was convicted.<sup>160</sup> Aside from criminal charges sought against Watts and Mohammed, this largely left officers in the unit untouched.<sup>161</sup>

### 7. FLORIDA DASH CAM FOOTAGE (2009)

In 2009, Officer Joel Francisco rear-ended a vehicle parked on the side of the road.<sup>162</sup> Instead of writing an accident report, four police officers (including Francisco) crafted a story to protect Francisco from punishment and place blame on the driver of the struck vehicle.<sup>163</sup> Dash camera footage caught a veteran officer saying, “We will do a little Walt Disney to protect the cop . . . ,”<sup>164</sup> “I’m gonna tell you exactly how to word this so we can get him off the hook,”<sup>165</sup> and “I don’t lie . . . but if I need to bend it a little to protect a cop, I’m gonna.”<sup>166</sup> When the dash camera footage was revealed, the charges were dropped and the officers placed on administrative leave.<sup>167</sup> The veteran officer would later be convicted of falsifying records and be sentenced to ninety days in jail.<sup>168</sup>

### 8. HARDING STREET RAID AND THE HOUSTON POLICE DEPARTMENT (2019)

On January 28, 2019, Houston Police Department officers executed a no-knock search warrant on Dennis Tuttle and Rhogena Nicholas’ home.<sup>169</sup> A shootout ensued, with both Tuttle and Nicholas being killed.<sup>170</sup> On January 30, 2019, the department released the search warrant, which stated that a confidential informant had purchased heroin from inside the house and had seen a gun.<sup>171</sup> Officer Gerald Goines had prepared and presented

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<sup>159</sup> Phil Rogers, *COPA Issues First Findings in Ronald Watts Scandal*, NBC5 (Mar. 15, 2021, 9:27 ET), <https://www.nbchicago.com/news/local/copa-issues-first-findings-in-ronald-watts-scandal/2462626/>; see CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, SUMMARY REPORT OF INVESTIGATION 1087742, at 21 (Mar. 3, 2021) (summarizing the investigation into Officer Watts).

<sup>160</sup> He plead guilty to federal charges and was sentenced to 22 months in prison. *Judge Tosses Convictions*, *supra* note 149.

<sup>161</sup> Rogers, *supra* note 159; Schuppe, *supra* note 152. Some officers were put on desk duty.

<sup>162</sup> Mallory Shipman, *Hollywood Police Officers Caught Falsifying DUI*, WILLIAM MOORE LAW FIRM, <https://www.crime-lawyers.com/hollywood-police-officers-caught-falsifying-dui.html> (last visited Dec. 24, 2025).

<sup>163</sup> *Id.*

<sup>164</sup> *DUI Charges Against Student Dropped in Light of Alleged Police Cover-Up*, HOYA (Oct. 4, 2009), <https://thehoya.com/uncategorized/dui-charges-against-student-dropped-in-light-of-alleged-police-cover-up/>.

<sup>165</sup> Shipman, *supra* note 162.

<sup>166</sup> Mike Celizic, *Tape Reveals Cops Tried to Frame Her For Crash*, TODAY (Aug. 3, 2009, at 8:57 ET), <https://www.today.com/news/tape-reveals-cops-tried-frame-her-crash-wbna32266883>.

<sup>167</sup> *Id.*

<sup>168</sup> *Brady Lists for Officers*, BRADYCOPS (Jan. 4, 2014), <https://bradycops.org/states/florida/17th.pdf>.

<sup>169</sup> Florian Martin, *Timeline: A Botched Houston Police Raid and Its Consequences*, HOUSTON PUBLIC MEDIA (Feb. 28, 2019), <https://www.houstonpublicmedia.org/articles/news/2019/02/28/323570/a-botched-houston-police-raid-and-its-consequences-a-timeline/>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; Adam Zuvanic, *Harding Street Raid: Former Houston Police Officer Gerald Goines Reindicted on Murder Charges*, HOUSTON PUBLIC MEDIA (Apr. 4, 2024), <https://www.houstonpublicmedia.org/articles/court/2024/04/04/482603/harding-street-raid-former-houston-police-officer-gerald-goines-reindicted-on-murder-charges/>.



the affidavit.<sup>172</sup> He also claimed that he had conducted a two-week investigation after an anonymous tip was received about heroin at the house.<sup>173</sup> Officer Steven Bryant also claimed that he witnessed the drug buy.<sup>174</sup>

These statements were proven false, as Officer Goines later admitted that he had fabricated the information.<sup>175</sup> Multiple confidential informants also told investigators that they often got paid for controlled buys that never took place.<sup>176</sup> As perjured statements were used to support the search warrant, the FBI charged Goines with two counts of violating the victim's Fourth Amendment rights and three counts of obstruction for providing false statements.<sup>177</sup> Harris County charged Goines with murder.<sup>178</sup>

This scandal spawned further investigation into Officer Goines and associated officers, with over 14,000 cases being reviewed.<sup>179</sup> The Texas Court of Criminal Appeals found that Goines had falsely testified when under oath in court, further stating that Goines had a "propensity to be untruthful in his undercover drug investigations."<sup>180</sup> Like many prior scandals, the Houston Police Department determined that there was little oversight of how narcotics officers dealt with confidential informants.<sup>181</sup>

## 9. KENTUCKY STATE POLICE (2020)

In April 2020, three Kentucky State Police Troopers went to Alex Hornback's home to execute a bench warrant.<sup>182</sup> The troopers entered the home's basement to arrest Hornback, and an altercation ensued. Troopers Wright and Czartoriski were deposed about the incident in 2021, where both testified that they did not strike Hornback.<sup>183</sup> Trooper Wright further denied placing his arm around Hornback's neck, and would receive a "trooper of the year award" later that year.<sup>184</sup> Unbeknownst to the troopers,

<sup>172</sup> Lucio Vasquez, *Ex-Houston Cop Gerald Goines Sentenced to 60 Years in Prison After Harding Street Murder Convictions*, HOUSTON PUBLIC MEDIA (Oct. 8, 2024), <https://www.houstonpublicmedia.org/articles/court/2024/10/08/502221/gerald-goines-60-years-harding-streetmurder-convictions-houston/>.

<sup>173</sup> Associated Press, *Former Houston Police Officer Charged with Murder Over Botched Drug Raid*, HOUSTON PUBLIC MEDIA (Aug. 23, 2019), <https://www.houstonpublicmedia.org/articles/news/2019/08/23/343819/formerhouston-police-officer-charged-with-murder-over-botched-drug-raid/>.

<sup>174</sup> Jacob Sullum, *C.I. Whose Heroin Buy Led to a Deadly Houston Drug Raid Does Not Seem to Exist*, REASON (Feb. 15, 2019), <https://reason.com/2019/02/15/the-ci-whose-controlled-buy-led-to-a-dea/>.

<sup>175</sup> Associated Press, *supra* note 173.

<sup>176</sup> Martin, *supra* note 169; Sullum, *supra* note 174.

<sup>177</sup> *Goines Indicted on Federal Civil Rights Charge*, U.S. ATT'YS OFF. (Nov. 20, 2019), <https://www.justice.gov/us-ao-sdtx/pr/goines-indicted-federal-civil-rights-charge>.

<sup>178</sup> Associated Press, *supra* note 173.

<sup>179</sup> Chloe Alexander, *14,000 cases related to Gerald Goines, Steven Bryant now under investigation*, KHOU 11 (Nov. 24, 2025), <https://www.khou.com/article/news/crime/14000-cases-related-to-gerald-goines-steven-bryant-now-under-investigation/285-c7aac68c-1dd7-4503-9275-478d554870ce>.

<sup>180</sup> *Ex parte Mallet*, 602 S.W.3d 922, 928 (Tex. Crim. App. 2020) ("The investigation into Goines showed his propensity to be untruthful in his undercover drug assignments.").

<sup>181</sup> Cameron Langford, *Shocking Corruption Revealed in Houston Police Department*, COURTHOUSE NEWS SERV. (July 2, 2020), <https://www.courthousenews.com/shocking-corruption-revealed-in-houston-police-department/>.

<sup>182</sup> *Hornback v. Czartorski*, 2022 BL 269935 (W.D. Ky. Aug. 3, 2022).

<sup>183</sup> R.G. Dunap, *False Testimony Didn't End These Kentucky State Troopers' Careers*, LPM (Feb. 28, 2022), <https://www.lpm.org/investigate/2022-02-28/false-testimony-didnt-end-these-kentucky-state-troopers-careers>.

<sup>184</sup> *Id.*; *Trooper Cameron Wright Honors for Impaired Driving Enforcement*, KY. ST. POL. (Mar. 12, 2021), <https://www.kentuckystatepolice.ky.gov/news/p4-3-12-2021-2>; Alexis Matthews, *Lawsuit Filed Against Indicted KSP Over*



the incident had been caught on a video-only camera, which directly contradicted the troopers' sworn testimony.<sup>185</sup> Trooper Czartorski was ultimately charged with two counts of excessive force, while Trooper Wright was charged with excessive force and perjury.<sup>186</sup>

### 10. FAIRFAX COUNTY POLICE DEPARTMENT (2020-2021)

The Fairfax County Police Department (FCPD) was accused of “provid[ing] misleading representations” in response to the Brevard Sheriff’s Office employment history request.<sup>187</sup> The Sheriff’s Office had hired Jonathan A. Freitag, a former Fairfax County police officer. During his background investigation, the Sheriff’s Office reached out to the FCPD seeking employment information. The county responded by saying that Freitag’s “overall work performance [was] ‘good’” and that he had never been subject to disciplinary action.<sup>188</sup> In reality, Freitag had resigned from the police department while under internal and criminal investigations.<sup>189</sup> County prosecutors alleged that Freitag had made racially motivated traffic stops and lied in reports.<sup>190</sup> Freitag’s lies resulted in a DC firefighter spending almost two years in prison.<sup>191</sup> Prosecutors attempted to dismiss more than 400 convictions that involved Freitag’s work.<sup>192</sup> When the Brevard Sheriff’s Office learned of the allegations, they fired Freitag, condemning the FCPD for providing “misleading representations.”<sup>193</sup> The FCPD stated that “administrative errors” caused the discrepancy.<sup>194</sup>

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*Excessive Force Claims*, WLKY (June 18, 2025); <https://www.wlky.com/article/lawsuit-filed-indictedksp-excessive-force/65106864>.

<sup>185</sup> Matthews, *supra* note 184.

<sup>186</sup> *Federal Grand Jury in Louisville Indicts One Former and Two Current Kentucky State Police Troopers for Federal Civil Rights Violations*, U.S. ATT’YS OFF. (Mar. 4, 2025); <https://www.justice.gov/usao-wdky/pr/federal-grand-jury-louisville-indicts-one-former-and-two-current-kentucky-state-police>. The troopers would ultimately face various civil suits as well. *E.g.*, *Blevins v. Wright*, Docket No. 3:25-cv-00363 (W.D. Ky. Jun 16, 2025); *Miller v. Wright*, Docket No. 3:25-00134 (W.D. Ky Mar. 5, 2025); *Hornback v. Czartorski*, Docket No. 3:20-cv-00703 (W.D. Ky. Oct. 16, 2020).

<sup>187</sup> Alessandro Marazzi Sassoon, *Brevard County Sheriff’s Deputy Fired After Past Misconduct Revealed by Washington Post*, FLOR. TODAY (Apr. 19, 2021), <https://www.floridatoday.com/story/news/2021/04/19/brevardflorida-sheriffs-deputy-fired-after-misconduct-history-virginia-revealed/7287865002/>. For more information on officers fired by or resigning from one department only to be hired by another, see Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020).

<sup>188</sup> Sassoon, *supra* note 187.

<sup>189</sup> Tom Jackman, *Fairfax Seeks to Dismiss 400 Convictions in Cases Brought by One Officer*, WASH. POST (Apr. 14, 2021), <https://www.washingtonpost.com/dc-md-va/2021/04/16/convictions-dismiss-jonathan-freitag-fairfax/>.

<sup>190</sup> *Id.*

<sup>191</sup> Drew Wilder, *DC Ex-Firefighter Freed From Prison After Virginia Police Stop Found Unlawful*, NBC4 (Apr. 21, 2021), <https://www.nbcwashington.com/news/local/northern-virginia/dc-ex-firefighter-elon-wilson-releasedconviction-overturned-jonathan-freitag/2647879/>.

<sup>192</sup> *Audio of Internal Affairs Interview Reveals Details of Challenged Va. Arrest*, NBC4 (Apr. 23, 2021), <https://www.nbcwashington.com/news/local/northern-virginia/audio-of-internal-affairs-interview-reveals-newdetails-of-challenged-va-arrest/2650585/>.

<sup>193</sup> Sassoon, *supra* note 187.

<sup>194</sup> Courtney Pomeroy, *Ex-Fairfax County Cop Accused of Racial Profiling Charged with DUI in Florida*, ABC7 (Apr. 27, 2021), <https://wjla.com/news/local/ex-fairfax-county-cop-accused-of-racial-profiling-charged-with-dui-inflorida>.



### III. VIRGINIA CRIMINAL PROCEDURE

Because this article uses Virginia as a case study for how a presumption of credibility functions, this section will explain the state's magistrate system, a magistrate's responsibilities, and how magistrates conduct hearings.

#### A. MAGISTRATE SYSTEM

Magistrates are “neutral and detached judicial officer[s]”<sup>195</sup> responsible for conducting various proceedings.<sup>196</sup> A magistrate's authority is derived from statutes, which provide for various powers, including the power to issue arrest warrants, issue search warrants, and admit an individual to bail.<sup>197</sup> A magistrate may also issue certain civil processes, such as an emergency custody order<sup>198</sup> or an emergency protective order.<sup>199</sup>

Virginia adopted a magistrate system in 1974, with a 2008 reorganization<sup>200</sup> placing magistrates under the Office of the Executive Secretary<sup>201</sup> within the Supreme Court.<sup>202</sup> The system is comprised of six regions, with each region containing one or more districts.<sup>203</sup> The Executive Secretary, in consultation with the chief circuit judge, appoints magistrates to a district,<sup>204</sup> with the magistrates having general authority to serve anywhere in the region.<sup>205</sup> Virginia Code 19.2-37 provides eligibility requirements, including that the person must have a bachelor's degree, be a Virginia resident, and be a citizen of the United States. There are also certain limitations, such as preventing outside employment or the practice of law while serving as a magistrate. Additionally, a person cannot serve as a magistrate if they work for the U.S. government or have been convicted of a felony.<sup>206</sup>

If appointed, a magistrate takes an oath of office, swearing that they will support the U.S. Constitution, the Virginia Constitution, and “faithfully and impartially” perform their duties.<sup>207</sup> The magistrate must also go through a certification process and a probation period. This training includes 240 hours of on-the-job training, resulting in magistrates

<sup>195</sup> *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979).

<sup>196</sup> In the Commonwealth of Virginia, a magistrate is a judicial officer authorized to issue arrest and search warrants, commit arrested people to jail, or release arrested people on bail. Va. S. Ct. R. 3A:2(b)(5).

<sup>197</sup> MAGISTRATE MANUAL, *supra* note 20, at 1-12; VA. CODE ANN. § 19.2-45.

<sup>198</sup> VA. CODE ANN. § 37.2-808.

<sup>199</sup> VA. CODE ANN. § 19.2-152.8.

<sup>200</sup> From 1974 to 2008, magistrates were appointed and governed by the Chief Circuit Court judge of the district the magistrate would serve. MAGISTRATE MANUAL, *supra* note 20, at 1-10.

<sup>201</sup> The Executive Secretary is the state court administrator. The Secretary acts under the direction of the Supreme Court Chief Justice. *Id.* at 1-9.

<sup>202</sup> *Id.* at 1-5.

<sup>203</sup> *Id.* at 1-6.

<sup>204</sup> *Id.* at 1-10.

<sup>205</sup> *Id.* at 1-13.

<sup>206</sup> VA. CODE ANN. §§ 19.2-37, 2.2-2800.

<sup>207</sup> MAGISTRATE MANUAL, *supra* note 20, at 1-11.



initially conducting hearings with a second supervising magistrate present.<sup>208</sup> Once the training is complete, the magistrate is cleared to independently conduct hearings and issue processes.<sup>209</sup>

## B. HEARINGS TO DETERMINE PROBABLE CAUSE FOR AN ARREST

This section will describe hearings held with law enforcement officers and community members.

### 1. LAW ENFORCEMENT OFFICERS

When a law enforcement officer makes a warrantless arrest, seeks a warrant with no one in custody, or arrests a person on an existing warrant, the officer must appear before the magistrate.<sup>210</sup> This appearance may be in person or via two-way electronic communication.<sup>211</sup> If the scenario involves a warrantless arrest, the officer must bring the arrested person “forthwith” before the magistrate.<sup>212</sup>

Once before the magistrate, the officer must provide testimony under oath.<sup>213</sup> In addition to this testimony, the officer must provide a written complaint for all felony charges sought.<sup>214</sup> If the officer is only seeking a misdemeanor, the officer does not have to provide a written complaint unless the magistrate requires it.<sup>215</sup> Once the magistrate is finished examining the officer’s testimony, the arrested person is given an opportunity to provide testimony, but he or she is not required to speak. Like the officer, the arrested person must provide testimony under oath.<sup>216</sup>

When evaluating testimony, the magistrate is only looking for whether there are enough credible facts to support probable cause.<sup>217</sup> To make his or her decision, the magistrate must decide whether there is a “fair probability” that a crime has been committed by the accused person.<sup>218</sup> “Fair probability” is not a clear standard,<sup>219</sup> but the magistrate must generally determine whether the information provided is accurate or

<sup>208</sup> Karl Hade, SB 971/SB1256 Letter, Magistrate Training, Nov. 1, 2023, <https://rga.lis.virginia.gov/Published/2023/RD621/PDF#:~:text=Only%20new%20magistrates%20who%20successfully,next%20phase%20of%20required%20training.&text=After%20completing%20the%20certification%20school,o n%2Dthe%2Djob%20training.>

<sup>209</sup> *Id.*

<sup>210</sup> VA. CODE ANN. §§ 19.2-82, 19.2-76, 19.2-80.

<sup>211</sup> VA. CODE ANN. § 19.2-3.1.

<sup>212</sup> VA. CODE ANN. § 19.2-82.

<sup>213</sup> *Id.*

<sup>214</sup> VA. CODE ANN. § 19.2-72.

<sup>215</sup> *Id.*; Va. S. Ct. R. 3A:3.

<sup>216</sup> VA. CODE ANN. § 19.2-72.

<sup>217</sup> There are different probable cause definitions. *E.g.*, *Sanders v. Palmer*, 55 F. 217, 2020 (2nd Cir. 1893) (“[A] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent and cautious [person] to believe that the accused is guilty of the offense with which he is charged.”); *Jaben*, 381 U.S. at 220, 225 (there must be enough information to sufficiently support moving the action to court); *Gates*, 462 U.S. at 232 (“[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.”); *Brinegar*, 338 U.S. at 175 (“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”).

<sup>218</sup> Goldberg, *supra* note 13, at 792; MAGISTRATE MANUAL, *supra* note 20, at 2-1.

<sup>219</sup> Goldberg, *supra* note 13, at 792.



“reasonably trustworthy.”<sup>220</sup>

In determining whether the information is accurate or trustworthy, the “nature of the source” is key.<sup>221</sup> As Part I outlines, courts have largely considered law enforcement officers to be *de facto* reliable. The Virginia Magistrate Manual further stipulates that law enforcement officers are *per se* reliable.<sup>222</sup> This results in a probable cause determination by an officer affiant being about whether the officer provides sufficient facts to show a coherent story. If the officer meets that low burden, then the magistrate is required to issue the charge.<sup>223</sup>

## 2. COMMUNITY MEMBERS

In Virginia, community members may seek misdemeanor charges with the magistrate.<sup>224</sup> The process is very similar to law enforcement officers, except that the community member’s testimony must be reduced to writing.<sup>225</sup> With the writing, the magistrate then follows the same steps: Are there adequate facts to meet probable cause? Is the provided information reliable?

In addressing whether the information is reliable, the magistrate must determine whether the affiant is credible. This area can get muddy, as courts have stated that eyewitness testimony and victim testimony are reliable.<sup>226</sup> Identifying an eyewitness or victim can be difficult, however, as magistrates do not conduct investigations. The determination mainly relies on the magistrate simply evaluating the information provided. Additionally, the magistrate system largely does not train magistrates on how to determine credibility or provide a framework for evaluating behavior.<sup>227</sup> Each magistrate is left to develop their own sense of credibility, which can be problematic.<sup>228</sup> If the magistrate makes a negative credibility finding, the magistrate is unlikely to issue the charge.

