Denver Law Review

Volume 95 | Issue 2 Article 6

January 2018

Vol. 95, no. 2: Full Issue

Denver Law Review

Vol. 95, no. 2: Full Issue

Published by the
University of Denver
Sturm College of Law

DENVER LAW REVIEW

2018 Volume 95 Issue 2

ARTICLES

COMMENT

Denver Law Review (ISSN 2469-6463) Spring 2018

The *Denver Law Review* is published quarterly by the University of Denver Sturm College of Law through the Denver Law Review Association.

Denver Law Review
2255 East Evans Avenue, Suite 425
Denver, Colorado 80208
(303) 871-6172

Cite as: 95 DENV. L. REV. ___ (2018).

Subscriptions: Subscriptions to the *Denver Law Review* are $40.00 per volume (add $5.00 for mailing addresses outside the United States). All subscriptions will be renewed automatically unless the subscriber provides timely notice of cancellation.

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Previous Nomenclature: Published as the *Denver Bar Association Record* from 1923 to 1928, *Dicta* from 1928 to 1965, *Denver Law Journal* from 1966 to 1984, and *Denver University Law Review* from 1985 to 2015.

Postmaster: Please send all address changes to *Denver Law Review*, 2255 East Evans Avenue, Suite 425, Denver, Colorado 80208.

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TELEMEDICINE: GAME CHANGER OR COSTLY GIMMICK?

MICHAEL W. KING†

ABSTRACT

Adoption of telehealth and alternative delivery methods is growing and could alter the health care delivery landscape, but it is still in the early stages. While there are risks that telehealth and alternative delivery methods are not worth the investment or may increase overall health care costs, a thoughtful but full adoption has the potential to improve patient access and health outcomes while greatly reducing health care costs. This Article addresses telehealth and whether it can help fundamentally change the game and achieve the "Triple Aim" of improving individual quality of care, improving population health, and lowering health care costs. Next, it addresses basic systemic challenges to achieving widespread adoption: longstanding health care regulatory laws that prevent more innovative delivery systems from expanding beyond their current "experimental" status, and reimbursement systems that undermine broad adoption, preventing expansion beyond limited niches. Finally, it concludes with a short review of pending legislation that would achieve modest reconciliation of the present conflicting regulations and unleash the telehealth industry for rapid growth.

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INTRODUCTION

Despite over a decade of reform efforts, health care continues to occupy center stage in Washington and with good reason: the United States substantially outspends peer high-income nations, dedicating almost eighteen percent of gross domestic product (GDP) to health care, yet on any number of statistical measurement—from life expectancy, to birth rates, to chronic disease—the United States achieves inferior health outcomes compared to those same high-income nations. In short, as a nation, America invests heavily in health care, but for a variety of reasons those dollars yield below average results causing significant economic and social challenges.[1]

While wholesale efforts to "repeal and replace" the Affordable Care Act[2] (ACA) have now been deferred in favor of debate over more limited changes that each side wishes to implement, these proposals do not address (1) reforming the current "fee-for-service" model where providers are paid for volume of care rather than quality or outcome, or (2) the use of technology to fundamentally change the delivery of care. Indeed, both the ACA and the Republican proposals for its replacement,

1. *See infra* Part I and Section I.A. for detailed statistical data and discussion.

2. Patient Protection and Affordable Care Act, 42 U.S.C. §§ 8001–18122 (2012). The Patient Protection and Affordable Care Act, often shortened to the Affordable Care Act (ACA), was enacted by the 111th United States Congress and signed into law by President Barack Obama on March 23, 2010. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

the American Health Care Act[3] and its progeny (collectively referred to herein as the AHCA), focus primarily on the reach and cost of providing coverage for health care rather than the delivery. Despite reform efforts, health care expenditures comprise almost one-fifth of the U.S. economy, and health care may well exceed the ability of any one law or branch of government to create or implement coherent reform across the complicated intersection of provider and payer industries and regulatory framework. However, the system must address the exorbitant cost of health care while improving patient health.

What is the best way to trim U.S. health care spending while improving patient experience and health outcomes? The health care industry wrestles with this challenge in a variety of ways: mergers, partnerships, and consolidation; new care delivery models such as bundled payments, population health management, and integrated care systems; information technology; and innovation through new drugs and medical devices. So far, these changes—as well as recent reform efforts—fall short of a cohesive approach. But could the use of telemedicine—delivered via a hybrid of telephonic, electronic mail, and video chat modalities, often supported by remote monitoring devices—and related technology be a game changer, getting patients healthier, faster, and cheaper? Or will the expansion of telemedicine merely lead to increased consumption of health care with limited efficacy, further straining already bloated budgets?

Telemedicine adoption is growing, but it is still in its early stages. Detractors argue that telemedicine is not worth the investment: they question its efficacy and claim it may increase overall health care costs, asserting that patients will utilize telemedicine in addition to, rather than instead of, in-person visits, creating new expenditures without offsetting savings. Proponents believe that a thoughtful, full adoption of telemedicine has the potential to improve patient access and health outcomes while reducing health care costs. Part I of this Article first addresses the current state of the U.S. health care system and health outcomes in America, including challenges with the prevailing fee-for-

3. The American Health Care Act of 2017, H.R. 1628, 115th Cong. (1st Sess. 2017). The American Health Care Act of 2017 was passed by the United States House of Representatives on May 4, 2017, which sent the bill to the United States Senate for consideration. *Actions Overview H.R. 1628 – 15th Congress (2017-2018)*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/1628/actions (last visited Nov. 19, 2017). This legislation constitutes the first step in a three-stage process to repeal the ACA. *The Three Phrases of Repeal and Replace*, SPEAKER PAUL RYAN (Mar. 7, 2017), https://www.speaker.gov/general/three-phases-repeal-and-replace. As a budget reconciliation bill and part of the 2017 federal budget process, the AHCA cannot be filibustered in the Senate and, accordingly, can be passed into law by the Senate with a simple majority. *Id.* If passed, the AHCA will repeal the portions of the ACA that fall within the ambit of the federal budget, including the "individual mandate,", the employer mandate and a variety of taxes, and would largely reverse the expansion of the federal Medicaid program implemented by the ACA. THE HENRY J. KAISER FAMILY FOUND., SUMMARY OF THE AMERICAN HEALTH CARE ACT 1–2, 5 (2017), http://files.kff.org/attachment/Proposals-to-Replace-the-Affordable-Care-Act-Summary-of-the-American-Health-Care-Act.

service model of care delivery. Part II then introduces telemedicine and certain demographic and other factors favoring its broader adoption, followed by an analysis of whether telemedicine can help to fundamentally change the health care system and achieve the "triple aim" of improving individual quality of care, improving population health, and lowering health care costs. Part III of this Article addresses basic concerns about whether telemedicine is a "budget buster," and addresses systemic challenges to achieving widespread adoption of telemedicine: longstanding health care regulatory laws that prevent innovative delivery systems from expanding beyond their current "experimental" status, and reimbursement systems that undermine broad adoption of telemedicine, preventing expansion beyond limited niches and rural areas. Part IV focuses on two case studies showcasing opportunities for expanded use of telemedicine: rural America and long-term care facilities. Finally, in Part V, the Article recommends how to more effectively deploy telemedicine. Specifically, while more ambitious reforms toward payment models based on value and population health management would benefit telemedicine along with health care more broadly, the passage and implementation of proposed federal legislation would clarify conflicting regulations; reduce obstacles to effective implementation; and unleash the industry for rapid growth.

I. U.S. HEALTH CARE: THE PATIENT NEEDS AN INTERVENTION

A. Poor U.S. Health Despite Highest Spending

Health care costs in the United States continue to rise with no sign of stopping, which places an ever-increasing burden on federal, state and local governments, as well as businesses and individuals. Over the last fifty years, health care spending as a percentage of GDP increased from 5% to 17.8%.[4] National health expenditures grew 5.8% to $3.2 trillion in 2015 (equal to $9,990 per person).[5] Projections suggest that this growth trend will continue through 2025 at an average rate of 5.8% per year, and experts project health care spending growing 1.2 percentage points faster than GDP per year over the same period.[6] As a result, experts anticipate health care expenditures reaching 19.1% of GDP by 2025.[7] For 2016, experts expect total health care spending of nearly $3.4 trillion, a 4.8%

4. CTRS. FOR MEDICARE & MEDICAID SERVS., NHE SUMMARY INCLUDING SHARE GDP, CY 1960-2015, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html (follow "NHE Summary including share GDP, CY 1960-2015" hyperlink) (last visited Nov. 19, 2017).

5. *Id.*

6. *Id.*

7. *Id.*; *see also* CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURE PROJECTIONS 2016–2025, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/proj2016.pdf (last visited Nov. 19, 2017).

increase from 2015, surpassing $10,000 per person for the first time ever,[8] with projections of average growth of 5.8% from 2015 to 2025.[9]

Governments, employers, and individuals all bear these costs. In the United States, a mix of private and public sources finance health care, with the bulk of Americans under age sixty-five obtaining private health insurance through employers.[10] For 2015, health insurance covered 90.9% of the U.S. population for some portion of the year, with private health insurance covering 67.2%, comprised of employer-based (55.7%) and direct-purchase (16.3%) insurance.[11] Public insurance covered the remainder of the insured population, comprised of Medicaid (19.6%), Medicare (16.3%), and military (4.7%), with some overlap amongst the foregoing private and public categories.[12] Projections anticipate governments across all levels funding almost half of all health care spending by 2025.[13]

Four government health insurance programs consumed one-quarter of the federal budget in 2016 (over $1 trillion): Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and ACA marketplace subsidies.[14] Almost three-fifths of the over $1 trillion funded Medicare, which is a federal health insurance program for people ages sixty-five and over and people with certain permanent disabilities.[15] Medicare covers approximately fifty-seven million people, helping pay for hospital and physician visits, prescription drugs, and other acute and post-acute care services.[16] Also, private payors often track Medicare reimbursement and reporting requirements and incorporate them in their own policies.[17] With Medicare playing a central role in funding the health care system,

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8. CTRS. FOR MEDICARE & MEDICAID SERVS., TABLE 1: NATIONAL HEALTH EXPENDITURE AND SELECTED ECONOMIC INDICATORS, LEVELS, AND ANNUAL PERCENT CHANGE: CALENDAR YEARS 2009 - 2025, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsProjected.html (follow "NHE Projections 2016-2025 - Tables" hyperlink) (last visited Nov. 19, 2017).

9. Ricardo Alonso-Zaldivar, *$10,345 Per Person: U.S. Health Care Spending Reaches New Peak*, PBS NEWSHOUR (July 13, 2016 6:20 PM), http://www.pbs.org/newshour/rundown/new-peak-us-health-care-spending-10345-per-person.

10. JESSICA C. BARNETT & MARINA S. VORNOVITSKY, U.S. DEP'T OF COMMERCE, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2015 1 (2016).

11. *Id.*

12. *Id.*

13. Alonso-Zaldivar, *supra* note 9.

14. *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 4, 2017), https://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go.

15. *Id.*

16. *See id.*

17. Michael Murphy, *Physician Reimbursement: Why It Matters for the Future of American Health Care*, MED. SCRIBE J. (Feb. 18, 2014), http://scribeamerica.com/blog/physician-reimbursement-why-it-matters-for-the-future-of-american-health-care ("[T]he private health insurance industry follows the lead of Medicare when it comes to reimbursements . . . ."); *see also* David. E Beck & David A. Margolin, MD, *Physician Coding and Reimbursement*, 7 OSCHSNER J. 8, 10 (2007) ("Private payers in non-capitated contracts often set reimbursement based on a percentage of the Medicare fee schedule.").

providers wishing to receive reimbursements from the Medicare program must take Medicare's requirements into account.[18] In 2015, Medicare expenditures constituted one-fifth of total national health spending, twenty-nine percent of retail sales of prescription drugs, twenty-five percent of all hospital care spending, and twenty-three percent of physician services spending.[19] Looking ahead, projections reflect net Medicare spending increasing from $590 billion in 2017 to $1.2 trillion in 2027.[20]

While the burdens are shared between public- and private-financing sources, the United States spends more on health care—both per capita and as a share of GDP—than any other country in the world.[21] These costs will continue to rise, further burdening governments, businesses, and individuals.[22] One might expect superior health outcomes from such an expensive health care system, but unfortunately, U.S. health care lags behind other countries on many key health indicators.[23]

B. Outspending Peer Industrialized Nations by a Wide Margin with Significantly Worse Health Outcomes

Notwithstanding outspending its peer industrialized nations by a wide margin, the U.S. health care system produces significantly worse health outcomes.[24] The United States suffers from a number of disturbing

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18. *See* Murphy, *supra* note 17; *see also* Beck & Margolin, *supra* note 17.

19. JULIETTE CUBANSKI & TRICIA NEUMAN, THE HENRY J. KAISER FAMILY FOUND., THE FACTS ON MEDICARE SPENDING AND FINANCING 1 (2017), http://files.kff.org/attachment/Issue-Brief-The-Facts-on-Medicare-Spending-and-Financing. "Kaiser Family Foundation analysis based on Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group, National Health Expenditures Tables, Table 4: National Health Expenditures by Source of Funds and Type of Expenditures: Calendar Years 2009-2015 (December 2016)." *Id.* at 8 n.1.

20. *Id.* at 3.

21. *See* Melissa Etehad & Kyle Kim, *The U.S. Spends More on Healthcare Than Any Other Country – But Not With Better Health Outcomes*, L.A. TIMES (July 18, 2017, 4:25 PM), http://www.latimes.com/nation/la-na-healthcare-comparison-20170715-htmlstory.html; *see also* DAVID SQUIRES & CHLOE ANDERSON, THE COMMONWEALTH FUND, U.S. HEALTH CARE FROM A GLOBAL PERSPECTIVE: SPENDING, USE OF SERVICES, PRICES, AND HEALTH IN 13 COUNTRIES 2 (2015).

22. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 7.

23. *See infra* Section I.B.

24. *See* GERARD F. ANDERSON & DAVID A. SQUIRES, THE COMMONWEALTH FUND, MEASURING THE U.S. HEALTH CARE SYSTEM: A CROSS-NATIONAL COMPARISON 1–2 (2010); DAVID SQUIRES, THE COMMONWEALTH FUND, EXPLAINING HIGH HEALTH CARE SPENDING IN THE UNITED STATES: AN INTERNATIONAL COMPARISON OF SUPPLY, UTILIZATION, PRICES, AND QUALITY 1 (2012); DAVID A. SQUIRES, THE COMMONWEALTH FUND, THE U.S. HEALTH SYSTEM IN PERSPECTIVE: A COMPARISON OF TWELVE INDUSTRIALIZED NATIONS 1–2 (2011); Gerard F. Anderson & Bianca K. Fogner, *Health Spending in OECD Countries: Obtaining Value Per Dollar*, 27 HEALTH AFF. 1718, 1718–19, 1722 (2008); Gerard F. Anderson et al., *Health Spending in OECD Countries in 2004: An Update*, 26 HEALTH AFF. 1481, 1481 (2007); Gerard F. Anderson et al., *Health Spending in the United States and the Rest of the Industrialized World*, 24 HEALTH AFF. 903, 904–05 (2005); Gerard F. Anderson et al., *It's the Prices, Stupid: Why the United States is so Different from Other Countries*, 22 HEALTH AFF. 89, 90, 103 (2003); Gerard Anderson & Peter Sutir Hussey, *Comparing Health System Performance in OECD Countries*, 20 HEALTH AFF. 219, 219, 229 (2001); Gerard F. Anderson et al., *Health Spending and Outcomes: Trends in OECD Countries, 1960–1998*, 19 HEALTH AFF. 150, 150 (2000); Gerard F. Anderson & Jean-Paul Poullier, *Health*

trends with respect to its population health, or lack thereof.[25] With a life expectancy of 78.8 years, the United States suffered from the lowest life expectancy among countries analyzed by the Organization for Economic Cooperation and Development (OECD) in 2013, which had a median life expectancy of 80.5 years.[26] The United States came in last among the countries reviewed for infant mortality with a rate of 6.1 infant deaths per 1,000 births, as compared to a median of 3.5 deaths per 1,000 births.[27] Notably, the United States suffers from higher prevalence of costly and deleterious chronic conditions when compared to analogous countries: a 2014 Commonwealth Fund International Health Policy Survey found that 68% of U.S. adults age sixty-five or older suffered from two or more chronic conditions, as compared to thirty-three percent in the United Kingdom and fifty-six percent in Canada.[28] In concluding a comparative analysis excoriating the U.S. health care system as compared to its peer nations, Ali Velshi of MSNBC said, "Overall, we pay more, for less that's the consensus of numerous studies comparing health care around the globe."[29]

Compared to peer high-GDP countries, Americans suffer numerous health disadvantages, with significant consequences for suffering from poorer health.[30] For example, in 2012, over one-third of adults in the United States suffered from obesity, compared to only 14.5% of adults in

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Spending, Access, and Outcomes: Trends in Industrialized Countries, 18 HEALTH AFF. 178, 178 (1999); Uwe E. Reinhardt et al., *U.S. Health Care Spending in an International Context*, 23 HEALTH AFF. 10, 10–11 (2004); Uwe E. Reinhardt et al., *Cross-National Comparisons of Health Systems Using OECD Data, 1999*, 21 HEALTH AFF. 169, 169 (2002); David Squires, *The Global Slowdown in Health Care Spending*, 312 J. AM. MED. ASS'N 485, 485 (2016); *see also* OECD, COUNTRY NOTE: HOW DOES HEALTH SPENDING IN THE UNITED STATES COMPARE? 1–2 (2015).

25. ELIZABETH H. BRADLEY & LAUREN A. TAYLOR, THE AMERICAN HEALTH CARE PARADOX: WHY SPENDING MORE IS GETTING US LESS 1–20 (2013).

26. *See* OECD, *Health at a Glance 2015: How Does the United States Compare?* https://www.oecd.org/unitedstates/Health-at-a-Glance-2015-Key-Findings-United-States.pdf (last visited Nov. 19, 2017).

27. BRADLEY & TAYLOR, *supra* note 25, at 82; *see also* SQUIRES & ANDERSON, *supra* note 21, at 7.

28. ROBIN OSBORN & DONALD MOULDS, THE COMMONWEALTH FUND 2014 INTERNATIONAL HEALTH POLICY SURVEY OF OLDER ADULTS IN ELEVEN COUNTRIES 6 (2014); Robin Osborn et al., *International Survey of Older Adults Finds Shortcomings in Access, Coordination, and Patient-Centered Care*, 33 HEALTH AFF. 2247, 2247–49 (2014) (listing chronic conditions as hypertension, high blood pressure, heart disease, diabetes, lung problems, mental health problems, cancer, and/or joint pain/arthritis); *see also* BRIAN W. WARD ET AL., CTR. FOR DISEASE CONTROL, MULTIPLE CHRONIC CONDITIONS AMONG US ADULTS: A 2012 UPDATE (2014), https://www.cdc.gov/pcd/issues/2014/pdf/13_0389.pdf.

29. Ali Velshi, *For Facts Sake: U.S. Healthcare Lags Others*, NBC NEWS (July 18, 2017, 9:44 AM), https://www.nbcnews.com/business/velshi-ruhle/facts-sake-u-s-healthcare-lags-others-n782126.

30. *See generally* INST. OF MED., CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE (2002) (contrasting the health of insured and uninsured adults in the United States and concluding those without health insurance are sicker and die sooner); Jack Hadley, *Sicker and Poorer—The Consequences of Being Uninsured: A Review of the Research on the Relationship Between Health Insurance, Medical Care Use, Health, Work, and Income*, 60 MED. CARE RES. & REV. 3S, 3S (2003) (concluding that having health insurance or using more medical care would improve the health of the uninsured).

France, 24.7% of adults in the U.K., 14.7% of adults in Germany, and a low of 3.6% of adults in Japan.[31] The Institute of Medicine asserted that lagging health outcomes in the United States in 2012 did not result from economic, social, racial, or ethnic disadvantages; additionally, the Institute concluded that middle-class Americans (who are neither smokers nor obese) still suffer from poorer health than adults located in other high-income countries.[32] The United States spends more on health care than other high-GDP nations, dedicating over seventeen percent of its GDP in 2013 to health care (compared to lower percentages among peer nations and only 10.6% of global GDP).[33] Even though the United States outspends other nations, it continues to underperform on an array of basic health indicators.[34] Poor population health and high spending on health care pose a series of economic and social ills, ranging from diminished quality of life, diminished earnings, lower educational attainment, and financial hardship, such as personal bankruptcy due to health care costs.[35] Linda M. Magno of the Centers for Medicare and Medicaid Services (CMS) concluded:

> The existing health care delivery system is fragmented, uncoordinated, unsupportive of both physicians and patients, and ultimately unsustainable. In spite of this, we like to think we have the best care in the world because people come from around the world to be treated here. In particular instances you can find the best care in the world, but this is not true of the system as a whole.[36]

C. Fee-for-Service Medicine: Part of the Challenge

Fundamentally, fee-for-service medicine refers to the delivery of health care by providers on an incident-by-incident basis, where providers must submit a valid reimbursement code for each incident of health care service rendered in return for a predetermined, prenegotiated reimbursement rate for that particular service.[37] If the fee-for-service system has no code for an activity—such as general counseling—then the provider receives no reimbursement.[38] Advocates for capitation and bundling agree that fee-for-service medicine promotes the wrong trend in

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31. OECD, OBESITY UPDATE 2 (2014), http://www.oecd.org/health/Obesity-Update-2014.pdf.

32. Harvey V. Fineberg & Robert M. Hauser, *Forward* to NAT'L RESEARCH COUNCIL & INST. OF MED., U.S. HEALTH IN INTERNATIONAL PERSPECTIVE: SHORTER LIVES, POORER HEALTH at ix (Steven H. Woolf & Laudan Aron eds., 2013); *see also* SQUIRES & ANDERSON, *supra* note 21, at 9.

33. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 4.

34. *See* OECD, *supra* note 26.

35. *See* THE HENRY J. KAISER FAMILY FOUND., SICKER AND POORER: THE CONSEQUENCES OF BEING UNINSURED - EXECUTIVE SUMMARY, 12–14 (2003) (asserting that, among other things, better health would improve annual earnings by about ten to thirty percent (depending on measures and specific health condition) and would increase educational attainment).

36. Linda M. Magno, *Center for Medicare & Medicaid Innovation*, *in* INST. OF MED., THE ROLE OF TELEMEDICINE IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY 37 (2012).