<sup>220</sup> Alameda County District Attorney’s Office, *Probable Cause Information: Proving It’s Reliable*, POINT OF VIEW (Spring 2008) at 11; MAGISTRATE MANUAL, *supra* note 20, at 2-2.

<sup>221</sup> United States v. Chappell, 2014 BL 265170 (E.D. Va. Sep. 24, 2014).

<sup>222</sup> MAGISTRATE MANUAL, *supra* note 20.

<sup>223</sup> VA. CODE ANN. § 19.2-82. While the law requires a magistrate issue a charge if probable cause is met, there is some discretion in deciding whether to issue an arrest warrant or a summons. If the charge is a misdemeanor offense, the magistrate may issue a warrant or summons. VA. CODE ANN. § 19.2-73.

<sup>224</sup> VA. CODE ANN. § 19.2-72.

<sup>225</sup> *Id.*; MAGISTRATE MANUAL, *supra* note 20, at 2-5.

<sup>226</sup> *E.g.*, Commonwealth v. Marsalisi, 18 Va. Cir. 294 (Cir. Ct. 1982) (a bystander or victim is presumed credible absent evidence to the contrary); Jackson v. Commonwealth, 39 Va. App. 624, 638 (Ct. App. 2003) (“citizens who witness a crime in progress are presumed [to be] personally reliable”). For a critique of this doctrine, see Ariel C. Wener, *What’s in a Name? Challenging the Citizen-Informant Doctrine*, 89 N.Y. L. REV 2337 (2014).

<sup>227</sup> The Magistrate Manual does note that motive and time lapses may impact credibility. MAGISTRATE MANUAL, *supra* note 20, at 2-52, 2-53. It also describes reliability in the context of search warrants. *Id.* at Ch. 5. This knowledge is not applied to determining credibility regarding oral testimony across a spectrum of backgrounds and communication skills.

<sup>228</sup> Judges are susceptible to cognitive biases, which include confirmation and affinity biases, yet rarely acknowledge the issue. Mary Smith et al, *Addressing Bias Among Judges*, STATE CT. REP. (Sep. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/addressing-bias-among-judges>.



### C. HEARINGS TO DETERMINE PROBABLE CAUSE FOR A SEARCH WARRANT

A magistrate reviews search warrant affidavits for probable cause. The standard is the same as for arrest warrants.<sup>229</sup> An officer affiant presents the affidavit to the magistrate and swears to the information. If the magistrate determines that there is enough information to support probable cause and that the place to be searched and items to be seized are adequately described,<sup>230</sup> they must issue the search warrant.

### D. HEARINGS TO DETERMINE BAIL

After someone is served with a warrant or *capias*, the accused individual is afforded a bail hearing.<sup>231</sup> In Virginia, a person is to be admitted to bail unless there is probable cause to believe that the person will not appear in court, or the person poses an *unreasonable* danger to themselves or to the public.<sup>232</sup> In determining whether there is probable cause, Virginia requires that the magistrate review the person's criminal record.<sup>233</sup> The criminal record may show prior instances where the person was charged with failing to appear in court or indicate past instances of violating a court order (e.g., protective order violations).

In addition to the person's criminal record, the magistrate must consider (1) the nature and circumstances of the offense, (2) whether a firearm was used, (3) the weight of evidence supporting the charged offense, (4) the person's employment history and family ties, (5) the length of residence in the community, and (6) whether the person is likely to intimidate or attempt to intimidate a witness.<sup>234</sup> Absent from this list is the requirement to consider the officer's history of arrests,<sup>235</sup> though the weight of evidence may be largely influenced by how complete the officer's testimony is and whether the magistrate believes the officer.

Once a bail decision is made, the charged individual will either be released on bond or committed to jail until their appearance before a judge. Depending on when they are committed, the commitment can last for a few hours or days.<sup>236</sup> If the person is charged with any felony or misdemeanor "punishable by confinement in jail," the person will also be fingerprinted.<sup>237</sup> The data is then "made available" to the Central Criminal Records Exchange (CCRE), which is tasked with receiving, classifying, and filing criminal record information.<sup>238</sup> This process ensures that charging decisions are documented in a criminal history, which will be viewed if the accused has a run-in with law enforcement in the future.

<sup>229</sup> MAGISTRATE MANUAL, *supra* note 20, at 2-1.

<sup>230</sup> *See generally id.* at 5:2-16.

<sup>231</sup> Hendricks, *supra* note 12, at 185.

<sup>232</sup> VA. CODE ANN. § 19.2-120 (emphasis added).

<sup>233</sup> *Id.* This history is provided by the law enforcement officer. VA. CODE ANN. § 19.2-80.2.

<sup>234</sup> VA. CODE ANN. § 19.2-120.

<sup>235</sup> This absence is common. Hendricks, *supra* note 12, at 182.

<sup>236</sup> If a person is committed on Friday, they won't see a judge until Monday.

<sup>237</sup> VA. CODE ANN. § 19.2-390.

<sup>238</sup> VA. CODE ANN. §§ 19.2-392, 19.2-387, 19.2-388, 9.1-101.



#### IV. BARRIERS TO CHANGE AND HOW TO MOVE FORWARD

This section will discuss existing issues to overcoming the presumption and make suggestions on how to move forward.

##### A. HISTORY OF JUDICIAL IGNORANCE AND ABSENT RECORDS

Standard practices and judicial procedure are set by judges, and trial judges have historically been extremely reluctant to address police officer credibility.<sup>239</sup> This reluctance could be due to familiarity, as judges and officers see each other often and get to know each other, creating a bias in favor of police credibility.<sup>240</sup> This familiarity may be even more likely with judicial officers, as they see an officer any time a warrant is served, or a warrantless arrest is made. Both the officer and magistrate also serve long shifts, providing times when the officer and magistrate may see each other multiple times a shift.<sup>241</sup>

Beyond this, many judges are former prosecutors.<sup>242</sup> This means that their professional development was largely tied to successfully working with the police. Habits are hard to break,<sup>243</sup> and the judge may be hesitant to publicly question the police. However, this does not mean that former prosecutors cannot challenge police veracity. As prosecutors are regularly exposed to police conduct, they are in prime positions to recognize patterns of behavior that indicate falsehood. They just have to act on it, which has not historically occurred.<sup>244</sup>

These concerns are not theoretical. When Professor Melanie Wilson analyzed

<sup>239</sup> *Contesting Police Credibility*, *supra* note 13, at 1365. *But see* United States v. Restrepo, 890 F. Supp. 190, 191 (E.D.N.Y. 1995) (court found that two officers had lied); Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 105 (2016) (a Baltimore judge threatened to hold police in contempt if he did not get a straight answer to his questions).

<sup>240</sup> *Improbable Cause*, *supra* note 19, at 310.

<sup>241</sup> If an officer serves a warrant and then makes an arrest during their shift, they may see the magistrate multiple times within a few hours. With each party working multiple shifts a week, there can be frequent contact between the same magistrate and officer.

<sup>242</sup> In a study of state supreme court judges, the Brennan Center found that 38% of justices were former prosecutors, in contrast to 10% being former public defenders. Zoe Merriman et al., *State Supreme Court Diversity – May 2024 Update*, BRENNAN CTR. (May 22, 2024), <https://www.brennancenter.org/our-work/research-reports/statesupreme-court-diversity-may-2024-update>. In federal courts, most judges were in private practice before taking the bench. Outside of that group, a “significant number also worked as . . . prosecutors.” Maggie Joe Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, CAP (June 17, 2020), <https://www.americanprogress.org/article/startling-lack-professional-diversity-among-federal-judges/>.

<sup>243</sup> For a discussion on how professional backgrounds influence judicial decision-making, see Joanna M. Shepherd, *The Relationship Between Professional Diversity and Judicial Decisions*, DEMAND JUST. (Mar. 2021), <https://demand-justice.org/report/> (select “See the Report”).

<sup>244</sup> Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?*, 16 OHIO ST. J. CRIM. L. 423, 424 (2019). Dallas County prosecutors declined to have drug samples tested, citing heavy workloads, and completely failed to catch officers submitting sheetrock as cocaine. Hollandsworth, *supra* note 134. This may be changing, as more prosecutors start tracking police misconduct and creating Brady lists. *See* Hendricks, *supra* note 12, at 181; *Contesting Police Credibility*, *supra* note 13, at 1381. Yet there will continue to be tension, as police officers are part of the prosecutorial team, meaning that any credibility issue with the officer can also be a credibility issue with the prosecutor. Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 795 (2015).



federal trial judge rulings on police perjury, she found that judges almost always favor the officer.<sup>245</sup> The study considered federal trial judge rulings on police perjury over a two-year period in Kansas. The study revealed that, though defendants rarely argue that the police lied,<sup>246</sup> they present corroborative evidence anytime they raise the issue.<sup>247</sup> Despite this, trial judges still ruled in favor of the police officer. Assuming judges have similar approaches, there is a disturbing precedent of favoring the state.

Even if a judge determines that a police officer is not credible, there are rarely any court records of that determination,<sup>248</sup> and police misconduct records are generally unavailable.<sup>249</sup> Moreover, even if there is a record, there may be little substantive impact if not caught at the pretrial stage. In *Franks v. Delaware*, the Supreme Court stated that false statements that do not impact probable cause are irrelevant.<sup>250</sup> The majority application of the exclusionary rule also places emphasis on the cost of releasing the defendant, deemphasizing truth-seeking and creating a situation where courts parse statements and ignore any statements deemed incredible. If the falsehood is not detected at an initial stage, it can be difficult to prioritize honesty and truthfulness. A falsehood may also impact a bail decision, which intrudes on an individual's liberty and economic welfare.<sup>251</sup>

To begin to overcome this history, judges should normalize testing officer credibility. This can occur through greater receptiveness to defense arguments or the creation of records to document when questions occur.<sup>252</sup> Regardless of the method, the testing must become standard practice, as the magistrate's role is designed to act as a

<sup>245</sup> *Improbable Cause*, *supra* note 19, at 164.

<sup>246</sup> Defense strategy may prevent challenging police veracity, as there is a risk calling a witness a liar and not be able to prove it. See Cloud, *supra* note 14, at 1324.

<sup>247</sup> *Improbable Cause*, *supra* note 19, at 263.

<sup>248</sup> *Contesting Police Credibility*, *supra* note 13, at 1365.

<sup>249</sup> See Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 154 (2019). When required to disclose records, a California police department decided to destroy them instead. Laurence Du Sault & Geoffrey King, *Senior Officials Ordered Destruction of Vallejo Police Shooting Evidence*, OPEN VALLEJO (Feb. 5, 2023), <https://openvallejo.org/2023/02/05/vallejo-destroyed-evidence-of-police-killings/>; Sukey Lewis et al., *California Police Are Destroying Files and Charging High Fees to Release Misconduct Records*, LA TIMES (June 30, 2019), <https://www.latimes.com/local/lanow/la-me-police-records-california-20190630-story.html>. This approach also excludes prosecutors, impeding their responsibility to disclose potentially exculpatory evidence to the defense. Levenson, *supra* note 15, at 497. Law enforcement agencies defend this position by arguing that Brady obligations are subject to police privacy concerns. *Id.* at 501. Yet there are positive signs; a survey conducted of law enforcement officers revealed that many officers believe disclosing records builds trust. Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1242 (2021). North Dakota also requires that police records be public. ND CONST. art. XI, § 6.

<sup>250</sup> *Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Shaw*, No. 3:21cr144 (DJN), 2022 U.S. Dist. LEXIS 71653, at \*10-12 (E.D. Va. Apr. 18, 2022).

<sup>251</sup> Cash bail can cause job and housing loss. *Smart Justice – Ending Cash Bail*, ACLU PA, <https://www.aclupa.org/en/smart-justice-ending-cash-bail> (last visited Dec. 26, 2025).

<sup>252</sup> Law enforcement could also make police misconduct records available to judicial officers. Hendricks, *supra* note 12, at 180. Judicial officers are bound by canons of conduct that prevent them from disclosing non-public information acquired during a hearing, so there is little risk of public condemnation of an officer. See *Canons of Conduct for Virginia Magistrates*, EXEC. SEC'Y SUP. CT. VA., at 4-8, <https://www.vacourts.gov/static/courtadmin/aoc/mag/resources/canons.pdf> (Canon 3).



check on police,<sup>253</sup> which requires there be contestation.<sup>254</sup> Normalizing testing officer credibility removes any potential controversy in judicial officers raising questions that address police officer veracity. There would be less risk of inciting law enforcement pushback, as asking such questions would be standard practice, not necessarily aimed at a particular individual.<sup>255</sup>

Such questioning and analysis can also improve the judiciary's credibility, as a presumption of credibility despite the known history of police lies implicates the court in police misconduct. If ignored, action can be considered sanctioned.<sup>256</sup> This perception is detrimental, as justice has actual and theatrical elements.<sup>257</sup> There must be the appearance of fairness as well as actual fairness. The presumption of police officer credibility makes the judicial branch appear like it favors the police officer over the defendant, instead of being a neutral party.<sup>258</sup> In pre-trial proceedings, neutrality is particularly vital.<sup>259</sup> If the accused considers the magistrate as on the same side as law enforcement, the accused is unlikely to talk to the magistrate, undermining the magistrate's ability to understand the whole picture and, if necessary, make a good bail decision. The accused is also unlikely to have counsel, meaning they have no advocate to combat favoritism towards the police. Normalizing questioning police officer veracity would signal that the court is a neutral entity that does not favor either side.

## B. PRESUMPTIONS

Presumptions are given due respect; they cannot just be ignored.<sup>260</sup> While trying

<sup>253</sup> Gershowitz & Lewis, *supra* note 12, at 1242 (“[T]he courts are, in reality, the supervisors of police agencies.”); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015) (“[I]t has largely been left to courts to govern police.”).

<sup>254</sup> See Miller, *supra* note 13, at 332 (“Contestation is a necessary feature of democracy.”).

<sup>255</sup> While it is not a judicial officer's job to cater to law enforcement, there is an unfortunate history of police departments acting like bullies that must be accounted for in considering options. Magistrates may come from a range of backgrounds, and not all may have the temperament (or energy) to regularly combat such departments. See *id.* at 297 (discussing how police use psychological tactics to get people to cooperate) (“And the police are, it turns out, psychologically sophisticated in badgering the public...”); see also Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dontchallenge-me/> (discussing how cops are trained to control every encounter) (“bully cops exist”).

<sup>256</sup> See Barnes, *supra* note 13, at 730 (“[L]egal action and inaction were [] tools of subjugation.”); see also Capers, *supra* note 10, at 858 (“[D]octrinal gaps signal responsiveness problems, for the most part denying recourse to victims of profiling, excessive force, and street under-enforcement . . . [i]f the police are [] perceived as an occupying force, the courts are often perceived as an enabling force.”).

<sup>257</sup> Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 160 (2019).

<sup>258</sup> When throwing out a conviction based on lies, the judge noted how the testifying officers' falsehoods impeded “judicial machinery.” Drew Wilder, *DC Ex-Firefighter Freed From Prison After Virginia Police Stop Found Unlawful*, NBC4 (Apr. 21, 2021), <https://www.nbcwashington.com/news/local/northern-virginia/dc-ex-firefighterelon-wilson-released-conviction-overturned-jonathan-freitag/2647879/>.

<sup>259</sup> DesNoyer, *supra* note 2 (“One of the chief values a court system provides is a neutral venue for the resolution of disputes.”).

<sup>260</sup> “The word ‘presumption’ is a precise term of art. It is a substitute for proof. The party enjoying a presumption is entitled to rest on that presumption.” *Herbert v. State*, 766 A.2d 190, 208 (Md. Ct. Spec. App. 2001).



to have judicial officers view all witnesses in a neutral fashion would be ideal,<sup>261</sup> that is unrealistic under current case law and procedure. As such, there is the ensuing problem of how a magistrate is to overcome the presumption. If an officer swears to the facts under oath, what must be present to counteract the presumption? This standard is probably the most difficult to establish, as the presumption only applies at pre-trial proceedings that deal with probabilities. The presumption also arises in an arena where hyper-technical reviews are discouraged,<sup>262</sup> meaning a common-sense approach must be used to overcome the presumption. While a common-sense approach could empower magistrates (who do not conduct investigations and cannot provide evidence), it also risks the standard collapsing.<sup>263</sup>

Despite these hurdles, a fair legal system cannot allow magistrates to take whatever an officer says as true.<sup>264</sup> Certainly, there is a basic check on whether the officer can tell a coherent story. Yet this check is insufficient, as officers are professional witnesses<sup>265</sup> and people do unexpected things. With that framework, there must be training and guidance on a practical standard magistrates can use to evaluate credibility and, if necessary, rebut the presumption.<sup>266</sup> While a full discussion of such a standard is beyond the scope of this article, there are potential avenues to consider.

One avenue would be to base the standard on how courts review search warrants on appeal and determine affiant credibility. For instance, courts have discussed a citizen informant's credibility and stated that credibility can be established by the absence of a motive to lie.<sup>267</sup> Credibility can also be inferred by the risk of potential harm as a result of disclosing the information. This could entail future prosecution or providing a statement against interest. With this option, magistrates must recognize that police officers may have a motive to lie to strengthen a case, cover an illegal or incorrect arrest,<sup>268</sup> or gain

<sup>261</sup> See *Commonwealth v. Preaster*, 37 Va. Cir. 262, 265 (1995) (“Both witnesses [law enforcement and civilian] come to the witness chair upon equal footing with no presumptions as to credibility.”); Trial judges are not asked to accept officer testimony as presumptively correct. Wilson, *supra* note 12, at 40.

<sup>262</sup> *United States v. Crawford*, 552 F. App'x 240, 246 (4th Cir. 2014) (“Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.”). Courts have also been hesitant to adopt policies that indicate a negative view of police, as that could discourage officers from seeking judicial review before acting. *Ventresca*, 380 U.S. at 108.

<sup>263</sup> Overly strict standards can unduly burden law enforcement, while loose standards undermine community protections and enable wayward officers. *Brinegar*, 338 U.S. at 176.

<sup>264</sup> *Franks*, 438 U.S. at 168 (“[A] flat ban on impeachment of veracity could denude the probable-cause requirements of all real meaning...”); *Melton v. Phillips*, 875 F.3d 256, 263 (5th Cir. 2017) (a magistrate is the “last bulwark” before an invasion of privacy occurs).

<sup>265</sup> *State v. Hunter*, No. 73252-8-I, 2016 Wash. App. LEXIS 1470, at \*5 (Wash. Ct. App. June 20, 2016) (“The fact that this statement was made by a police officer, a professional witness...”); *In Re J.J.*, 2016 IL App (1st) 160378-U, at \*¶31 (2016) (“[T]he trial court found Officer [] to be ‘a professional witness...’”).

<sup>266</sup> See *United States v. Cortina*, 630 F.2d 1207, 1217 (7th Cir. 1980) (rejecting “standardless discretion.”); *United States v. Figueroa*, 750 F.2d 232, 237 (2d Cir. 1984) (do not want “frivolous challenges” to cause unnecessary delay).

<sup>267</sup> *Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (discussing state court jury instruction on how to overcome “presumption of truthfulness”); *Lester v. Commonwealth*, 30 Va. App. 495, 501 (Ct. App. 1999); *Corey v. Commonwealth*, 381 S.E.2d 19, 22 (Va. Ct. App. 1989).

<sup>268</sup> *Olwyn Conway, How Can I Reconcile with You When Your Foot is on My Neck: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1372 - 73 (“Perjury and falsification to avoid disciplinary sanctions or criminal charges...are also common...”).



advancement in the department.<sup>269</sup> They also do not face regular consequences for dishonest behavior.<sup>270</sup>

A second avenue would be to consider how courts have determined that evidence is incredible. The Virginia Supreme Court has stated that evidence is incredible if it is “so manifestly false” that a reasonable person could not believe it, or the evidence is “shown to be false by objects or things as to the existence and meaning of which reasonable [people] should not differ.”<sup>271</sup> This provides a route for magistrates to find evidence incredible without directly finding a statement to be a lie, as they could simply disagree with the meaning of the evidence.<sup>272</sup> Evidence law also provides guidance on impeachment, stating that credibility can be impacted by prior inconsistent statements, contradictions, bias, or other evidence.<sup>273</sup> Regardless of the approach chosen, there needs to be standard guidance on what is necessary to overcome the presumption.