37. Beck & Margolin, *supra* note 17, at 8.

38. *See id.* at 8–9.

health care: providers end up focusing on acute episodes that fit into neat categories of billing codes rather than focusing on maintaining the continuing health and well-being of the patient.[39]

It is instructive to contrast the fee-for-service model with capitation and bundling, which offer alternative models.[40] Examples of capitation are accountable care organizations (ACO) and patient-centered medical homes.[41] The ACO or patient-centered medical home receives one capped-payment for the year from the payor for each person or "life" included in the population that the ACO or medical home manages.[42] On the other hand, bundling is where disparate providers partner together to provide a defined medical service or procedure for one bundled rate.[43] For both capitation and bundling, quality and efficiency are rewarded, since the ACO or bundled provider may keep any savings realized within the defined payment, provided that they specified patient quality metrics.[44] While critics claim these models resemble the health maintenance organizations (HMOs) of the 1990s that will lead to minimal care as the ACO and bundled providers reach for more profit, proponents note that in the ACO and bundled models, the provider controls the decision making rather than the payor.[45] Furthermore, in these models the providers retain risk because readmitted patients or patients with complications erode profits under the capitated or bundled rate.[46] Finally, with dramatic advancements in technology since the HMOs of the 1990s, health care consumers and ratings entities now have access to quality metrics and performance goals that did not exist during the rise and fall of HMOs.[47]

Fee-for-service medicine struggles to provide care coordination—a crucial element to a successful, complex surgery and recovery, and crucial for managing chronic conditions and end-of-life-care.[48] Absent specific billing codes for care coordination efforts, no single physician point of contact emerges from amongst the array of providers (e.g.,

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39. *See* Brent C. James & Gregory P. Poulson, *The Case for Capitation*, HARV. BUS. REV., July-Aug. 2016, at 102; Michael E. Porter & Robert S. Kaplan, *How to Pay for Health Care*, HARV. BUS. REV., July-Aug. 2016, at 88.

40. The *Harvard Business Review* compared capitation and bundling as the leading alternatives to fee-for-service in its July-August 2016 Issue. James & Poulson, *supra* note 39; Porter & Kapan, *supra* note 39. In *The Case for Capitation*, Brent C. James, MD and Gregory P. Poulsen assert the benefits of capitated systems, such as ACOs, while in *How to Pay for Health Care*, Michael E. Porter and Robert S. Kaplan succinctly summarize the arguments for bundling. James & Poulson, *supra*, note 39; Porter & Kapan, *supra*, note 39.

41. James & Poulson, *supra* note 39.

42. *See id.*

43. Porter & Kaplan, *supra* note 39.

44. James & Poulson, *supra* note 39; Porter & Kaplan, *supra* note 39.

45. *See* James & Poulson, *supra* note 39.

46. James & Poulson, *supra* note 39; Porter & Kaplan, *supra* note 39.

47. James & Poulson, *supra* note 39.

48. *See* Edward H. Wagner et al., *Improving Chronic Illness Care: Translating Evidence into Action*, 20 HEALTH AFF. 64, 68 (2001).

anesthesiologists, surgeons, specialists, post-operative care, physical therapy) to coordinate all aspects of care—the relationships, treatments, and medications being meted out by the various players.[49] Care coordination is particularly important for those providers handling the complex needs of patients in chronic care and end-of-life care.[50] Of the substantial health care expenditures in the United States, chronic care and end-of-life care dominate over eighty-six percent of U.S. health care spending.[51] Seven out of ten deaths each year result from chronic diseases.[52] Both chronic care and end-of-life care require care coordination and an ongoing, well-managed relationship with the patient to provide the patient with a more user-friendly experience and to optimize the varying treatments and medications required, as well as resources consumed.[53]

In seeking alternative health care models to fee-for-service medicine, the ACA created a research entity called the CMS Innovation Center.[54] The CMS Innovation Center conducts a limited array of experiments that are referred to as test models or demonstration projects.[55] Projects include (1) Next Generation ACOs—volunteer assembly of doctors, hospitals, and other health care providers and suppliers as a group that offers coordinated care for Medicare patients; (2) Bundled Payments for Care Improvement—a model that applies one bundled payment to an episode of care; and (3) Comprehensive Care for Joint Replacement Model—a model that attempts to efficiently drive higher-quality care for beneficiaries facing hip and knee replacements, which constitute the most common surgical procedure for the population on Medicare.[56]

Another Medicare development with the potential to promote a value-based care model is the Quality Payment Program.[57] Congress created the Quality Payment Program as part of the 2015 Medicare Access and CHIP Reauthorization Act (MACRA) and designed the program to focus on quality over quantity.[58] The Quality Payment

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49. *See generally* Beck & Margolin, *supra* note 17 (reviewing physician reimbursement from the government and third-party players and physician coding to support reimbursement).

50. Wagner et al., *supra* note 48, at 74.

51. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, CHRONIC DISEASE OVERVIEW (2017), https://www.cdc.gov/chronicdisease/overview (citing JESSIE GERTEIS ET AL., DEP'T OF HEALTH & HUMAN SERVS., AHRQ PUB. NO. 14-0038, MULTIPLE CHRONIC CONDITIONS CHARTBOOK 7 (2014)).

52. *Id.*; CTRS. FOR DISEASE CONTROL & PREVENTION, CHRONIC DISEASE AND HEALTH PROMOTION (2017), https://www.cdc.gov/chronicdisease/index.htm.

53. *See* Wagner et al., *supra* note 48, at 68.

54. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., ABOUT THE CMS INNOVATION CENTER (2017), https://innovation.cms.gov/About/index.html.

55. *See id.*

56. CTRS. FOR MEDICARE & MEDICAID SERVS., INNOVATION MODELS, https://innovation.cms.gov/initiatives/index.html (last visited Nov. 21, 2017).

57. Medicare Access and CHIP Reauthorization Act, Pub. L. No. 114-10, 129 Stat. 87 (2015).

58. *Id.* 129 Stat., at 99–100.

Program replaced the Sustainable Growth Rate formula, which is a reimbursement calculation that measures spending on physician services that Medicare used for almost fifteen years to contain spending on physician services.[59] The Quality Payment Program contains two tracks: the Merit-based Incentive Payment System (MIPS), a system of value-based payment adjustments (incentives or penalties) determined by a zero to one-hundred point scale; and the Alternative Payment Model (APM), a program for coordinated and efficient care.[60] MACRA permits the use of telemedicine and remote patient monitoring (RPM) as a care-coordination subcategory of the clinical practice improvement activities performance category under MIPS.[61] Participation in an APM exempts physicians from participating in MIPS and gives physicians a five percent annual payment bonus for those that participate in the program successfully.[62]

II. THE FUTURE IS NOW: TELEMEDICINE AS A PRESCRIPTION FOR CHANGING THE GAME

Advocates of telemedicine tout seemingly limitless benefits of telemedicine, and their visions of a world with telemedicine often resemble futuristic worlds of science fiction novels:

> Imagine that you feel ill at your office and your self-driving car whisks you home. On the way, you use your handy telemedicine phone application to take your vitals and book a telemedicine consultation. Meanwhile, the phone application tells the climate control in your home that you are coming home mid-day, and thus commands the climate control to alter the temperature to your preferred setting, while simultaneously notifying your kitchen that you wish to have a cup of hot tea ready upon arrival. Once home, you initiate your scheduled, secure video chat with your telemedicine physician, who asks you to use your home health device to record and send your updated vital signs. The video chat and data yield a clear verdict, the physician sends a targeted prescription to the electronic pharmacy, and a drone delivers the needed medication to your front door within the hour. To mitigate against a mis-diagnosis, you use your home health device to record and send your vital signs once or twice more throughout the day, which are monitored by a program that notifies a health care professional if your data drifts out of bounds. Having been

59. Billy Wynne, *May the Era of Medicare's Doc Fix (1997–2015) Rest in Peace. Now What?*, HEALTH AFF. (Apr. 15, 2015), http://www.healthaffairs.org/do/10.1377/hblog20150415.046932/full.

60. *Id.*

61. U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS: E-HEALTH AND TELEMEDICINE 7 (2016).

62. Medicare Access and CHIP Reauthorization Act § 101.

> diagnosed and medicated quickly, you arrest your illness early on, knocking out the downward spiral of nasty symptoms and side effects before they accelerate. All of this occurs rapidly, from the comfort of your own home, and you rest comfortably for the rest of the day. After a quick check on your vitals the next morning, you jet off to your morning meeting, operating at close to 100%.

If properly implemented, telemedicine could drive substantial, mutually-beneficial efficiencies. On the most basic level, instead of waiting interminably in a triage setting at a primary care provider's office—or the emergency room—a telemedicine provider could quickly learn of any ailments at the intake stage and direct the patient to a more targeted specialist, without the patient spending unnecessary time in a waiting room. Telemedicine patients can avoid wasted time on the ponderous triage process where those suffering less traumatic maladies wait their turn. Finally, rather than facing triage limited to the medical personnel available on site, telemedicine cuts through costly and time-consuming layers of health care bureaucracy because the proper health care specialist can treat the patient in the comfort of his or her own home, no matter where the patient is located. Additionally, by eliminating triage and intake time, the expedited and targeted nature of telemedicine care delivery has the potential to get the patient back to work faster than the current system.[63] In short, at least for certain medical needs, telemedicine could achieve a previously unthinkable logistical achievement in health care: obtaining the right medical attention at the right time, in the right place, at the right price.

A. Overview of Telemedicine Technology and Modalities

There are three basic communication categories of telemedicine: (1) synchronous, (2) asynchronous, and (3) remote patient monitoring.[64] Synchronous telemedicine communications occur in real time, where health care providers deliver services to patients through a two-way interactive video conferencing platform.[65] Synchronous telemedicine creates remote consultations (teleconsults) with specialists, primary care physicians, counselors, social workers, and other health care

63. *See* JEFF ELTON & ANNE O'RIORDAN, HEALTHCARE DISRUPTED: NEXT GENERATION BUSINESS MODELS AND STRATEGIES 128 (2016) (asserting that a services based approach can deliver outcomes more effectively than a medicine or device alone: "Given the relatively high expense of formal healthcare facilities, this is also how we are going to be able to take care of the sickest patients, keep them healthier, but do it affordably.").

64. *See Telemedicine*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/benefits/telemed (last visited Nov. 27, 2017) [hereinafter *Telemedicine*]; *see also About Telemedicine*, AM. TELEMEDICINE ASS'N, http://www.americantelemed.org/main/about/telehealth-faqs- (last visited Nov. 27, 2017) [hereinafter *About Telemedicine*].

65. *See Telemedicine*, *supra* note 64; *see also About Telemedicine*, *supra* note 64.

professionals.[66] Examples of synchronous programs include post-appointment or post-operative follow-up; real-time diagnosis and treatment of low-acuity conditions; specialist consultations; tele-stroke, tele-neurology, tele-endocrinology, tele-psychiatry; and real-time centralized patient monitoring.[67]

Asynchronous telemedicine, often called store-and-forward, is where health care providers deliver services to patients after receiving health information from the patient or other health care provider through secured electronic means.[68] Asynchronous communications occur without real-time interaction between the provider and the patient.[69] Rather, patients store images, videos, audio, and clinical data on their computer or mobile device, and the stored information is then securely transmitted to a health care provider for later study and analysis.[70] Examples of asynchronous telemedicine communication include online, second opinion consultations; protocol driven diagnosis and treatment of minor ailments; specialist consultations; eRadiology; ePathology; and tele-dermatology.[71] While basic data collection and monitoring devices already exist, emerging technologies will soon bring sophisticated measuring tools from the hospital to the home.[72] Meanwhile, asynchronous communication routinely occurs today within hospitals and at other care provider locations, with x-ray, MRI, and blood work analyzed by an expert who reviews an image or data remotely and provides feedback to an onsite health care professional.[73]

Remote patient monitoring (RPM) is where a patient uses sensors and monitoring equipment that captures and then transmits data to an

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66. *Telemedicine Series 2016: New Frontiers in Telemedicine, Part I: The Regulatory Landscape*, AHLA, https://distancelearning.healthlawyers.org/products/telemedicine-series-2016-new-frontiers-in-telemedicine-part-i-the-regulatory-landscape-intermediate#tab-product_tab_overview (last visited Nov. 29, 2017) [hereinafter *The Regulatory Landscape*]; *see also About Telemedicine*, *supra* note 64; *Telemedicine*, *supra* note 64.

67. *The Regulatory Landscape*, *supra* note 66; *see also About Telemedicine*, *supra* note 64; *Telemedicine*, *supra* note 64.

68. *The Regulatory Landscape*, *supra* note 66; *see also About Telemedicine*, *supra* note 64; *What is Telemedicine Technology?*, EVISIT, https://evisit.com/what-is-telemedicine-technology (last visited Nov. 27, 2017); *Telemedicine*, *supra* note 64.

69. *The Regulatory Landscape*, *supra* note 66; *see also About Telemedicine*, *supra* note 64; *Telemedicine*, *supra* note 64.

70. *The Regulatory Landscape*, *supra* note 66; *see also About Telemedicine*, *supra* note 64; *Telemedicine*, *supra* note 64.

71. *The Regulatory Landscape*, *supra* note 66; *see also About Telemedicine*, *supra* note 64; *Telemedicine*, *supra* note 64.

72. ELTON & O'RIORDAN, *supra* note 63, at 126–28.

73. Rachel Z. Arndt, *Hacked Medical Devices Could Wreak Havoc on Health Systems*, MOD. HEALTHCARE (Jan. 20, 2018), http://www.modernhealthcare.com/article/20180120/NEWS/180129999; *see also* Eric Wicklund, *Telehealth Terminology: 'Store-and-Forward' Has Its Fans - and Critics*, MHEALTHINTELLIGENCE (July 21, 2016), https://mhealthintelligence.com/news/telehealth-terminology-store-and-forward-has-its-fans-and-critics ("Advocates say the asynchronous platform gives doctors time to apply best practices to a telehealth visit; critics say it isn't the same as a real-time encounter."); *Telemedicine Guide*, EVISIT, https://evisit.com/what-is-telemedicine (last visited Feb. 13, 2018).

external monitoring center.[74] Health care providers can then use the external monitoring center to monitor the patient remotely.[75] Remote patient monitoring may resemble "Big Brother"—devices clicking away and generating data for review by health care professionals standing by—but it holds the potential to keep the most precarious patients healthier and more compliant, with proper treatment, wellness, and medication protocols.[76] In particular, patients with chronic conditions and those making the transition home following a procedure could benefit from remote patient monitoring. By constantly generating data, remote patient monitoring provides caregivers a more complete picture of the patient's status.[77]

Studies show telemedicine is effective in assisting with chronic care.[78] Often, patients wait to contact their health care provider until after they feel ill. However, with remote patient monitoring, a health care professional monitoring the patient remotely is able to intervene prior to the point at which a patient becomes seriously ill.[79] Patient thresholds could trigger notifications to health care providers, letting providers know when they should contact patients to see how they are feeling.[80] Finally, researchers can then study the data obtained from the remote patient monitoring systems, enabling them to identify patterns and work to create new treatment modalities and even cures.[81]

Recognizing the potential, many private insurers are incorporating telemedicine technologies in their policies, but only in incremental steps.[82] For example, the model reimbursement policy for Horizon Blue

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74. Arndt, *supra* note 73; *see also Telemedicine Guide*, *supra* note 73.

75. *Id.*

76. *See, e.g.*, *id.* at 102 ("MS impairs the ability to walk for many people with MS, yet we only access walking ability in the limited time a patient is in the doctor's office. Consumer devices can measure number of steps, distance walked, and sleep quality on a continuous basis in a person's home environment. These data could provide potentially important information to supplement office visit exam."); *see also* Jessica Bartlett, *Study by Biogen, Patients Like Me Suggests Wearables Can Help MS Patients*, BOS. BUS. J. (Apr. 14, 2015, 12:01 AM), https://www.bizjournals.com/boston/blog/health-care/2015/04/study-by-biogen-patientslikeme-suggests-wearables.html.

77. *See* ELTON & O'RIORDAN, *supra* note 63, at 102.

78. *See, e.g.*, *Population Health Programs*, IOWA CHRONIC CARE CONSORTIUM, http://iowaccc.com/population-health-programs (last visited Nov. 27, 12017); *Study Validates Use of Technology-Based Remote Monitoring Platform to Reduce Healthcare Utilization and Costs*, IOWA CHRONIC CARE CONSORTIUM (July 27, 2008), http://www.iowaccc.com/wp-content/themes/iccc/pdf/Congestive_Heart_Failure.pdf.

79. ELTON & O'RIORDAN, *supra* note 63, at 126–28.

80. *See, e.g.*, ELTON & O'RIORDAN, *supra* note 63, at 102 ("MS impairs the ability to walk for many people with MS, yet we only access walking ability in the limited time a patient is in the doctor's office."); *see also* Bartlett, *supra* note 76.

81. *See, e.g.*, ELTON & O'RIORDAN, *supra* note 63, at 102 ("Consumer devices can measure number of steps, distance walked, and sleep quality on a continuous basis in a person's home environment. These data could provide potentially important information to supplement office visit exam."); *see also* Bartlett, *supra* note 76.

82. *See, e.g.*, *Services on Telemedicine Platforms*, HORIZON BLUE CROSS BLUE SHIELD N.J. (June 27, 2017), https://www.horizonblue.com/providers/policies-procedures/policies/reimbursement-policies-guidelines/services-on-telemedicine-platforms; *Policies*

Cross Blue Shield of New Jersey provides the following definition for telemedicine:

> The delivery of health care services through the use of . . . secure interactive audio-video or other electronic media for the purpose of diagnosis, consultation, and/or treatment of a patient when the patient is in one location (e.g., "originating site") and the provider is in any other location (i.e. "distant site") at the time service is provided.[83]

The policy stipulates that reimbursement for services performed through telemedicine platforms may be available as follows:

> Real time (synchronized) services on telemedicine platforms may be eligible for separate reimbursement as part of this Health Plan's benefits when such services meet all the requirements of a face-to-face consultation or contact between a health care provider and patient. Reimbursement for telemedicine/telehealth services is limited to services involving the use of interactive audio-video or other interactive electronic media for the purpose of diagnosis, consultation or treatment.[84]

Note that the requirement of "interactive" audio-video effectively excludes the use of asynchronous and RPM telemedicine modalities.[85] The policy also includes a common licensure requirement: "In order for services on telemedicine platforms to be eligible for reimbursement as part of this Health Plan's benefits, the provider shall be appropriately licensed in the state where the patient is physically located at the time of the telemedicine encounter ('originating site')."[86]

Similarly, the model reimbursement policy for CareFirst Blue Cross Blue Shield defines telemedicine services as "the use of a combination of interactive audio, video or other electronic media used by a licensed health care provider for the purpose of diagnosis, consultation or treatment consistent with the provider's scope of practice."[87] It offers the following health care provider guidelines:

> Services for diagnosis, consultation or treatment provided through telemedicine must meet all the requirements of a face-to-face consultation or contact between a licensed health care provider and patient consistent with the provider's scope of practice for services

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and Procedures, CAREFIRST BLUECROSS BLUESHIELD, https://provider.carefirst.com/carefirst-resources/provider/pdf/professional-provider-manual-policies-pm0010.pdf (last visited Oct. 14, 2017) (referencing policy on telemedicine); *Medical Policy: Section 2.01.072 Telemedicine (Unified Communications)*, CAREFIRST BLUECROSS BLUESHIELD (Feb. 21, 2017), http://notesnet.carefirst.com/Ecommerce/medicalpolicy.nsf/vwWebTableX/BDFB7E8F61E5816E8525813F00588C00?OpenDocument [hereinafter *Unified Communications*].

83. *Services on Telemedicine Platforms*, *supra* note 82.

84. *Id.*

85. *See id.*

86. *Id.*

87. *Policies and Procedures*, *supra* note 82; *see also Unified Communications*, *supra* note 82.

> appropriately provided through telemedicine services. Diagnostic, consultative and treatment telemedicine services should be reported with the appropriate [billing] code and the [service code] (. . . via a real-time interactive audio and video telecommunication system[s]).[88]

Once again, the interactive requirement essentially precludes the use of asynchronous and RPM telemedicine modalities.[89] In short, private insurers have begun slowly acknowledging available telemedicine technologies,[90] recognizing that telemedicine technologies provide ample opportunities to disrupt the current model of delivering health care, with potential for significant improvements to patient health and access at a lower cost. However, the policy's requirements for interactive media, its restrictions on types of medicine acceptable for practice via telemedicine, and its prohibition on telemedicine patients outside the physician's state of licensure reveal that even payors open to telemedicine maintain structural obstacles to widespread adoption.[91]

B. Favorable Demographic and Technological Landscape for Telemedicine

The potential benefits of telemedicine include efficient, cost-effective patient care; increased opportunities for collaboration between providers to improve patient care; access to specialty and sub-specialty care that extends the reach of the hospital, provider, or both; and access to care for patients in underserved locations, rural locations, or both.[92] Telemedicine may enhance patient satisfaction and assist in cost-or-penalty avoidance in value-based-purchasing models that are accountable for patient and population health outcomes, such as accountable care organizations.[93]

Certain industry and demographic elements create a significant opportunity—or a pressing need—for increased adoption of telemedicine. U.S. health care continues a slow transition from fee-for-service, volume-based payments to pay-for-performance systems that take into account outcomes and quality or population-health-management systems, such as accountable care organizations.[94] These payment systems emphasize value and results rather than volume,

88. *Unified Communications*, *supra* note 82. Note that the policy also states that "[u]tilization review may be performed. Documentation in the medical record must support the services rendered." *Id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See infra* Part IV.

93. *See infra* Part V.

94. *See* Thomas S. Nesbitt, *Reaction in Discussion*, *in* THE ROLE OF TELEMEDICINE IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY, *supra* note 36, at 38–39 (discussing response of Linda M. Magno, M.P.A., to a participant in an open discussion regarding her presentation on Medicaid & Medicare Innovation).

perhaps creating more incentive to adopt an alternative method of delivery.[95] With increased technical capabilities, the availability of more accessible technologies, and the rise of patients as consumers, demand will increase for convenient, in-home health care modalities.[96] In short, the public increasingly accepts telemedicine as an efficient and cost-effective care delivery vehicle, particularly as compared to emergency rooms with long wait times and costly services, and urgent care units with only limited expertise available.[97]

Other potentially favorable factors for telemedicine include U.S. demographics: absent other reforms that bend the demand curve, experts anticipate an aging population, growing awareness of medical needs, and questionable population health increasing the demand for health care.[98] Demographers project the U.S. population exceeding 359 million by 2030, with one in five people sixty-five years of age or older.[99] With those sixty-five and over projected to grow by fifty-five percent from 2015 to 2030, combined with the overall poor health of American citizens, demand for medical services will continue to grow.[100] Chronic conditions—such as hypertension, heart disease, diabetes, lung problems, mental health problems, cancer, and joint pain, arthritis, or both—afflict approximately half of the American population.[101] One in four Americans suffer from two chronic conditions, and seven out of ten Americans die as a result of chronic conditions, with heart disease and cancer causing almost forty-six percent of all deaths.[102]

There is also a compelling need for improvements with respect to obesity and smoking cessation, both of which have numerous secondary health effects.[103] Meanwhile, although opinions differ, experts project fewer physicians despite increasing needs, with a projected shortfall of

95. *See id.* at 39–40.

96. *See* ACCENTURE, ACCENTURE TECHNOLOGY VISION 2015 at 7 (2015), https://www.accenture.com/t20170707T141710Z__w__/us-en/_acnmedia/Accenture/Conversion-Assets/Microsites/Documents11/Accenture-Technology-Vision-2015.pdf; *see also* ELTON & O'RIORDAN, *supra* note 63, at 27.

97. *See* ACCENTURE, *supra* note 96, at 7, 39; *see also* ELTON & RIORDAN, *supra* note 63, at 27.

98. *See New Research Confirms Looming Physician Shortage*, ASS'N AM. MED. COLLS. (Apr. 5, 2016), https://www.aamc.org/newsroom/newsreleases/458074/2016_workforce_projections_04052016.html [hereinafter *Looming Physician Shortage*].

99. SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. DEP'T OF COMMERCE, P25-1143, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, 1, 4–6 (2015).

100. *See Looming Physician Shortage*, *supra* note 98.

101. *See* OSBORN & MOULDS, *supra* note 28, at 6; *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 51; WARD ET AL., *supra* note 28.

102. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 51; *see also* OSBORN & MOULDS, *supra* note 28, at 6; WARD ET AL., *supra* note 28.

103. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 51; *see also* OSBORN & MOULDS, *supra* note 28, at 6; WARD ET AL., *supra* note 28.

almost 100,000 physicians by 2025 and similar shortages for nurses.[104] And, if the United States wishes to provide underserved populations access to health care, 96,000 doctors would be needed immediately to satisfy that particular demand.[105] Driven by increased costs and post-acute care strategies designed to reduce re-admission, health care payment systems with emphasis on value and outcome should lead to increased adoption of telemedicine technology.[106] Finally, other countries adopting telemedicine more quickly than the United States offer useful insight for best practices in technology, tactics, and payment systems.[107]

III. OBSTACLES TO TELEMEDICINE: REIMBURSEMENT, LAWYERS, AND REGULATIONS

With rapid technological improvements and all of the potential benefits, one would think that the health care industry would have embraced telemedicine as the standard of care. However, that has not occurred due to three primary obstacles: reimbursement, lawyers, and regulations.

With broadening access to technology that bridges the digital divide, increase in awareness of the benefits, demographic trends pushing for a greater demand, and insufficient numbers of physicians and health care professionals to meet that demand, the United States can anticipate an uptick in the use of telemedicine. Yet, widespread adoption requires elemental change.

Challenges to the efficient and effective deployment of telemedicine include tort liability; increased malpractice insurance rates for physicians practicing in telemedicine, payment and reimbursement hurdles; skepticism regarding efficacy; state laws limiting telemedicine and prohibiting prescriptions of controlled substances; and difficulty practicing medicine across state lines. Additionally, bigger, system-wide issues still require reform, which poses special challenges for telemedicine—lack of integration, coordination, and alignment among disparate health care providers, limiting the potential reach of a telemedicine engagement.

A. Payor Fears of Telemedicine as a Budget Buster in Fee-for-Service Model

While all payors require some degree of persuasion to expand reimbursement for telemedicine, the fee-for-service system itself is the greatest hurdle. A persistent concern about telemedicine in a fee-for-

104. *Looming Physician Shortage*, *supra* note 98.
105. *See id.*
106. *See* ELTON & RIORDAN, *supra* note 63, at 26–28, 57.
107. *Id.* at 17–20 (stating examples of Italy, Sweden, United Kingdom, and Spain, among others).

service reimbursement model impedes the adoption of telemedicine by CMS and other payors because they fear that patient-consumers will simply use telemedicine in addition to—rather than instead of—existing consumption of in-person health care services, substantially driving costs up.[108] Successful adoption requires payment incentives encouraging and rewarding appropriate use, and the fee-for-service system seems ill-equipped to handle telemedicine:

> It would be tempting to codify every distinct activity that primary care physicians perform and then pay fee-for-service for them. Unfortunately, "for every complex problem, there is a solution that is simple, neat, and wrong" (H.L. Mencken). Consider the relatively simple approach of payment for "asynchronous communication" like e-mails. Although there have been some payer experiments in reimbursing for e-mail consultations as alternatives to an office visit, payors correctly resist requests to reimburse [fee-for-service] for routine e-mails and phone calls. The transaction costs of submitting and processing legitimate claims would likely exceed the value of the actual reimbursement. In addition, there are daunting concerns about verification of such communications (consider the fraud potential for an electronic billing system linked to e-mail authoring software). Finally, there would be a serious moral hazard problem with [fee-for-service] payment for e-mails; one doubts the long-term viability of a [fee-for-service] payment system in which patients and doctors are text messaging back and forth while the third-party payer pays the bill for each interaction.[109]

Even where fee-for-service payment systems reimburse for telemedicine consultations, those interactions typically receive lower reimbursement rates than procedures, and physicians must make rational economic choices with how they allocate their limited work time.[110] In recent years, some states expanded access to telemedicine under state Medicaid provisions and enacted or considered "parity laws" requiring that telemedicine services be reimbursed by private payors in a manner comparable to brick-and-mortar health care, yet reimbursement for telemedicine in the fee-for-service model remains challenging.[111] Meanwhile, during that same period, uptake of telemedicine increased rapidly in capitated systems, providing a clear contrast.[112]

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108. *See* INST. OF MED, *supra* note 36, at 18.

109. Robert A. Berenson & Eugene C. Rich, *US Approaches to Physician Payment: The Deconstruction of Primary Care*, 25 J. GEN. INTERNAL MED. 613, 614–15 (2010) (citing Robert A. Berenson & Jane Horvath, *Confronting the Barriers to Chronic Care Management in Medicare*, HEALTH AFF. 37, 39 (2003)).

110. Karen E. Edison, *Traditional Payment Models and Regulation*, *in* THE ROLE OF TELEMEDICINE IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY, *supra* note 36, at 34, 35.

111. See, for example, Part V for discussion of federal and state legislation.

112. *See* INST. OF MED, *supra* note 36, at 39 (referencing increasing Telemedicine use in both the Kaiser system and the Veterans Administration).

Indeed, with the exception of certain experimental programs that are already outside of fee-for-service, telemedicine continues to suffer from disfavored status with CMS, severely limiting opportunities for telemedicine reimbursement through Medicare, and thus results in a low percentage of beneficiaries utilizing telemedicine.[113] Specifically, the Department of Health and Human Services (HHS) questioned the clinical efficacy of telemedicine for many medical conditions, citing privacy and security concerns, and continues to limit telemedicine benefits to rural beneficiaries in areas with limited health care professionals, missing an opportunity for telemedicine use in urban settings.[114] While HHS references efficacy and privacy concerns for limiting use of telemedicine to rural locations, the core concerns may be more elemental, and with substantial budgetary implications: (1) notions that telemedicine will enable providers to engage in fraud and abuse; or (2) fear of a net increase in costs to the Medicare program that could result from the expansion of telemedicine benefits (assuming patients will use telemedicine in addition to, rather than instead of, existing health care encounters, ratcheting up costs).[115] Finally, consider the oft quoted fear that telemedicine will cost the health care system more money if people seek more health care services once those services are more accessible.[116] This fear does not take into account long-term savings that result from people getting healthier, let alone the indirect benefits from a healthier population. These long-term preventative care savings do not "score" as well with the Congressional Budget Office (CBO), as the government incurs expenditures immediately, while the CBO scoring struggles to credit the potential benefits of improved health, fewer acute health care episodes, and reductions in chronic maladies.[117]

The Medicare, Medicaid, and State Children's Health Insurance Program Benefits Improvement and Protection Act of 2000 included severe restraints on telemedicine reimbursement in the Medicare program, and no meaningful expansion of Medicare for telemedicine has

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113. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-365, HEALTH CARE: TELEHEALTH AND REMOTE PATIENT MONITORING USE IN MEDICARE AND SELECTED FEDERAL PROGRAMS 14 (2017).

114. Notably, significant telemedicine coverage exists in certain other government programs (i.e., Veterans Administration and Medicaid) and telemedicine and data monitoring is included in health care reform initiatives (i.e., Center for Medicare and Medicaid Innovation (CMMI)), and the Medicare Shared Savings Program promotes the use of telemedicine. By and large, these examples are capitated systems that have effectively incorporated telemedicine as a useful tool to maintain population health and prevent inefficient use of care.

115. *See* Jonathon Linkous, *Overview of Common Challenges*, *in* THE ROLE OF TELEMEDICINE IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY, *supra* note 36, at 17, 18.

116. *See id.*

117. *Reps. DeGette and Burgess Introduce Legislation on to Modernize CBO Scoring*, DEGETTE.HOUSE.GOV (Oct. 1, 2015), https://degette.house.gov/media-center/press-releases/reps-degette-and-burgess-introduce-legislation-on-to-modernize-cbo ("Congresswoman Diana DeGette (D-CO) and Congressman Michael C. Burgess, M.D. (R-TX) . . . introduced bipartisan legislation, H.R. 3660, that would direct the Congressional Budget Office (CBO) to analyze scientific medical data to provide information on the savings of preventive health initiatives beyond the traditional 10-year scoring window.").

occurred since, leaving the program out of step with current, generally accepted uses of telemedicine.[118] Medicare limits telemedicine applications to mostly rural beneficiaries conducting telemedicine from certain health care facilities, with only a limited number of services covered.[119] Specifically, Medicare severely limits reimbursement for telemedicine through a triad of restrictions: type of site where the patient originates telemedicine contact from (referred to as the "originating site"); geography of the patient; and types of services that may be provided via telemedicine.[120] Medicare only permits live, interactive audio, video, or both, offering no coverage for asynchronous or remote patient monitoring telemedicine.[121] Presently, to conduct telemedicine activities, Medicare requires that the patient visit a qualifying medical facility in person.[122] Hospitals, skilled nursing facilities, physician offices, rural health clinics, and community mental health centers qualify as originating sites.[123]

As a further constraint on telemedicine, subject to limited waivers, Medicare limits originating sites to locations in rural communities (counties that are not included in a metropolitan statistical area) with a shortage of health care professionals or an entity that participates in a federal telemedicine demonstration project approved by, or receiving funding from, the Secretary of Health and Human Services as of December 31, 2000.[124] Finally, in terms of coverage for professional fees, Medicare only covers telemedicine for certain activities, such as end-stage renal dialysis related services; individual and group kidney disease education; smoking cessation; individual psychotherapy; psychiatric diagnostic interview examination; depression screening; intensive behavioral therapy for cardiovascular disease; and annual wellness visits.[125]

With such severe limitations on the type and geographic location of originating sites and the limited services approved for reimbursement, during calendar year 2014, only 0.2% of Medicare Part B fee-for-service beneficiaries utilized telemedicine services, and Medicare paid 175,000 telemedicine claims totaling approximately $14 million.[126] This constituted under 0.01% of the $257 billion annual Medicare funds spent on Part B services (physician and outpatient hospital services) in fiscal

118. Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. 106-554, 114 Stat. 2763 (2000).
119. *Id.* § 223.
120. *Id.*
121. *Id.*
122. *Id.* § 223, 114 Stat. at 2763A-488 to 89.
123. *Id.* § 223, 114 Stat. at 2763A-489.
124. *Id.*
125. DEP'T OF HEALTH & HUMAN SERVS., ICN 901705, TELEHEALTH SERVICE 3–5 (2016).
126. MEDICARE PAYMENT ADVISORY COMM'N, REPORT TO THE CONGRESS: MEDICARE AND THE HEALTH CARE DELIVERY SYSTEM 239–40 (2016) (stating numbers based on Medicare telehealth claims for calendar year 2014).

year 2014.[127] However, upon further scrutiny, these anemic Medicare telemedicine utilization figures are even worse: fifty-five percent of the claims lacked an originating site, indicating that many of these services likely occurred in patient homes, thus in violation of Medicare's originating site requirement.[128] Further, forty-four percent of claims without originating sites tied to beneficiaries located in urban areas, violating Medicare's geographic restrictions on originating sites.[129] When asked by the Government Accountability Office (GAO) about these findings in January 2017, CMS officials indicated they would "take action on [the] findings as warranted" and "determine and complete appropriate corrective actions."[130] In short, even with a large percentage of Medicare telemedicine claims flagrantly violating the originating site and geography requirements, and even with corrective action from CMS, telemedicine only reached a paltry 0.2% of Medicare beneficiaries and less than 0.01% of Medicare dollars in 2014.[131]

MACRA included a provision requiring that the GAO study telemedicine and remote patient monitoring.[132] The GAO published a report to congressional committees in April 2017 entitled "*Telemedicine and Remote Patient Monitoring Use in Medicare and Selected Federal Programs*."[133] Among other things, the study noted:

> While Medicare currently uses tele[medicine] primarily in rural areas or regions designated as having a shortage of health professionals, in the future[,] emerging payment and delivery models may change the extent to which tele[medicine] and remote patient monitoring are available and used by Medicare beneficiaries and providers in other areas. . . . CMS . . . oversees Medicare payments for telemedicine services. According to the Congressional Budget Office, the financial impact of expanding telem[edicine] and remote patient monitoring in Medicare is difficult to predict—it may reduce federal spending if used in place of face-to-face visits, but it may increase federal spending if used in addition to these visits.[134]

Accordingly, the tepid expansion by CMS of telemedicine opportunities through limited waivers for value-based demonstration models aligns with its skepticism of telemedicine.[135] Value-based models reward outcomes rather than reimbursing each patient interaction, better

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127. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 113, at 18 n.39.
128. *Id.* at 19.
129. *Id.* at 20.
130. *Id.* at 20.
131. *See id.* at 14, 18 n.39.
132. Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, § 106, 129 Stat. 87, 140–42 (2015).
133. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 113, at 1.
134. *Id.* at 2.
135. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 3021, 10306, 124 Stat. 119, 389, 939 (to be codified at 42 U.S.C. § 1315a).

aligning the economic incentives around consumption of health care services.[136] Although CMS continues to express concerns about telemedicine as a "budget buster," it is now slightly opening the door for telemedicine, allowing its use in value-based demonstration models.[137] Health care experts believe that deployment of telemedicine in these alternative, value-based models that involve accountability for managing the health of a population, such as ACOs, or managing the health of the person following a procedure, such as bundling, could mitigate concerns about overuse.[138] APMs may cover telemedicine and remote patient monitoring, even if those services are not usually reimbursed under Medicare.[139] Finally, while Medicaid offers somewhat greater flexibility than Medicare for telemedicine, Medicaid faces other challenges, with its state-by-state patchwork of differing requirements.[140]

In a practical approach that acknowledges the challenging reality of obtaining reimbursement for fee-for-service and the growing appetite of patient-consumers, some telemedicine providers boldly offer flat-rate monthly subscriptions per member.[141] In what essentially amounts to concierge medicine, the subscription buys the patient immediate access and convenience.[142] Flat-rate monthly telemedicine subscriptions play a complimentary role in a fee-for-service based model. In addition to individuals seeking this experience, self-insured employers as well as non-self-insured employers may subscribe, pursuing improvement in the health, and therefore, the effectiveness, of their workforce, and potentially driving lower insurance premiums for that healthier workforce.

In a move that may not bode well for telemedicine providers offering unlimited consults for a fixed month fee, in May 2017, UnitedHealth Group announced that it would wind down its health plan experiment that provided unlimited primary and behavioral care at no cost to the patient through its subsidiary, Harken Health.[143] In a November 2015 interview, the CEO of Harken Health proclaimed that "giving people unfettered access to relationship-based primary care will provide better counsel and advice and get members to use the broader health care system more judiciously . . . . [It is] reasonably proven that if

136. *Compare* James & Poulson, *supra* note 39 (asserting the benefits of capitated systems, such as ACOs), *with* Porter & Kapan, *supra* note 39 (summarizing the arguments for bundling).

137. U.S. DEP'T OF HEALTH AND HUMAN SERVS., REPORT TO CONGRESS: E-HEALTH AND TELEMEDICINE 3, 6–7 (2016).

138. *See id.* at 3, 7.

139. *Id.*

140. *See, e.g.*, INST. OF MED., supra note 36, at 40–41.

141. *See, e.g., Membership Pricing Options*, HIPPOHEALTH, http://www.hippohealth.com/pricing (last visited Nov. 23, 2017).

142. *See, e.g., id.*

143. Harris Meyer, *UnitedHealth Pulls Plug on Plan Testing No-Charge Primary Care*, MOD. HEALTHCARE (May 15, 2017), http://www.modernhealthcare.com/article/20170515/NEWS/170519893.

you overinvest in primary care, you have lower downstream cost in the system."[144] Value-based health care experts criticized Harken's model from the outset as poorly designed, arguing that it ignored a need for differentiation in the level of preventive services required by members with chronic issues and young, healthy members.[145] Those who are already skeptical of telemedicine's efficacy may point to Harken's failure as more evidence not to pursue telemedicine. Critics noted the experimental aspect of unlimited, low cost access to care as Harken's demise, with this scenario posing concerns for telemedicine enabling easy access to care in the comfort of the patient's own home.[146]

The continued prominence of fee-for-service undermines adoption of telemedicine, notwithstanding its potential. Telemedicine providers must acknowledge the risk of overconsumption and address fears of daunting demands and draining time and money if not handled properly. Providers may address these concerns through appropriate intake and screening procedures, and by including provisions in the terms and conditions of its policies for use of telemedicine services to limit obligations in the event of inappropriate or excessive demands. Thus, fears of driving up costs through overuse of telemedicine services may be addressed through alternative payment models, as well as proper patient case management.[147]

B. State Licensure and Telemedicine: Maintaining Moats and Walls in a Digital Age

Traditionally, establishing a physician–patient relationship requires at least an initial in-person encounter.[148] The rise in use of telemedicine offers great potential, but it raises interesting and perhaps daunting questions regarding traditional views, such as implications for payment and reimbursement systems, as well as legal liability. When do physicians' telemedicine activities constitute consulting? Can a physician make a diagnosis via telemedicine? What constitutes a physician treating a patient? Further complicating matters, some independent physicians and small providers perceive telemedicine as a threat.[149] Those providers

144. *Id.*

145. *Id.*

146. *See id.*; *see also* Sam Schaust, *Experimental UnitedHealthcare Subsidiary Harken Health Closing Down*, TWIN CITIES BUS. (May 16, 2017), http://tcbmag.com/news/articles/2017/may/experimental-unitedhealthcare-subsidiary-harken-he.

147. *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 137, at 3, 7.

148. Numerous state medical boards have codified this as a prerequisite to a physician-patient relationship. *See, e.g.*, Erica Teichert, *Texas Drops Appeal Against Teladoc Lawsuit*, MOD. HEALTHCARE (Oct. 18, 2016), http://www.modernhealthcare.com/article/20161018/NEWS/161019900.

149. Edison, *supra* note 110, at 34.

fear large networks displacing them,[150] and raise concerns about what telemedicine could mean for physician compensation.[151]

Further complicating the implementation of telemedicine, state licensure rules and requirements do not contemplate the practice of telemedicine since it transcends geographic boundaries.[152] Much like the difficulty in taxation of goods and services sold on the internet, the very aspects of telemedicine that offer potential to efficiently bring health care to areas in need frustrate the notion of state-by-state governance and regulation.[153] Health care professionals practicing telemedicine are generally subject to licensure rules of (1) the state(s) in which their patients are physically located and (2) the state(s) in which they are practicing.[154] Consequently, telemedicine providers must be admitted to practice in the state in which they practice and in the states where their patients are located.[155] Furthermore, a multistate telemedicine program must comply with a wide array of disparate state regulations for its operations.[156]

By way of example, citing a desire to ensure quality of care, numerous state medical boards mandate an in-person consult prior to beginning telemedicine services.[157] Specifically, the Texas Medical Board proposed a rule requiring that either (1) "physicians to meet with patients in person before . . . treat[ing] them remotely," or (2) another health care provider be physically present at any initial telemedicine consultation to create a physician–patient relationship.[158] Teladoc—a Texas-based telemedicine company—asserted that the rules were anticompetitive and undermined access to care, claiming the Texas

150. *Id.*

151. INST. OF MED., *supra* note 36, at 41.

152. In the United States, physician licensure must be obtained on a state by state basis, and physicians cannot practice outside of their state(s) of licensure. *See Obtaining a Medical License*, AM. MED. ASS'N, https://www.ama-assn.org/education/obtaining-medical-license (last visited Nov. 23, 2017). *But see The IMLC*, INTERSTATE MED. LICENSURE COMPACT, http://www.imlcc.org (last visited Nov. 23, 2017) ("The Interstate Medical Licensure Compact offers a new, voluntary expedited pathway to licensure for qualified physicians who wish to practice in multiple states.").

153. *See The IMLC*, *supra* note 152, at 41 (summarizing Manish N. Oza's, M.D., Wellpoint Comprehensive Health Solution and Jeff Stensland's, Ph.D., MedPAC comments regarding increased costs of telehealth).

154. *See Obtaining a Medical License*, *supra* note 152.

155. Note that at least one initiative addressing these complications exists: the Interstate Medical Licensure Compact, an agreement between 22 states and the 29 Medical and Osteopathic Boards in those states, with the mission of:

> [I]ncreas[ing] access to health care for patients in underserved or rural areas and allowing them to more easily connect with medical experts through the use of telemedicine technologies. While making it easier for physicians to obtain licenses to practice in multiple states, the Compact strengthens public protection by enhancing the ability of states to share investigative and disciplinary information.

The IMLC, *supra* note 152.

156. *See Obtaining a Medical License*, *supra* note 152. *But see The IMLC*, *supra* note 152.

157. *See* Linkous, *supra* note 115, at 18.

158. *See, e.g.*, Teichert, *supra* note 148.

Medical Board violated the federal antitrust laws requiring the state to supervise the creation of rules impacting competition.[159] Even as the Texas Medical Board withdrew its appeal before the U.S. Court of Appeals for the Fifth Circuit, its interim executive director said that "[t]he regulation of medicine is a right reserved for the states, and the board stands behind and will seek future vindication of its state-action immunity for performing the duties assigned it by the Texas legislature."[160] All of this came as Texas suffered a profound physician shortage, which bordered on a public health crisis: thirty-five Texas counties lacked even one practicing physician.[161] While states justifiably cling to their right to regulate the practice of medicine, unnecessary restrictions on physicians' ability to engage in telemedicine is a disservice to the state and its residents who could benefit from lower costs and improved access to care.

In late May 2017, the Texas legislature finally resolved the standoff between the Texas Medical Board and Teladoc, passing legislation allowing for a patient–physician relationship without an initial in-person visit.[162] Notably, in addition to the Teladoc litigation against the Texas Medical Board, the Board was under Federal Trade Commission (FTC) investigation for possible antitrust violations based on allegations that its position restricted the practice of telemedicine in Texas.[163] However, the FTC announced closure of its investigation shortly after passage of this new telemedicine law, which overrode the Texas Medical Board's prior restrictions on telemedicine.[164]

C. Tort Liability for Telemedicine

Tort liability poses risk in telemedicine just as it does in traditional health care settings, plus some degree of additional risk due to remoteness and technology.[165] Joseph P. McMeniman and Paul A. Greve, Jr. summarize the most prevalent claims in telemedicine in their article, *Telemedicine Law and Liability*.[166] They note that the prevalence of tele-radiology has led to a number of claims, including:

> Incorrect interpretations of diagnostic images of various types by a radiologist, from home or some other remote location; [m]iscommunication over the timeliness of the required reading: e.g.

159. *Id.*
160. *Id.*
161. *Id.*
162. James S. Tam, *Momentum Continues in Telemedicine Legislative Activity with Passage of Texas Law*, TECHHEALTH PERS. (June 26, 2017), https://www.techhealthperspectives.com/2017/06/26/momentum-continues-in-telehealth-legislative-activity-with-passage-of-texas-law.
163. *Id.*
164. *Id.*
165. Joseph P. McMeniman & Paul A. Greve, Jr, *Telemedicine Law and Liability: 2015*, PROF'L LIABILITY UNDERWRITING SOC'Y J., Sept. 2015, at 13.
166. *Id.* at 12–13.