### C. MAGISTRATE TURNOVER

There is a very high rate of turnover in the magistrate system. On a statewide level, between July 1, 2018, and June 30, 2020, the magistrate system lost 146 of 400 magistrates, a turnover of 37%.<sup>274</sup> This is well-above the 10% turnover expected in a standard organization.<sup>275</sup> This turnover may be due to the job’s stressful nature,<sup>276</sup> extensive workload,<sup>277</sup> or low compensation.<sup>278</sup> With the high rate of magistrates leaving the system, they are hard to replace. Many districts across the state struggle to even get qualified applicants.<sup>279</sup>

<sup>269</sup> Even without quotas, police culture drives officers to make many arrests. Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 289 (2017). Yet a motive to lie does not mean that a lie has occurred. Dorfman, *supra* note 10, at 490.

<sup>270</sup> See Amelia Thomson-DeVeaux et al., *Why It’s So Rare For Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (June 4, 2020), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/> (discussing charges related to excessive force claims); Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away With Murder*, ACLU (June 26, 2020), <https://www.aclu.org/news/criminal-law-reform/why-prosecutors-keep-letting-police-get-away-with-murder> (discussing how prosecutor’s professional reliance on police often results in prosecutors operating with “blinders on.”).

<sup>271</sup> *Gerald v. Commonwealth*, 295 Va. 469, 487 (2018).

<sup>272</sup> A magistrate can subtly challenge police testimony without calling an officer a liar. *Improbable Cause*, *supra* note 19, at 288.

<sup>273</sup> Supreme Court of Virginia, Virginia Rules of Evidence, Article 6, Rule 2:607: Impeachment; <https://www.courts.state.va.us/static/courts/scv/rulesofcourt.pdf>.

<sup>274</sup> *Implement Magistrate Retention Plan*, MAGISTRATE SYSTEM (2021), [https://publicreports.dpb.virginia.gov/rd-Page.aspx?rdReport=OB\\_DocView&Param1=72763616](https://publicreports.dpb.virginia.gov/rd-Page.aspx?rdReport=OB_DocView&Param1=72763616).

<sup>275</sup> Christina Zurek, *Why a Low Employee Turnover Rate Isn’t Necessarily a Good Thing*, ITA GROUP, <https://www.ita-group.com/insights/employee-experience/why-low-employee-turnover-rate-isnt-necessarily-good-thing> (last visited Dec. 26, 2025).

<sup>276</sup> *Judicial Immunity Doesn’t Extend Matters of Stress and Well-Being*, BEACON (Feb. 21, 2021), <https://vjlap.org/resources/the-beacon/2021/02/21/judicial-immunity-doesnt-extend-matters-of-stress-and-well-being/>.

<sup>277</sup> See *State of the Judiciary Address: Chief Justice S. Bernard Goodwyn*, Supreme Court of Virginia (May 2024), [https://www.courts.state.va.us/static/courts/scv/2024\\_0528\\_state\\_of\\_the\\_judiciary\\_address.pdf](https://www.courts.state.va.us/static/courts/scv/2024_0528_state_of_the_judiciary_address.pdf) (noting how the general district court saw over 2.2 million cases filed, the juvenile and domestic relations district court saw over 430,000 cases, and the circuit court had over 400,000 cases filed).

<sup>278</sup> Magistrates made around forty thousand dollars until 2022. *Implement Magistrate Retention Plan*, *supra* note 274.

<sup>279</sup> *Id.*



This makes it difficult to build a system with experienced magistrates, which impacts a magistrate's ability to catch lies. In 2008, the median experience level of Virginia's magistrates was 8.3 years; by 2020, it had fallen to only 4.4 years.<sup>280</sup> This can make it difficult to gain practical experience in catching testimonial falsehoods. While magistrates must go through a certification process, the training does not address many practical elements of the job. This focus may be necessary,<sup>281</sup> but when combined with the high turnover rate, it fosters a magistrate system where there is a limited skill set able to catch police lies.<sup>282</sup>

To address this turnover, there have been efforts to improve magistrate compensation, with some success in 2022.<sup>283</sup> While compensation is a key element, there needs to be additional efforts to improve retention, including development opportunities and resources to combat stress and exhaustion.<sup>284</sup> There could also be efforts to develop a talent pipeline,<sup>285</sup> which would address staffing shortages and improve knowledge retention. By combining improvements in compensation with comprehensive support systems and a focus on long-term career development, these efforts can help create a more sustainable system, ultimately enhancing the effectiveness of the magistrate system and retaining valuable experience that can help identify incredible evidence.

### CONCLUSION

The presumption of police officer credibility in pre-trial proceedings, though rooted in longstanding Supreme Court precedent, presents significant challenges for ensuring fairness and integrity in the judicial process. While the presumption may facilitate efficient decision-making, it risks undermining the rights of the accused by allowing unreliable or even false testimony to influence critical determinations, such as probable cause and bail decisions. This is particularly concerning in light of the documented prevalence of police lies, which are sufficiently widespread to cause alarm.

As illustrated through the case study of Virginia's magistrate system, the presumption can have real-world consequences, impacting both procedural fairness and broader legitimacy of the legal system. Judicial officers, tasked with ensuring that justice is served from the outset of a legal proceeding, must navigate this presumption carefully. By advocating for more rigorous scrutiny of officer testimony in pre-trial proceedings,

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<sup>280</sup> *Id.*

<sup>281</sup> Virginia does not require any prior legal training to become a magistrate. This means that the certification training must account for very basic principles and cover a wide-range of topics. The course has been described as "taking a drink from a firehose." DesNoyer, *supra* note 2.

<sup>282</sup> *But see* Lizette Ramirez, *Judges Are Confident That They Can Tell When Someone is Lying*, NAT'L JUD. COLL. (Feb. 13, 2023), <https://www.judges.org/news-and-info/judges-are-confident-that-they-can-tell-when-someone-is-lying/> (stating that 90% of the 371 surveyed judges said they were confident they could catch lies).

<sup>283</sup> *Budget Approval Announcement*, VA. MAG. ASSOC. (2022); <https://www.vamagistrate.org/issues> (last visited Feb. 1, 2026).

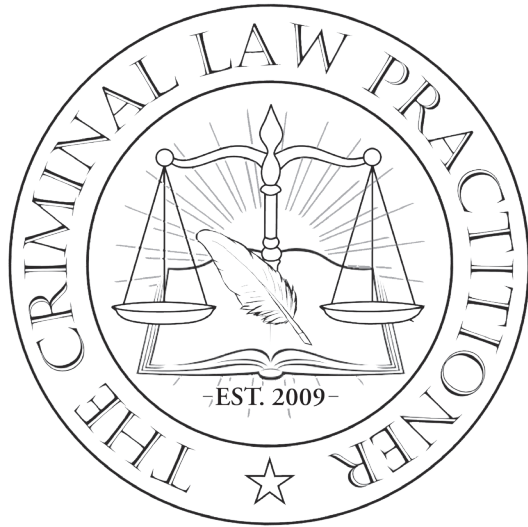
<sup>284</sup> *14 Effective Employee Retention Strategies*, ROBERT HALF (July 15, 2024), <https://www.roberthalf.com/us/en/insights/management-tips/effective-employee-retention-strategies>.

<sup>285</sup> Lee Sheu Quen, *The Blueprint for Talent Success: Developing a Strong Talent Pipeline – A Step-by-Step Guide*, ACCENDO (Jan. 6, 2025), <https://accendotechnologies.com/blog/developing-a-strong-talent-pipeline-guide/#:~:text=talent%20pipeline%20guide:-,Talent%20pipeline%20development%20involves%20creating%20a%20continuous%20stream%20of%20qualified,passive%20candidates%2C%20and%20succession%20planning>.



this article encourages a reevaluation of practices that favor police over the rights of the accused.

The challenge is not just about preventing misconduct, but about reinforcing the fundamental principle that justice should not be compromised, even in the early stages of a criminal proceeding. The legal system must evolve to ensure that the presumption of police credibility does not become a tool for perpetuating injustices.





THE FIREARM THAT ISN'T:
SILENCERS AND THE 'LOUD BANG THEORY'

BY THOMAS L. CHITTUM, III<sup>1</sup>

ABSTRACT

Guns are loud. The law prefers them that way. Because silencers make guns quieter, they have long been regulated over concern they enable stealthy violence. To control them, federal law defines silencers as "firearms" even though they do not shoot. Courts, however, hold they are not "Arms" protected by the Second Amendment. Meanwhile, optical sights for firearms (i.e., "scopes") have facilitated some of the most consequential crimes in American history but are unregulated. This article presents a comprehensive legal and historical analysis of silencers, including an exhaustive review of contemporaneous news reports of crimes involving silencers to offer context for their early regulation. It then presents a novel analysis contrasting silencers with scopes to arrive at a theory for why silencers are treated differently under the law. Finally, it considers whether, but for legal restraint, the natural evolution of firearms would be quieter ones.

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INTRODUCTION: A FATHER AND SON IN A FIELD

“There he is.” I had to whisper. The sun had set but there were still 20 minutes of daylight left when the buck my son hoped to see finally stepped into the field.

“Ease off the trigger. Slow.” Still whispering. My 12-year-old son was only two feet away from me, and the deer 60 yards or so, but I only wanted one of them to hear me.

“Should I shoot?” Him whispering.

“Whenever you have a shot. Take your time. Easy on the trigger. Don’t jerk. Lots of time.” All in a whisper.

BOOM!

I was overwhelmed. Yes, of course, with pride. My son had just killed his first buck with the same .30-06 rifle that I used to kill my first deer when I was his age. But I was also overwhelmed by the explosion that just occurred by my head. Everything sounded like I had cotton in my ears. As we took a picture in that field to memorialize the event, I wondered to myself: “Can’t they make these things any quieter?!”

The answer is yes, of course. It is technically possible to make firearms quieter. More than 100 years ago, a firearm “silencer” was introduced to the commercial market.<sup>2</sup> I detail

<sup>2</sup> It has become fashionable to refer to silencers as “suppressors,” which reflects the reality that silencers do not actually “silence” firearms. In this article, however, I use the term silencer, for its historic prevalence and widespread use in the law.



this history in Section I, below. But whether the Second Amendment protects technical progress toward quieter guns—or whether the loud ‘bang’ is an immutable characteristic of firearms—is the real question, and the subject of this article.

Guns are loud. Deafeningly so. They have always been. It is not an intentional element of their design, of course. It is simply an artifact of the physics of how firearms function; the rapid expansion and escape of gases from the barrel makes a “bang.” That loud sound is harmful. It can immediately damage the hearing of anyone nearby. A silencer can mitigate those harms.

There are other methods of protecting hearing, of course, but they are imperfect and impractical. Shooters engaged in target practice can wear earplugs or earmuffs to protect their hearing. However, everyone nearby must also take steps to protect their own hearing, such as also wearing earplugs or earmuffs, or covering their ears with their hands before every shot. The sound of gunfire can also be a nuisance to residents who live near a gun range; it’s rude. Earmuffs at the range do nothing to ease a neighbor’s annoyance.

And while they may dampen the sound heard by the shooter, earmuffs also do nothing to reduce the attendant recoil the shooter experiences, which can cause ‘flinching’ and impair aim.<sup>3</sup> A silencer can ameliorate that effect too, thereby improving accuracy.

Besides being inconvenient and of only partial utility, wearing such protection can also limit the ability to communicate. For instance, it can make it difficult to hear safety warnings on the range and can diminish situational awareness.<sup>4</sup> While hunting, where whispers, stillness, and careful listening are essential, implementing those measures is all but impossible.

Despite these downsides, the ‘loud bang’ might also have implicit benefits. Perhaps it is “a feature, not a bug.”<sup>5</sup> An exclamation point to the act of firing a gun, a thing not to be taken lightly. It can raise alarm and draw attention. This might be especially important when a firearm is used to commit a crime or has been discharged accidentally. If a person has been shot, the sound of the gun being fired might alert people nearby, who can render aid to the wounded person or alert the authorities. Modern public safety technology uses the loud, impulsive noise to detect gunfire and notify police so they can respond.<sup>6</sup>

The sound of gunfire might also deter some criminals, who would perhaps shoot their firearms more freely if they could do so quietly but are instead deterred by the unavoidable sound that might draw attention and lead to detection of their crimes. Indeed, almost immediately after the silencer appeared on the commercial market, the concern for its potential misuse for facilitating violent crime came to dominate public perception of the device.<sup>7</sup> Silencers were, in fact, used in some violent crimes. Section II contains an exhaustive review of contemporaneous news reports of crimes involving silencers, especially around its early years. It shows that their use was relatively infrequent. When

<sup>3</sup> See *infra* note 22.

<sup>4</sup> See *infra* note 272.

<sup>5</sup> Nicholas Carr, ‘It’s Not a Bug, It’s a Feature.’ *Trite—or Just Right?*, WIRED (Aug. 19, 2018, 7:00 AM).

<sup>6</sup> Robert B. Calhoun et al., *Precision and Accuracy of Acoustic Gunshot Location in an Urban Environment*, SOUNDTHINKING, INC. (Jan. 14, 2020), <https://www.soundthinking.com/wp-content/uploads/2021/08/TN-098-Accuracy-of-Acoustic-Gunshot-Location.pdf>. I was formerly employed by the company that makes the acoustic gunshot detection system known as “ShotSpotter.”

<sup>7</sup> See *infra* section I.C.



they were used, however, those crimes were high-profile, and they solidified the silencer's nefarious reputation. All this led to legal restrictions.

Silencers are not banned in America, at least not in most places. But they are heavily regulated and have been for a very long time. I describe this regulation in Section III.

Silencers are not the only advancement to enhance how firearms operate. For instance, telescopic sights (or "scopes") have greatly enhanced the ability to aim firearms from long distances, increasing accuracy and range. Despite the obvious parallels between silencers and scopes for facilitating surreptitious crimes—and the fact that scopes have actually enabled some of the most consequential violent crimes in American history—they experience vastly different public perceptions and legal treatment. I describe this in Section IV.

But the Second Amendment must protect technical innovation in firearms. Like the law itself, firearms are not "trapped in amber."<sup>8</sup> The guns protected by the Constitution today are descendants of the ones that existed in 1791, not their twins. Firearms have improved in every respect (except for their volume) since the Founding. They have evolved and the Constitution protects that evolution. I describe how this applies to silencers and scopes in Section V.

The legal restrictions on silencers have led to numerous prosecutions of people who simply possessed silencers in violation of those laws.<sup>9</sup> Some of those cases have resulted in challenges under the Second Amendment. The courts that have considered those challenges have relied on a textual shortcut to invariably find that the Second Amendment does not protect silencers. They are not "Arms," they say, (even though federal law specifically defines silencers as firearms) and since only arms are protected, silencers are merely discretionary accessories. They do not regard them as protected technical improvements to harmfully loud guns.

Meanwhile, unlike silencers, scopes are virtually unregulated and have enjoyed a permissive legal and cultural reception. They are not maligned as useful only for crime; there have been no calls to banish them. As such, there is almost no case law assessing whether scopes are protected by the Second Amendment. But legal precedent suggests the Constitution protects such developments. So why not when it comes to making guns quieter?

In the Conclusion, I attempt to reconcile this disparate treatment and examine whether courts have reached shallow textual conclusions about silencers that do not consider whether, but for the legal restraint they have faced, the natural evolution of firearms would be quieter ones. If the Constitution protects innovations that make guns better-aimed, why not innovations that make them quieter? If the courts are right that the Second Amendment does not protect silencers—even though it protects other technological improvements—then this leads to the inevitable conclusion that the "loud bang" is the reason. They must believe it an essential characteristic of firearms, like the boom of a firework or the clap of thunder; a thing inseparable from the instrument that makes it. My "Loud Bang Theory" offers a simple, unarticulated, underlying rationale to explain why silencers continue to be treated differently than other improvements under the law.

<sup>8</sup> United States v. Rahimi, 602 U.S. 680, 691 (2024).

<sup>9</sup> Paul A. Clark, *Criminal Use of Firearm Silencers*, W. CRIMINOLOGY REV., 8(2), 44–57 (2007).



## I. THE SILENCER'S SHAKY START

### A. HIRAM PERCY MAXIM'S NEW INVENTION

In 1907, Hiram Percy Maxim filed an application for a patent for a “Silent Firearm.”<sup>10</sup> Marketed as the “Maxim Silencer,” it did not actually *silence* a firearm.<sup>11</sup> But Maxim was as savvy a marketer as he was an inventor. Maxim gave the first public demonstration of his new invention on February 8, 1909.<sup>12</sup> He held it for a group of news reporters at, of all places, his attorney’s office.<sup>13</sup> Why not? With the Maxim Silencer attached, the rifle that was fired in the demonstration was “noiseless.”<sup>14</sup>

Coincidentally, this story involves another father and son—not deer hunting in a field, but at the inventor bench. Hiram Percy Maxim was the son of the inventor of the first true machinegun. His father was also named “Hiram Maxim,” necessitating public use of the son’s middle name, Percy, to distinguish him from the elder Maxim. Their inventions would in time face strikingly similar receptions, both in law and reputation. Hiram Percy Maxim’s uncle, Hudson Maxim, invented a high explosive used extensively in WWI.<sup>15</sup> The Maxim family spawned a legacy of armament.

### B. REVOLUTIONARY: EARLY MILITARY INTEREST

Hopes were high for Maxim’s new device. “May Revolutionize War,” the *New York Times* proclaimed.<sup>16</sup> *Scientific American* predicted his invention would be as important to military stealth as the inventions of smokeless powder and camouflage.<sup>17</sup> As the journal noted: “In determining the position of the enemy and strength of the attacking force, the leader of a body of troops is dependent almost entirely upon the sound of the enemy’s rifles.”<sup>18</sup> The value of that sound for locating the source of gunfire reflects the theme that the sound of a firearm is of quintessential importance.

The military was indeed interested. Maxim soon announced that U.S. military officials had ordered a quantity for testing.<sup>19</sup> So had representatives from the governments of “England, France, Russia, Germany, and Italy.”<sup>20</sup> The King of France even got one for his personal rifle.<sup>21</sup>

In addition to concealing a shooter’s location in battle, the silencer was also valuable for training by helping “flinchers” aim.<sup>22</sup> It reduced recoil as well as noise, and

<sup>10</sup> U.S. Patent No. 880,386 (filed Mar. 7, 1907).

<sup>11</sup> *Maxim Tests Gun at Albany*, N.Y. TIMES, Mar. 25, 1909, at 3.

<sup>12</sup> *Maxim’s Gun Proves That It’s Noiseless*, N.Y. TIMES, Feb. 9, 1909, at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Bailey Millard, *Inventor Maxim*, L.A. TIMES (May 11, 1927), at A4; *Science: Death of Maxim*, TIME (May 16, 1927, 12:00 AM), <https://time.com/archive/6663940/science-death-of-maxim>.

<sup>16</sup> *Id.*

<sup>17</sup> *The Silent Gun – Counterpart of Smokeless Powder*, SCI. AM., Vol. 100, No. 8 (Feb. 20, 1909), p. 150.

<sup>18</sup> *Id.*

<sup>19</sup> *To Try Maxim’s Silencer*, N.Y. TIMES, Mar. 11, 1909, at 1.

<sup>20</sup> *Id.*

<sup>21</sup> *No More Noise*, L.A. TIMES, Mar. 11, 1909, at II8.

<sup>22</sup> *Trying Maxim Silencers*, N.Y. TIMES, Sep. 2, 1910, at 6.



that could help new recruits better learn marksmanship by minimizing the unsettling effects of firing a rifle.<sup>23</sup>

### C. NOISELESS MENACE: AN ABRUPT SHIFT IN PERCEPTION

But the jubilation was short lived. Only one month after praising its value in combat, *Scientific American* clarified that, beyond military use, it considered the silencer a “menace.”<sup>24</sup> The same virtues that made it useful to combat, “greatly enlarged the opportunities for the commission of undetected crime.”<sup>25</sup> It noted that there was deterrent value in the fear of detection, and that was erased for a criminal with a silencer. A “man with murder in his heart may now dispatch his victims in silence.”<sup>26</sup> Burglars who previously did not shoot occupants because they wished to remain concealed, now would be able to shoot them with impunity.<sup>27</sup> Robberies would be made easier because victims could be summarily shot, their pockets then rummaged without worry of alerting any nearby police.<sup>28</sup> Violent crime would no longer need the cover of darkness; killers could murder “on a crowded thoroughfare and in broad daylight.”<sup>29</sup> *Scientific American* was unequivocal in its revised view:

The deadly character of the noiseless gun renders it, in the hands of unscrupulous people, a distinct menace to society; and we are strongly of the opinion that it should be made the subject of immediate and very stringent legislation. The principle upon which such a law would be founded is already recognized in the penalties which are attached to the carrying of concealed weapons. The frightful possibilities of undetectable crime, which are opened up by the appearance of this weapon, should be met by a statute declaring that the manufacture, sale, or possession of this weapon, for any but strictly military purposes is a felony, and punishable by a long term of years in the penitentiary.<sup>30</sup>

The *New York Times* changed its tune, too. In an opinion piece that cited *Scientific American*'s position, it added that a silencer was only useful to “[t]he burglar, the highway robber, and the Black Hand assassin,” and that no “true sportsman” would use it.<sup>31</sup>

But the State of North Dakota was way ahead of *Scientific American* and the *New York Times*. On March 12, 1909, barely a month after Maxim first publicly demonstrated his invention, North Dakota's legislature found that “an emergency exists in that there is

<sup>23</sup> *Rifle Instruction on the Seagirt Range*, L.A. TIMES, May 11, 1909, at 16.