> a "stat" reading was requested but not provided; [f]ailure to communicate presenting symptoms to a remote, examining neuro-radiologist; failure to timely diagnose a spinal abscess resulting in permanent impairment; [i]ncorrect remote reading of fetal monitoring strips by an obstetrician; [s]uspected stroke incorrectly diagnosed by a tele-stroke consult; [f]ailure to adequately remotely monitor and assess an ICU patient for blood loss and hypotension resulting in severe brain damage; failure to summon an intensivist for a more thorough bedside evaluation.[167]

Additional general telemedicine allegations and complaints include claims that physicians should have conducted an examination in-person instead of by videoconference; an image distortion caused a misdiagnosis; a technology or power failure during a consultation caused a harmful delay or error; negligent prescription based on a video examination; and negligent failure to provide necessary telemedical support.[168] Although medical records increasingly reside "in the cloud" regardless of treatment modality, to the extent reliant on additional use of technology infrastructure, telemedicine presents some incremental exposure for potential hacks or privacy breaches.[169]

Numerous guidelines proffered by telemedicine associations and trade groups attempt to mitigate these risks.[170] Although these documents are published to provide guidance, plaintiffs' counsel often wield them as a weapon, treating them as the minimum standard of care that providers must abide by.[171] The problem is aggravated by the fact that as of 2008, there were already more than 2,700 clinical practice guidelines promulgated by a wide variety of groups and organizations, which often contained inconsistencies, along with the inherent challenge of regulating a rapidly emerging treatment modality on the verge of becoming its own big business industry.[172] These well-intentioned guidelines tend to be inflexible in light of the technology involved and quickly become outmoded given technological evolution. They also often lack sufficient detail or basis for standards and can be promulgated by parties with

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167. *Id.* at 12.

168. *Id.*

169. *See, e.g.*, Brian Krebs, *The Equifax Breach: What You Should Know*, KREBSONSECURITY (Sept. 11, 2017), https://krebsonsecurity.com/2017/09/the-equifax-breach-what-you-should-know (describing the recent Equifax data breach); Brian Krebs, *Target Hackers Broke in Via HVAC Company*, KREBSONSECURITY (Feb. 5, 2014), https://krebsonsecurity.com/2014/02/target-hackers-broke-in-via-hvac-company (describing the Target data breach).

170. *See, e.g.*, Hyams et al., *Proactive Guidelines and Malpractice Litigation: A Two-way Street*, 122 ANNALS OF INTERNAL MED. 450, 451–52 (1995) (stating only 17 of 259 claims reviewed (6.6%) involved clinical practice guidelines; of these, in 12 the guidelines were inculpatory and in 4, exculpatory); Maxwell J. Mehlman, *Medical Malpractice Guidelines as Malpractice Safe Harbors: Illusion or Deceit?*, 40 J. L., MED. & ETHICS 286, 297 (2012) (stating in 24 additional reported cases, the defense used guidelines successfully in 9 and the plaintiffs in 11).

171. *See, e.g.*, Hyams et al., *supra* note 170; Mehlman, *supra* note 170, at 286.

172. *See* INST. OF MED., CLINICAL PRACTICE GUIDELINES WE CAN TRUST 2 (Robin Graham et al. eds., 2011).

conflicts of interest, including parties with a vested interest in their corner of the industry.[173] In the absence of a unifying federal standard, such disparate guidelines will continue to proliferate.

While the standard of care and practice guidelines are a problem for any provider facing tort liability, telemedicine providers are particularly at risk because the practice of telemedicine is new and evolving. Providers, medical boards, telemedicine associations, and malpractice insurers must establish practical solutions to ensure workable standards for practicing telemedicine that do not obstruct the adoption of telemedicine technologies.

IV. TAILOR-MADE OPPORTUNITIES FOR EXPANDED USE OF TELEMEDICINE: RURAL AMERICA AND LONG-TERM CARE FACILITIES

The push toward integrated care and related care reforms, combined with the physician shortfall and increasing chronicity in U.S. population health, point toward the need to fully adopt telemedicine technologies to address these issues. While all patients could likely benefit from the use of telemedicine technologies, the adoption of telemedicine is particularly urgent in two segments of the health care industry: (1) rural hospitals and (2) skilled nursing and long-term care facilities.

A. Rural Hospitals in Critical Condition

Since the beginning of 2010, eighty-three rural hospitals across the country have closed their doors.[174] This dynamic forces more and more Americans to either do without, or haul long distances for health care—often leading to health risks most Americans would find unacceptable.[175] While not all submarket and community situations are alike, it seems that with every passing week, state and national news organizations report the closure or deep financial struggles of another rural hospital.[176]

Each closure results in tragic stories of community members forced to drive long distances to obtain basic and emergency care.[177] Certain emergencies simply will not wait for a long drive or a helicopter flight.

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173. *See, e.g.*, Hyams et al., *supra* note 170; Mehlman, *supra* note 170, at 292.

174. Victoria Pelham, *Medicaid Overhaul Could Imperil Rural Health, Analysts Warn*, BLOOMBERG L. (May 23, 2017), https://www.bna.com/medicaid-overhaul-imperil-n73014451402; *see also 83 Rural Hospital Closures: January 2010 – Present*, UNC CECIL G. SHEPS CTR. FOR HEALTH SERVS. RES., http://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures (last visited Feb. 13, 2018).

175. *See, e.g.*, Marianne Vanderschuren & Duncan McKune, *Emergency Care Facility Access in Rural Areas Within the Golden Hour?: Western Cape Case Study*, INT'L J. HEALTH GEOGRAPHICS (Jan. 16, 2015).

176. *See, e.g.*, The Summit Daily, *New Leadville Hospital Dealt Major Setback After Feds Withhold Loan*, DENV. POST (May 23, 2017, 7:09 AM), http://www.denverpost.com/2017/05/23/leadville-hospital-building-repairs-setback (stating St. Vincent's Hospital, a Critical Access Hospital serving a mountainous rural area is the only hospital in Lake County and North America's highest city of Leadville, Colorado).

177. *See, e.g.*, *id.*

For example, treatment for heart attacks and strokes must occur within the "golden hour"—the first hour—to avert permanent loss of heart muscle and brain tissue, and time is of the essence for mother and baby in pregnancies with complications.[178] In addition to undermining the health and wellness of local residents, closures of rural hospitals typically take away what is often a primary economic engine in proud communities.[179]

Rural communities find that the ACA and market forces challenge their stand-alone hospitals.[180] For states adopting the Medicaid expansion, opportunity offered by the ACA, while the uninsured population decreased, also created other challenges for rural facilities, such as decreased support for the uninsured; reduced reimbursement rates; increased compliance and electronic health records requirements; strict regulatory requirements; increased accountability to federal and state regulatory agencies; and tough penalties when patients return to the hospital after their release to be readmitted.[181] Together with lingering effects of the economic recession, tight state and local government budgets, and payors permitting fewer patients to stay overnight, rural hospitals often find themselves trapped in a perfect storm that could force many more closures in the years ahead.

Hospitals are now required to publish charges annually, creating greater transparency and empowering counterparties to negotiate.[182] Hospitals must find efficiencies as they compete against large health care systems in responding to the ACA's demands for better coordinated high-quality care as well as reimbursement reductions under federal and state health care programs.[183] Pay-for-performance programs harshly impact facilities with high re-admission rates or clinical quality measures

178. *See* Vanderschuren & McKune, *supra* note 175.

179. Bram Sable-Smith, *Deep Cuts to Medicaid Put Rural Hospitals in the Crosshairs*, CNNMONEY (June 24, 2017, 9:30 AM), http://money.cnn.com/2017/06/24/news/economy/medicaid-rural-hospitals/index.html ("And a rural hospital closure goes beyond people losing health care. Jobs, property values and even schools can suffer. Pemiscot County already has the state's highest unemployment rate. Losing the hospital would mean losing the county's largest employer.").

180. *See* Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–18122 (2012); *see also* Julie Brill, Comm'r Fed. Trade Comm'n, Keynote Address at the 2013 National Summit Provider Market Power Catalyst for Payment Reform: Promoting Healthy Competition in Health Care Markets: Antitrust, the ACA, and ACOS 1–3 (June 11, 2013) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_statements/promoting-healthy-competition-health-care-markets-antitrust-aca-and-acos/130611cprspeech.pdf); Stephen Barlas, *Hospitals Struggle with ACA Challenges: More Regulatory Changes are in the Offing in 2015*, 39 PHARMACY & THERAPEUTICS 627, 627–29, 645 (2014).

181. *See* CRISTINA BOCCUTI & GISELLE CASILLAS, THE HENRY J. KAISER FAMILY FOUND., AIMING FOR FEWER HOSPITAL U-TURNS: THE MEDICARE HOSPITAL READMISSION REDUCTION PROGRAM 4, 8–9 (2017), http://files.kff.org/attachment/Issue-Brief-Fewer-Hospital-U-turns-The-Medicare-Hospital-Readmission-Reduction-Program.

182. *See* 42 U.S.C. § 1395w-4 (2012); *see also* Julie Brill, *supra* note 180; JESSICA CURTIS, COMMUNITY CATALYST: HOSPITAL ACCOUNTABILITY PROJECT, WHAT DOES THE AFFORDABLE CARE ACT SAY ABOUT HOSPITAL BILLS? 2, 4, 16, 17 (2015).

183. *See* Julie Brill, *supra* note 180, at 2–4.

that fall below national standards.[184] A Kaiser Family Foundation report on hospital readmissions noted that "lower-income communities and families may have limited resources for reliable transportation to take patients to follow-up medical appointments, assistance with patient mobility and daily living needs during recovery, and access to foods that meet patients' special dietary needs."[185] One way to mitigate patient and community challenges with transportation to follow-up appointments to achieve lower hospital readmissions in distant rural areas: greater access to telemedicine, either provided in the home, or in community-based clinics in closer proximity than the nearest hospital.

In the event that the rural hospital proves unsustainable, the next best alternative may be a free-standing emergency room with less bed space or a small urgent care clinic leveraging additional expertise and bandwidth through telemedicine programs and harnessing ambulance or helicopter support when absolutely necessary. Telemedicine may provide an opportunity to save rural health care, avoiding "selling out" via a sale, or, worse yet, closure. While funding challenges and competition will continue to plague rural hospitals, telemedicine provides rural facilities with the ability to leverage telemedicine in concert with regional partners to bring specialist care into the rural facility rather than allowing patients to drift to large hospitals in metro areas. Gary Capistrant, Chief Policy Officer of the American Telemedicine Association, said the following about the profound change telemedicine can bring:

> Twelve states have less than 2,000 specialists, and [eleven] states have less than [eleven] specialists per 10,000 [people]. Would it be right to limit individuals in those states just to the provider pools within their own states? Three states are on both of these lists: Idaho, Montana, and Wyoming. This is especially a problem for people with special needs, such as in the care of rare diseases (diseases that affect less than 200,000 Americans). What kind of access does somebody with one of those diseases have in rural or underserved areas? Where would you go if you needed a pediatric cardiologist who spoke Spanish or knew sign language?[186]

If telemedicine expanded beyond current limits, a robust telemedicine program could retain patients and compliment on-site physicians. However, for telemedicine to alleviate the rural health crisis, payors—particularly the federal government—must greatly expand treatments eligible for reimbursement.[187] At present, without dramatic expansion of the type of permitted and recognized telemedicine services, community members will still need to travel significant distances for

184. BOCCUTI & CASILLAS, *supra* note 181, at 7–9.

185. *Id.* at 8.

186. *See* Gary Capistrant, *Licensure*, *in* THE ROLE OF TELEMEDICINE IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY, *supra* note 36, at 20.

187. *See supra* Section IV.A.

many key aspects of their health care needs.[188] Leveraging telemedicine to preserve rural hospitals should be a priority to ensure that patients in rural areas have reasonable access to care, both through technology and in-person visits.

B. Telemedicine Benefits for Skilled Nursing and Long-Term Care Facilities

Telemedicine also offers substantial benefits to the long-term care industry.[189] Aging populations require significant medical attention, and skilled nursing and long-term care facilities face challenges in properly handling an aging patient's needs.[190] While a frail resident may not wish to be transported to a hospital, skilled nursing and long-term care facilities lack onsite resources and thus face legal liability if these facilities undertake medical efforts onsite that fall short of the standard of care.[191] Meanwhile, the ambulance transport and hospital in-patient-stay increase costs significantly, with skilled nursing and long-term care facilities losing reimbursements for each day the patient is offsite.[192] Having arrived at the hospital, the skilled nursing and long-term care populations, typically frail and elderly to begin with, are then exposed to potential hospital-acquired secondary infections.[193] Finally, these patients cannot simply checkout at their own convenience and obtain transportation from a friend or relative.[194] Once admitted to the hospital—out of protection for their own well-being and protection for hospital management—patients must navigate a legal and bureaucratic maze to return home.[195] The flurry of required paperwork may exceed the capacity of the ill patient, and some do not have access to assistance, such as a trusted friend, advisor, or attorney.

While treating marginal cases in less expensive settings than hospitals makes sense, the long-term care industry lacks engagement with telemedicine, as evinced by Medicare's scant reimbursements.[196] This conundrum drew the attention of the Medicare-Medicaid Coordination Office, which partnered with the Center for Medicare & Medicaid Innovation to establish "The Initiative to Reduce Avoidable Hospitalizations Among Nursing Facility Residents" to enhance the

188. INST. OF MED., *supra* note 36, at 6, 14, 20, 31–33, 35, 55, 102.

189. *See Initiative to Reduce Avoidable Hospitalizations Among Nursing Facility Residents*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Oct. 20, 2017), https://innovation.cms.gov/initiatives/rahnfr.

190. *See id.*

191. *See id.*

192. *See id.*

193. *HAI Data and Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 25, 2016), https://www.cdc.gov/hai/surveillance/index.html ("On any given day, about one in 25 hospital patients has at least one healthcare-associated infection.").

194. *See Initiative to Reduce Avoidable Hospitalizations Among Nursing Facility Residents*, *supra* note 189.

195. *See id.*

196. *See supra* Section IV.A.

quality of care for people in long-term facilities, specifically focusing on avoiding unnecessary inpatient hospitalizations.[197] "CMS research on Medicare–Medicaid enrollees in [nursing] facilities found that approximately 45% of hospital admissions among individuals receiving either Medicare skilled nursing facility services or Medicaid nursing facility services could have been avoided, accounting for 314,000 potentially avoidable hospitalizations and $2.6 billion in Medicare expenditures in 2005."[198] Consider the benefits of remote patient monitoring: a proper on-site response when triggered by a patient's vitals or other information could prevent deterioration in health among vulnerable populations by identifying problems earlier on and by avoiding hospital-acquired infections.[199] Further, telehealth can mitigate costly readmissions following discharge by increasing timely access to providers with a relationship with the patient.[200] With great potential for saving money and improved patient health, adopting telemedicine in skilled nursing and long-term care facilities is a solution benefiting all parties—keeping the resident-patient comfortable at home; avoiding losses in daily reimbursements for the care facility; reducing readmissions and associated penalties; and saving payors substantial amounts in ambulance transit and overnight stays at hospitals.[201]

V. PATHS TO MORE EFFICIENT USE OF TELEMEDICINE

Despite a myriad of obstacles of varying severity impeding the broader adoption of telemedicine, proposed solutions for many of those obstacles offer meaningful potential for the industry. Broad health care delivery and payment reforms, along with establishing common standards and implementing changes addressing its unique challenges, would pave the way for telemedicine to gain traction in the United States. Fully adopting telemedicine would require significant support and participation from payors and regulatory agencies alike. Even so, the potential benefits from improvements in access to, and quality of, care—at a significantly lower cost—suggest paving the way for the efficient use of telemedicine will be worth the effort.

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197. *Initiative to Reduce Avoidable Hospitalizations Among Nursing Facility Residents*, *supra* note 189.

198. *Id.*

199. Niall Brennan & Tim Engelhardt, *Data Brief: Sharp Reduction in Avoidable Hospitalizations Among Long-Term Care Facility Residents*, CMS BLOG (2017), https://blog.cms.gov/2017/01/17/data-brief-sharp-reduction-in-avoidable-hospitalizations-among-long-term-care-facility-residents ("In 2015 . . . . Medicare beneficiaries eligible for full Medicaid benefits living in long-term care facilities . . . accounted for 270,000 hospitalizations. . . . [A]lmost a third . . . of these hospitalizations resulted from six potentially avoidable conditions: bacterial pneumonia, urinary tract infections, congestive heart failure, dehydration, chronic obstructive pulmonary disease or asthma, and skin ulcers.").

200. Phil McNulty, *Achieving Meaningful ROI by Reducing Rehospitalizations*, MCKNIGHT'S LONG-TERM CARE NEWS (Sept. 21, 2015).

201. *See* Brennan & Engelhardt, *supra* note 199.

A. System-Wide Transition from Fee-for-Service Medicine Towards Models Focused on Value and Population Health

One major obstacle to the adoption of telemedicine is payors' fear that under a fee-for-service model, telemedicine will increase costs.[202] Policy experts have long expressed profound concerns with fee-for-service medicine, but longstanding health care regulatory laws prevent more innovative delivery systems from expanding beyond their current "experimental" status.[203] Meanwhile, the current debate on Capitol Hill continues to focus on "access" to health care—how patients obtain insurance coverage and how it is paid for—rather than focusing on reforms promoting alternatives to fee-for-service.[204] Unfortunately, even assuming politicians address comprehensive reform in access to health care, substantial legal obstacles remain.[205]

Fundamentally, the U.S. health care system is dysfunctional and in need of reform.[206] Telemedicine can provide core health care services in many areas and serve as a compliment to traditional in-person visits, which do not fit neatly within a fee-for-service system.[207] Patient compliance suffers in traditional fee-for-service medicine: the follow-up visit that is inconvenient for the patient, given the travel involved and time spent in a waiting room in exchange for a short follow-up.[208] Periodic check-ins could lead to successful health care reform, monitoring key patient vital signs and ensuring patient compliance with post-operative instructions, proper use of prescription drug treatments, and rehabilitation through correct physical therapy techniques. As long as fee-for-service medicine remains the baseline for delivery of care, the use of telemedicine for these smaller interactions will prove challenging. In a fee-for-service system, any interaction that lacks a reimbursement code is uncompensated.[209] While some physicians care about their patients and their profession, they cannot afford to be uncompensated for services they provide. The smaller interactions that telemedicine can

202. Linkous, *supra* note 115, at 17–18.

203. *See* discussion *infra* p. 49 and note 229; *see, e.g.*, Stark Law, 42 U.S.C. § 1395nn (2012) (prohibiting physician referrals to entities in which they have any economic interest); 42 U.S.C. § 1320a-7b(b) (Anti-Kickback Statute).

204. *See* American Health Care Act of 2017, H.R. 1628, 115th Cong. (1st Sess. 2017).

205. *See supra* Part III.

206. *See supra* Section I.B.

207. *See* Beck & Margolin, *supra* note 17, at 10.

208. BOCCUTI & CASILLAS, *supra* note 181.

209. *See* David E. Beck & David A. Margolin, *Physician Coding and Reimbursement*, 7 Ochsner J., no. 1, Spring 2007, at 8–15 ("Physician reimbursement from Medicare is a three-step process: 1) appropriate coding of the service provided by utilizing current procedural terminology (CPT®); 2) appropriate coding of the diagnosis using ICD-9 code; and 3) the Centers for Medicare and Medicaid Services (CMS) determination of the appropriate fee based on the resources-based relative value scale (RBRVS). . . . For a new procedure or technology to receive a code, it must first meet criteria: It must be done by a reasonable number of the specialty that presents the code, be performed at reasonable frequency, be done throughout the country, and have peer-reviewed literature supporting its efficacy. . . . Once a procedure or service receives a code, it needs to be valued for reimbursement purposes.").

support should not be relegated to "loss leader" status, dependent upon physician good will or willingness to "do the right thing" by giving away their services.

Some political leaders tout high-deductible insurance plans paired with health savings accounts as a path toward efficiency within the existing fee-for-service system, forcing patients to evaluate their own health care spending as market participants.[210] To some degree, this approach constitutes de facto self-rationing of health care, as health care consumers rein in their use of health care unless and until their annual deductible is met.[211] To the extent that health care consumers wish to allocate their own health care expenditures more efficiently, telemedicine can play a key role in empowering the patient as consumer, enabling patients to reduce spending by using it as part of careful management of their own care. Telemedicine can support keeping populations healthy by caring for a person in the most efficient time, manner, and setting; enhancing preventive medicine; supporting patient compliance with post-acute care treatment instructions; and reducing acute care episodes and readmissions to hospitals, creating efficiencies and cost savings.

B. Recent Federal Legislation Proposed to Overcome Barriers to Telemedicine

Even without progress toward reimbursement models focused on value-based health care and population health, simple legislative reforms offer great promise for broader adoption of telemedicine. With or without health care reform, incorporating telemedicine across a broad spectrum of payor and provider systems can change the health care world. In response to some obstacles inherent in broad adoption of telemedicine, congressional representatives introduced federal legislation addressing these challenges.[212] The Telehealth Modernization Act of 2015 establishes that if a state authorizes a health care professional to deliver health care services, the state should authorize delivery of those services via telemedicine modalities, subject to certain conditions.[213] Addressing concerns about telemedicine standard of care, the Act mandates a litany of best practices.[214] Additionally, the Act requires

210. Jessie Hellmann, *GOP Healthcare Plans Push Health Savings Account Expansion*, HILL (Feb. 22, 2017, 1:22 PM), http://thehill.com/policy/healthcare/320656-gop-healthcare-plans-push-health-savings-account-expansion ("'What if 30 percent of the public had health savings accounts?' Sen. Rand Paul (R-Ky.) asked. 'What do you do when you use your own money? You call up doctors and ask the price. . . . If you create a real marketplace, you drive prices down.'").

211. Notably, the healthiest Americans who may self-ration are not those driving the costs in the system; the high-deductible insurance plans paired with health savings accounts do little to address the exorbitant cost of chronic conditions and end-of-life care, and instead leave these patients to annually burn through their personal savings until deductibles have been exceeded simply to meet basic health care needs.

212. *See, e.g.*, Telehealth Modernization Act of 2015, H.R. 691, 114th Cong. (1st Sess. 2015).

213. *Id.*

214. *Id.* § 3.

document sharing from the medical consultation, a best practice that can often prove difficult in a traditional setting.[215] Finally, acknowledging fears that telemedicine will provide easy access to controlled substances, the Act strictly bars physicians from prescribing certain drugs.[216]

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(1) ACCESSIBILITY AND REVIEW OF MEDICAL HISTORY.–The health care professional should have access to the medical history of the individual, and should review such medical history with the individual, to the same extent that the health care professional would have access to such medical history and would review such medical history if delivering the health care in person.

(2) IDENTIFICATION OF UNDERLYING CONDITIONS AND CONTRAINDICATIONS.–To the extent practicable, the health care professional should attempt to identify the conditions underlying the symptoms, if any, reported by the individual before such professional provides any diagnosis or treatment to the individual. In the case that the health care professional recommends a treatment to the individual, the health care professional should review with the individual the contraindications to the recommended treatment.

(3) DIAGNOSIS.–Subject to the professional discretion of the health care professional, such professional should have a conversation with the individual adequate to establish any diagnosis rendered.

Id.

215. *Id.*

(4) DOCUMENT EVALUATION, MEDICAL RECORDS, AND PROVISION OF MEDICAL INFORMATION.–The health care professional should document the evaluation and treatment delivered to the individual, if any, for the purpose of generating a medical record of the encounter. At the option of the individual, the health care professional should:

(A) provide the individual with medical information, in standard medical record format, about such evaluation and treatment; and

(B) send any documentation concerning such evaluation and treatment to one or more selected health care professionals responsible for the care of the individual.

The requirements go on to stipulate that health care professionals provide their credentials, and not make promises of outcomes in return for money or simply completing questionnaires:

(5) TRANSPARENCY REGARDING PROFESSIONAL CREDENTIALS.–At the option of the individual, the health care professional should provide to the individual, in electronic and paper format, information regarding the health care education, certification, and credentials of the health care professional.

(6) NO ASSURANCE CONCERNING ITEMS OR SERVICES.–The health care professional should offer no assurance to the individual that any item or service, including a prescription, will be issued or provided:

(A) in exchange for the payment of the consultation fee charged by the health care professional; or

(B) solely in response to the individual completing a form or questionnaire.

Id.

216. *Id.*

(7) PRESCRIPTION REQUIREMENTS.–Any prescription issued by the health care professional as part of the health care delivered to the individual should meet the following requirements:

(A) The prescription is issued for a legitimate medical purpose in the usual course of professional practice.

(B) The prescription is issued by a health care professional who has obtained a medical history and conducted an evaluation of the individual to whom such prescription is issued adequate to establish a diagnosis.

(C) The prescription is not for a drug or substance in schedule II, III, or IV of section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(D) The prescription is filled by an appropriately licensed dispensing entity.

Id.

In addition to the Telehealth Modernization Act of 2015, the Telehealth Enhancement Act of 2015 promotes and expands the application of telemedicine under Medicare, Medicaid, and other federal health care programs, including ACOs and bundling.[217] The Act requires robust reporting on quality measures:

> As a condition for receiving payment for health home services provided to an eligible individual with chronic conditions, a designated provider shall report, in accordance with such requirements as the Secretary shall specify, including a plan for the use of remote patient monitoring, on all applicable measures for determining the quality of such services. When appropriate and feasible, a designated provider shall use health information technology in providing the Secretary with such information.
>
> Not later than [two] years after the date of the enactment of this Act, the Secretary of Health and Human Services shall survey States . . . on the nature, extent, and use of the option under such section particularly as it pertains to: (i) hospital admission rates; (ii) chronic disease management; (iii) coordination of care for individuals with chronic conditions; (iv) assessment of program implementation; (v) processes and lessons learned . . . ; (vi) assessment of quality improvements and clinical outcomes under such option; and (vii) estimates of cost savings.[218]

The proposed language regulates telemedicine providers more stringently than traditional in-person providers, as these reporting requirements and the Health and Human Services mandate to collect additional data represent additional burden on telemedicine.

Despite the proliferation of abuse of prescription drugs, several states recently reversed prior stringent restrictions on the prescription of controlled substances via telemedicine without an in-person examination.[219] These reversals indicate a growing trend acknowledging the increased role of telemedicine, and the clinical importance of controlled substances in numerous practices engaged in telemedicine, such as emergency medicine, hospitalists, telepsychiatry, and endocrinology.[220] These states recognize that the role of telemedicine, coupled with the ability to prescribe, outweighs incremental risk of proliferation of controlled substances with those states relying upon

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217. Telehealth Enhancement Act of 2015, H.R. 2066, 114th Cong. (1st Sess. 2015).

218. *Id.* § 102.

219. *See, e.g.*, S.B. 213, 99 Leg, Reg. Sess. (Mich. 2017); S.B. 226, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017) (reversing prior laws to now allow prescription of controlled substances via telemedicine without an in-person examination).

220. *See, e.g.*, Nathaniel M. Lacktman & Thomas B. Ferrante, *Michigan Telemedicine Prescribing and Controlled Substance Laws*, HEALTH CARE L. TODAY (June 22, 2017), https://www.healthcarelawtoday.com/2017/06/22/michigan-telemedicine-prescribing-and-controlled-substance-laws-2/https://www.healthlawyers.org/hlresources/Pages/archive.aspx.

federal laws regulating the remote prescription of controlled substances once permissible under state law.[221]

A third telemedicine act, the Tele-Med Act of 2015, cuts the Gordian knot of state regulation that hinders the practice of telemedicine across state lines.[222] This Act permits certain Medicare providers, licensed in a state, to provide telemedicine services to certain Medicare beneficiaries in a different state, without requiring licensure in that state.[223] Unfortunately, all three of these legislative proposals did not pass in the 114th Congress and the future remains uncertain in the current Congress.[224]

On a positive note, several congressional representatives recently founded the bipartisan Congressional Telehealth Caucus, a growing group dedicated to reinvigorating telemedicine reform at the federal level.[225] The group promotes the Medicare Telehealth Parity Act of 2017.[226] The Act expands coverage of Medicare for telemedicine services over the course of three phases, eventually allowing originating sites to include home telemedicine sites, and expanding qualifying originating geographic locations to include counties in metropolitan statistical areas with populations above 100,000,[227] which would "modernize the way Medicare reimburses telehealth services."[228]

In May 2017, the Senate Finance Committee moved forward with the Chronic Care Act, a bipartisan, limited expansion of telemedicine in Medicare for consultations for monthly clinical assessments for those on home dialysis and for patients with stroke complications.[229] Senator Roger Wicker stated that "Medicare is behind the curve—limiting access to millions of seniors. The Chronic Care Act is a step in the right direction."[230] However, if anything, hospital leaders adamantly pushed for greater expansion of telemedicine than the Chronic Care Act

221. *See* Ryan Haight Online Pharmacy Consumer Protection Act of 2008, 21 U.S.C. § 829(e) (2012) (governing remote prescription of controlled substances).

222. TELE-MED Act of 2015, H.R. 3018, 114th Cong. (2015).

223. *Id.*

224. *See H.R.691 – Telehealth Modernization Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/691 (last visited Nov. 27, 2017); *H.R.2066 - Telehealth Enhancement Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/2066 (last visited Nov. 27, 2017); *S.1778 – TELE-MED Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/1778 (last visited Nov. 27, 2017).

225. Nathaniel M. Lacktman & Thomas B. Ferrante, *Is Telemedicine Change Coming to Congress? The Medicare Telehealth Parity Act of 2017Among Several New Bills*, HEALTH CARE L. TODAY (July 20, 2017), https://www.healthcarelawtoday.com/2017/07/10/is-telemedicine-change-coming-to-congress-the-medicare-telehealth-parity-act-of-2017-among-several-new-federal-bills.

226. Medicare Telehealth Parity Act of 2017, H.R. 2550, 115th Cong. (2017).

227. *Id.*

228. Lacktman & Ferrante, *supra* note 220.

229. Creating High-Quality Results and Outcomes Necessary to Improve Chronic (CHRONIC) Care Act of 2017, S. 870, 115th Cong. (2017).

230. Rich Daly, *Medicare Telehealth Set to Expand in Bipartisan Legislative Push*, HFMA (May 16, 2017), https://www.hfma.org/Content.aspx?id=54165.

presently offers.[231] With the Congressional Budget Office's report pending, John Lovelace, president of the University of Pittsburgh Medical Center Health Plan Insurance Services Division, refuted dour expectations of increased spending and no savings in the long term.[232] Mr. Lovelace testified that the "evaluation of [proposals to expand access to telemedicine] to date indicate there is not an incremental cost to this, rather they replace services people would otherwise get in doctors' offices, urgent care centers, and emergency centers."[233]

Overall, while the Chronic Care Act and Medicare Telehealth Parity Act are encouraging, they hold an uncertain future in a Congress with a very full slate, and each Act takes only small steps towards expanding telemedicine. Even with federal legislation expanding access to reimbursement for telemedicine, entrepreneurs in the telemedicine space must navigate a thicket of general health care regulations that, while well-intentioned, nonetheless stifle innovation.[234] Several examples include the Stark Law, which prohibits physician referrals to entities in which they have any economic interest, as well as the Anti-Kickback Statute, which prohibits the offer, payment, solicitation or receipt of any form of remuneration in return for, or with the purpose to induce, the referral of Medicare, Medicaid or other federal health care program patients, and other fraud and abuse laws.[235] Moreover, while new businesses often offer incentives to first time visitors, any form of discount offered to new telemedicine subscribers could be viewed as an improper patient inducement under the Civil Monetary Penalties Law—which includes a prohibition against offering or paying remuneration to a patient who is a Medicare or Medicaid beneficiary with the purpose to encourage a beneficiary to select a particular provider.[236] Providers cannot offer remuneration to beneficiaries if they know or should know that the remuneration is likely to influence the beneficiary's decision to select a certain provider.[237] In this context, remuneration includes the transfer of items or services for free, or other than fair market value, effectively barring discounts for new adopters of telemedicine services.[238] Thus, despite the cost of hospital re-admissions, and telemedicine's potential to assist in maintaining healthy populations, Congress and the CMS show only limited interest in promoting

231. *Id.*
232. *Id.*
233. *Id.*
234. *See* Michael King, *Achieving Health Care Efficiencies Through Consolidation and Alternative Models: Irreconcilable Differences?*, AM. J. LAW. & MED. (forthcoming 2017).
235. Stark Law, 42 U.S.C. § 1395nn (2012); 42 U.S.C. § 1320a-7b(b) (2012) (Anti-Kickback Statute); *see id.*
236. *See* 42 U.S.C. § 1320a-7a.
237. *Id.*
238. *Id.* § 1320a-7a. Providers who violate the prohibition on beneficiary inducements may face a civil fine of $10,000 per item or service. *Id.* Additionally, the OIG may initiate proceedings to exclude the offending provider from participation in federal health care programs. *Id.*

reimbursement for telemedicine visits, and telemedicine continues to struggle to fit into the current fee-for-service driven health care world.

CONCLUSION: IMAGINE THE POSSIBILITIES

Disruptive technologies challenge the status quo by forcing us to think differently. However, fear of change does not justify unnecessary legal and bureaucratic obstacles to progress. Instead of preventing or undermining the implementation and use of telemedicine, leaders and regulators should focus on establishing standards, protocols, and technologies that promote safe and efficient use of this technology.

Despite spending eighteen percent of the GDP on health care, limited political will exists for fundamental health care payment and delivery reform at the federal level. Both the ACA and the AHCA created political wildfires, even though they primarily focused on how Americans receive health insurance coverage, rather than methods of delivery for health care treatment. While sweeping change may be politically and logistically difficult, with or without comprehensive federal health care delivery reform, full adoption of telemedicine will help wring significant efficiencies for health care in America. Unfortunately, substantial obstacles to full adoption of telemedicine will persist until politicians muster the will to tackle payment and delivery reforms. Concerns about telemedicine interactions occurring in addition to, rather than instead of, traditional health care foment fears of telemedicine as a "budget buster." These fears are addressed through deployment of telemedicine in support of value-based initiatives, where providers collaborate across disciplines and maintain accountability for the ongoing health of the patient, such as bundled health care or population health management. At a minimum, the telemedicine provider can implement a plan of care in the event of inappropriate or excessive demands from a patient.

An increased movement away from conventional reimbursement models and fee-for-service medicine increases opportunities for logical deployment of telemedicine in support of overall patient health and well-being, as well as reduction in re-admissions. As health plans drive toward value-based health care and population health management, growing demand for telemedicine will follow. Meanwhile, to the extent that high deductible plans continue to play a prominent role, consumer demand for telemedicine services will grow in recognition of telemedicine as a less costly alternative to managing health care needs. Finally, to the extent that employer-based health care continues to dominate the private health insurance market, large employers will demand telemedicine services to more efficiently support the health and well-being of their workforce, thus facilitating leverage in negotiating for lower premiums and deductibles for a healthier, more efficient population. These incentives are greater for self-insured employers.

Rural as well as long-term care settings offer opportunities for telemedicine to immediately address pressing needs, but telemedicine's effectiveness transcends rural settings, and artificial limitations to rural localities foreclose beneficial expansion. Promising signs emerge at the state level, such as the Texas legislature effectively overruling its state medical board to enable telemedicine physician–patient relationships to proceed without an initial in person visit,[239] and the Michigan and Indiana legislatures reversing prior restrictions on the prescription of controlled substances via telemedicine without an in-person visit.[240] Even as the shift toward value-based reimbursement models move forward, federal legislation should be adopted to expedite the availability of treatment modalities and reimbursement for telemedicine, with expedited rules for telemedicine across state lines, which would consider the location of the physician to be the treatment jurisdiction, much like driving across state lines for care. The United States did not maintain artificial barriers to more efficient access to other goods and services revolutionized by the Internet, from music and video entertainment, to browsing for real estate, to shopping for all manner of consumer goods now delivered to our homes. With America obtaining such a poor return on its dollars invested in health care,[241] it should assume the risks associated with innovation to drive better results. Even modest legislative and regulatory reforms create the opportunity for telemedicine as the emerging standard of care for a variety of medical needs, with the right specialists able to serve patients in the right place at the right time, and at the right price—achieving long-term savings and health improvements for a system very much in need of both.

239. S.B. 1107, 85th Leg., Reg. Sess. (Tex. 2017).

240. *See* S.B. 213, 99 Leg, Reg. Sess. (Mich. 2017); S.B. 226, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017).

241. *See supra* Sections I.A. and I.B.

THE RIGHT TO ARMS IN NINETEENTH CENTURY COLORADO

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ABSTRACT

This Article details the legal, cultural, and political history of the right to arms in Colorado in the nineteenth century. The Article pays particular attention to the period between 1858, when mass white settlement began with the gold rush, and 1876, when Colorado achieved statehood. When Colorado became the thirty-eighth state, Coloradans chose to adopt a constitution whose right to arms guarantee was stronger than any other state. The choice stemmed in part from pre-statehood conditions, when the settlers had to rely on their own resources for defense against a myriad of dangers. Right from the start, Coloradans established a vigorous and enduring tradition of self-government and self-defense. In the Colorado view, the right to arms is an inherent, inalienable human right, which is protected by legitimate governments, but not created by government. Accordingly, the Article extensively describes the exercise of the right to arms by Colorado Indians. Not only were their rights guaranteed by the 1876 constitution, they had vigorously exercised their natural right to arms since long before the constitution was adopted.

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INTRODUCTION

Adopted in 1876 and unchanged ever since, the Colorado Constitution guarantees

> [t]hat the right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.[1]

This Article examines the right to keep and bear arms in nineteenth-century Colorado. Part I describes the arms of early Coloradans: the Indians and the mountain men. Part I also covers the dramatic improvements in firearms technology that took place in the quarter century before 1876. Part II describes some of the conditions that made Colorado's arms culture different from neighboring territories. Because the gold rush settlers were remote from any functioning government, they initially had to make their own governments. They created a Colorado tradition of popular self-government that still thrives today. Collectively, the settlers used their arms to defend Colorado from Confederate aggression during the Civil War. Soon after, war with the Arapaho and Cheyenne tribes wiped out trade routes from the states, leaving Coloradans near starvation. The Indians—including Colorado's oldest continuous inhabitants, the Utes—were in their own view exercising their natural right of armed self-defense; the Article pays careful attention to the Indians as actors in their own right. Because government in pre-statehood days was often incapable of securing public safety, Coloradans provided for their own armed defense, generally successfully. Given the need for arms for multiple purposes, firearms businesses thrived in early Colorado. They helped make Denver the "emporium" of the Rocky Mountains. The settlers survived because they had the arms to fight for survival. The pre-statehood period is one reason the 1876 Colorado Constitution affirms the importance of the individual right to arms for personal defense *and* for collective defense.

Part III examines the creation and structure of the Colorado Constitution. It begins with the 1875–1876 Colorado Convention. It then examines the core principles of the Colorado Constitution: that inherent rights precede government; that the people have the right to alter the government; that Coloradans have "the sole and exclusive" right of governing themselves; and that fundamental human rights, including self-defense, are inalienable. Part III also discusses two leading means of collective self-defense in early Colorado: the state militia (article XVII) and the posse comitatus of able-bodied males, who may be summoned by elected county sheriffs or other appropriate officials (article XIV).

Part IV closely examines the text and original meaning of Colorado's right to keep and bear arms. Coloradans chose the strongest language available to secure the right to arms. Each phrase in Colorado provision is studied, showing how Colorado sometimes followed or differed from

1. COLO. CONST. art. II, § 13 (1876), http://www.colorado.gov/pacific/sites/default/files/Colorado%20Constitution.pdf.

other states. Immigrant-friendly Colorado specified that the right belongs to every "person," not solely to the "citizen." Personal defense and collective defense were both of fundamental importance, and each was expressly included in the constitutional right. The constitutional text makes it clear that collective defense is to be under the direction of appropriate civil authorities, such as county sheriffs, obviating the need for the vigilance committees that had characterized earlier days. Notwithstanding the broad general language about individual rights, Coloradans did favor one type of gun control—restricting the *concealed* carrying of arms. That was the only gun control expressly authorized by the constitutional text, which removed concealed carry from the right to bear arms.

Part V examines several interpretive issues. First, what types of arms are implicated by the text of the Colorado guarantee? Second, should this understanding be modified by an idea in the personal notes of Territorial Justice E.T. Wells, a distinguished Colorado Founder? Third, how did arms change in the years following the 1876 Colorado Constitution, and did the changes affect Coloradans' views of what types of arms laws were permissible? In addition, Part V examines the state of law and order in the post-statehood nineteenth century. While the large cities, such as Denver or Colorado Springs, were becoming fairly calm, there was plenty of turbulence elsewhere. Part V examines the frontier town of Trinidad as a case study.

Finally, Part VI describes gun control laws enacted in nineteenth-century Colorado. Most of these were compliant with the 1876 constitution: restrictions on concealed carry, laws against unsafe firearms discharge in towns, and safe storage laws for large quantities of loose gunpowder. The notable exception was an 1891 statute against selling arms to Indians, which cannot be reconciled with the constitutional text.

Rather than examining constitutional text in isolation, this Article aims to describe the cultural and social background of arms use in Colorado. So before getting to the 1875–1876 Constitutional Convention, this Article spends a long time on early Colorado history. This is important not only for the legal history of arms rights in Colorado, but also for general understanding of constitutional originalism and early practice in Colorado. While the original history of the U.S. Constitution is now well documented, scholarly exploration of original meaning in Colorado is not so advanced. The extensive footnotes in this Article are intended, in part, to provide scholars with helpful starting points for new research.[2]

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2. *Bibliographical note*: The following sources are cited often and appear in more than one subdivision of this Article. They are collected here for reader convenience.
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According to legal historian Donald S. Lutz, state constitutions often embody a vision of the "good life." They "describe what the life should be like and the institutions by of which will be achieved that way of life. A constitution enunciates the values that support the good life . . . ."[3] State constitutions express the "moral values, moral principles, and definition of justice toward which a people aims."[4] The Colorado Constitution,

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3. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 33 (1988).
4. *Id.* at 16.

including the right to arms, aims to support the good life. In text and context, the Colorado Constitution protects the right to possess and carry arms for defense of self and of society. The individual right to arms secures the natural right of self-defense *and* it secures the collective interest in community survival and self-government. It is a constitution by and for a people determined to exercise their right of self-government and defend their inherent rights.

I. THE EARLY INHABITANTS

A. Indians and Their Arms

Previous legal history of the right to arms and Indians has focused almost entirely on the white side of white–Indian relations: how whites possessed arms for offense or defense against Indians, and how whites attempted to regulate or suppress the gun trade with Indians.[5] This Article includes those perspectives, but it also treats Indians as subjects, not only objects. After all, it is recognized that the Second Amendment codified a preexisting natural right.[6] Whether or not Indians were part of "the people" protected by the text of the Second Amendment, they exercised their natural rights, including their natural right of self-defense and to possess and carry arms. Until the mass white migration beginning in 1858, the overwhelming majority of people in Colorado who exercised the right to arms were Indians, and so any history of the right that did not include them would be incomplete.

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5. In American legal histories of the right to arms, the omission is near universal. One example is the first edition of my law school textbook. *See* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW & THE SECOND AMENDMENT; REGULATION, RIGHTS, AND POLICY (1st ed. 2012). The oversight is corrected in the 2017 second edition, which examines the arms culture of Indians in the American colonies, and how Indian arms culture was eventually adopted by the English settlers. JOHNSON ET AL., *supra* note 2, at 187–94, 220, 239–40 (including Indian perspectives and practices, as well as describing colonial arms trade with Indians and legal limits on the trade). For example, firearms culture in the United States places much emphasis on accuracy and on individual initiative. These traditions did not come from England's arms culture; rather they were Indian traditions that were imitated by the whites. *Id.*

6. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 594–95 (2008) (Second Amendment is an inherent "natural right of . . . self-preservation") (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *139); Binderup v. Attorney Gen. U.S., 836 F.3d 336, 367 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) ("These proposals show that there was broad consensus between Federalists and their opponents on the existence and nature of the 'natural right' to keep and bear arms for defensive purposes . . . ."); Ezell v. City of Chicago, 651 F.3d 684, 700 (7th Cir. 2011) (*Heller*'s original meaning "inquiry led the Court to conclude that the Second Amendment secures a pre-existing natural right to keep and bear arms"); David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 235–37 (2008) (discussing natural rights language in *Heller*); Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1048–53 (2009) (founders thought there was a natural right to own certain manmade objects, specifically arms and presses).

1. Prehistory

The first settlers of Colorado may have arrived around 12,000 BCE.[7] We know that they were hunters.[8] The archeological records become more detailed with the settlement of Indians around Mesa Verde, in far southwestern Colorado.[9] The leading arm of the time was the atlatl,[10] a spear thrower: "A rod or narrow board-like device used to launch, through a throwing motion of the arm, a dart five to eight feet in length."[11] Within its range, it was a formidable weapon. In the early 1540s, the conquistador Hernando de Soto discovered that the atlatl could penetrate his soldiers' armor.[12] The atlatl was also prevalent in Mexico and Central America.[13] Today, the atlatl is used for sport; for example, the game laws of Missouri specify when atlatls may be used in hunting and fishing.[14]

Perhaps around 500 CE, and no later than 1000 CE, North American Indians began to take up the bow; by the time Europeans began arriving, it was pervasive.[15] The bow was not always as powerful as the atlatl, but it had longer range. Also, repeat fire from a bow is much faster than from an atlatl. Repeat fire from a bow is also much faster than from a firearm that must be reloaded after every shot. So, until repeating firearms became common in the mid-nineteenth century, some Indians continued to prefer bows to firearms.[16]

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7. NOEL, *supra* note 2, at 33.

8. *Id.*

9. *See id.* at 36–38.