<sup>24</sup> *The Menace of the Noiseless Gun*, SCI. AM., Vol. 100, No. 12, Mar. 20, 1909, 218.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Editorial, *The “Silencer” for Firearms*, N.Y. TIMES, Mar. 18, 1909, at 8.



now in existence no provision prohibiting the use of a firearm silencer in this state.”<sup>32</sup> To remedy that emergency, it passed “An Act Prohibiting the Use, Sale or Purchase of Any Device Known as a Silencer to be Used on Any Firearm.”<sup>33</sup> The State of Maine followed suit less than two weeks later.<sup>34</sup> It wouldn’t take long for the first prosecution.<sup>35</sup> Other states would impose similar laws in the years to come.<sup>36</sup>

## D. POLICE WORRY ABOUT SILENT VIOLENCE

Scientific journals and sparsely populated states weren’t the only ones with concerns. The silencer also met immediate skepticism from some in law enforcement.<sup>37</sup> Within a month of Maxim’s public demonstration, Pittsburgh’s Superintendent of Police captured the sentiment that would come to dominate public perception of silencers for the next 100 years:

There is no question in my mind but that the use of the ‘silencer’ will prove disastrous to the peace of every city where precautions against its use are not taken. With a ‘silencer’ attached to his revolver a thug or murderer could stand 100 feet away from his victim, shoot him, and then make his escape without fear of detection.

Highwaymen at present seldom use a revolver except to intimidate pedestrians. The risk of shooting is too great; the discharge of the weapon makes too much noise and attracts

<sup>32</sup> *Laws Passed at the Eleventh Session of the Legislative Assembly of the State of North Dakota, Begun and Held at Bismarck, the Capital of Said State on Tuesday, the Fifth Day of January, A.D. 1909, and Concluding March Fifth, 1909* (Bismarck, ND: Tribune State Printers and Binders, 1909), 130-31. Chapter 122—An Act Prohibiting the Use, Sale or Purchase of Any Device Known as a Silencer to Be Used on Any Firearm, §§ 1-4. Approved March 12, 1909.

<sup>33</sup> *Id.*

<sup>34</sup> *Acts and Resolves of the Seventy-Fourth Legislature of the State of Maine, 1909: Published by the Secretary of State, Agreeably to Resolves of June 28, 1820, February 18, 1840, and March 16, 1842* (Augusta, ME: Kennebec Journal Print, 1909), 141-42. Chapter 129—An Act to Prohibit the Use of Firearms Fitted with Any Device to Deaden the Sound of Explosion, §§ 1-3. Approved March 24, 1909.

<sup>35</sup> *Working Hard to Save Game*, L.A. TIMES, Aug. 2, 1911, at III4 (noting that in 1910 “in one of the Maine courts a fine was imposed for possession of a silencer, the first penalty of the kind under the recent law.”).

<sup>36</sup> Though some only imposed restriction on use for hunting. See, e.g., Louisiana in 1910 (*Acts Passed by The General Assembly of the State of Louisiana*, 218-221, Act 142, Approved July 6, 1910.); New Jersey in 1911 (*Acts of the One Hundred and Thirty-Fifth Legislature of the State of New Jersey and Sixty-Seventh Under the New Constitution*, 185, Ch. 128, Approved April 7, 1911.); Vermont in 1912 (*Acts and Resolves Passed by the General Assembly of the State of Vermont at the Twenty-Second Biennial Session*, 310, Number 237, Approved Nov. 14, 1912); Michigan and Minnesota in 1913 (Frederick C. Martindale, ed., *Public Acts of The Legislature of the State of Michigan Passed at the Regular Session of 1913*, 472, No. 250, Approved May 7, 1913; Julius A. Schmahl, eds., *General Laws of the State of Minnesota: Passed During the Thirty-Eighth Session of the State Legislature*, 55, Ch. 64, Approved March 13, 1913.); Connecticut in 1917 (*Public Acts Passed by the General Assembly of the State of Connecticut in the Year 1917*, 2301, Ch. 105, Approved, April 10, 1917.); and Montana in 1918 (*Laws, Resolutions and Memorials of the State of Montana Passed by the Extraordinary Session of the Fifteenth Legislative Assembly*, 13-14, Ch. 6, Approved Feb. 20, 1918.). When responding to an inquiry from the Superintendent of Fisheries and Game, Connecticut’s Attorney General determined that, yes, it was even illegal to shoot “woodchucks and frogs” with a silencer. *Letter to John M. Crampton*, CONNECTICUT ATTORNEY GENERAL REPORTS AND OPINIONS 91 (1917).

<sup>37</sup> *Bars Maxim Silent Gun*, N.Y. TIMES, Mar. 8, 1909, at 1.



too many people. But with the silencer in use this would be different.<sup>38</sup>

He seemed certain that thugs were reluctant to shoot, not out of hesitance to murder, but only for fear that the loud bang of the gun would draw attention and lead to their capture. With a silencer, however, they need not worry about that and could safely murder with whimsy and elude capture. He was expressing the utility of the “loud bang” for detection and deterrence.

So, within about a month of its appearance, there were calls from the press and police leaders to ban civilian possession of silencers. Maxim responded. Just a month after he had demonstrated his invention to much fanfare for reporters, he put on another demonstration, this time hoping to prove to lawmakers “that his silent gun was not quite noiseless” after all.<sup>39</sup>

Condemnation of Maxim’s device was not entirely universal, though. In a letter to the editor, one man wrote in support of the use of a silencer to guard against “flinching” . . . caused by dread of noise and recoil.”<sup>40</sup> Moreover, though he had not yet bought one, he planned to and added that if it was then forbidden by law, it would “be an unwarranted interference with [his] rights.”<sup>41</sup> A century later, many people agree with him.

## II. SILENCERS AND CRIME

### A. SILENCERS RECOVERED IN CRIMES

Even if the worry was overblown, the concern that some criminals might employ silencers was not entirely unjustified. Almost right away Maxim Silencers began appearing in crimes. What is not clear is how *often* they were used in crimes. Considering the growing number of violent crimes during the era of the silencer’s debut,<sup>42</sup> public reports of their actual employment in crimes were comparably infrequent. But what is clear is that when they did appear, the crimes were sensational.

#### 1. L.A. TIMES BOMBING

In 1910, a bomb at the Los Angeles Times building exploded, killing twenty-one people.<sup>43</sup> Aside from the terribleness of the casualties, the nature of the target ensured headlines. Moreover, so did the motive. The bombing was the result of a union dispute, and the L.A. Times’ Editor opposed unions. Of course, it was a bomb that killed the

<sup>38</sup> *Id.*

<sup>39</sup> *Maxim Tests Gun at Albany*, *supra* note 11, at 3.

<sup>40</sup> Stewart, Letter to the Editor, *Right to Buy “Silencers”*, N.Y. TIMES, Sep. 8, 1910, at 8.

<sup>41</sup> *Id.*

<sup>42</sup> Joan Klebba, *Homicide Trends in the United States, 1900-74*, CDC Public Health Reports, May-June, 1975, Vol. 90, No. 3, [https://stacks.cdc.gov/view/cdc/65093/cdc\\_65093\\_DS1.pdf](https://stacks.cdc.gov/view/cdc/65093/cdc_65093_DS1.pdf). “An examination of the rates for homicide during this century shows that both the total rate and the age-adjusted rate increased from 1900 to about 1933.”

<sup>43</sup> *A bomb explodes in the Los Angeles Times building*, HISTORY.COM (Feb. 18, 2025), <https://www.history.com/this-day-in-history/october-1/a-bomb-explodes-in-the-los-angeles-times-building>.



victims in that case, not a silencer. But when union leaders were arrested, two of the suspects were found in possession of twelve bombs...and a rifle with a silencer.<sup>44</sup> The silenced rifle (it was speculated) was intended for assassination: “This weapon was used when necessary to pick off a watchman.”<sup>45</sup> It is not clear that any watchmen were killed.

## 2. INDUSTRIAL WORKERS OF THE WORLD

In 1912, the Industrial Workers of the World (IWW) were kept in the headlines over a dispute regarding labor and free speech. Silencers sometimes figured prominently in these headlines. “Assassins Use a Silencer,” exclaimed an article reporting that a Maxim Silencer was used by “murderous IWW assassins,” or so the police chief suspected when a bullet was shot through the window of a San Diego home.<sup>46</sup> His speculation was based on the subsequent recovery of a rifle with a silencer nearby, believed to have been discarded by an “IWW gunman” as he fled.<sup>47</sup>

The silencer was also prominently reported on during a 1912 grand jury investigation into the IWW.<sup>48</sup> Threats made against a primary witness in the government’s investigation of the IWW, and the shipment of a silencer from Los Angeles to a man using an alias in San Diego, also drew the attention of federal investigators.<sup>49</sup>

## 3. TIME-BOMB PLOT

Shortly after Christmas in 1913, labor activist Thomas J. Mooney was arrested for a plot to destroy a power substation that supplied electricity to communities in the San Francisco area.<sup>50</sup> At the time of his arrest, he had a rifle with a Maxim Silencer, several other firearms, and wiring and blasting caps for a bomb that would destroy the energy facility. As the Governor of California would later write when Mooney sought a pardon for a different conviction, “The rifle with the Maxim Silencer was intended to enable the user to kill from ambush or in concealment without fear of detection by anyone standing in the way of accomplishment of his intended purpose.”<sup>51</sup> The governor’s report included a photograph of the seized items, the silencer plainly visible on the rifle, alongside the ‘time bomb.’<sup>52</sup>

## 4. AUERBACH

But in 1915, a silencer appeared in a crime where it was not simply possessed by someone who might—or might not—have used it to kill discreetly. This time, it played a

<sup>44</sup> *Union Leaders Arrested for Bomb Outrage*, N.Y. TIMES, Apr. 23, 1911, at 1.

<sup>45</sup> *Dynamiters of the Times Building Caught*, L.A. TIMES, Apr. 23, 1911, at 11.

<sup>46</sup> *Assassins Use a Silencer*, L.A. TIMES, May 14, 1912, at 115.

<sup>47</sup> *Id.*

<sup>48</sup> *Bombs are Court Exhibit*, N.Y. TIMES, May 30, 1912, at 1.

<sup>49</sup> *I.W.W. Witness is Threatened*, L.A. TIMES, May 29, 1912, at 118.

<sup>50</sup> James Rolph, Jr., *In the Matter of the Application Made on Behalf of Thomas J. Mooney for a Pardon*, California State Printing Office, Apr. 21, 1932, pg. 18-19.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 93.



central role in a shocking murder: “SILENT GUN KILLS A FAMILY OF FOUR.”<sup>53</sup>

Herman Auerbach lived with his wife, two daughters, and son in their apartment by Central Park in New York City. Apparently despondent over financial loss, Auerbach used a Winchester rifle equipped with a Maxim Silencer to kill his wife and two daughters as they slept, then killed himself. He spared his 14-year-old son, who slept through the massacre. The boy discovered the bodies the next day. There between his dead parents: the Maxim Silencer Auerbach had recently purchased. Only after discovering the bodies did the boy find a handwritten note his father left him, directing him to call his uncles and grandfather and report the atrocity that the dad knew the boy would discover when he awoke.<sup>54</sup>

As the newspaper dramatically recounted: “Up to this time nobody in the apartment house had any knowledge of the tragedy, for the Maxim silencer had prevented even the boy from hearing the shots that killed his sisters in the next room and had enabled the maid, in ignorance of the killings, to go about her work for two hours” before the boy stirred.<sup>55</sup> The man had only recently purchased the rifle and silencer. When he brought them home, he told his wife that he was pursuing a business venture to manufacture silencer-equipped rifles.<sup>56</sup>

The official reaction to this crime was swift. The New York Police Commissioner called for a ban on silencers, believing “unrestricted use of the device would increase gunman activity and put a premium upon crime in general.”<sup>57</sup> This prompted Maxim himself to respond, and he rejected the notion that his brainchild was an “aid to criminals.”<sup>58</sup> Shortly after the Auerbach murders and in response to the Commissioner’s calls for a prohibition, Maxim demonstrated his device for police and prosecutors, who were “not convinced yet however, that the device is a harmless firearm accessory.”<sup>59</sup> The authorities waited in a hallway outside the gun range where Maxim shot so they could assess for themselves the sound with and without the device attached. They found the sound was reduced considerably and not immediately recognizable as gunfire, but it was not as dramatic as commonly thought.<sup>60</sup> Maxim, for his part, offered reasons why use of his device was not particularly suited for crime; on revolvers it was ineffective and on pistols it “causes a backfire.”<sup>61</sup>

Maxim’s efforts at reassurance were in vain. In response to the awful Auerbach murders, two New York lawmakers introduced a bill to outlaw silencers and make their

<sup>53</sup> *Silent Gun Kills a Family of Four*, N.Y. TIMES, Feb. 1, 1915, at 1.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Maxim Shoots to Defend Silencer*, N.Y. TRIBUNE, Feb. 11, 1915, at 5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> As future crimes would show, even when Maxim’s silencer was used, it did not always have the intended effect. In a 1917 trial of several organized crime figures for murdering a prominent poultry dealer, a firearms expert demonstrated the silencer for the judge and jury by shooting a rifle two times, once with the silencer and once without. The reporter covering the trial reported that the silencer made “scarcely an appreciable difference” between the two shots. *Murder ‘Silencer’ Echoes in Court*, N.Y. TIMES, July 10, 1917, at 7.

<sup>61</sup> *Maxim Shoots to Defend Silencer*, *supra* note 57.



“manufacture, sale, or possession [. . . ]” a felony.<sup>62</sup> “The danger of such a contrivance in aiding crime should be stopped at the start,” said one lawmaker of the bill.<sup>63</sup> “It does not take a police expert to see how it helps gunmen who are able to eliminate the noise of their shots, about the only thing they have to fear.”<sup>64</sup> The bill passed the Senate on March 8, 1916.<sup>65</sup> The governor signed it into law less than one month later, on April 6.<sup>66</sup> Silencers were prohibited in the Empire State.

## 5. ‘ALBANY SLAYER’

There were other silencer-assisted murders in New York. In Albany that same year, 1916, four people were shot in separate incidents on the street and in broad daylight, and none reported hearing any gunfire.<sup>67</sup> One of the victims died from his wounds.<sup>68</sup> Police suspected the perpetrator used a silencer.<sup>69</sup> They were right. A young actor—dubbed the ‘Albany Slayer’ by the news—was arrested for the shootings four days later in Schenectady.<sup>70</sup> He was given up by the “landlady” of the boarding house where he lodged, after she “became suspicious of his constant tampering with a strangely-fashioned gun he kept in his room.”<sup>71</sup> Police recovered the makeshift weapon. He had rigged a .22-caliber rifle, with the stock removed and the barrel sawed off, and concealed it up the sleeve of his coat. He fired it using a wire. And attached to the rifle: a Maxim Silencer. The man was not initially charged with murder because authorities suspected he might suffer from a mental illness that would complicate prosecution.<sup>72</sup> He had apparently wandered about the country before finally acting on his impulses in Albany. He was vague about where he obtained the silencer but claimed he had wanted one for years and had recently “written to the makers for one and had received it a week later.”<sup>73</sup>

## 6. BANK ROBBERY

Five years later, in 1921, a double murder during a bank robbery in NY grabbed headlines and started a multi-state manhunt.<sup>74</sup> The news reported that the killer, who shot and killed a teller and a clerk, left behind two handguns, including one equipped with a silencer. He was “what the criminal world and the police call ‘a two-gun man’” (though if that means anything other than a man that carried two guns, it was not clear from the report). Based on speculative similarities to other recent crimes, police assumed

<sup>62</sup> *Put Ban on “Silencers”*, N.Y. TIMES, Feb. 4, 1915, at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Passes Anti-Silencer Bill*, N.Y. TIMES, Mar. 9, 1916, at 4.

<sup>66</sup> *Restricts Use of Silencers*, N.Y. TIMES, Apr. 7, 1916, at 4.

<sup>67</sup> *Noiseless Shots Wound 4 in Street*, N.Y. TIMES, Jan. 29, 1916, at 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Arrest Young Actor as Albany Slayer*, N.Y. TIMES, Feb. 2, 1916, at 5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Two Arrests Made in Bank Murder*, N.Y. TIMES, Dec. 31, 1921, at 4.



the perpetrator was also responsible for several other robberies, adding to his (and the silencer's) criminal reputation.

### 7. CRIMES ELSEWHERE

Silencers appeared in serious crimes in other places, too (though sometimes they played only a supporting role).

In 1915, a Colorado man was arrested for murdering his father, who was killed by a bullet shot through his window.<sup>75</sup> Police suspected the son after discovering he had recently purchased a rifle and ordered a silencer through the mail. They found the rifle and silencer in his home, disassembled, the parts hidden in various places in his garage.

In 1917, a beautiful model was murdered in Pennsylvania.<sup>76</sup> She was not shot and killed, however; she was beaten and strangled with a silk stocking. But the suspected murderer shot himself dead with a silencer days later as police attempted to enter his apartment. "USES NEW SILENT RIFLE," the newspaper headline noted.<sup>77</sup> The silencer did not conceal the shooting, however. Though the police were not sure what the 'bang' they heard was, after they broke into the room they soon discovered. Despite coming from a wealthy family, the man (proclaimed a "rake" by the headlines) borrowed \$10 the day before and used it to purchase the silenced rifle.<sup>78</sup>

In February 1926, a serial shooter terrorized Omaha, Nebraska.<sup>79</sup> The news referred to the shooter as a "sniper." For several weeks, someone had been firing .22-caliber bullets, mostly through the windows of homes but also in a couple of incidents that occurred outdoors. The shooter had killed two and wounded others. One of the wounded was a railroad detective, who engaged in a gunfight with the suspect. The detective said he was certain the suspect's gun was equipped with a silencer because he only heard "a little noise" when the suspect shot him in the back and did not hear the other rounds that struck him.<sup>80</sup> The detective's shooting drew the attention of a nearby train crew, who aided him. Police eventually identified and arrested the shooter, a 45-year-old farm hand, as he walked along train tracks outside of town.<sup>81</sup> As the wounded railroad detective surmised, the man had used a pistol equipped with a Maxim Silencer. The man gave a full confession and expressed no remorse. Sometimes, he said, he wanted to "kill, kill, kill." He claimed that he purchased the pistol in Chicago a couple years before and equipped it with the silencer because: "I Just [sic] thought that some day [sic] I might use it and would not want any one [sic] to hear me, so I had that silencer put on."<sup>82</sup>

The man described his crimes in detail, and the paper printed those details.<sup>83</sup> He missed one of the victims, a man walking on the street, with his first shot. The victim

<sup>75</sup> *Sheriff Holds Banker's Son*, L.A. TIMES, Dec. 4, 1915, at I2.

<sup>76</sup> *Pittsburgh Rake a Suicide After Murder of Model*, N.Y. TIMES, Jan. 5, 1917, at 1.

<sup>77</sup> *Id.*

<sup>78</sup> A rake—short for "rakehell"—is an immoral man. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1454 (Joseph P. Pickett et al. eds., 5th ed. 2016).

<sup>79</sup> *Terror of Sniper Wears Omaha Folk to Breaking Point*, N.Y. TIMES, Feb. 21, 1926, at 1.

<sup>80</sup> *Omaha Calm Again as Sniping Ceases*, N.Y. TIMES, Feb. 22, 1926, 1.

<sup>81</sup> *Omaha Gets Sniper; Farm Hand Boasts of Skill in Killing*, N.Y. TIMES, Feb. 23, 1926, at 1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



“heard the working of the gun, but the silencer prevented him from knowing it was a shot. He looked around, saw me and the gun and started to run.”<sup>84</sup> The shooter did not miss with his second shot.

## B. SILENCERS NOT RECOVERED IN CRIMES

Though it appears silencers were only confirmed used in a relative handful of actual shootings—and even then, rarely concealing the crimes—the public reporting and assumptions had an effect. The silencer’s *reputation* began to precede it. It appeared in news reports of crimes even when its use was only speculative. It seems if no one reported hearing a shot, police (or news reporters) assumed it was because the shooter had used a silencer.

### 1. JEWELRY HEISTS

In 1920 and 1921, a series of jewelry heists in New York kept silencers in the headlines. Police did not recover a silencer and merely suspected one was used because no one reported hearing the shot that killed a jewelry store owner in his office. Still, the headline’s subtitle proclaimed it: “SILENCER IS USED ON GUN.”<sup>85</sup> Three other men stumbled upon the robbery in progress and the perpetrators bound and gagged them before fleeing. No nearby tenants heard the shot that killed the man, giving rise to the suspicion that a silencer was involved. Although no one reported hearing the shot, they heard the shouts of the bound victims when they cried out after the assailants fled. The victims described being threatened with a “sawed-off rifle.” They did not describe a silencer.<sup>86</sup>

Just a few months later, four men (“evidently Italians,” the news reported), held up another jewelry store in NYC.<sup>87</sup> Police suspected the same perpetrators that had killed the jeweler in the previous robbery. This time, though, the news did not say that a silencer was *suspected*. This time it simply said the man was killed with a pistol equipped with a Maxim Silencer.<sup>88</sup> What that certainty was based on, however, is unclear. No arrests had been made and no gun recovered.

### 2. TOBACCO DEALER

In 1922, a tobacco dealer was working in his shop when his wife, in the attached apartment, heard three “whip-like cracks” and came to investigate.<sup>89</sup> What she found was her husband shot and being pistol-whipped by one of three intruders. She was struck over the head and the robbers fled. She noticed their revolvers had long barrels, so police began searching for “three gunmen with revolvers and possibly with silencers.” That

<sup>84</sup> *Id.*

<sup>85</sup> *Slayers Escape Police Net*, N.Y. TIMES, Dec. 17, 1920, at 1.

<sup>86</sup> *Id.*

<sup>87</sup> *\$80,000 Robbery Just Off 5th Av.*, N.Y. TIMES, Mar. 17, 1921, at 1.

<sup>88</sup> *Id.*

<sup>89</sup> *Bandits Use ‘Silent’ Pistols in Hold-Up*, N.Y. TIMES, Jan. 26, 1922, at 1.



uncertainty was not reflected in the headline, however: “BANDITS USE ‘SILENT’ PISTOLS IN HOLD-UP.”<sup>90</sup>

### 3. KENTUCKY MOONSHINERS

Big cities weren't the only place to experience crimes with (suspected) silencers. In 1922, in the mountains of Kentucky, moonshiners shot and killed a Federal Prohibition Agent (not with a silencer) as he and a group of lawmen attempted to enter a mountain cabin in search of a still.<sup>91</sup> A standoff ensued for hours, and about 200 rounds of (loud) gunfire were exchanged between the lawmen and the moonshiners. At dark, the moonshiners escaped. The next day, as the group of lawmen reentered the area to search for the wanted men, another lawman was shot and killed. This time though, rather than being “riddled” with bullets by up-close gunfire as the Federal agent had been the day before, this officer was killed from afar. Police suspected the shot came from a rifle equipped with a silencer (or from very far away) because they did not hear the gunfire that killed him. The dramatic deaths of two Appalachian lawmen made headlines in faraway New York City.<sup>92</sup>

### 4. OTHER (SILENT) SHOOTINGS

In 1923, a woman was walking with friends in Brooklyn when she was shot through both legs.<sup>93</sup> None of them heard any gunfire. “The police believe[d] that a gun with a Maxim Silencer must have been used.”<sup>94</sup> The woman said she had no enemies and knew of no reason anyone would target her with “silent shots.” The report does not indicate whether police considered the possibility that, rather than being targeted, she might have been struck by a stray round fired from somewhere else.<sup>95</sup>

In 1925, a New York grocery store clerk was shot on his first day on the job when two young gunmen robbed the store.<sup>96</sup> In the ensuing melee, the store manager was also shot before the perpetrators fled the store with a small amount of cash. “No one hears firing,” proclaimed the headline.<sup>97</sup> But they heard the screams of a woman who was an eyewitness to the altercation, and her alarm brought a crowd, including a detective having lunch next door. As the detective spoke to one of the victims, who described the “big, black guns” the suspects carried, he surmised they were equipped with silencers, giving them an “elongated, bulky appearance.” That would also explain why he did not hear the gunfire, even though he heard the witness screaming. Whether his supposition is correct or not is uncertain. The men were gone, and the story does not report their arrest or

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<sup>90</sup> *Id.*

<sup>91</sup> *Moonshiners Kill Second Dry Raider; Hold Off Big Posse*, N.Y. TIMES, Dec. 11, 1922, at 1.

<sup>92</sup> *Id.*

<sup>93</sup> *Silent Shots Wound Woman in Both Legs*, N.Y. TIMES, Jun. 20, 1923, at 7.

<sup>94</sup> *Id.*

<sup>95</sup> Thomas Chittum, *What Goes Up...: A Brief Legal History of Celebratory Gunfire*, DUKE LAW SCHOOL CENTER FOR FIREARMS LAW, SECOND THOUGHTS BLOG (May 07, 2025), <https://firearmslaw.duke.edu/2025/05/what-goes-up-a-brief-legal-history-of-celebratory-gunfire>.

<sup>96</sup> *Gunmen Shoot Two Who Resist Hold-Up*, N.Y. TIMES, Nov. 11, 1925, at 25.

<sup>97</sup> *Id.*



recovery of weapons or silencers.<sup>98</sup>

In 1927, two police detectives were on patrol in Los Angeles when a bullet came through the windshield of their car; fired by “an unknown assassin, apparently using a silencer on his gun.”<sup>99</sup>

In 1928, a policeman on foot patrol in New York was shot in a drive-by, the suspected work of ‘gangsters’ retaliating for the officer’s enforcement activities.<sup>100</sup> The news reported that a “silent pistol” was believed used because it only made “a sharp ‘ping’ as though a “child’s pea shooter” had been discharged.”<sup>101</sup>

In 1930, a New Jersey railroad ticket agent was found shot to death on the street in the early morning hours, the victim of an apparent botched robbery. “The police declared a silencer must have been used by the gunmen,” because no one reported hearing a shot.<sup>102</sup>

In 1932, a fruit dealer was shot by an assailant; his wife witnessed the shooting but heard no gunfire, leading police to suspect a silencer was used.<sup>103</sup>

### C. SILENCERS JUST POSSESSED

Often silencers were just possessed during other crimes, but they still received public attention, perhaps due to the nature of the crimes they were associated with.

#### 1. PATRICIDE

In Chicago, two sons plotted to kill their parents (but did not); when they were arrested, the police recovered a rifle with a silencer.<sup>104</sup>

#### 2. DRUG DEALERS

In 1922, local and federal agents searched a warehouse in New York’s Chinatown looking for opium.<sup>105</sup> They found it. They also found a silencer, along with twenty firearms and other weapons. They arrested seven men. Police announced that through their actions, they had averted a “war” among rival gangs.<sup>106</sup> There was no indication the silencer had been used.

#### 3. ‘HOLD-UP’ GANGS

In 1925, a champion pistol shooter and firearms inventor was arrested for providing three silencers to a gang “accused of committing more than eighty hold-ups

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<sup>98</sup> *Id.*

<sup>99</sup> *Harbor Police Made Targets of Silent Gun*, L.A. TIMES, Jan. 9, 1927, at 23.

<sup>100</sup> *Silent Pistol Used to Shoot Policeman*, N.Y. TIMES, Aug. 20, 1928, at 14.

<sup>101</sup> *Id.*

<sup>102</sup> *Rail Agent Slain; \$244 is Untouched*, N.Y. TIMES, Jul 2, 1930, at 14.

<sup>103</sup> *Shot Down in His Store*, N.Y. TIMES, Mar. 6, 1932, at 25.

<sup>104</sup> *Plotted to Slay Parents*, N.Y. TIMES, Jan. 17, 1916, at 6.

<sup>105</sup> *Chinatown Raid Averts Tong War*, N.Y. TIMES, Dec. 2, 1922, at 8.

<sup>106</sup> *Id.*



and at least one murder.”<sup>107</sup> One of the silencers was suspected of being used in the death of one man, and the other two silencers were used to shoot at a police officer. The gang’s leader trained members of his organization to use silencers, because the “bulky cylinder” makes a handgun difficult to aim without practice.<sup>108</sup> The gang’s leader and five members were also arrested and charged with robbery offenses. The inventor’s crimes were discovered when a member of the gang cooperated and led police to the murder weapon, which had been discarded in a chimney. Police dismantled the chimney and recovered the firearm, silencer still attached. Maxim himself was quoted in the paper that his company had not sold the silencers to the arrested man and did not know where they came from, but also did not think it would have worked well on the firearm on which it was attached.<sup>109</sup> In exchange for an agreement to drop the silencer charge, the inventor pled guilty to illegally possessing firearms.<sup>110</sup>

#### 4. ORGANIZED CRIME

In the late summer of 1930, police in New York located “an arsenal of gangsters’ weapons unprecedented in the history of the police department” in an apartment in Brooklyn.<sup>111</sup> Amidst the weapons, police recovered bombs, tear gas, guns disguised as pens, rudimentary body armor . . . and multiple silencers.<sup>112</sup> Police speculated (on what seems thin evidence) that Al Capone himself may have been preparing to take over illicit liquor sales in New York, and the armament was for the “gang war on a large scale” that would involve.<sup>113</sup>

#### D. NO SILENCER AT ALL

And sometimes there was no silencer at all. Even though it was a made-up threat, “Death by Maxim Silencer” proclaimed the New York Times when reporting a harebrained extortion scheme dreamed up by teenage boys. They threatened to kill a stable full of delivery horses and the stable manager with a rifle and silencer.<sup>114</sup> Some horses had, in fact, been killed previously . . . by poison. That crime is what had inspired the boys’ plan.<sup>115</sup> There was no silencer.

#### E. WORLD WAR I

While their reputation for crime was still growing, silencers took on a different specter during World War I: not just a tool not for crime, but one for terrorism.

In 1917, President Woodrow Wilson, exercising his wartime powers as America

<sup>107</sup> *Held for Supplying Bandits’ Silencers*, N.Y. TIMES, Oct. 21, 1925, at 25.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Reising Pleads Guilty to Having Firearms*, N.Y. TIMES, Oct. 28, 1925, at 3.

<sup>111</sup> *Bombs, Guns, Armor for Gang War Found*, N.Y. TIMES, Aug. 25, 1930, at 1.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *60 Horses Killed; Boys Held For It*, N.Y. TIMES, Nov. 17, 1909, at 1.

<sup>115</sup> *Id.*



prepared to battle Germany, declared that no “alien enemy” shall possess, among other items, a “maxim [sic] or other silencer.”<sup>116</sup>

In fact, later that year the first conviction under the New York ban on silencers involved an Austrian man.<sup>117</sup> He had not used the silencer to commit a crime. Rather, he was charged with simply possessing it after police discovered it while they were arresting him for another offense.

In 1918, a man plowing his estate in the suburbs of Los Angeles unearthed two Maxim Silencers, carefully wrapped and buried.<sup>118</sup> Explosives were also found nearby, leading police to speculate that both caches may have been “evidence of a well-laid plot of terrorism, possibly of pro-German inception.”<sup>119</sup>

During the war, the State Department reported that the Russian government was summarily executing officers, who were “shot at night in the cellars, guns being muffled with silencers.”<sup>120</sup>

Silencers were also used against American soldiers on the battlefield. When a soldier brought home a captured German machinegun as a trophy, the story reported that with its silencer “the noise of exploding cartridges became like the muffled purr of a cat, spitting 500 slugs of death a minute.”<sup>121</sup>

### III. A REPUTATION CEMENTED

#### A. A SILENCER ON BROADWAY

It wasn't just headlines about sporadic crimes involving silencers (real or speculated) that helped solidify their reputation for crime and death. They began appearing in popular entertainment, too. In 1912, just a few years after it was invented, a successful Broadway play prominently featured a Maxim Silencer.<sup>122</sup> The next year, the play was turned into a novel, and again the Maxim Silencer played a starring role.<sup>123</sup>

“I shot English Eddie, because he was a skunk, and a stool-pigeon, and he got just what was coming to him . . . because he was a skunk, and a stool-pigeon,” he repeated. ‘Have you got it?’ And then, as the stenographer nodded assent, he went on, less violently: ‘I croaked him just as he was going to call the bulls with a police-whistle. I used a gun with smokeless powder. It had a Maxim silencer on it, so that it didn't make any noise.’

‘Say,’ he exclaimed, ‘I'll bet it's the first time a guy was ever croaked with one of them things! Ain't it?’

<sup>116</sup> *Proclamation by the President of the United States of America*, Presidential Proclamations, Apr. 6, 1917, pg. 1651., AM. J. INTL. L., Vol. 11, No. 3, (July 1917), pp. 152-156.

<sup>117</sup> *Austrian Had a Silencer*, N.Y. TIMES, Nov. 1, 1917, at 8.

<sup>118</sup> *Unearth Plot of Terrorism*, L.A. TIMES, Feb. 10, 1918, at I12.

<sup>119</sup> *Id.*

<sup>120</sup> *Reign of Terror Continues, Russian Refugees Report*, Official U.S. Bulletin, Vol. 2, No. 420, Sep. 24, 1918, at 1.

<sup>121</sup> *Brings Home Big War Trophy*, L.A. TIMES, July 2, 1919, at I13.

<sup>122</sup> *‘Within the Law’ a Vivid Melodrama*, N.Y. TIMES, Sep. 12, 1912, at 11.

<sup>123</sup> MARVIN DANA, *WITHIN THE LAW* (1913).



The Inspector nodded affirmation. There was sincere admiration in his expression, for he was ready at all times to respect the personal abilities of the criminals against whom he waged relentless war.

‘That’s right, Joe!’ he said, with perceptible enthusiasm.

‘Some class to that, eh?’ Garson demanded, still with that gruesome air of boasting. ‘I got the gun, and the Maxim-silencer thing, off a fence in Boston,’ he explained. ‘Say, that thing cost me sixty dollars, and it’s worth every cent of the money. . . . Why, they’ll remember me as the first to spring one of them things, won’t they?’

‘They sure will, Joe!’ the Inspector conceded.<sup>124</sup>

Maxim felt compelled to respond to this sensational depiction of his invention. He wrote that people who see the play “are bound to get an altogether mistaken notion of what can be done in real life with a firearms silencer. . . .”<sup>125</sup> He described why his silencer would be ineffective on a revolver or pistol and could only truly silence a .22-caliber rifle (which he opined “is obviously impractical for the purposes of crime”), because larger rifles used ammunition that produced a sonic boom.<sup>126</sup> At the same time, his device was useful to target shooters because it reduced noise and recoil, and improved marksmanship. That is why, he said, it was part of the military’s training regimen. He concluded with this final thought: “There is no way in which the criminal can ever make his revolver or automatic pistol noiseless.”<sup>127</sup> This legacy of silencers making cameo appearances in Hollywood was just beginning.<sup>128</sup>

## B. MAXIM CALLS IT QUILTS

Eventually, Maxim threw in the towel. In 1930, he announced he would stop making silencers for firearms “because of the popular impression that this invention was

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<sup>124</sup> *Id.* at 335-36.

<sup>125</sup> Hiram Percy Maxim, *The Limitations of Firearm Silencing*, SCI. AM., Vol. 107, No. 23 (Dec. 7, 1912), 496-97.

<sup>126</sup> Maxim wrote about this phenomenon—the distinction between the sound of a gun being fired and the sonic boom of the bullet—often and even credited his invention of the silencer for its discovery. Hiram Percy Maxim, *Gun Report Noise - Action of the Maxim Silencer and the Difference Between Report Noise and Bullet-Flight Noise Explained*, ANNUAL REPORT OF SMITHSONIAN INSTITUTION, 193 (1916). See also Hiram Percy Maxim, *The Whiplash Crack and Bullet Sound Waves*, SCI. AM., Vol. 113, No. 11, 231 (Sep. 11, 1915). As he wrote, “In the ordinary gun the report noise is so loud that it engulfs all other sounds, and we are conscious of nothing but report noise itself. It is not until this report noise is annulled that we can hear the “bullet flight” noise.” Hiram Percy Maxim, *The Double Report in Gun Fire*, SCI. AM., Vol. 106, No. 5, 107 (Feb. 3, 1912). Subsonic ammunition alleviates this issue.

<sup>127</sup> Maxim, *supra* note 125.

<sup>128</sup> William Lawson, *Silencers in Cinema*, SILENCERCO (July 14, 2023), <https://silencerco.com/blog/silencers-in-cinema>.



an aid to crime.”<sup>129</sup> He estimated that by that point about 2,500 Maxim Silencers were “in private hands.”<sup>130</sup> He had adapted his invention to silence things other than firearms, such as automobiles, and he was moving on.

### C. CALLS FOR UNIVERSAL REGULATION

Maxim’s surrender was hardly surprising. Even though it is far from clear that they were the menace they were thought to be, for years there was a consistent and steady call for comprehensive regulation of devices that could dampen the sound of a firearm. It happened to overlap with a growing public concern over the easy availability of weapons, generally, and especially machineguns.<sup>131</sup> (Interestingly, besides silencers and machineguns, there was also concern about devices equipped with poison gas, hinting at the explanation of why “poison gas” was later included in the definition of a “destructive device” under the National Firearms Act.<sup>132</sup>)

In a 1926 editorial in the *New York Times*, journalist and criminologist Edward H. Smith railed against unrestricted access to machineguns, poison gas, and silencers. About the latter he wrote:

The same criticism may be leveled at the gun silencer. Some mild attempt is being made to supervise or restrict the sale of that device, yet it is easily obtainable, and crooks are everywhere supplied with it . . . Silencers can be picked up in pawnshops and the police annually dump numbers of them into the bay. One must ask himself why even one was ever publicly sold. Is there any conceivable use, except criminal concealment and the facilitation of murder, to which such a device can be put outside of the battlefield? The excuse of hunting will not hold. Yet, a few years ago, when deputy commissioner Joseph Faurot of the New York Police department protested against the sale of silencers he was fairly overwhelmed with abuse coming from manufacturers.<sup>133</sup>

Foreshadowing details of the National Firearms Act that would eventually follow, Smith also described what he called “trick guns”—disguised firearms, such as ones made to look like pocketknives, canes, umbrellas, cigarette lighters, pens, and other unassuming items.<sup>134</sup> These would later come to be classified as “any other weapon” under the NFA.<sup>135</sup>

Smith was not so prescient with all his grievances, though. He also lamented the easy access to acetylene torches. Though they had an industrial purpose, he acknowledged, they were useful to burglars, and he thought they should be regulated.

<sup>129</sup> *Maxim Bans Gun Silencer*, N.Y. TIMES, May 8, 1930, at 27.

<sup>130</sup> *Id.*

<sup>131</sup> Edward H. Smith, Editorial, *Machine Guns and Gas Are Easy to Purchase*, N.Y. TIMES, Nov. 21, 1926, at 12.

<sup>132</sup> 26 U.S.C. § 5845(f).

<sup>133</sup> Smith, *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> 26 U.S.C. § 5845(e).



Unlike machineguns, silencers, and disguised weapons, however, acetylene torches were not included in the NFA. Smith would not live to see it pass, anyway. He died the next year of pneumonia at the age of forty-two.<sup>136</sup>

### 1. THE NATIONAL CRIME COMMISSION

Smith wasn't the only one demanding universal regulation. The following year, in 1927, the National Crime Commission called for a far-reaching uniform law to regulate firearms.<sup>137</sup> The Commission was a body created by President Coolidge in 1925 to propose solutions to America's growing crime problem.<sup>138</sup> The proposal included prohibiting the manufacture of machineguns and silencers, with exceptions for police and military.<sup>139</sup>

The Commission's call for a ban on silencers was no surprise. The year before, one of its members—former Massachusetts Attorney General J. Weston Allen—said in remarks at an American Bar Association symposium, “the modern inventions for committing crime; the medium of the automatic with a silencer in the hands of the bandit, and the high powered car for getting away, have given new stimulus to crime.”<sup>140</sup>

### 2. POLICE LEADERS

In 1932, in the absence of a federal or state law prohibiting them, the Chief of the Los Angeles Police Department called on city leaders to pass an ordinance banning silencers, after twenty-four Maxim Silencers were shipped to a local firearms dealer from England.<sup>141</sup> He said:

No one but a criminal with the intention of committing murder with the least possibility of detection would have use for silencers on pistols. Police officers and members of bona fide pistol clubs have no reason to use them. It is only the gunman who slays in the dark who would find it to his advantage to use such an impertinence to muffle the sound of his shots. I certainly will strive to have a local ordinance passed making it an offense to possess such silencers.<sup>142</sup>

### D. THE NATIONAL FIREARMS ACT OF 1934

They got their wish. In 1934, the National Firearms Act was passed, imposing universal regulations on silencers (as well as machineguns, bombs using poison

<sup>136</sup> *Edward H. Smith; Journalist and Criminologist Dies of Pneumonia at Age of 42*, Obituary, N.Y. TIMES, Sep. 20, 1927, Section RADIO, at 29.