10. CARL UBBEHODE, MAXINE BENSON & DUANE A. SMITH, A COLORADO HISTORY 20 (10th ed. 2015).

11. MO. CODE REGS. tit. 3, § 10-20.805(4) (2017). In the above regulation, I silently omitted an erroneous parenthetical: (5"-8"). The double-quote means "inches" whereas the written text says "feet." *Cf.* THIS IS SPINAL TAP (Spinal Tap Productions 1984) (rock star writes a note telling his crew to build an on-stage replica of a Stonehenge monolith; for dimensions, he uses 18" when he means 18'. Following instructions literally, the crew builds a monolith 18 inches tall.); Snagamir, *Spinal Tap-Stonehenge*, YOUTUBE (May 12, 2011), https://youtu.be/qAXzzHM8zLw (monolith appears at 2:13).

12. *See* COLIN F. TAYLOR, NATIVE AMERICAN WEAPONS 59–62 (2001).

13. *See, e.g.*, Prehispanic Artifacts From El Salvador, 60 Fed. Reg. 13,352-01, 13,355 (Mar. 8, 1995) ("Most [figurines] appear to represent males who may carry war equipment (such as a dart thrower or atlatl) and large headgear . . . .").

14. MO. CODE REGS. tit. 3, § 10-6.410(1) (approving use of an atlatl for fishing); *id.* § 10-6.415(3)(D) (restricting use of atlatl in fishing in certain areas); *id.* § 10-6.550(1) (providing a daily limit of endangered or game fish that can be hunted with an atlatl); *id.* § 10-6.615(2) (allowing atlatl hunting for bullfrogs and green frogs); *id.* § 10-7.410(1)(I) (allowing atlatl use when hunting wildlife); *id.* § 10-7.431(5) (permitting deer hunting using an atlatl); *id.* § 10-7.445 (establishing limitations for hunting bullfrog and green frogs with the atlatl); *id.* § 10-7.455(1)(A) (permitting atlatl use when hunting turkeys); *id.* § 10-11.165(1) (establishing harvesting limitations for hunting bullfrogs and green frogs with an atlatl); *id.* § 10-11.205(1)(B) (listing areas where hunting certain animals with an atlatl is allowed); *id.* § 10-12.115(1) (allowing the use of atlatl for hunting bullfrogs and green frogs); *id.* § 10-12.135(4) (listing places where certain game can be hunted using an atlatl).

15. *See* REGINALD & GLADYS LAUBIN, AMERICAN INDIAN ARCHERY 1 (1980); TAYLOR, *supra* note 12, at 63, 63 n.13.

16. LAUBIN, *supra* note 15, at 3.

2. Territories

Evidence of Ute presence in Colorado is at least hundreds of years old. By 1800, Utes had been living in the mountainous and western regions of Colorado for centuries. They often ventured onto the plains for buffalo hunting and to fight other tribes.[17]

We do not know the full history of Indians in eastern Colorado, but we do know that part of it was once under Apache control.[18] The Apache were later pushed south by the Kiowa and Comanche.[19] They in turn were displaced in part by the Cheyenne and Arapaho, beginning sometime between the late eighteenth century and the 1820s.[20] Until 1750–1780, the Cheyenne had been horticulturalists in the Great Lakes region.[21] As they acquired horses and firearms, they adopted a hunting lifestyle, with many of them (later known as the Southern Cheyenne) migrating to the high plains of western Kansas and eastern Colorado. The Cheyenne–Arapaho alliance may date to around 1830.[22]

As of the mid-nineteenth century, the San Luis Valley was predominantly controlled by the Mohuache Utes and the Jicarilla Apache.[23] Besides the Cheyenne, Arapaho, Kiowa, Comanche, and Apache, another tribe active in Colorado was the Sioux, who dominated much of the upper Midwest and the region north of the South Platte River.[24] They were renowned warriors and one of the largest tribes. The

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17. SIMMONS, *supra* note 2, at 29–30, 44–46, 56–57; Ute Indian Museum (Montrose, Colo.) (on file with Museum) (map displays of hunting territory). To be precise, the "buffalo" is an Old World animal. The American animal is formally known as the "bison." Because "buffalo" was the word that most Coloradans used then, and still do, I follow the common usage.

18. DOLORES A. GUNNERSON, THE JICARILLA APACHES: A STUDY IN SURVIVAL 105, 114, 130 (1974); NOEL, *supra* note 2, at 41; *see* WEST, *supra* note 2, at 39 (Apaches came to Colorado about one century or less before Coronado's 1541 expedition).

19. *See* Laurie Collier Hillstrom, *Comanche*, *in* 3 THE GALE ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES 228, 229 (1998) [hereinafter GALE ENCYCLOPEDIA] (Comanches in southeastern Colorado in 1750–1875).

20. *See* JOSEPH JABLOW, THE CHEYENNE IN PLAINS INDIAN TRADE RELATIONS 1795–1840, at 62–63 (Univ. of Neb. Press 1994) (1950); LEONARD & NOEL, *supra* note 2, at 14; VIRGINIA COLE TRENHOLM, THE ARAPAHOES: OUR PEOPLE 33–34, 48 (1st ed. 1970) (arguing that the Arapaho moved to Colorado before the Cheyenne).
Having obtained metal weapons and horses from the Spanish around 1670, the Apaches dominated the area until other tribes acquired them. GEORGE E. HYDE, THE PAWNEE INDIANS 46 (Univ. of Okla. Press 2d. ed. 1974) (1951). Apache also traded for firearms with the French, on the eastern plains. SIMMONS, *supra* note 2, at 32.

21. *See* Morris W. Foster, *Introduction* to JABLOW, *supra* note 20, at vi.

22. JABLOW, *supra* note 20, at 65. During the 1820s and 1830s, the Arapaho and Cheyenne each split into northern and southern branches, with the northern branches based around the North Platte River in Wyoming or thereabouts, and the southern based around the Arkansas River in Colorado. *See* Anne Boyd, *Cheyenne*, *in* GALE ENCYCLOPEDIA, *supra* note 19, at 221, 221–22; Laurie Collier Hillstrom, *Arapaho*, *in* GALE ENCYCLOPEDIA, *supra* note 19, at 192, 193. "Arapaho" is sometimes spelled with an "e" at the end.

23. *See* TAYLOR, *supra* note 2, at 13–14; Morris F. Taylor, *Some Aspects of Historical Indian Occupation of Southeastern Colorado*, 4 GREAT PLAINS J. 17, 20 (1964).

24. *See* LAMAR, *supra* note 2, at 208. The Sioux included several different tribes, and today, members of those tribes do not necessarily call themselves "Sioux." *See* Laurie Collier Hillstrom, *Lakota*, in GALE ENCYCLOPEDIA, *supra* note 19, at 287, 287. For purposes of Colorado history, the

Pawnee, whose heartland was in Nebraska, were also present in Colorado.[25]

From time immemorial, possession of land in Colorado (and America) had been by right of conquest, and such possession had lasted only as long as the conquerors could defend their holdings by force of arms.[26] This did not change when population pressures from Old World immigration east of the Mississippi River pushed some tribes westward. In turn, others were pushed further west or south or north. The same was true when mass white immigration began in 1858.[27] The historical experience is reflected in the 1876 Colorado Constitution: it aims to prevent popular government then in power from being displaced by conquest. This was no theoretical matter; as will be detailed below, repeatedly in the 1860s the settlers came close to being conquered.[28]

3. Trading Networks

Before the arrival of Europeans, the arms of Colorado tribes included the bow and arrow, spear, lance, tomahawk, club, shield, and body armor of hardened animal hides.[29] As European trade networks developed in the seventeenth century, Indians eagerly sought Europeans goods, especially

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relevant tribe was the Lakota (a/k/a Teton Sioux or Western Sioux). At their peak, they were "the most powerful tribe in North America." *Id.*

25. *See* David Masci & Kenneth R. Shepherd, *Pawnee*, *in* GALE ENCYCLOPEDIA, *supra* note 19, at 331, 332 (explaining that the Pawnee were primarily based in Nebraska but also ranged in to Colorado, as far south as the Arkansas River basin). They obtained metal weapons around 1695. HYDE, *supra* note 20, at 56. During the eighteenth century, the Pawnee had less contact with French traders than did most other plains tribes, so the Pawnee were relatively late in obtaining firearms. *See id.* at 88. The Osage, who got their guns from French Canada, and later from English Canada, used their advantage to attack the Pawnee. *See id.* at 98–101. While the Plains tribes had changing alliances over time, the Pawnee were treated as irreconcilable enemies by all other tribes. Unlike other Plains tribes, the Pawnee continued to cultivate the land even after horses became plentiful. Masci & Shepherd, *supra*, at 332.

26. JAMES L. HALEY, THE BUFFALO WAR: THE HISTORY OF THE RED RIVER INDIAN UPRISING OF 1874, at 2 (1976).

> The experience of their history, like that of all primitive peoples, was that one occupied a hunting ground precisely as long as one could hold it by force of arms. Indeed, the very migration of the "South Plains" tribes to the South Plains had occurred because a powerfully expanding Sioux Nation had physically driven them from their old territories, and when they arrived on the South Plains and found them already occupied by Apache Indians, the latter had to be vanquished and driven into the deserts of the Southwest.

Id.

27. *See infra* Section II.C, D.

28. *See infra* Section II.C, D.

29. *See* COLIN F. TAYLOR, NATIVE AMERICAN WEAPONS 15–18, 33, 43, 63–64, 72, 77–79, 82–87, 99–101 (1st ed. 2001).

In eighteenth and nineteenth century usage, "arms" included "armor." *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 106 (Librairie du Liban 1978) (1755) (stating that "arms" are "[w]eapons of offence, or armour of defence."); 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 13 (1828) ("Arms" means "Weapons of offense, or armor for defense and protection of the body . . . . A stand of arms consists of a musket, bayonet, cartridge-box and belt, with a sword. But for common soldiers a sword is not necessary.") (cited with approval in *Heller*, 554 U.S. at 581).

arms. Horses, firearms, and metal-bladed arms (knives, hatchets, etc.) each spread in different ways in America.

Several trading networks operated in Colorado. The Utes traded with New Spain, a colony based in Mexico, but whose claims included most of Colorado.[30] The Spanish introduced horses to North America, and as horses were acquired and bred by various tribes, tribal prosperity greatly increased.[31] The Utes were among the first to get Spanish horses.[32] The Spanish tried to limit arms sales to Indians, and did not permit enterprising persons to go among the tribes for trade or theft.[33] The firearms of the Utes in western Colorado were from illicit Spanish trade.[34] After Mexico won its independence from Spain in 1821, there were few practical limits on arms trade with Indians.[35]

At first, the other major trading network influencing Colorado belonged to New France. Anchored in New Orleans, New France stretched up the Mississippi River and into Canada with a chain of forts and trading posts.[36] The Spanish colonization, which was directly controlled by the Spanish crown, was mainly interested in enslaving the Indians to work on large *encomiendas*.[37] In contrast, the English settlement, led by corporations or individuals with government charters, encouraged mass migration.[38] So the Spanish and English programs both created inherent tensions with the Indians. In contrast, the French were interested mainly in trade, and not settlement, and they had no hesitation about selling arms to Indians.[39] For the French, the most desired good was beaver pelts.[40] For Indians, one of the most desired goods was firearms.[41] Although Colorado

30. *See* NOEL, *supra* note 2, at 55 (Spanish claims in Colorado as of 1819); SIMMONS, *supra* note 2, at 33–35, 39–44.

31. *See* SIMMONS, *supra* note 2, at 29–30.

32. *Id.* at 29. In 1640, Ute warriors who had been captured and enslaved by the Spanish escaped, and took horses with them. *Id.*

33. HYDE, *supra* note 20, at 64–65, 114; *see also* GUNNERSON, *supra* note 18, at 223–24. After the Spanish acquired French Louisiana in 1763, they had to change their policy, and provide arms to Indians in order to maintain the loyalty of friendly Indians, including those who were used to getting French arms. *See id.*

34. *See* JOLIE ANDERSON GALLAGHER, COLORADO FORTS: HISTORIC OUTPOSTS ON THE WILD FRONTIER 63, 65 (2013).

35. *See* FRANK RAYMOND SECOY, CHANGING MILITARY PATTERNS OF THE GREAT PLAINS INDIANS 84–85 (1992).
From the mid-1820s to 1845, Utes could buy arms at Fort Uncompahgre (near the present town of Delta, Colorado) and Fort Uintah (in Utah), both of which were owned by Antoine Robidoux, who had no compunction about violating Mexican laws against selling arms to Indians. GALLAGHER, *supra* note 34, at 62–65.

36. JOHNSON ET AL., *supra* note 2, at 189.

37. *See, e.g.*, LESLEY BYRD SIMPSON, THE ENCOMIENDA IN NEW SPAIN: THE BEGINNING OF SPANISH MEXICO 1–3 (3d ed. 1982).

38. *See* Merrill Jensen, *Introduction*, *in* 9 ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 23–26 (David C. Douglas & Merrill Jensen eds., 1955).

39. *See* HYDE, *supra* note 20, at 64–65.

40. *See* ERIC JAY DOLIN, FUR, FORTUNE, AND EMPIRE: THE EPIC HISTORY OF THE FUR TRADE IN AMERICA 94–100, 107–13 (2010).

41. JOHNSON ET AL., *supra* note 2, at 189; *see also* DOLIN, *supra* note 40, at 94–100, 107–13 (1st ed. 2010) (discussing the French fur trade).

was beyond the direct range of the French traders, tribes in contact with the French often served as middlemen, acquiring goods from tribes deeper in the interior, in exchange for goods that the middlemen had acquired from the French.[42] Once the French were gone from North America, after the 1803 Louisiana Purchase, some of the Indians who had traded with the French traded with Americans.

During the Colonial Period and thereafter, American laws had attempted to restrict arms sales to hostile Indians.[43] But these laws proved nearly impossible to enforce in practice. In the Early Republic, the federal government established trading posts to conduct its own trade with Western Indians; few licenses were granted for private traders.[44] Then in 1822, John Jacob Astor's American Fur Company convinced Congress to stop operating trading posts and to liberalize private trading licenses.[45] These licenses were "issued almost wholesale by the Superintendent of Indian Affairs."[46]

Even if the United States had somehow suppressed all arms trade, the Indians had another source. Great Britain had taken Canada from France in 1763, and the British readily sold arms to Indians, even if the arms might be used against Americans.[47] So broadly speaking, the "horse frontier" had begun with New Spain in the southwest, and then spread across the continent, as horses were acquired by trading or raiding. Meanwhile, there was also a "gun frontier" from New Spain, and a more plentiful one from the east. Any Indian tribe that acquired horses or guns before its neighbors gained a tremendous advantage in warfare.[48]

The Cheyenne emerged as key middlemen traders in the vast region between the Mississippi River and the Rocky Mountains.[49] They obtained firearms, ammunition, edged weapons, and other goods from tribes in direct contact with the whites to the northeast. They bought and stole horses from the tribes near the Spanish in the southwest. In-between were tribes who had buffalo hides or other natural commodities to sell.[50] Within

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42. *See, e.g.*, *infra* text accompanying notes 47–48 (Cheyenne).

43. JOHNSON ET AL., *supra* note 2, at 190–92.

44. DAVID LAVENDER, BENT'S FORT 31 (1954).

45. *Id.*

46. *Id.*

47. In part the British were attempting to entice Indians toward recognizing British, not American, sovereignty, over them.

48. *See* DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 22–23 (2016).

49. *See* JABLOW, *supra* note 20, at 58–60, 78–81.

50. *See id.*

According to Cheyenne tradition, when the then-agricultural Cheyenne first saw horses, they asked the All Being for horses for themselves. He replied:

> You may have horses.... You may even go with the Comanches to take them. But remember this: If you have horses, everything will be changed for you forever.
>
> You will have to move around a lot to find pasture for your horses. You will have to give up gardening and live by hunting and gathering, like the Comanches. And you will have to

the plains, the most important trading center, by far, was Bent's Fort, located on the Arkansas River in southeastern Colorado.[51] The Cheyenne and their Arapaho allies had an excellent relationship with the Bent brothers; other Indians did not dare venture near the fort if the Cheyenne or Arapaho were in the vicinity.[52]

Eastern Colorado had long been a scene of endemic intertribal warfare but that changed in 1840, as an indirect consequence of Texas victory in its 1836 war of independence against Mexico. In the Southwest, the Comanche were the dominant power, controlling most of the area from Arizona to Texas.[53] They had obtained large quantities of French firearms around 1750.[54] Since the Spanish (and later, the Mexicans) were so close, stealing horses was straightforward. The Comanche bottled up Spanish/Mexican expansion—allowing trading posts to exist in New Mexico, while looting settlements to the south.[55] Like some other tribes, the Comanche carried on a lucrative slave trade, selling captured members of other tribes to Americans or Mexicans, or sometimes keeping the slaves for themselves.

Texan independence in 1836 soon led to intensified pressure on the southeast side of the empire of the Comanches and their Kiowa allies.[56] Then in the 1838 Battle of Wolf Creek, the Kiowa and Comanche were defeated by Cheyenne and Arapaho.[57] So in 1840, the Kiowa, Comanche, and their Prairie Apache allies concluded a peace treaty with their northern adversaries.[58] The great buffalo pasture between the Arkansas and South Platte Rivers was recognized as Cheyenne and Arapaho territory, while the Kiowa, Comanche, and Prairie Apache would have the area south of

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> come out of your earth houses and live in tents. I will tell your women how to make them, and how to decorate them.
>
> And there will be other changes. You will have to have fights with other tribes, who will want your pasture land or the places where you hunt. You have to have real soldiers, who can protect the people. Think, before you decide.

WEST, *supra* note 2, at 86 (quoting ALICE MARRIOT & CAROL K. RACHLIN, PLAINS INDIAN MYTHOLOGY 96–97 (1975)).

51. *See* JABLOW, *supra* note 20, at 65–66.

52. *Id.*

53. HÄMÄLÄINEN, *supra* note 2, at 2.

54. HYDE, *supra* note 20, at 95.

55. JABLOW, *supra* note 20, at 70.

56. *See* FEHRENBACH, *supra* note 2, at 280–83, 292–333; *see also* WEST, *supra* note 2, at 77. The Kiowa and Comanche had confederated around 1795. HALEY, *supra* note 26, at 1.

57. JABLOW, *supra* note 20, at 70.

58. *Id.* at 72. The peace council was named "Giving-Presents-to-One-Another-Across-the-River." TRENHOLM, *supra* note 20, at 110.

the Arkansas.[59] All of them could trade freely at Bent's Fort.[60] Friendly trade relations meant more horses for the northern tribes, and more guns for the southern ones.[61]

The Cheyenne would, of course, stop stealing the Comanche and Kiowa horses, but they could freely pass through Comanche and Kiowa territory to raid horses from Mexicans.[62] Conversely, Comanche and Kiowa could freely travel north of the Arkansas.[63]

This did not mean the end of all warfare in Colorado. Everyone was still at war with the Pawnees, and vice versa.[64] And Utes remained at war with the plains tribes. Even so, the 1840 treaty made buffalo hunting in Colorado much easier, with unforeseen consequences, as will be detailed *infra* in Section II.D.1.[65]

4. Types of Arms

American Indian arms consumers were discerning. Whereas colonists in some other parts of the world could get away with selling low-quality, primitive firearms to indigenous peoples, American Indians quickly became sophisticated arms consumers, knowing and demanding quality.[66] In the first half of the nineteenth century, Plains Indian firearms

59. Kiowa arms were the bow and arrow, a short lance or spear for use on horseback, club, tomahawk, circular shield of rawhide from buffalo neck, and guns. MILDRED P. MAYHALL, THE KIOWAS 121 (2d ed. 1971). The latter "were obtained from the Spaniards and Anglo-Americans." *Id.* Kiowa also traded for guns with the Mexicans, with the Kiowa supplying wild horses. BERNARD MISHKIN, RANK & WARFARE AMONG THE PLAINS INDIANS 23 (Univ. Neb. Press 1992) (1966). After the Kiowa had obtained horses, their bows and shields were reduced in size, for easier use on horseback. *Id.* at 7, 19.

In 1854, the Kiowa, Comanche, Arapaho, and Cheyenne assembled a war party of 1,500, the largest in the history of the southern Plains. MAYHALL, *supra*, at 215. They attacked the Sac & Foxes, who were moving into Kansas and competing for buffalo. *Id.* Although there were only 100 Sac & Fox, they had new long-range American rifles, and they utterly defeated the much larger attacking coalition. *Id.*

After 1854, the Kiowa became more aggressive. *Id.* Their raiding increased, and some of them moved to Colorado to fight the Utes. *Id.* By 1871, when Kiowa attacked a Texas wagon train in the Warren Wagon Train Massacre, Kiowa had "Spencer carbines, breech-loading rifles, and pistols," most of which had been acquired from a Caddo Indian named George Washington. *Id.* at 267.

60. *See* JABLOW, *supra* note 20, at 75.

61. *Id.*

62. JABLOW, *supra* note 20, at 76–77.

63. *See* TRENHOLM, *supra* note 20, at 150–51. In 1852, a unit of U.S. mounted rifles led by Colonel Sanborn traveled along the Arkansas and then up Cherry Creek and eventually to Laramie, in a mission against the Comanche. 1 HALL, *supra* note 2, at 141 n.*. Laramie is named for the French fur trader Jacques La Ramie, who was killed by Arapaho in 1823. *See* TRENHOLM, *supra* note 20, at 46–47.

64. For example, the Arapaho fought the Pawnee in Larimer County in August 1858. TRENHOLM, *supra* note 20, at 150–51.

65. *See infra* text accompanying notes 342–45.

66. *See, e.g.*, CARL P. RUSSELL, FIREARMS, TRAPS AND TOOLS OF THE MOUNTAIN MEN 70 (2011) (in the late eighteenth century, Michigan Indians refused "trade guns" made for sale to Indians, and demanded rifles instead); J. Frederick Fausz, *Fighting "Fire" with Firearms: The Anglo-Powhatan Arms Race in Early Virginia*, 3 AM. INDIAN CULTURE & RES. J., no. 4, 1979, at 33, 33. Desire for the best European guns of colonial period (flintlocks) compelled Indians to develop a sophisticated and large scale trade economy; this included eastern tribes obtaining beaver pelts from tribes deep in the interior, in order to trade them to Atlantic seaboard whites for guns. *See* PATRICK A.

were mostly single-shot muzzleloaders; as breech-loading repeaters became the most common firearms for whites after 1850, the same was true for Indians.[67]

Besides firearms, Indians were particularly interested in edged weapons made of steel or iron.[68] Before European contact, Indian knives had been crude tools not suitable for use as arms.[69] Steel knives for Indians (and whites) were first imported from England, and later made in the United States.[70] The last Indians to acquire them were in the Great Plains, Rocky Mountains, and Pacific Northwest.[71] Well before 1800, even they had large quantities of fine knives.[72] Indians generally preferred fixed blades to folding knives.[73] The predominant types among the Plains Indians were a straight blade with a point and two sharp edges (similar to a dagger), and a curved knife, well-suited for skinning.[74]

Before European contact, the tomahawk was a short pole to which a shaped stone was attached, suitable for use as a club.[75] With the availability of steel and iron, the tomahawk developed into a bladed arm, also handy for noncombat use as an axe or hatchet.[76] There were two centers where the tomahawk was most prevalent: in the larger northeast (from the southern Great Lakes area all the way to New England) and in the Great Plains.[77] In the latter, the ceremonial or status role of the tomahawk sometimes exceeded the mundane use.[78] The most popular type of tomahawk, by far, was the pipe tomahawk, excellent for all traditional tomahawk uses, and for smoking.[79]

As of 1825, about half the Ute Indians had firearms, while the other half used bows and other arms.[80] Known as excellent warriors, the Utes were in near-constant war with the Cheyenne and Arapaho. The latter said that their favorite opponents were the Utes, because the Utes were the

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MALONE, THE SKULKING WAY OF WAR: TECHNOLOGY AND TACTICS AMONG THE NEW ENGLAND INDIANS 36 (1991).