<sup>137</sup> *To Ask All States for Ban on Pistols*, N.Y. TIMES, Jan. 30, 1927, at 2.

<sup>138</sup> John H. Wigmore, *The National Crime Commission: What Will It Achieve?*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 312, 312 (1925).

<sup>139</sup> *Gun Law Sent to Governors*, L.A. TIMES, Feb. 23, 1927, at 8.

<sup>140</sup> *Symposium – Enforcement of the Criminal Law*, Discussion, 49 ANNU. REP. A.B.A. 238, 239 (1926).

<sup>141</sup> *Gun-Silencer Curb Sought*, L.A. TIMES, Jun. 4, 1932, at A1.

<sup>142</sup> *Id.*



gas, disguised firearms, and other weapons).<sup>143</sup> As prominent Second Amendment scholar Stephen Halbrook has noted, there was virtually no discussion—let alone any deliberation—about silencers at the hearings that preceded passage of NFA.<sup>144</sup> Of course, by then it may have been a foregone conclusion. The uncritical acceptance of the belief that silencers were only useful for crime—bolstered by years of sensational headlines, popular depictions in entertainment, and steady pronouncements from experts and police leaders—had been firmly set by that time. There were few advocates for (or even awareness of) the benefits that would help rally support for deregulation of silencers beginning in the early part of the 21st century.<sup>145</sup> The silencer's fate was sealed.

### E. SILENCERS AND CRIME AFTER THE NFA

A year after the National Firearms Act was passed—as he advocated for similar regulation and registration of handguns—Attorney General Homer Cummings announced that even though “our great American underworld is armed to the teeth,” we had “made great progress” on crime.<sup>146</sup> After the NFA was passed, the use of silencers to commit crimes (however infrequently it had occurred before) was diminished. News reports of silencers being used or recovered in crimes decreased considerably. They would show up only occasionally, in headlines that often seemed to reflect the crime issue of the era (sometimes only speculatively, often only possessory).

In 1936, a man was shot on San Diego's waterfront; “Pistol Silencer Believed Used.”<sup>147</sup>

In 1956, a mob witness murdered (police suspected with a silencer-equipped pistol).<sup>148</sup>

In 1965, a triple-murder, in what was called the “‘bloodiest’ bank robbery of modern times,” led to a nationwide manhunt and an announcement from J. Edgar Hoover that the crime was committed with a silencer-equipped pistol.<sup>149</sup> The killer later sobbed at his trial and announced that he hoped someone—his industrial arts teacher or his father, perhaps—would have discovered that he was making a silencer for his pistol, so that he might have been stopped before he committed the murders.<sup>150</sup>

In 1966, the “head of the militant right-wing Minutemen” (a group that advocated “underground guerrilla training to resist a ‘Communist takeover’”) and two of its members were convicted of conspiracy and weapons offenses, including possessing a silencer.<sup>151</sup>

In 1968, there was a brazen robbery in Harlem where a guard was shot by a suspect

<sup>143</sup> National Firearms Act of 1934, Pub. L. No. 90–618, § 201, 82 Stat. 1232 (1968).

<sup>144</sup> Stephen P. Halbrook, *The Power to Tax, The Second Amendment, and the Search for Which “‘Gangster’ Weapons” to Tax*, 25 WY. L. REV. 150, 173–74 (2025).

<sup>145</sup> See *infra* Section V.C.

<sup>146</sup> *Heavy Military Arms are Stolen by Gang*, N.Y. TIMES, Oct. 29, 1935, at 2.

<sup>147</sup> *San Diego Police Hunt Sniper After Mystery Bullet Fells Worker*, L.A. TIMES, Jan. 5, 1936, at A15.

<sup>148</sup> *Key Racket Witness Shot in Car in Jersey*, N.Y. TIMES, Mar. 11, 1956, at 1.

<sup>149</sup> *Suspect Hunted in Bank Murders*, N.Y. TIMES, Jun. 7, 1965, at 28.

<sup>150</sup> *Bank Killer Cries on Witness Stand*, N.Y. TIMES, Nov. 17, 1965, at 64.

<sup>151</sup> *Minutemen Leader Guilty in Arms Case*, N.Y. TIMES, Nov. 15, 1966, at 1.



with a silenced pistol in an office full of people.<sup>152</sup>

In the late 1960s, authorities expressed concerns about “militant groups” such as “the Minutemen, the Ku Klux Klan, the Black Panthers, the Liberators and the Mafia” heavily arming themselves, recounting large seizures that included, among other things, silencers.<sup>153</sup>

In 1971, during the height of the Vietnam war, a former Green Beret who was accused (along with seven other Green Berets) of murdering a suspected South Vietnamese “double agent” claimed he did so—with a silencer—on orders from the Central Intelligence Agency.<sup>154</sup> The eight soldiers were charged but not tried because the Nixon Administration “could not enlist the cooperation of the C.I.A.”<sup>155</sup> The Green Beret claimed he killed the man with “two shots to the head from a .22-caliber pistol equipped with a silencer (which jammed between shots).”<sup>156</sup>

Even the hunt for Jimmy Hoffa involved a silencer. Three men with mob ties were suspected in the Hoffa’s murder.<sup>157</sup> During the investigation of the men, authorities searched the belongings of Salvatore “Sally Bugs” Briguglio in the local union office, looking for “two .38-caliber pistols with silencers.”<sup>158</sup> Hoffa’s murder remains unsolved... as does the murder of Briguglio himself. He was shot and killed not long after, when two gunmen approached him on the street in Manhattan and shot him four times.<sup>159</sup> No word on whether they used silencers.

In 1976, as the drug wars in South Florida heated up, police worried about “Assassination Kits” that included “silencer-equipped Luger pistols” hidden in briefcases that “could be fired by pulling a ring hidden beneath the cases’ handles, the bullet going through a hole in the side of the case.”<sup>160</sup>

In 1978, a wealthy industrialist in Texas was caught with a silencer when he was arrested for trying to arrange the murder of the judge overseeing his divorce. He was previously charged with a shooting in a Texas mansion that left his ex-wife injured, her 12-year-old daughter (his stepdaughter) dead, the wife’s boyfriend dead, and another person wounded.<sup>161</sup> He had already been acquitted of the stepdaughter’s death and after he was also acquitted of trying to arrange the judge’s murder, all the remaining charges—including the charge for possessing the silencer—were dismissed.<sup>162</sup>

In 1979, police arrested three men for a robbery, and recovered four firearms, including one pistol with a silencer attached.<sup>163</sup> The silencer led police to suspect that

<sup>152</sup> *Con Ed Guard Slain by Harlem Gunmen In a \$650 Robbery*, N.Y. TIMES, Jan. 25, 1968, at 39.

<sup>153</sup> Martin Waldron, *Militants Stockpile Illegal Guns Across the U.S.*, N.Y. TIMES, Dec. 28, 1969, at 42.

<sup>154</sup> John Darnton, *Ex-Beret Says He Killed Agent on Orders of C.I.A.*, N.Y. TIMES, Apr. 4, 1971, at 1.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Agis Salpukas, *Hoffa Abductors Reported Named*, N.Y. TIMES, Dec. 5, 1975, at 81.

<sup>158</sup> *Id.*

<sup>159</sup> Leonard Buder, *Federal Agents Hope Teamster Slaying in Little Italy Will Offer Leads in the Hoffa-Disappearance Case*, N.Y. TIMES, Mar. 23, 1978, Sec. B, at 3.

<sup>160</sup> *Inquiry on ‘Assassination Kits’ Urged on a Florida Grand Jury*, N.Y. TIMES, Oct. 6, 1976, at 13. (As a young ATF agent in Miami, I observed one of these kits that was still in the agency’s inventory).

<sup>161</sup> *F.B.I. Tape Heard at Houston Trial*, N.Y. TIMES, Nov. 17, 1978, at A16.

<sup>162</sup> *Texas Millionaire Is Cleared of Soliciting a Murder*, N.Y. TIMES, Nov. 10, 1979, at 9.

<sup>163</sup> James Feron, *Gun Used in Bedford Hills Slayings Recovered in Brooklyn*, N.Y. TIMES, May 30, 1979, at A1.



the firearm was linked to a recent quadruple murder. A ballistics comparison confirmed the fact. Police suspected a silencer might have been used in the murders because people nearby had not heard any shooting.<sup>164</sup>

In 1982, four people were caught in New Jersey (after traveling from North Carolina) with 200 silencers.<sup>165</sup> The report did not say why they had so many, but presumably resale.

In 1983, a man was tried for murdering four people—a witness in a federal fraud investigation and three CBS employees who happened by at the time of the shooting.<sup>166</sup> Although the weapon and silencer were not recovered, records showed the suspected killer had acquired silencer parts. The man—alleged to be a hitman hired to kill the witness—was also accused in the disappearance of one of the witness' co-workers. Interestingly, the main witness tying the packages of silencer parts to the suspected killer was a gun dealer himself. He denied seeing the silencer that was shipped to him and claimed that he had never actually seen a silencer in real life: “Only in the movies.”<sup>167</sup>

In 1984, there were the “Libyans” with alleged ties to the “regime of Col. Muamar el-Qaddafi” who were caught buying three silencers from an undercover agent.<sup>168</sup> Federal prosecutors said, “guns and silencers are obviously used for murders.”<sup>169</sup> The men pled guilty to possessing the silencers; they denied planning to murder anyone with them.

In 1985, the head of an Anti-Castro group “Omega 7” in south Florida was convicted (along with his firearms-dealer co-defendant) of a conspiracy that involved numerous machineguns and silencers.<sup>170</sup> The man had already been convicted of killing a Cuban diplomat and organizing dozens of bombings over the course of a decade.

Just two months later, four members of “The Order” were arrested hiding out in an Arkansas compound that housed an organization known as “The Covenant, the Sword, and the Arm of the Lord” (or CSA).<sup>171</sup> Along with the members of the Order, the leader of the CSA, Jim Ellison, was arrested for “conspiracy to manufacture, possess and distribute machine guns and silencers.”<sup>172</sup> The five surrendered after a protracted standoff, where hundreds of federal and state law enforcement officers surrounded the rural compound. During the subsequent search of the compound, authorities recovered a converted machinegun like the one that members of the Order had used to murder Jewish talk show host, Alan Berg, in Denver.<sup>173</sup> Berg was believed to have been killed with a machinegun equipped with a silencer because a short time later, a Missouri State Trooper was killed and another trooper wounded with the same machinegun, and it was equipped with a silencer.<sup>174</sup>

<sup>164</sup> *Id.*

<sup>165</sup> *4 Held in Newark with 200 Silencers*, N.Y. TIMES, Feb. 24, 1982, at B2.

<sup>166</sup> Selwyn Raab, *Prosecutor Says 2 Items Tie Nash to CBS Deaths*, N.Y. TIMES, Apr. 28, 1983, at B1.

<sup>167</sup> *Id.*

<sup>168</sup> Joseph P. Fried, *Libyan Admits Illegally Buying Arms on S.I.*, N.Y. TIMES, Aug. 11, 1984, at 3.

<sup>169</sup> *Id.*

<sup>170</sup> *Miami Jury Convicts 2 In Anti-Castro Plot*, N.Y. TIMES, Feb. 13, 1985, at A16.

<sup>171</sup> Wayne King, *Survivalist and 4 Neo-Nazis Give Up*, N.Y. TIMES, Apr. 23, 1985, at A14.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*



### F. WORRY ABOUT SILENCER KITS

Though incidents like those described above were infrequent, they were high-profile and led authorities to decry the ease with which one could make an illegal machinegun and silencer that, when combined, would make “no more noise than a sewing machine.”<sup>175</sup> Kits to convert semi-automatic firearms into machineguns and to make silencers were widely available at gun shows. Indeed, authorities charged the leaders of several companies for conspiring to (separately) sell all the parts necessary to convert a firearm to fully automatic or to fashion a silencer.<sup>176</sup> During the investigation that led to the indictments, authorities seized “289 machine guns, 196 silencers and 246 kits to make silencers,” many of which they found in the possession of “convicted felons, drug traffickers, firearms traffickers....” In their experience, “semiautomatic weapons, illegally silenced and modified for automatic fire, had become weapons of choice for extremists and hate groups.”

### G. BUT MOSTLY JUST POSSESSORY OFFENSES

While there certainly were some high-profile instances of murders where silencers were used, one comprehensive analysis of silencer-related prosecutions suggests that most violations were just possessory in nature.<sup>177</sup>

A ‘homemade’ silencer is fairly simple to fashion. For instance, in one case, police surmised a killer made a silencer from a Gatorade bottle and medical tape.<sup>178</sup> A detective in the investigation testified that it “reminded him of a makeshift silencer he’d seen in a Steven Seagal movie.”<sup>179</sup> In *United States v. Williams*, a man planned to use a potato as a silencer.<sup>180</sup> As Stephen Halbrook pointed out, in another case, a man made silencers from “[o]ld toilet paper tubes and stuffing from some old stuffed animals.”<sup>181</sup>

This suggests that if more criminals wished to use silencers to commit violent crimes, impromptu ones would not be hard to fashion.<sup>182</sup> When silencers and machineguns were both restricted by the NFA, criminal misuse of both dropped significantly. However, when a new device made it easy to illegally convert a semi-automatic pistol into a machinegun, their use to commit crimes skyrocketed.<sup>183</sup> Meanwhile, even though it has long been easy to fashion a rudimentary silencer, and

<sup>175</sup> Wayne King, *U.S. Says It Is Too Easy to Get a Submachine Gun*, N.Y. TIMES, May 27, 1985, at 7.

<sup>176</sup> Neil A. Lewis, *5 Indicted for Violating Machine-Gun Restrictions*, N.Y. TIMES, Jun. 15, 1985, at 8.

<sup>177</sup> Clark, *supra* note 9.

<sup>178</sup> *Martin v. Nines*, No. 24-6086, 2025 WL 215521, at \*2 (4th Cir. Jan. 16, 2025).

<sup>179</sup> *Id.* at 6.

<sup>180</sup> *U.S. v. Williams*, 547 F.3d 1187, 1194 (9th Cir. 2008).

<sup>181</sup> Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, CUMB. L. REV., Vol. 46:1, 65, citing *U.S. v. Webb*, 49 F.3d 636, 639 (10th Cir. 1995).

<sup>182</sup> Some companies have marketed items as “solvent traps,” but which ATF has classified as silencers. See *Open Letter to All Federal Firearms Licensees*, Nov. 20, 2023, <https://www.atf.gov/firearms/docs/open-letter/all-ffls-open-letter-nov-2023-solvent-trap-devices/download>.

<sup>183</sup> Scott Glover and Curt Devine, *A device that can turn a semi-automatic weapon into a machine gun in moments is wreaking havoc on American streets*, CNN.COM, Aug. 30, 2022, <https://www.cnn.com/2022/08/30/us/automatic-machine-gun-fire-invs>.



even though the number of legal silencers in circulation has grown exponentially,<sup>184</sup> there has not been a similar increase in silencer-related crimes (the Midtown assassination described in the next section notwithstanding). This suggests that silencers may not be as desirable for crime as long assumed.

## H. AN ASSASSINATION IN MIDTOWN

Which brings us to modern times. Perhaps the most high-profile modern crime involving a silencer did, in fact, involve an apparent assassination. In the early morning hours of December 4, 2024, as the CEO of a health insurance company walked in Midtown Manhattan from his hotel to an investor conference, a man stepped out behind him and shot him twice, once in the leg and once in the back, killing him.<sup>185</sup> The shooting was captured on nearby security video, and it appeared the assassin was armed with a pistol fitted with a silencer.<sup>186</sup> The suspect fled on foot.

The use of a silencer, however, did not conceal the brazen crime; the shooting happened right in front of an uninvolved witness, who could be seen on the video ducking and running away. A manhunt immediately ensued and held the nation's attention. Five days later, the suspect was arrested in Pennsylvania. He was found in possession of a 9mm pistol and a silencer.<sup>187</sup> The United States charged the suspect with, among other charges, "discharging a firearm that was equipped with a silencer in furtherance of a crime of violence."<sup>188</sup>

And not very long ago, in 2019, a disgruntled employee used a silencer in the mass killing of 12 people at a municipal building in Virginia Beach, Virginia.<sup>189</sup> One survivor said the silencer delayed awareness of the horrific crime.<sup>190</sup>

We might also have had one other high-profile example to cite, if the perpetrator of the 2023 mass shooting in Lewiston, Maine had successfully obtained the silencer he

<sup>184</sup> See *infra* Section V.C.

<sup>185</sup> Criminal Complaint, *U.S. v. Luigi Nicholas Mangione* (S.D.N.Y.), U.S. DEPT. OF JUST., Dec. 18, 2024, [https://www.justice.gov/d9/2024-12/signed\\_complaint\\_mangione.pdf](https://www.justice.gov/d9/2024-12/signed_complaint_mangione.pdf).

<sup>186</sup> In the early stages of the investigation, before the suspect was arrested, some speculated that the weapon used was a rare WWII-era pistol with an integral silencer. See, e.g., Jesus Mesa, *What We Know About Gun Used in UnitedHealth CEO Assassination*, NEWSWEEK, Dec. 6, 2024, <https://www.newsweek.com/what-we-know-about-gun-used-unit-edhealth-ceo-assassination-1997033>. Online sleuths, however, knew better. See LouisvilleGun (@LouisvilleGun), X (Oct. 27, 2024, 2:13 PM), <https://x.com/LouisvilleGun/status/1864452541397819899>.

<sup>187</sup> Press Release, *Luigi Mangione Charged With The Stalking And Murder Of UnitedHealthcare CEO Brian Thompson And Use Of A Silencer In A Crime Of Violence*, U.S. DEPT. OF JUST., Dec. 19, 2024, <https://www.justice.gov/us-ao-sdny/pr/luigi-mangione-charged-stalking-and-murder-unitedhealthcare-ceo-brian-thompson-and-use>.

<sup>188</sup> See 18 U.S.C. § 924(c)(1)(A)(i)–(iii), (c)(1)(B)(ii); 18 U.S.C. § 2261A (predicate crimes of violence: interstate stalking resulting in death, and stalking through use of interstate facilities); Press Release, *Luigi Mangione*, *supra* note 187.

<sup>189</sup> Phil McCausland, *Virginia Beach Shooter Killed 12 Using Silencer and High-Capacity Magazine. Now, Lawmakers Might Look at Both*, NBC NEWS, (June 4, 2019, 3:48 PM EDT), <https://www.nbcnews.com/news/us-news/virginia-beach-shooter-killed-12-using-silencer-high-capacity-magazine-n1012771>.

<sup>190</sup> Gary Harki, *The silencer used in Virginia Beach was legal. A survivor says it was lethal*, VIRGINIAN-PILOT, (July 27, 2019, at 7:13 p.m.), <https://www.pilotonline.com/2019/06/03/the-silencer-used-in-virginia-beach-was-legal-a-survivor-says-it-was-lethal-2/>.



tried to purchase.<sup>191</sup> The gun store blocked the sale after raising concerns about the soon-to-be mass murderer's eligibility.<sup>192</sup>

These high-profile instances of killers using (or attempting to use) silencers to carry out heinous acts undoubtedly reinforce for many the notion that silencers are only useful for committing crimes. Yet the notoriety underscores the opposite. As the Mayor of New York said about the Midtown shooting, "In all of my years of law enforcement, I have never seen a silencer before. And so that was really something that was shocking to us all."<sup>193</sup> Despite their rare use in violent crime, silencers have maintained a remarkably durable reputation as sinister tools.

#### IV. SILENCERS, SCOPES, AND THE EVOLUTION OF FIREARM TECHNOLOGY

##### A. TECHNICAL ADVANCES IN FIREARMS

Guns have always been loud. It is a function of the way they work. From the earliest days of "hand cannons" nearly 700 years ago to modern firearms, they rely on exploding powder to propel a projectile.<sup>194</sup> Although Maxim was surely not the first person who thought reducing the noise was a good idea, he created the first major technological breakthrough with his silencer.