67. SECOY, *supra* note 35, at 98–99.

68. HAROLD L. PETERSON, AMERICAN KNIVES: THE FIRST HISTORY AND COLLECTORS' GUIDE 116 (1st ed. 1958).

69. *Id.* at 115. In the Arapaho creation stories, some "hard thinking" heroes taught the Arapaho how to make knives, arrow points, and bows, so that they could take and use buffalo. TRENHOLM, *supra* note 20, at 7.

70. PETERSON, *supra* note 68, at 120, 122.

71. *Id.* at 120.

72. *See id.*

73. *See id.*

74. *See id.* at 120–25.

75. HAROLD L. PETERSON, AMERICAN INDIAN TOMAHAWKS 8–9 (2d ed. 1971).

76. *Id.* at 10–15.

77. *Id.* at 11–12.

78. *Id.* at 12.

79. *Id.* at 33–39.

80. *See* SIMMONS, *supra* note 2, at 51 (noting that the guns were flintlocks); *cf. id.* at 46 (as of 1821, the Utes had some firearms, but bows and spears were predominant). Even in the 1840s, the Utes often preferred to use bows rather than firearms when fighting on horseback, since bows had a faster rate of repeat fire than single-shot arms. *Id.* at 63.

bravest fighters.[81] Famed explorer and military leader Kit Carson described the Utes as "a very brave, warlike people; they are of rather small size, but hardy, and very fine shots."[82] New Mexico's Territorial Governor Abraham Rencher in 1858 called the Utes "the most warlike and formidable of any of our Indian tribes. Their weapons are rifles, which they use with great skill and success."[83]

When the Cheyenne had been moving from Minnesota to Colorado, they were attacked and defeated by a tribe that had firearms, which the Cheyenne did not.[84] By 1857, that had changed. According to a U.S. Army report of a battle with 300 Cheyenne that year, "most of them had rifles and revolvers."[85] Cheyenne arms were augmented by 1859 gold rushers, who traveled along the South Platte route and brought lots of Sharps rifles (described below in Section I.C); the Cheyenne acquired many Sharps in trade with argonauts.[86]

Cheyenne arms also include round shields of "the toughest rawhide" and polished lances.[87] Among the Cheyenne and Arapaho, "It was not unusual for female Indians to take part in these battles [raids on other Indian camps]; some could ride astride and shoot as well as warriors . . . ."[88]

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81. *Id.* at 62–63.

82. ESTERGREEN, *supra* note 2, at 264.

83. SIMMONS, *supra* note 2, at 118.

84. *See* GRINNELL, *supra* note 2, at 7. The Cheyenne and the Assinboins were both after the same buffalo herd, and they fought over who could take the buffalo. *Id.* The Cheyenne had clubs and sharp sticks, while the Assinboin had firearms. *Id.* The conflict ended badly for the Cheyenne. *Id.* Grinnell interviewed many Cheyenne who personally remembered the events of the mid-nineteenth century, and sometimes earlier.

"Cheyenne" is the Sioux name for the group, meaning "people who speak an unintelligible language." The Cheyenne called themselves "Tsistsistas." *See* AFTON ET AL., *supra* note 2, at 61.

85. MONAHAN, *supra* note 2, at 19.

86. *See* GRINNELL, *supra* note 2, at 352 n.4 (according to the recollection of American Horse, for the period 1858–65). The Cheyenne also had cap and ball revolvers. *See id.* Cheyenne were among the combatants at Little Big Horn in 1876, where about half had guns and half used bows. "The guns were of many sorts—muzzle-loaders, Spencer carbines, old-fashioned Henry rifles, and old Sharps military rifles. The Sharps were probably the best guns they had, except those recently captured from the soldiers." *Id.* at 352.

> The method by which the Indians kept themselves supplied with ammunition for firearms not only loose ammunition, but also fixed, has always been more or less mysterious, but they [Cheyenne whom Grinnell interviewed in the early twentieth century] explain that in those war days they were constantly purchasing powder, lead, primers, and also outfits for reloading cartridges. They carried with them as part of their prized possession sacks of balls they had molded and cans of powder. So far as possible, they saved all the metal cartridge shells they used or found, and no doubt became expert reloaders of shells.

Id. at 352 n.4.

87. MONAHAN, *supra* note 2, at 89–90.

88. *Id.* at 91; 2 GEORGE BIRD GRINNELL, THE CHEYENNE INDIANS: WAR, CEREMONIES, AND RELIGION 44 (Bison Books 1972) (1923) ("While it was not common for women to go on the war-path with men, yet they did some sometimes, and often should as much courage and were quite as efficient as the men whom they accompanied."). Ute women too sometimes joined in warfare. *Id.* at 63. Among the Comanche, "[e]ven the women are daring riders and hunters, lassoing antelope and shooting buffalo." ALBERT D. RICHARDSON, BEYOND THE MISSISSIPPI: FROM THE GREAT RIVER TO THE

When Boston journalist Albert Richardson visited Colorado in 1859, he observed some Arapaho camps.[89] The boys "were very expert with the bow, easily hitting a silver half-dollar at sixty or seventy yards."[90] The shields "will usually ward off any rifle ball which does not strike them perpendicularly. The bows have great force, sometimes throwing an arrow quite through the body of a buffalo."[91] U.S. General Frederick Benteen said that the Cheyenne and Sioux were "[g]ood shots, good riders, the best fighters the sun ever shone on . . . ."[92]

In short, when citizens of the United States first began venturing into Colorado, they met Coloradans who were well-armed and proficient in the use of arms. The history of the white–Indian wars of the mid-nineteenth century will be told *infra*, in Section II.D.[93]

B. Mountain Men and the Plains Rifle

The United States purchased the Louisiana Territory from France in 1803.[94] The Colorado portion was the northeast part of the modern state: north of the Arkansas River and east of the Continental Divide.[95] The U.S.

GREAT OCEAN: LIFE AND ADVENTURE ON THE PRAIRIES, MOUNTAINS, AND PACIFIC COAST 229 (1867).

89. RICHARDSON, *supra* note 88, at 300.

90. *Id.* at 172.

91. *Id.* at 173.

92. STANLEY VESTAL, JIM BRIDGER: MOUNTAIN MAN 274 (1946).

93. *See infra* text accompanying notes in Section II.D.

94. Treaty Between the United States of America and the French Republic, Fr.-U.S., art. I, Apr. 30, 1803, 8 Stat. 200.

95. The Arkansas River boundary between the U.S. and New Spain was established in 1819 by the Adams-Onís Treaty. Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-U.S., art. 3, Feb. 22, 1819, 8 Stat. 252, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 254, 256 [hereinafter Adams-Onís Treaty]. It was negotiated by U.S. Secretary of State (and future President) John Quincy Adams and Spanish foreign minister Luis de Onís y González-Vara. *Id.* at 254 (quoting Adams-Onís Treaty, *supra*, at pmbl.). The Treaty also provided for Spain's sale of Florida to the United States. *Id.* (quoting Adams-Onís Treaty, *supra*, at art. 2). Before the treaty, Spain had contended that its territory included the northern drainage of the Arkansas. NOEL, *supra* note 2, at 56.

Soon after, in 1821, the United States of Mexico won its independence from Spain. *Id.* Thus, the non-Louisiana part of Colorado became part of Mexico. *Id.* Then in 1836, the Republic of Texas won its independence from Mexico. *Id.* Texas included southeast, south central, and north central Colorado, and even a little bit of south central Wyoming. *See id.* at 57. The northern border of Texas was the Arkansas River. *See id.* at 56. The western border was the Rio Grande River. *Id.* Texas also claimed the land in-between the lines drawn northward for the headwaters of each river (stretching into what is today south-central Wyoming). *Id.* at 57.

Mexico did not recognize the independence of Texas, nor did it recognize the Texan boundary claims. *See id.* at 56. Under President Mirabeau Lamar, the Republic of Texas attempted to take control of eastern New Mexico in 1841 but was defeated. *See* GEO. WILKINS KENDALL, NARRATIVE OF THE TEXAN SANTA FÉ EXPEDITION (N.Y., Harper & Brothers 1844).

In 1845, Texas joined the United States. *See* NOEL, *supra* note 2, at 57. As part of the Compromise of 1850 (dealing with sectional conflicts in the U.S.), Texas sold its northern territory to the federal government. *See id.* at 57.

Even after the Texan Revolution, Colorado west of the Rio Grande River (and west of the line north from the headwaters of the Rio Grande) was agreed by everyone to still be part of the United States of Mexico. *See id.* This land was sold the United States of America in 1848, as part of the Treaty of Guadalupe-Hidalgo, ending the Mexican–American War. *Id.*

government began sending military exploration missions to Colorado. The first of these was in 1805, led by Captain Zebulon Pike (namesake of Pike's Peak). Then came Colonel Long (namesake of Long's Peak) in 1819, and Captain Bonneville in 1832. In 1853, Captain John W. Gunnison explored southwestern Colorado, leading the first group of white men to see the Black Canyon.[96]

Most influential of all the explorers in Colorado was Captain John C. Frémont, who led five expeditions in the 1840s and 1850s, all of which included Colorado.[97] His first expedition dispelled the notion that the high plains of Colorado were barren and unsuited for husbandry or agriculture.[98]

On the way west, Frémont's second expedition encountered a Colorado-bound traveler who had sold all his books to buy the supplies for a journey to Colorado.[99] William Gilpin eagerly joined the Frémont team.[100] Later, in 1861, Gilpin would become the first Territorial Governor of Colorado. In 1856, Frémont would become the first presidential nominee of the Republican party, running under the motto "Free Speech, Free Press, Free Soil, Free Men, Frémont and Victory."[101] The Republican platform was no expansion of slavery into the territories, which should be free soil for industrious free men.

Of course a detached observer in 1848 would have to say that the Colorado tribes exercised much more practical sovereignty than did Americans, Texans, or Mexicans, whose holdings amounted, at most, to some small settlements, trading posts, and forts.

96. He has been honored as the namesake of a river, county, and town.

97. *See generally* ALLAN NEVINS, FRÉMONT: PATHMARKER OF THE WEST (1939). The first expedition, in 1842, explored along the South Platte River and then Colorado's northern mountains. *Id.* at 104–05. The second expedition, in 1843–44, went through the small trading village of Pueblo, and thence to Ceran St. Vrain's fort near the northern Front Range; it was guided by Kit Carson through the northern Colorado mountains, and then into Wyoming. *See id.* at 128–29, 136–38. When returning eastward, the expedition crossed Muddy Pass (on present-day U.S. Highway 40, in Jackson and Grand counties), traversed the intermountain park region, and left Colorado via Pueblo and Bent's Fort. *Id.* at 184. The third expedition, commencing in 1845, moved up the Arkansas River, rested at Bent's Fort, and proceeded from there to the Great Salt Lake. *See id.* at 208–09. In 1848–49, the fourth expedition again used Bent's Fort and Pueblo as rest points. *Id.* at 350–51. It attempted to find—during the winter—a westward route from the headwaters of the Rio Grande through the San Juan mountains. *Id.* at 354. Unfortunately, Frémont used the only guide available, "Old Bill" Williams, who did not know the country as well as he claimed. *Id.* at 352–53, 357–60. The entire expedition nearly perished in the San Juans, and several members did not survive. *See id.* at 355, 360–68. The fifth expedition, of 1853–54, again attempted to find a usable railroad route through the San Juans, and this time it succeeded. *See id.* at 412–13. Frémont had indeed discovered the easiest route for a transcontinental railroad. However, the federal government eventually chose a route going through southern Wyoming, because that was more convenient for the Chicago region. *Id.* at 637. For maps of all five expeditions, see *id.* at 211.

98. *See id.* at 124.

99. NELL BROWN PROPST, SOUTH PLATTE TRAIL: STORY OF COLORADO'S FORGOTTEN PEOPLE 17 (2d ed. 1989).

100. *Id.*; NEVINS, *supra* note 97, at 129.

101. NEVINS, *supra* note 97, at 442.

On all discovery expeditions, the arms would have been the best U.S. military arms of their time, typically rifles and handguns.[102]

In the Colonial Period and the Early Republic, almost all Americans lived east of the Appalachians.[103] Except for land that had been cleared for cultivation, most of the area was thickly wooded. In those days, Americans owned a wide variety of firearms, including handguns, muskets, blunderbusses, fowling pieces, shotguns, and rifles. The quintessential American firearm of the late eighteenth and early nineteenth century was the Pennsylvania–Kentucky rifle. Originally made by German immigrant gunsmiths in Lancaster, Pennsylvania, the rifle was popularized by frontiersmen and hunters in "Kentucky"—at the time, a general term for the western areas around the Ohio River. The rifle "'fit the forest.' Its long barrel gave the ample sighting radius needed for small targets. Its stock was slender and drooping for stand-up shooting. The slender-barrel and small caliber were adapted to the light load that a far-reaching foot traveler needed."[104]

As the United States expanded westward, needs changed. West of the Appalachians, "the frontiersman's path crossed more level prairies. He rode a horse; he shot bison and elk."[105] Thus, calibers

> began to increase for the man from the West. Barrels became heavier and shorter. Sun-catching ornaments and figured wood were less popular. The man on the prairie wanted more of the purchase price put into range and power and less of it into thin patch boxes and curly wood which couldn't survive a fall from a pitching mustang.[106]

The result was the Plains Rifle, also known as the Hawken Rifle for its leading manufacturer.[107] The Plains Rifle was well-suited to carrying on a horse and was powerful enough to take a grizzly bear or a buffalo.[108] The manufacturing center was St. Louis, the Gateway to the West.[109] Its "[a]ccuracy was good, killing power was great, and the recoil . . . was hardly noticeable."[110]

A typical example of a Plains Rifle may be found in the Tenth Circuit Courthouse in Denver. In the hallway outside Courtroom 1, the museum

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102. For example, Frémont's second expedition (1843) "was armed with a really superior weapon, the Hall breech-loading rifled carbine, a piece fired by flintlock, but using ready-fixed ball-and-powder cartridges, and susceptible of rapid reloading." *Id.* at 130. For the third expedition (1845), Frémont "purchased a dozen of the finest rifles on the market, and offered them to his corps as prizes for the best marksmanship." *Id.* at 207.

103. I here use "Americans" in the sense of persons who considered themselves to be part of the United States of America, or of its predecessor English colonies.

104. CHARLES E. HANSON, JR., THE PLAINS RIFLE 1 (1960).

105. *Id.*

106. *Id.*

107. *See id.* at 2.

108. *Id.*

109. *See id.*

110. RUSSELL, *supra* note 66, at 88.

display includes the Plains Rifle owned by Justice White's grandfather, an early settler of Iowa.

While the missions of exploration were passing through Colorado, the first long-term presence of U.S. citizens in Colorado was that of the mountain men, beginning in the early nineteenth century. Many of these rugged men made their living as intermediaries in the trade between Indians and the citizens of the United States of America or the United States of Mexico.[111]

Some mountain men brought the goods they had acquired from the Indians (e.g., beaver pelts) to forts that were also trading posts. The most important of these was Bent's Fort, in southeastern Colorado.[112] An adobe trading post that operated 1833–1849, it was for most of that time the only significant white settlement on the Santa Fe Trail (connecting Independence, Missouri, to Santa Fe, New Mexico).[113] Located near present-day La Junta, Bent's Fort managed a thriving trade business with the Cheyenne and Arapaho Indians.[114] Other mountain men would meet up with commercial traders at a periodic "rendezvous," such as those held in southern Colorado with the cooperation of the Utes.[115]

In the early decades, the primary economic activity of the mountain men was collection of beaver pelts, for hats and other clothing.[116] The

111. Some mountain men were employees or contractors for fur companies. Others were "free trappers," who owned their equipment, and traded as they pleased. DOLIN, *supra* note 40, at 227. In the classic period of the Rocky Mountain fur trade, up to 1840, there were probably no more than 3,000 mountain men all together. *Id.*

112. *See* LAVENDER, *supra* note 44, at 15.

113. *See id.* Bent's "Adobe Empire" of trade stretched into all the (future) states adjacent to Colorado, plus far northern Texas. *See id.* at inside cover (map). Bent's Fort was a partnership of brothers William and Charles Bent, plus Ceran St. Vrain. *See* RONALD K. WETHERINGTON, CERAN ST. VRAIN: AMERICAN FRONTIER ENTREPRENEUR 10 (2012). The latter was a former trapper. *Id.* He built another trading post, Fort St. Vrain, near the northern Front Range. *See id.*

114. The Santa Fe Trail opened in 1821. AFTON ET AL., *supra* note 2, at xiii. In 1825, thirteen Cheyenne leaders concluded a peace treaty with the United States, allowing travel along the Santa Fe Trail. Treaty with the Cheyenne Tribe, 1825, art. 4, Cheyenne-U.S., July 6, 1825, 7 Stat. 255, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 234 ("[N]or will they, whilst on their distant excursions, molest or interrupt any American citizen or citizens, who may be passing, from the United States to New Mexico, or returning from thence to the United States.").
Charles J. Kappler was the clerk for the Senate Committee on Indian Affairs, and his compilation is "the standard reference work for treaty texts." PRUCHA, *supra* note 2, at 444–45.
William and Charles Bent are the namesakes of Bent County, Colorado, where a rebuilt version of their fort is located. *See Bent County*, COLO. ENCYCLOPEDIA, https://coloradoencyclopedia.org/article/bent-county (last visited Nov. 26, 2017).

115. SIMMONS, *supra* note 2, at 51. A rendezvous in the San Luis Valley took place in 1825, and perhaps other years. *Id.* However, the site was abandoned for rendezvous because the nearest town was Taos, where the Mexicans imposed high tariffs on trade. *Id.* Western Wyoming and nearby areas were the most common rendezvous cites. *See* RUSSELL, *supra* note 66, at 12–14. Perhaps the major white-Indian meeting for trade took place in 1816, on the banks of the Cherry Creek, near the future site of Denver. *See* TRENHOLM, *supra* note 20, at 41. Cheyenne and Arapaho held the grand encampment, where they met with forty-five employees of the St. Louis traders A.P. Chouteau and Julius de Mun. *Id.*

116. *See* DOLIN, *supra* note 40, at 223–54.

beaver trade had been going on since the early colonial days.[117] As eastern beaver were overhunted, traders had to range further and further west.[118] Because beaver became harder to find in the 1830s, substitutes were developed. French fashion designers created the silk hat. Nutria pelts, from a South American relative of the beaver, were not as good as beaver pelts, but they were much cheaper and sufficient for many uses. By 1840, the Rocky Mountain beaver trade was pretty much finished.[119]

Thereafter, the mountain men generally shifted from beaver trapping to acting as middlemen in the buffalo hide trade, preferring buffalo harvested in the fall when their fur was thick.[120] Mountain men also served as guides for expeditions or as army scouts.

While mountain men were rugged individualists, they were not solitary. On beaver expeditions, eight men might travel and camp together.[121] From an established camp, each man would go off by himself in the morning to set traps, hunt for game thereafter, and then return to the traps in the evening.[122] Many mountain men married Indian wives, sometimes polygamously.[123] These marriages were usually with the daughters or sisters of high-ranking chiefs, and the biracial families helped bridge the Indian and white worlds.[124]

The risk of death from animals, hostile Indians, or bad weather was very high. At a rendezvous, there was plenty of drinking, gambling, and fighting—some of it fatal. Yet the code of the mountain man was that in the wilderness two men who had previously brawled at a rendezvous would always rescue and protect each other.[125]

In a sense, the mountain man lifestyle was very healthy. Kit Carson recalled that of the hundreds of mountain men he had known, not one had

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117. *See id.* at 3–116.

118. *See id.* at 282–88.

119. *See id.* at 281–89; *see also* M.M. Quaife, *Introduction* to WOOTTON, *supra* note 2, at 1, 2 (also noting competition from skins of fur seals). Wootton's autobiography was originally published in the late nineteenth century, "as told to" Howard L. Conrad, a scholar who interviewed Wootton and turned his reminisces into book form. *Id.* at 4–7.

120. WEST, *supra* note 2, at 80 ("Mountain men became middlemen."); *see also* DOLIN, *supra* note 40, at 301 (stating that Bent's Fort shipped about 15,000 buffalo robes annually).

121. *See* WOOTTON, *supra* note 2, at 35; *see also* DOLIN, *supra* note 40, at 230 (stating that some expeditions were as large as sixty men).

122. *See* WOOTTON, *supra* note 2, at 35.

123. DOLIN, *supra* note 40, at 227–28 (stating that about a third of mountain men took Indian wives, with free trappers typically doing so).

124. *See id.*; *see also* WEST, *supra* note 2, at 80–82, 185 ("Virtually every trader in Denver had at least one Indian wife.").

125. JEROME CONSTANT SMILEY, HISTORY OF DENVER: ITS EARLY FUR TRADING POSTS, HUNTERS, TRAPPERS, AND MOUNTAIN MEN (1901).

died from sickness.[126] The air was pure, and the diet was mainly game, especially buffalo.[127]

The typical arms of a trapper were two pistols, two large knives, and a tomahawk hatchet, all worn on a belt.[128] "In addition to this, of course, every man carried his rifle and ammunition enough to meet any emergency likely to arise," recalled "Uncle Dick" Wooten.[129] According to Wooten, "We always slept with our loaded guns at our side, in such a position that we could grab them instantly and in case of emergency shoot without getting on our feet."[130] Besides personal arms, the men carried large supplies of arms and ammunition on pack animals for trade with the Indians.[131]

Although some mountain men journeyed west intending to make good money for a few years and then return home, many found the West irresistible and never left.

Among Colorado's notable mountain men were:

Mariana Modena. From Taos, he first came to the mountains in 1833.[132] He was three-quarters Mexican and one-quarter Indian.[133] Educated by Spanish priests, he could, it was said, speak thirteen Old World languages and twelve Indian dialects.[134] He built Fort Namaqua over the Big Thompson River in Colorado, where he operated a toll bridge for travelers.[135] He had many Hawken Rifles, and his favorite, a finely engraved piece, is in the collection of the Colorado History Museum.[136]

126.

> Our ordinary fare consisted of fresh beaver and buffalo-meat without any salt, bread, or vegetables . . . . During the winter, visiting our traps twice a day, we were often compelled to break the ice and wade in water up to our waists. Notwithstanding these hardships sickness was absolutely unknown among us. I lived ten years in the mountains with from one to three hundred trappers, and I cannot remember that a single one of them died from disease.

RICHARDSON, *supra* note 88, at 257–58 (1873) (quoting Kit Carson).