Besides being loud, firearms were also not always accurate, or able to be accurately aimed. Hitting one's target is a fundamental, functional aspect of using a firearm. The technological advancements of "rifling" (cutting twisting grooves in the interior of a barrel to impart a spin on the projectile) and the addition of front and rear "sights" helped improve accuracy and aim, respectively.<sup>195</sup> Rifle accuracy played a distinct role in the Revolutionary<sup>196</sup> and Civil<sup>197</sup> Wars, by extending the effective range of weapons.

But precision aiming improved even more with the invention of telescopic sights, or "scopes."<sup>198</sup> Scopes provide a magnified view and precise point of aim. Attempts to produce such devices have been ongoing for a long time but began showing promise in the mid-19th century. Some early scopes were used in the Civil War, but they really came into use around WWII.<sup>199</sup> After the war, they became common additions to civilian rifles, especially for hunting. Modern devices for better aiming, including at long distances,

<sup>191</sup> Sasha Pezenik and Josh Margolin, *Alleged Maine gunman tried to buy a silencer months before Lewiston shootings*, ABC NEWS, (Oct. 29, 2023), <https://abcnews.go.com/US/alleged-maine-gunman-buy-silencer-months-lewiston-shootings/story?id=104453990>.

<sup>192</sup> *Id.*

<sup>193</sup> Christina Fan, Ali Bauman, Dick Brennan & Natalie Duddridge, *Photos show man wanted for questioning after UnitedHealthcare CEO shot in Manhattan, the NYPD says*, CBS NEWS, (Dec. 6, 2024), <https://www.cbsnews.com/newyork/news/unitedhealthcare-ceo-shot-manhunt/>.

<sup>194</sup> Jim Supica, *A Brief History of Firearms*, NRA MUSEUM, <https://www.nramuseum.org/gun-info-research/a-brief-history-of-firearms.aspx>.

<sup>195</sup> *Id.*

<sup>196</sup> John W. Wright, *The Rifle in the American Revolution*, AM. HIST. REV., Vol. 29, No. 2, 293-299 (Jan. 1924).

<sup>197</sup> See EARL J. HESS, *THE RIFLE MUSKET IN CIVIL WAR COMBAT: REALITY AND MYTH* (2008); see also *Civil War Weapons in the Shenandoah Valley*, U.S. NAT'L PARK SERV. (last visited Dec. 20, 2025), <https://www.nps.gov/articles/000/civil-war-weapons-in-the-shenandoah-valley.htm>.

<sup>198</sup> Supica, *supra* note 194.

<sup>199</sup> *Id.*



continue to improve.<sup>200</sup>

## B. MURDER FROM AFAR

Like silencers (and guns themselves), scopes have a similar potential for misuse. Unlike silencers, however, the public has not viewed them as posing a broad threat to public safety. A scope increases a firearm's effectiveness by allowing accurate fire from greater distances. This may help a potential murderer to not only kill their target but also evade detection (just as a quieter gun might). The killer could secrete himself at a safe distance away from the intended target—someone he might not otherwise be able to approach—and shoot from afar. That distance could enable the shooter to get away undetected.

This threat is not theoretical. Some of the most consequential crimes in American history were facilitated by scopes on rifles. Several are so notorious, there is little need to describe them in detail. They are presented here briefly to drive home the point.

### 1. MEDGAR EVERS

Medgar Evers was a World War II veteran.<sup>201</sup> On June 11, 1963, he was also a prominent civil rights activist living in Jackson, Mississippi.<sup>202</sup> Just after midnight, early on June 12, as he arrived home from a meeting, he was shot and killed by a man armed with a rifle equipped with a “6 X 32 power Goldenhawk scope.”<sup>203</sup> Authorities discovered the rifle discarded a couple hundred feet from where Evers was standing when he was shot. The shooter fled the scene without being seen. Luckily, a fingerprint on the scope linked the gun to the man who bought the rifle. After three trials and more than 30 years, a jury finally convicted the killer for shooting Evers.<sup>204</sup>

### 2. JFK

On November 22, 1963, Lee Harvey Oswald hid on the sixth floor of the Texas School Book Depository in Dallas, Texas, and waited for President John F. Kennedy to pass by on a predetermined route. When the president's motorcade drove through, Oswald shot the president in the head (and wounded the governor of Texas), using an Italian bolt-action rifle.<sup>205</sup> Mounted on the rifle was “an inexpensive four-power telescopic

<sup>200</sup> *Id.*; John Keller, *Marines Pick Envision to Provide Electro-Optical Aiming Laser and Infrared Illuminator for Infantry Weapons*, MILITARY AEROSPACE ELECTRONICS (Mar. 4, 2025), <https://www.militaryaerospace.com/sensors/article/55271997/aiming-laser-and-infrared-illuminator-for-infantry-weapons>.

<sup>201</sup> *Medgar Evers*, FBI, <https://www.fbi.gov/history/famous-cases/medgar-evers>.

<sup>202</sup> *Id.*; *Medgar and Myrlie Evers Home*, NATL. PARK SERV., June 10, 2024, <https://home.nps.gov/memy/learn/historyculture/assassination.htm>.

<sup>203</sup> Ronald Smothers, *Jurors in Medgar Evers Case Handle Rifle from the Past*, N.Y. TIMES, Late Edition (East Coast), Jan. 29, 1994, at 1.6.

<sup>204</sup> *Byron De La Beckwith, 80, Dies; Assassinated Medgar Evers in '63*, WASH. POST, Jan. 23, 2001, at B6.

<sup>205</sup> *Report of the President's Commission on the Assassination of President Kennedy, Chapter 3: The Shots from the Texas School Book Depository*, U.S. GOV'T PRINTING OFFICE, 61, 81 (Sep. 24, 1964), <https://www.archives.gov/research/jfk/warren-commission-report/chapter-3.html#description>.



sight, stamped ‘Optics Ordnance Inc./Hollywood California,’ and ‘Made in Japan.’”<sup>206</sup> This cheap device helped Oswald assassinate the most powerful, heavily protected man in the world and escape the scene on foot.

### 3. TEXAS CLOCK TOWER

On August 6, 1966, Charles Whitman killed his mother and his wife by stabbing, and then climbed to the top of the tower of the main building on the campus of the University of Texas at Austin.<sup>207</sup> He took with him several weapons, including a rifle equipped with “4-power Leupold telescopic sight.”<sup>208</sup> With it he killed most of the thirteen people he murdered that day, and injured dozens more, some with other firearms. The scope did not conceal Whitman’s crime, of course, or allow him to escape, but it did permit him to occupy an advantaged position that he used to keep authorities at bay for more than ninety minutes while he rampaged.

### 4. MLK

On the evening of April 4, 1968, inspirational civil rights leader Dr. Martin Luther King, Jr., was in Memphis, Tennessee.<sup>209</sup> He had traveled there to support sanitation workers on strike. As he stood on the second-floor balcony of the Lorraine Motel, he was shot dead by an escaped convict from across the street. James Earl Ray used a .30-06 rifle that he purchased using an alias.<sup>210</sup> He intentionally obtained a rifle that was equipped with a scope. Given the advantage his distance provided, Ray successfully fled the scene but dropped the murder weapon as he did. Authorities subsequently recovered Ray’s fingerprint from both the rifle and the scope, but it would be two months before the assassin was arrested.<sup>211</sup>

### 5. BELTWAY SNIPER

Crimes like these are not just remnants of history. For three weeks in October 2002, a series of sniper-style attacks kept the Washington, D.C. area on edge. After a massive investigative effort, law enforcement identified, located, and arrested a pair of killers: Lee Boyd Malvo and John Allen Muhammad.<sup>212</sup> They had created a “rolling sniper’s nest” in the trunk of their car, cutting a hole in the rear of it so they could use the rifle—and its optical sight—to target their victims.<sup>213</sup> Using this method of concealment and taking advantage of distance, they killed at least 17 people, and wounded many

<sup>206</sup> *Id.* at 84.

<sup>207</sup> *Nation: The Madman in the Tower*, TIME (Aug. 12, 1966), <https://time.com/archive/6889270/nation-the-madman-in-the-tower/>.

<sup>208</sup> *Id.*

<sup>209</sup> *House Select Committee on Assassinations Final Report*, Vol. II, H.R. Rep. No. 95-1828 Part 2, 287, 296 (1979), <https://www.archives.gov/research/jfk/select-committee-report/part-2a.html#shot>.

<sup>210</sup> *Id.* at 296, 307.

<sup>211</sup> *Id.* at 296.

<sup>212</sup> *Beltway Snipers*, FBI, <https://www.fbi.gov/history/famous-cases/beltway-snipers>.

<sup>213</sup> *Id.*



others, on different occasions and without being detected, before they were finally captured.<sup>214</sup>

## 6. LAS VEGAS “1 OCTOBER” SHOOTING

On October 1, 2017, as a music festival played in an outdoor venue along the Las Vegas Strip, a man opened fire on the crowd from his room on the 32nd floor of a nearby casino hotel.<sup>215</sup> He fired more than 1,000 rounds, killed sixty people, and wounded hundreds more, before he eventually killed himself. This atrocity focused much attention on the “bump stocks” he used to accelerate the rate of fire from the weapons he used.<sup>216</sup> Much less attention was paid to the scopes mounted on many of the rifles the killer used, which enabled him to shoot effectively at a great distance.<sup>217</sup>

## 7. ATTEMPTED ASSASSINATION OF DONALD TRUMP

On July 13, 2024, a man attempted to assassinate then-former president Donald Trump as he campaigned in Pennsylvania.<sup>218</sup> He used a rifle equipped with a modern “Holosun AEMS” (Advanced Enclosed Micro Sight) optical sight.<sup>219</sup> Even though he did not kill the past and future president, the would-be assassin nearly did, wounding him from a distance of “400 to 500 feet.”<sup>220</sup> The government sniper who shot back, equipped with his own modern optics, did not miss.<sup>221</sup>

## 8. ASSASSINATION OF CHARLIE KIRK

On September 10, 2025, an assassin shot and killed political commentator Charlie Kirk as he addressed a crowd on a college campus in Utah. The shot was fired from a rooftop well over 100 yards away from where Kirk was seated. Police quickly recovered the murder weapon: a rifle equipped with a scope. Days later, authorities arrested a suspect who reportedly had inherited the rifle from his grandfather. In text messages to a confidant, the alleged shooter wrote: “judging from today I’d say grandpas [sic] gun does

<sup>214</sup> *DC Area Sniper Fast Facts*, CNN (Sep. 23, 2024), <https://www.cnn.com/2013/11/04/us/dc-area-sniper-fast-facts>.

<sup>215</sup> *LVMPD Preliminary Investigative Report, 1 October 1 Mass Casualty Shooting*, LAS VEGAS METRO. POLICE DEPT. 41–42 (Jan. 18, 2018), <https://www.lvmpd.com/about/news-events/information-and-resources-regarding-the-1-october-shooting>.

<sup>216</sup> *Garland v. Cargill*, 144 S. Ct. 1613, 1618 (2024).

<sup>217</sup> LVMPD Preliminary Investigative Report, *supra* note 215, at 41–42.

<sup>218</sup> *Final Report of Findings and Recommendations*, Task Force on The Attempted Assassination of Donald J. Trump, at 5 (Dec. 5, 2024), <https://taskforce.house.gov/sites/evo-subsites/july13taskforce.house.gov/files/evo-media-document/12-5-2024-Final-Report-Redacted.pdf>.

<sup>219</sup> *Butler Investigation Evidence Photos*, FBI (Aug. 28, 2024), <https://www.fbi.gov/news/press-releases/butler-investigation-photos>; Task Force on The Attempted Assassination of Donald J. Trump, Interview of [redacted], at 114 (Sep. 13, 2024), <https://taskforce-kelly.house.gov/sites/evo-subsites/taskforce-kelly.house.gov/files/evo-media-document/butler-esu-op.-2.pdf>.

<sup>220</sup> *Gunman was a few hundred feet away from Trump, CNN analysis shows*, CNN (July 14, 2024), <https://www.cnn.com/2024/07/14/politics/trump-rally-shooting-distance>.

<sup>221</sup> *Final Report of Findings and Recommendations*, *supra* note 218, 44–46.



just fine idk. I think that was a \$2k scope.”<sup>222</sup>

## 9. OTHER SNIPER ATTACKS

There have been many other sniper-style crimes that have been facilitated, to one degree or another, by modern optics. From highways,<sup>223</sup> to high rises,<sup>224</sup> to homes,<sup>225</sup> it would take too much space to summarize them all here.

### V. SOUND, SIGHTS, AND THE SECOND AMENDMENT

#### A. THE FIREARM THAT ISN'T

Despite having a similar potential for use in crime (and leaving aside their benefits and lawful uses), the law treats silencers and scopes very differently. Both the National Firearms Act and the Gun Control Act define silencers—in and of themselves—as “firearms.”<sup>226</sup> Silencers are not firearms, of course, at least not in the traditional sense. They cannot be used alone to shoot. Nonetheless, as “firearms,” they are subject to the same regulations as actual firearms.<sup>227</sup> A person who is prohibited by law from possessing a pistol or rifle, is also prohibited from possessing a silencer, even if it is not attached to such a weapon.<sup>228</sup>

The NFA additionally imposes a strict regulatory framework under which a silencer must be registered and a tax paid.<sup>229</sup> The penalty for simply possessing a silencer that is not properly registered is stiff: up to ten years in prison.<sup>230</sup>

Federal law also provides substantially enhanced penalties when a crime is committed with a firearm equipped with a silencer. For instance, if a drug dealer were to carry a firearm during his crimes, federal law would subject him to a minimum-mandatory sentence of five years.<sup>231</sup> If he brandished that firearm: seven years.<sup>232</sup> If the firearm was a discharged: ten years.<sup>233</sup> Same if it is short-barreled shotgun.<sup>234</sup> But if it was

<sup>222</sup> Information, *Utah v. Robinson*, OTN: 70090584, at 9 (4th Jud. Dist. Ct., Sep. 16, 2025), available at [https://atty.utah-county.gov/cms/uploads/TJR\\_Information\\_49872215e3.pdf](https://atty.utah-county.gov/cms/uploads/TJR_Information_49872215e3.pdf).

<sup>223</sup> Mike Wendling, Christal Hayes and Brandon Drenon, *Kentucky highway shooting suspect vowed to ‘kill a lot of people’*, BBC (Sep. 10, 2024), <https://www.bbc.com/news/articles/cy76lermkg4o>.

<sup>224</sup> Faith Karimi, Catherine E. Shoichet and Ralph Ellis, *Dallas sniper attack: 5 officers killed, suspect identified*, CNN (July 9, 2016), <https://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests>.

<sup>225</sup> *Sniper Who Fired On Oakland Officers Dies In Hospital*, CBS NEWS (Feb. 17, 2017), <https://www.cbsnews.com/sanfrancisco/news/oakland-police-shot-man-after-armed-standoff/>.

<sup>226</sup> National Firearms Act, 26 U.S.C. § 5845(a)(7); Gun Control Act, 18 U.S.C. § 921(a)(3)(C).

<sup>227</sup> Halbrook, *supra* note 181, at 37-39.

<sup>228</sup> *Id.*

<sup>229</sup> 26 U.S.C. § 5861. On July 4, 2025, President Trump signed “The One Big Beautiful Bill Act” into law, which on January 1, 2026, reduced the tax on silencers from \$200 to \$0, but otherwise left all other relevant provisions of the National Firearms Act intact. H.R. 1, 119th Cong., Sec. 70436 (2025).

<sup>230</sup> 26 U.S.C. § 5871.

<sup>231</sup> 18 U.S.C. § 924(c)(1)(A)(i).

<sup>232</sup> 18 U.S.C. § 924(c)(1)(A)(ii).

<sup>233</sup> 18 U.S.C. § 924(c)(1)(A)(iii).

<sup>234</sup> 18 U.S.C. § 924(c)(1)(B)(i).



a firearm equipped with a silencer? Not less than 30 years.<sup>235</sup>

Unlike silencers, however, Federal law does not regulate firearm optics, such as scopes.<sup>236</sup> That means, also unlike silencers, no one is ever charged with the “crime” of possessing a scope, and consequently, there is no case law to examine for clues to how courts might view them.<sup>237</sup> But there are plenty of examples involving silencers.

## B. SILENCERS IN COURT

The Second Amendment protects the individual right to keep and bear “Arms.”<sup>238</sup> In *D.C. v. Heller*, the Supreme Court looked to historical definitions from the time of the Founding to find that—then, as now—“arms” means armor and weapons.<sup>239</sup> It also observed that “[s]ome have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment.” Although we look to history for meaning, the “Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the Founding.”<sup>240</sup>

The Supreme Court has repeated this point many times: in *Caetano v. Massachusetts*<sup>241</sup>; in *New York State Rifle & Pistol Association, Inc. v. Bruen*<sup>242</sup>; in *U.S. v. Rahimi*.<sup>243</sup> Clearly, the Court really means it. In *Rahimi*, Chief Justice Roberts added that it would be a mistake to apply the Second Amendment’s constitutional protections “only to muskets and sabers.” But we didn’t go from “muskets and sabers” to AR-15s and autoloading pistols overnight. Firearms have evolved since 1791. That means the Second Amendment must also protect that evolution.

Despite how federal law explicitly treats silencers—even alone—as firearms, the courts take the opposite view when assessing whether they are protected by the Constitution. When courts examine silencers, they do not find them to be firearms, or a device that represents a stage in the natural evolution of firearm technology. They think of them as “accessories,” and optional ones, at that.

In 2018 (before *Bruen* or *Rahimi*), the Tenth Circuit held that the National Firearms Act was not an unconstitutional restriction on the possession of a silencer.<sup>244</sup> In *U.S. v.*

<sup>235</sup> 18 U.S.C. § 924(c)(1)(B)(ii).

<sup>236</sup> At least not in the way it does silencers, e.g., through registration and controls on purchase or possession. Some optical sighting devices for firearms have historically been subject to controls by the Department of State’s Directorate of Defense Trade Controls, the Department of Commerce’s Bureau of Industry and Security, and the Treasury Department, but that is beyond, well, the scope of this paper. See 15 C.F.R. § 774.1 (2025).

<sup>237</sup> A few local jurisdictions restrict “laser sights,” which function differently and pose different risks than scopes, and one U.S. District Court found one such law constitutional. See *Arms v. City of Chicago*, No. 10-4257, 2024 WL 3495010 (N.D. Ill. July 22, 2024). Interestingly, Chicago’s ban on laser sights is contained in the same statute that prohibits silencers. MUNICIPAL CODE OF CHICAGO, § 8-20-070 (2025).

<sup>238</sup> U.S. CONST. AMEND. II.

<sup>239</sup> *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). Specifically, “weapons of offense, or armour of defence” and “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.”

<sup>240</sup> *Id.* at 581.

<sup>241</sup> *Caetano v. Massachusetts*, 577 U.S. 411 (2016).

<sup>242</sup> *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 28 (2022).

<sup>243</sup> *U.S. v. Rahimi*, 602 U.S. 680, 691 (2024).

<sup>244</sup> *U.S. v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018).



*Cox*, the defendant raised the arguments that silencers are rarely used in crimes, they are useful for protecting hearing, and they “improve accuracy” because they reduced “flinch” and “disorientation.”<sup>245</sup> For all these reasons, he argued, they merit constitutional protection. The court was unpersuaded. Using the now-rejected two-step analysis under *Heller*, it found (at step one) that “[a] silencer is a firearm accessory; it’s not a weapon in itself” and therefore “can’t be a ‘bearable arm’ protected by the Second Amendment.”<sup>246</sup> By extension, the court found that “the business of manufacturing and dealing in silencers” also did not survive the first step and therefore was unprotected.<sup>247</sup>

In a brief concurrence, one judge warned against relying on the logic that just because silencers are unprotected since they are not bearable arms, that other items that also aren’t bearable arms “but are necessary to the operation of a firearm”<sup>248</sup> are unprotected as well. As an example of a necessary item, the judge added “(think ammunition).”<sup>249</sup> Or think scopes. Few things are more necessary to firing a gun than accurate aim. This highlights the flaw in the court’s too-convenient, deconstructionist reasoning for dismissing the matter without deeper analysis. It risks narrowing the Second Amendment’s protections to only the basic components needed to form a crude weapon. This approach has appealed to other courts.

In an unpublished opinion in 2024, the Fourth Circuit used the same escape route and took just a single paragraph to find that “a silencer does not fall within the scope of the Second Amendment’s protection.”<sup>250</sup> Its reasoning was two-fold. First, silencers are not arms, because they are not “capable of casting a bullet.” Second, though they may be helpful for protecting hearing, they do not “serve a core purpose in the arm’s function.” A gun will still be “useful and functional” without one. Loud sure, but still useful and functional. The court did not explain what level of usefulness and functionality would be protected. It did not mention scopes as an example but did mention “cleaning materials and bullets” as “key” to firearms, suggesting they would enjoy protection. Of course, cleaning materials and bullets are also not arms, but clearly the court believes that they fall within the scope of the Second Amendment. So, some things that are not bearable arms are protected. Where to draw the line?

About a month later, the Fifth Circuit reached the same conclusion, though it used more than a paragraph to do it.<sup>251</sup> The defendant in the case, a firearms dealer, had made a silencer from a kit and it was discovered during a search of his home. It was the first time the Fifth Circuit had considered whether a silencer was an “arm.” It looked at other circuits’ decisions, including the recent unpublished Fourth Circuit case, the 2018 Tenth Circuit case, and a couple district court cases that all reached the same conclusion: silencers do not implicate the Second Amendment because they are not bearable arms, “[and] while possession of firearms themselves is covered by the plain text of the Second

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1187.

<sup>248</sup> *Id.* at 1196 (J. Hartz, concurring).

<sup>249</sup> *Id.*

<sup>250</sup> *U.S. v. Saleem*, No. 23-4693, 2024 WL 5084523, at 2 (4th Cir. Dec. 12, 2024).

<sup>251</sup> *U.S. v. Peterson*, 127 F.4th 941 (5th Cir. 2025).



Amendment,” it wrote, “possession of firearm accessories is not.”<sup>252</sup>

The Fifth Circuit also rejected two related arguments. Namely, that silencers were protected because they made firearms “useful and functional” and that they were important to maintaining proficiency. In the court’s view, silencers simply aren’t “necessary.”<sup>253</sup> They are an unprotected, optional accessory.

Then the Fifth Circuit waffled. Without explanation, the court withdrew its opinion.<sup>254</sup> The likely cause of this retraction? After the appellant petitioned for rehearing *en banc*, the government in its response *agreed* with appellant that silencers are “arms” protected by the Second Amendment.<sup>255</sup> When the court reissued the opinion, it now included expanded discussion about silencers, favorably recounting their beneficial uses and even using advocates’ preferred term, “suppressors.”<sup>256</sup> But it punted on the question of whether silencers are “arms.” The court wrote, “we assume without deciding that suppressors constitute ‘arms’ under the Second Amendment, as both parties now contend.”<sup>257</sup> Nonetheless, it found the strict regulation of silencers “presumptively constitutional.”<sup>258</sup>

All these decisions read the Second Amendment as only protecting a rudimentary (and loud) firearm, one that is minimally functional. It also overlooks the inevitable, necessary, and constitutionally protected incremental improvements to firearms. Of course, we know that modern firearms are protected; the Constitution does not limit protection to the single-shot muskets of our Founding. Treating silencers as an unprotected discretionary device halts their incorporation into a completely modern firearm, preserving the loud sound even as other improvements in firearm design accrue.<sup>259</sup>

Compare guns to cars. Though perhaps at one time people might have, today we would not call a car’s muffler an “accessory” to a car, which implies optionality. It is a component of a complete car. It is not necessary for the core functionality of a car, of course. You could drive a car without a muffler on it. But we would think that car defective (and annoying and harmfully loud) without one. So maybe the value of the noise of a car and the noise of a firearm are not the same. (Though Hiram Percy Maxim knew how to quiet both).

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<sup>252</sup> *Peterson*, 127 F.4th at 946.

<sup>253</sup> *Id.* at 947.

<sup>254</sup> U.S. v. *Peterson*, 2025 WL 1688717, No. 24-30043 (5th Cir. Jun. 17, 2025) (withdrawing opinion).

<sup>255</sup> *Id.* (Government’s Supplemental Response to Defendant-Appellant’s Petition for Rehearing *En Banc*, filed May 23, 2025).

<sup>256</sup> U.S. v. *Peterson*, 150 F.4th 644 (5th Cir. 2025); On December 9, 2025, the court reissued its opinion for a second time with the same result: “Assuming without deciding that the Second Amendment protects suppressors” but nonetheless finding the federal regulation of silencers constitutional. U.S. v. *Peterson*, 2025 WL 3523826, No. 24-30043 (5th Cir. Dec 09, 2025).

<sup>257</sup> *Id.* at 652.

<sup>258</sup> *Id.*

<sup>259</sup> But for a discussion defending the historical basis for regulation of accessories, including “assault weapons, magazines, and silencers,” see Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 LAW AND CONTEMPORARY PROBLEMS 231-255 (2020), Available at: <https://scholarship.law.duke.edu/lcp/vol83/iss3/13/>.



### C. SILENCERS HAVE A RENAISSANCE

Despite the judicial view on necessity, silencers certainly are *popular*. In the first three years after the NFA was passed (1934-1937), only 769 silencers were registered.<sup>260</sup> In the year 2000, only 5,001 new silencers were manufactured.<sup>261</sup> By 2021, the number had grown to 480,281.<sup>262</sup> Nearly half a million new silencers entered the market in that year alone. That is a 9,504% increase! Between 2000 and 2023, nearly three million silencers were manufactured and registered in the National Firearms Registration and Transfer Record.<sup>263</sup> What is driving this urgent interest? Increasing awareness of their benefits and growing advocacy.

#### 1. SELF-DEFENSE

Despite the lukewarm adoption the military made of Maxim's silencer in the early 20th century, the military and law enforcement agencies seem to have reconsidered the value of silencers in the early 21st century. Indeed, the military itself is driving some new innovations in silencer technology.<sup>264</sup> For many of the same reasons they are useful to the military, they are useful for civilian defense, as well. This includes their value for training to maintain proficiency but also protecting hearing and minimizing the disorienting effects of shooting in an enclosed space, e.g., in the event of a confrontation with an intruder in one's home.

#### 2. HEARING PROTECTION

There have been several legislative attempts to remove silencers from the National Firearms Act premised on their value for protecting hearing, for instance, the Hearing Protection Act<sup>265</sup> and the SHUSH Act.<sup>266</sup> Such efforts have recently garnered the support of relevant medical groups, such as the Academy of Doctors of Audiology<sup>267</sup> and the

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<sup>260</sup> Homer Cummings, *Firearms and the Crime Problem, An Address By Honorable Homer Cummings Attorney General of the United States Before the Annual Convention of the International Association of Chiefs of Police*, U.S. GOV'T PRINTING OFFICE, at 7, Oct. 5, 1937.

<sup>261</sup> *National Firearms Commerce and Trafficking Assessment, PART I: Firearm Commerce Updates and New Analysis*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, at 6, <https://www.atf.gov/firearms/docs/report/nfcta-volume-iv-part-i-firearm-commerce-updates-and-new-analysis/download>.

<sup>262</sup> *Id.*; compare this to the paltry 2,500 Maxim Silencers that Maxim said were in private hands when he exited the firearm silencer business. *Maxim Bans Gun Silencer*, *supra* note 129.

<sup>263</sup> *Id.* at 49.

<sup>264</sup> U.S. Patent No. 10,598,458 B1 (filed Sep. 25, 2018).

<sup>265</sup> Hearing Protection Act, H.R.404, 119th Congress (2025-2026), <https://www.congress.gov/bill/119th-congress/house-bill/404/text>; Hearing Protection Act, S.364, 119th Congress (2025-2026), <https://www.congress.gov/bill/119th-congress/senate-bill/364>.

<sup>266</sup> SHUSH Act, H.R.850, 119th Congress (2025-2026), <https://www.congress.gov/bill/119th-congress/house-bill/850>.

<sup>267</sup> Letter from Dawn Heiman, President, and Stephanie Czuhajewski, Executive Director, Academy of Doctors of Audiology, to Representative Jeff Duncan and Senator Mike Crapo (May 31, 2023), AM. SUPPRESSOR ASSOC., [https://americansuppressorassociation.com/wp-content/uploads/2023/06/ADA-Support-Letter-Hearing-Protection-Act-2023\\_Upload.pdf](https://americansuppressorassociation.com/wp-content/uploads/2023/06/ADA-Support-Letter-Hearing-Protection-Act-2023_Upload.pdf).



American Academy of Otolaryngology–Head and Neck Surgery,<sup>268</sup> which have taken public positions endorsing silencers as a protective tool for preventing hearing loss. Credible research has shown that silencers are an effective method of preventing the “immediate, permanent harm to hearing” that exposure to gunfire can cause.<sup>269</sup>

### 3. HUNTING

They are also useful for hunting (as the introduction to this article suggests). In fact, in the United Kingdom, the government articulates the reasons well when it explains how silencers (which over there are known as “sound moderators”):

are often used when shooting game, deer, or vermin. In the case of the latter, they might facilitate more effective or less intrusive pest control. They are appropriate for reducing hearing damage to the shooter, or to reduce noise nuisance, for example, for deer control in urban parks, or close to residential properties, to avoid disturbing other sensitive species (especially during the breeding season) or to reduce recoil of the rifle.<sup>270</sup>

Maxim, for his part, was more circumspect about the value of silencers for hunting. Of course, it protected hearing and made for a pleasanter experience, but he thought that his silencer only gave one advantage over game. Though it concealed the sound of the shot, it did not suppress the sound of the *bullet*, which made a sound independent of the report from the muzzle. “The noise heard by an animal being fired at is no different than has ever been the case. . . . Game will not hear [the shot], and when startled by the bullet noise they may run toward the gun.”<sup>271</sup> Of course, when a gun is carried in the woods for protection from animals (say, bears in Alaska) the loud sound might offer the advantage of frightening the animal away.

### 4. TARGET PRACTICE

They are also useful on the shooting range, for the reasons described above and as concisely summarized by the Government of the United Kingdom:

Some target shooting events where fire and movement is conducted on field firing ranges may require the use of sound moderators, for example, where hearing protection may impede the shooter and where voice commands need to be heard or given by the shooter for safety and continuity.<sup>272</sup>

<sup>268</sup> *Suppressors for Hearing Preservation*, American Academy of Otolaryngology–Head and Neck Surgery, Nov. 18, 2024, <https://www.entnet.org/resource/suppressors-for-hearing-preservation/>.

<sup>269</sup> ADA Letter, *supra* note 267, citing research by the Centers for Disease Control and Prevention.

<sup>270</sup> *Guide on Firearms Licensing Law*, HOME OFFICE, at 111 (Nov. 2022), [https://assets.publishing.service.gov.uk/media/67b73deb9ae06ef4a71cf385/Firearms\\_Guide\\_-\\_November\\_2022.pdf](https://assets.publishing.service.gov.uk/media/67b73deb9ae06ef4a71cf385/Firearms_Guide_-_November_2022.pdf).

<sup>271</sup> Maxim’s Gun Silencer, L.A. TIMES, June 21, 1909, at I11.

<sup>272</sup> *Guide on Firearms Licensing Law*, *supra* note 270.



## D. USEFULNESS OF THE “BANG”

Even though they both have lawful applications and enhance the utility of firearms, the vastly differing treatment of silencers and scopes—culturally, legally, and precedentially—suggests that something other than the potential for criminal misuse must be responsible. That returns us to the loud bang. The sound of gunfire has inherent utility that may serve several valuable purposes. It is an immediate, unmistakable, culturally ingrained warning and call for attention. When it happens in public, it is an alert to an invariably consequential event. It can activate emergency services and help bring aid to anyone who might have been wounded by the shooting. The loud bang of a gun is useful.

### 1. CRIME DETECTION

Although the historical record described above shows that when silencers are used for violence, they do not always (or even most of the time) conceal the crime. Nonetheless, the sound of gunfire can help bring immediate attention to unlawful shootings. Some public safety technology companies produce “acoustic gunshot detection” systems that use the loud impulsive noise of gunfire for that explicit purpose, to locate shooting incidents and report them to police.<sup>273</sup> The sound also has potential forensic value. If captured by a recording device, for instance, it may help establish precise timelines for a shooting event.<sup>274</sup>

### 2. DETERRENCE

From the earliest days of the silencer, some have believed that the sound of gunfire has a deterrent effect on criminals’ willingness to shoot.<sup>275</sup> There is little research to support this notion, but it makes intuitive sense. Fear of detection surely guides some criminal decision making. Deciding to fire an unsilenced firearm means potentially alerting people to the crime, something most criminals presumably hope to avoid.

### 3. EMERGENCY RESPONSE

Shootings often leave behind wounded people. In the case of active shooters, if left unaddressed, it may lead to more wounded people. Timely notice allows appropriate emergency response, allowing first responders to treat wounded people and address criminal behavior.<sup>276</sup> With gunshot wounds, time is of the essence.<sup>277</sup> Same with active shooters, since the incidents most often end upon arrival of police or intervention of a

<sup>273</sup> I previously worked for SoundThinking, Inc., the company that produces the acoustic gunshot detection system known as ShotSpotter. <https://www.soundthinking.com/law-enforcement/leading-gunshot-detection-system/>.

<sup>274</sup> See, e.g., *People v. Colone*, 2024 IL App (1st) 230520, Apr. 28, 2025, at 8.

<sup>275</sup> See *supra* note 24.

<sup>276</sup> Anna Goldenberg et al., *Use of ShotSpotter detection technology decreases prehospital time for patients sustaining gunshot wounds*, J. TRAUMA ACUTE CARE SURG., Dec. 2019, 87(6):1253-1259.

<sup>277</sup> *Id.*



third party who has been alerted to the event.<sup>278</sup>

#### 4. PUBLIC WARNING

As the well-known motorcycle bumper sticker suggests, “Loud Pipes Save Lives.”<sup>279</sup> Indeed, the fear of loud noises is one of only two innate human fears; all other fears are learned.<sup>280</sup> In this way, the bang can trigger psychologically ingrained survival responses, encouraging people to flee from an unsafe area.

#### 5. OTHER USES

Though of little importance to the theory that loudness matters, the report of a firearm has also long served other purposes too, including a ceremonial purpose,<sup>281</sup> a survival purpose,<sup>282</sup> and—dangerously—sometimes a celebratory purpose.<sup>283</sup> The point is: the loud bang of a firearm has long been recognized for its utility.

#### 6. OTHER PUBLIC SAFETY SOUNDS

The idea that sound can improve safety is not unique to guns. Other technologies also use loud sound to help protect human life, especially in emergencies. Think of smoke alarms, car horns, ambulance sirens, trucks backing up, and tornado sirens. These applications recognize the public safety application of noise, so to think that it matters with guns is not novel.

#### CONCLUSION

The practical utility of the loud bang—for detection, warning, response, awareness—may implicitly explain why courts and some policymakers treat silencers with such skepticism, even when experience suggests their concerns are exaggerated. In effect, the law treats the loud bang not merely as a byproduct, but an inherent, essential feature of a firearm, one so integral that efforts to suppress it—no matter

<sup>278</sup> *Active Shooter Incidents 20-Year Review, 2000-2019*, FBI, May 2021, 25-28.

<sup>279</sup> Though apparently that may not be true, at least with motorcycles. *Can the sound of your motorcycle save your life?*, FEDERATION OF EUROPEAN MOTORCYCLISTS' ASSOC. (Dec. 3, 2020), <https://www.femamotorcycling.eu/the-sound-of-your-motorcycle/>.

<sup>280</sup> Matt Huston, *The Neurobiology of Fear*, PSYCH. TODAY (Oct. 3, 2019), <https://www.psychologytoday.com/us/blog/parenting-neuroscience-perspective/201910/the-neurobiology-fear>. The other innate fear is falling. The innate fear of loud noises was exploited in the notorious—and unethical, by modern standards—study known as “Little Albert,” which used loud noises to condition an infant to fear other stimuli. Harris, B. (1979). *Whatever happened to little Albert?* AM. PSYCHOLOGIST, 34(2), 151–160.

<sup>281</sup> *21-Gun Salute*, ARLINGTON NATIONAL CEMETERY, <https://www.arlingtoncemetery.mil/Visit/Ceremonies/Ceremonies/21-Gun-Salute>. “Salute by cannon or artillery is a military tradition that originated in the 14th century. The 21-gun salute, commonly recognized by many nations, is the highest honor rendered.”

<sup>282</sup> *Signaling for Help*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Signaling-for-Help/201099\\_93100/](https://www.hunter-ed.com/national/studyGuide/Signaling-for-Help/201099_93100/). “The international emergency sign for distress is three of any signal: three shots, three blasts on a whistle, three flashes with a mirror, or three fires evenly spaced.”

<sup>283</sup> Chittum, *supra* note 95.



how beneficial—fall outside the scope of the Second Amendment. If so, it effectively prioritizes public safety benefits over the health and personal safety benefits of noise reduction.

This principle that firearms must produce a loud, detectable noise is not explicitly stated in the law or in judicial opinions, of course, which instead parse distinctions between “accessories” and “arms.” But preserving the loud noise is an implicit, unarticulated legal principle that provides a compelling underlying rationale for why silencers are treated differently than other devices that improve firearm functionality, such as scopes. It is a tacit recognition of the value of the “loud bang.”

If so, then the logical conclusion is that a quieter gun is a proscribed technological advancement. That is, while we can make firearms lighter, more reliable, more accurate, and more effectively aimed, they must remain loud. This strains constitutional coherence. If the right to keep and bear arms extends to the ways that firearms naturally evolve, then surely it protects that evolution when it enhances safety, rather than increases lethality.

This also means that firearms that shoot at a safe volume are only available thanks to “legislative grace.”<sup>284</sup> If the Second Amendment does not protect silencers, then legislators would be free to insist that the only firearms available to the public are loud ones. Although silencers are legally available today (in most but not all places; and even though one must jump through bureaucratic hoops to obtain one; and even though they must be registered with the government under threat of severe punishment), that is no guarantee that they won’t be wholly prohibited in the future. Without constitutional protection, the government would be within its power to do that.

When courts refuse to treat silencers as protected arms—while simultaneously upholding laws premised on their definition as “firearms” under federal law—they expose a constitutional tension. They cannot have their cake and eat it, too. Though they do not say explicitly that firearms must be loud, that is the functional effect of these decisions.

As a practical matter, the legal exile of silencers for the last century has stymied innovation. Though firearms have existed for about 500 years, silencers were only invented about 100 years ago and were strictly and comprehensively regulated within just a couple of decades. That has had the effect of stunting the development of firearms. Unchecked, silencers might one day cease to be a separate, detachable device and simply become an integrated, essential part of firearms (the way mufflers are to cars). Treating them as “accessories” separates them from the obvious technical progress they represent. While Maxim was the first to market, he was not without would-be competitors. Just months after Maxim’s silencer debuted, a French soldier announced his competing design.<sup>285</sup> Indeed, the renaissance described above is driving innovative designs and increasing competition in the market.

Rather than the end, Maxim’s invention may have been the beginning of a new branch of development. In 1920, firearms historian Charles Winthrop Sawyer predicted a path forward: “[W]hy not simplify the Maxim Silencer” and “incorporate [it] within

<sup>284</sup> See *White v. United States*, 305 U.S. 281 (1938). The concept of “legislative grace” is often used to refer to tax deductions and credits but artfully describes anything that is not a right but rather a privilege that the legislature can give or take away, at its discretion.

<sup>285</sup> *French Gun Silencer*, N.Y. TIMES, May 16, 1909, at C4.



the barrel.”<sup>286</sup> He saw that the early silencer design still left much to be desired. For one, “the silencer is a monstrosity.”<sup>287</sup> He saw integration as the obvious next generation. More than 100 years later, there has been little progress. The restrictions on silencers have been an impediment to the natural evolution of firearms technology, without which we might have quieter firearms today, just as we have better aimed ones.

Moreover, the current regulatory scheme paints with too broad a brush, restricting silencers *in toto*, rather than narrowly addressing the specific concerns they raise. Perhaps a better regulatory scheme, one that would comport with the Second Amendment, preserve the value of the “loud bang” where it matters, embrace all the benefits silencers offer, and encourage new innovations, would be to simply prohibit their possession where they are least valuable—such as on public streets—but leave them unrestricted entirely where they can do good, such as in the woods, on the range, or in the home. Or, instead of imposing the threat and burden on the law-abiding who can benefit, shift it to where the concern really lies: punish the criminal misuse of silencers, not the possession of them.

In the meantime, even if the law does not say it this way, it treats the loud bang not as a bug, but as a feature. The “Loud Bang Theory” simply provides a memorable, unarticulated, underlying rationale to explain why silencers have been treated differently under the law.

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<sup>286</sup> CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY 329 (1920).

<sup>287</sup> *Id.*