127. *See* WOOTTON, *supra* note 2, at 34–35 (listing buffalo, bear, venison, elk, antelope, wild turkey, rabbits, squirrels, pheasants, partridges, and beaver—all roasted over a campfire); *see also* DOLIN, *supra* note 40, at 245–46 (listing mountain lion, when lucky, plus snakes, lizards, and the men's own horses and mules during hard times; diet could include "berries, corn, goose and crow eggs, and wild onions and lettuce").

128. *See* WOOTTON, *supra* note 2, at 34.

129. *Id.*

130. *Id.* at 106.

131. *See id.* at 28 (discussing trade conversions: one butcher knife for a buffalo robe; for two robes, a pound of gunpowder, plus gun caps, and about 60 bullets; for a buckskin, three bullets and three charges of powder); *id.* at 65 ("I had about fifty guns in my stock of goods and plenty of ammunition."). A particularly common knife for the mountain men was the Green River knife, sometimes called a "scalper," which was handy for butchering and skinning, among other things. *See* RUSSELL, *supra* note 66, at 199–205, 228–31.

132. JOHN D. BAIRD, HAWKEN RIFLES: THE MOUNTAIN MAN'S CHOICE 6 (1968).

133. *Id.* at 29.

134. *Id.*

135. *Id.*

136. *See id.* at 5–6, 29–32.

Jim Baker. In 1858, after his itinerant days were over, he built a cabin and toll bridge north of Denver.[137] A painting in the collection of the Colorado History Museum shows Baker with his Hawken.[138]

Jim Bridger. A fur trader and guide, Bridger first came to Colorado in 1822. In 1840–1860, he "roamed the territory between Canada and southern Colorado . . . . He was the first white man known to have visited Great Salt Lake, and later was to guide a party of Mormons to this place."[139] Along with Edward L. Berthoud, Bridger discovered Berthoud Pass as a usable wagon trail in 1861.[140] Bridger carried a Hawken and an over-and-under rifle made in Pennsylvania.[141] He was also a gunsmith.[142]

Jimmy Hayes. The first white inhabitant of El Paso County, he arrived in 1833.[143] The Indians eagerly traded with him.[144] When he was murdered by a gang of Mexicans, the Indians buried his body in his cabin, tracked down the eleven Mexican killers, and hanged them all.[145]

Kit Carson. Based in Taos, Colonel Carson "ranged the Great Plains, the Colorado Rockies, and the Uinta Basin."[146] He guided John C. Frémont's 1842–1846 expeditions.[147]

Carson fought alongside Colorado militia in New Mexico during the Civil War.[148] In addition to the Hawken, he carried Colt revolvers.[149] Some of his men had Hall carbines, a short rifle made by the federal armories.[150]

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137. LEONARD & NOEL, *supra* note 2, at 29; WOOTTON, *supra* note 2, at 103 n.37.

138. BAIRD, *supra* note 132, at 5–6. *See generally* NOLIE MUMEY, THE LIFE OF JIM BAKER, 1818–1898: TRAPPER, SCOUT, GUIDE AND INDIAN FIGHTER (1931) (discussing the life of Jim Baker). One of Baker's knives, forged from a common file, is in the collection of the Colorado State Historical Society. RUSSELL, *supra* note 66, at 187, 203, 205 (specimen no. 322F).

139. BAIRD, *supra* note 132, at 4–7; *see* VESTAL, *supra* note 92, at ix–x (discussing Jim Bridger's achievements and advocating for a "new attempt" in biographing his life).

140. *See* BAIRD, *supra* note 132, at 208–09.

141. *Id.* at 5. Bridger established a trading post on the Oregon Trail in the Utah Territory (now, Fort Bridger Wyoming). *See* VESTAL, *supra* note 92, at 185. It was later burned by Mormons, after Brigham Young accurately accused Bridger of selling guns to Indians. SIMMONS, *supra* note 2, at 93; *see also* VESTAL, *supra* note 92, at 185, 189 (describing Mormon defeat by Snake Indians, whom Bridger had armed with modern rifles).

Bridger is portrayed in the movie *The Revenant*, about mountain man Hugh Glass. *See The Revenant*, IMDB, http://www.imdb.com/title/tt1663202 (last visited Dec. 21, 2017). According to Glass, after he was mauled by a grizzly bear in South Dakota, he was abandoned by a party, including Bridger, which presumed he was fatally wounded. DOLIN, *supra* note 40, at 247–49. Nevertheless, Glass survived, and eventually made his way to a trading post. *Id.* at 248.

142. VESTAL, *supra* note 92, at 152.

143. 3 HALL, *supra* note 2, at 341.

144. *See id.* at 341–42.

145. *Id.*

146. BAIRD, *supra* note 132, at 7.

147. ESTERGREEN, *supra* note 2, at 89, 103, 106, 126.

148. *Id.* at 230–31.

149. BAIRD, *supra* note 132, at 8.

150. *See* ESTERGREEN, *supra* note 2, at 106. Carson passed away at Ft. Lyon, Colorado, in 1868. *Id.* at 275–78. Future Colorado Supreme Court Justice Wilbur Fiske Stone called Carson

> pre-eminent among the pathfinders . . . . [H]is long career, ennobled by hardship and danger, is unsullied by the record of a littleness or meanness. He was nature's model of a

Carson's picture adorns the inner dome of the Colorado State Capitol, as one of sixteen in the "Colorado Hall of Fame."[151] In the Denver Civic Center, the Pioneer Monument marks the end of the Smoky Hill Trail, an Indian trail from Kansas that was used by pioneers in the Gold Rush and thereafter. At the top of the fountain, rising on horseback from the basin, is the bronze figure of Kit Carson wearing buckskin, carrying a rifle, and pointing westward. The monument also features a prospector, a trapper, and a pioneer mother. She cradles a baby in one arm and holds a rifle in the other.[152]

The Hawken Rifle of the mountain men and some pioneer women was made in St. Louis.[153] In 1859–1860, William S. Hawken sold the St. Louis shop and moved to Denver, opening a Denver store in January 1860.[154] Perhaps he hoped that Denver would be the new St. Louis, the Gateway to the West. Hawken appears to have been the first nationally known manufacturer to move to Colorado. Denver soon became the "emporium" of the West, the commercial hub of a vast region in which there was no other large city.[155]

> gentlemen, kindly of heart, tolerant to all men . . . leaving behind him a name and memory to be cherished by his countrymen so long as modesty, valor, unobtrusive worth, charity and true chivalry survive among men.

1 HALL, *supra* note 2, at 161 (quoting Wilbur Fiske Stone, *Death of Kit Carson*, COLO. CHIEFTAIN, June 1, 1868, at 1, http://pccldigitalcollection.contentdm.oclc.org/cdm/compoundobject/collection/p16620coll15/id/202).

He is the namesake of Kit Carson County, Colorado, as well as Carson City, the capital city of Nevada. The Kit Carson Highway takes travelers through southeastern Colorado into New Mexico. ESTERGREEN, *supra* note 2, at 279.

151. *Id.* The members in the Colorado Hall of Fame who are mentioned in this article are: Jim Baker (mountain man; *see* text accompanying notes 92, 139–42, 177, 550, 705); Casimero Barela (Sheriff and State Senator, *see* text accompanying notes 832–33); William Byers (founder of the Rocky Mountain News, *see* text accompanying notes 630–31); James Denver (territorial governor of Kansas during the first phase of the Gold Rush; *see* text accompanying notes 233–34); John Evans (territorial governor, founder of the University of Denver; *see* text accompanying notes 376, 418–21, 441–42, 455–56, 480, 497); William Gilpin (territorial governor; *see* text accompanying notes 100, 278–81, 284–99); Nathaniel Hill (chemist who discovered how to efficiently extract gold ore from the rest of the rock; U.S. Senator 1879–85; *see* text accompanying note 591); Bela Metcalf Hughes (founder of Overland Stage Company, president of first Denver-Cheyenne railroad; *see* text accompanying note 495); Chief Ouray (a leader of the Southern Utes; *see* text accompanying notes 549, 562, 575–76, 580, 583). *See* DEREK R. EVERETT, THE COLORADO STATE CAPITOL: HISTORY, POLITICS, PRESERVATION 195–96 (2005).

Others in the Colorado Hall of Fame are: Dr. Richard Buckingham (helped establish the School of Deaf and Blind); John Lewis Dyer (Methodist-Episcopal preacher in the mining camps, known for pointing his gun at drunks who tried to interrupt his services. JOHN L. DYER, THE SNOW-SHOE ITINERANT: AN AUTOBIOGRAPHY OF THE REV. JOHN L. DYER (Andesite Press 2015) (1890)); Benjamin Eaton (started irrigation near Greeley; Governor 1885–87); Frances Jacobs (organized help for the destitute, which later became Community Chest; started free kindergartens and the National Jewish Hospital); Alexander Majors (carried supplies to forts and stations in the West; helped start the Pony Express; note 459); William Jackson Palmer (founder of Colorado Springs, and of the Denver & Rio Grande Railroad). *See* EVERETT, *at* 195–96.

152. Another equestrian statue of Carson is in Kit Carson Park, in Trinidad, Colorado, next to a Santa Fe Trail route.

153. *See* HANSON, JR., *supra* note 104, at 2.

154. BAIRD, *supra* note 132, at xvi–xvii, 29.

155. *See* LAMAR, *supra* note 2, at 246 (calling Denver "the vaunted emporium of the West").

The settlement of Colorado by the men and women of the United States began in earnest with the discovery of gold in Colorado at 1858.[156] A few hundred argonauts immediately rushed to Colorado.[157] Tens of thousands poured into Colorado in 1859, starting in the spring. Although there were many discouraged "go-backers," the migrants who stayed probably equaled or exceeded the Colorado Indian population east of the Continental Divide, whose various tribes had only several thousand members each.[158]

While the gold rush was underway, American firearms manufacture was in the midst of a great leap forward.

C. Firearms Improvements in Mid-Nineteenth Century

The greatest advances ever in affordable firearms coincided with Colorado's entry into the United States. Between the first large-scale Colorado settlements in the 1850s, and statehood in 1876, all Americans witnessed astonishing improvements in firearms.

The Plains and Hawken Rifles were single-shot.[159] After one shot was fired, the user had to reload the gun. Multishot arms—commonly known as "repeaters"—had been invented centuries before, but they were

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156. The discovery was made by a group headed by Georgia miner Green Russell and including Cherokee Indians. Russell was married to a Cherokee. LUKE TIERNEY & WILLIAM B. PARSONS, PIKE'S PEAK GOLD RUSH GUIDEBOOKS OF 1859, at 34, 55 (LeRoy R. Hafen ed., 1941). For a memoir stating that Russell joined the expedition when it was underway, and was not the founder of the expedition, see Philander Simmons, *The Cherokee Expedition of 1858*, *in* TIERNEY & PARSONS, *supra*, at 299, 299–304. *See also* 1 HALL, *supra* note 2, at 177 (describing how the Cherokees discovered Colorado gold in 1849 during travels for the California gold rush, and later organized the 1858 Colorado expedition).

Indians in Colorado had known about the gold for a while, and kept the secret, since they correctly foresaw that whites would swarm into the Indian hunting grounds once they learned about the gold. GEO. S. BLANCHARD, PEARMAN'S MAP AND PARSON'S GUIDE TO THE NEBRASKA AND KANSAS GOLD REGIONS 56 (Cincinnati, Geo. Blanchard 2d ed. 1859) (quoting "Memorial of the St. Louis Chamber of Commerce to the Honorable the Senate and House of Representatives of the United States of America, in Congress assembled") (emphasis omitted).

157. *See* WEST, *supra* note 2, at 107.

158. *See* BERWANGER, *supra* note 2, at 10 (1860 census population of 34,277 in the former Kansas region; plus 4,223 in the former Nebraska region, and about 5,000 in the former New Mexico region); LAMAR, *supra* note 2, at 208 (estimating the total Indian and white populations in Colorado were about equal); LEONARD & NOEL, *supra* note 2, at 15 (1851 Cheyenne and Arapaho population was about 10,000); MISHKIN, *supra* note 59, at 11, 25 (total Kiowa population of 1,500 in 1869; probably not more than 2,000 in 1832); TRENHOLM, *supra* note 20, at 98–99, 133 (estimated total Arapaho population of 3,600 in early 1830s, and about 3,000 around 1850); *id.* at 164 (The 1862 Census of the Arkansas River tribes found 1,500 Arapaho; 1,800 Comanche; 1,800 Kiowa, and 500 Apaches).

Between 1860 and 1861, many men, especially those born in the South, returned to the States to fight on one side or the other of the Civil War. BERWANGER, *supra* note 2, at 9–10.

Although this article refers to early waves of immigrants from the East as "whites," there was a small free black population Colorado from 1858 onwards, principally in Denver. *See* WHITFORD, *supra* note 2, at 40, 111. The summer 1861 census of Colorado reported 25,331 non-Indian inhabitants, comprising 18,136 white males over 21; 2,622 white males under 21; 4,484 females; and 89 blacks. *Id.* By the 1870 census, the black population had risen to 457. *Id.* at 111 (stating that the black population totaled in 237 in Denver, 54 in Central City, and 17 in Georgetown). As of 1880, the black population was 2,435. *Id.*

159. *See* BAIRD, *supra* note 132, at 5; *see also* HANSON, JR., *supra* note 104, at 1, 147.

expensive.[160] Their parts had to fit together much more closely than did the parts of a single-shot gun. The only way to make repeating firearms that were affordable to the mass consumer market was to make guns with interchangeable parts. To make interchangeable parts, it was first necessary to invent machine tools (tools for making tools) that could produce firearms parts.[161] These machine-made parts had to have close tolerances.[162] For example, the wooden stock for a rifle needed to have a slot that was just the right size to hold the rifle barrel—without extensive hand fitting needed for either the stock or the barrel.[163]

Starting in 1815, the federal government put the federal armories at Springfield, Massachusetts, and Harpers Ferry, Virginia, to work on inventing machine tools to make interchangeable parts.[164] In the Connecticut River Valley of western New England, the Springfield Armory worked closely with private arms makers, who in turn networked with other nascent industries.[165] The objective was a low-cost rifle, ideally a repeater.

With abundant rivers and streams for power, plenty of iron nearby, and an entrepreneurial spirit of middle-class inventors, the "Gun Valley" of New England became the Silicon Valley of its era. Its networks of "retained knowledge" and "technical skills and innovations . . . became embedded in communities of practice."[166] The job-hopping, sophisticated,

160. *See, e.g.*, M.L. BROWN, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY 1492–1792, at 50, 105–08 (1980) (ten-shot repeater with revolving cylinder, from 1490–1530; four-barreled fifteen-shot gun from seventeenth century; thirty-shot Danish flintlocks from 1646); J.N. GEORGE, ENGLISH GUNS AND RIFLES 55–58 (1947) (English breech-loading lever-action repeater, and a revolver, made no later than the British Civil War, and perhaps earlier, by an English gun maker); W.W. GREENER, THE GUN AND ITS DEVELOPMENT 81–82 (9th ed. 1910) (Henry VIII's gun with a revolving multi-shot cylinder); David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852–53 (2015) (discussing the history of multishot arms, starting with the sixteen-shot gun from 1580 and continuing to Lewis and Clark's twenty-two-shot Girandoni rifle); Samuel Niles, *A Summary Historical Narrative of the Wars in New-England with the French and Indians*, *in* 6 Collections of the Massachusetts Historical Society 1837, at 154, 154 (American Stationers' Co. Ser. No. 3, 1837) (eleven-shot gun in Massachusetts in 1722); HAROLD L. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 1526–1783, at 217 (Dover Publications 2000) (eight-shot gun invented by Philadelphia's Joseph Belton); CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY: 1600 TO 1800, at 194–98, 215–16 (1910) (multi-shot pistols from the American Revolution).

161. JOHNSON ET AL., *supra* note 2, at 143–44, 395.

162. *See* FELICIA JOHNSON DEYRUP, ARMS MAKERS OF THE CONNECTICUT VALLEY: A REGIONAL STUDY OF THE ECONOMIC DEVELOPMENT OF THE SMALL ARMS INDUSTRY, 1798–1870, at 97–98 (1948); *see also* ROSS THOMSON, STRUCTURES OF CHANGE IN THE MECHANICAL AGE: TECHNOLOGICAL INNOVATION IN THE UNITED STATES, 1790–1865, at 54–57 (2009).

163. JOHNSON ET AL., *supra* note 2, at 395.

164. *See* THOMSON, *supra* note 162, at 54–57.

165. *See* DEYRUP, *supra* note 162, at vii, 3–5 (an exquisitely detailed study on gun manufacturing, still relied on by scholars today); DAVID R. MEYER, NETWORKED MACHINISTS: HIGH-TECHNOLOGY INDUSTRIES IN ANTEBELLUM AMERICA 1–8 (2006); MERRITT ROE SMITH, HARPERS FERRY ARMORY AND THE NEW TECHNOLOGY: THE CHALLENGE OF CHANGE 121–23 (1977); THOMSON, *supra* note 162, at xiii–xiv, 54–57.

166. MEYER, *supra* note 165, at 280.

and youthful "machinists in the antebellum East anticipated modern behavior by over one hundred and fifty years."[167]

By the 1830s, the federal arms-making project had succeeded so well that arms makers for the consumer market were also using mass production—and also substantially improving the techniques first developed in the federal armories. Early leaders were Colonel Samuel Colt, with his state-of-the-art revolver factory near Hartford; Christian Sharps, a riflemaker with his own outstanding factory in Hartford; and Eliphalet Remington, founder of the Remington Arms Company in upstate New York. In the 1850s, two other enduring companies—Smith & Wesson, and Winchester Repeating Arms—would enter the market.[168]

The first very common repeating firearms in America were "pepperbox" handguns. Introduced in the mid-1830s, they had multiple barrels that would fire sequentially.[169] The most common configurations were four to eight shots, but some models had as many as twenty-four.[170] Pepperboxes were good enough for self-defense at close range, but not accurate enough for anything else.[171]

Pepperboxes came on the market several years before Colt's revolvers.[172] Unlike a pepperbox, a revolver has only a single barrel.[173] It holds several rounds of ammunition in a rotating cylinder, behind the barrel.[174] Because pepperboxes were less expensive than revolvers, many people who joined the 1849 California Gold Rush carried pepperboxes.[175] About a third of the miners of the Colorado Gold Rush had been California miners,[176] so we may infer that some of them brought pepperboxes. But by 1858, when the Colorado Gold Rush began, revolvers had become more affordable, and the advertisements for Colorado gun stores (discussed below) indicate that people buying new guns wanted revolvers, not pepperboxes.

As for long guns, the Plains or Hawken rifles were muzzleloaders. They had to be loaded from the front of the gun. Today, breechloaders are common; they load from the back of the gun. This makes reloading much faster. For a muzzle-loader, an expert might be able to fire five shots per minute, although three per minute was more typical.

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167. *Id.*

168. Initially, the companies had different names.

169. *See* LEWIS WINANT, PEPPERBOX FIREARMS 7–10 (1952) (discussing the firing mechanics of a pepperbox and providing pictures of different pepperboxes).

170. *See id.*

171. *See* WINANT, *supra* note 169, at 7, 10. *See generally* JACK DUNLAP, AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS (1964) (discussing the various types of pepperboxes).

172. *See* CHARLES EDWARD CHAPEL, GUNS OF THE OLD WEST 84–86 (1961).

173. *Id.* at 85.

174. *Id.*

175. *Id.*

176. *See infra* text accompanying note 547.

The Plains rifle was outstanding in many ways, but heavy rifles are difficult to fire accurately while on horseback. In combat with a mounted party of Indians, who could rapidly load and fire arrows, even the best single-shot rifle was at a disadvantage.[177]

The first consumer mass market breechloader was the Sharps rifle, introduced in 1850. Although it was a single-shot gun, the breech-loading mechanism was so simple that a novice could fire nine shots in a minute.[178] The Sharps were particularly popular with pioneer families heading West. A superb long-range gun, the Sharps remained in common use for decades afterward.[179]

The first common repeating rifle was the lever action. With a lever action, loading the next shot is simple. To eject the empty metallic case and then bring a fresh cartridge into the firing chamber, the user pulls down a lever and then pushes it back up. In a typical lever action rifle, the reserve ammunition is held in a tubular magazine underneath the barrel.[180] Although the lever action had been invented in the seventeenth century,[181] it was not until the 1850s that machine tools were sufficiently advanced so that lever actions could be produced for the mass market.[182]

Daniel Wesson and Oliver Winchester collaborated to produce the thirty-shot Volcanic Rifle.[183] It did not sell well because of reliability problems.[184] Thereafter, Wesson concentrated on other projects, especially handguns, for which Smith & Wesson became famous. Meanwhile, Winchester worked on the rifle. A much-improved Winchester was introduced in 1862, the Henry Rifle.[185] It could fire sixteen shots without reloading. The Henry was a big success.[186]

An even bigger success was an improved version of the Henry, the Winchester Model 1866, the first gun produced under the Winchester name.[187] It could fire up to eighteen shots without reloading.[188] Winchester

177. *See* VESTAL, *supra* note 92, at 270–71 (providing Jim Bridger's observations on Indians' combat prowess).

178. *Sharps' Breech-Loading Patent Rifle*, 5 SCI. AM. 193, 193 (1850).

179. *See* TOWNSEND WHELAN, THE AMERICAN RIFLE: A TREATISE, A TEXT BOOK, AND A BOOK OF PRACTICAL INSTRUCTION IN THE USE OF THE RIFLE 9 (1918).

180. JOHNSON ET AL., *supra* note 2, at 403; ARTHUR PIRKLE, WINCHESTER LEVER ACTION REPEATING FIREARMS: THE MODELS OF 1866, 1873 & 1876 (2010).

181. GEORGE, *supra* note 160, at 55–58 (1947) (English lever-action repeater).

182. JOHNSON ET AL., *supra* note 2, at 397–98, 403.

183. *See* NORM FLAYDERMAN, FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS . . . AND THEIR VALUES 300 (9th ed. 2007). Oliver Winchester had an ownership interest in Volcanic, and he acquired the company in 1857. *Id.*

184. *See id.*

185. WILEY SWORD, THE HISTORIC HENRY RIFLE: OLIVER WINCHESTER'S FAMOUS CIVIL WAR REPEATER 7 (2002).

186. Indeed, it is still in production today. *See* HENRY ARMS COMPANY, THE RIFLES OF THE HENRY REPEATING ARMS COMPANY (2009). Sales in 1860–1866 were about 14,000. FLAYDERMAN, *supra* note 183, at 305.

187. *See* HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 49 (1952).

188. *Id.*

touted the Model 1866 (or M1866) for defense against "sudden attack either from robbers or Indians."[189] According to advertising, the M1866 "can . . . be fired thirty times a minute."[190] With seventeen in the magazine and one in the chamber, "eighteen charges, which can be fired in nine seconds."[191] The gun was a major seller in the American West, including in Denver.[192] There were over 170,000 Model 1866s produced.[193]

The trends that had been established in the 1850s were accelerated by the Civil War in 1861–1865.[194] Breechloaders and repeaters "were exceptional at the beginning of the war but had become weapons of choice at the war's end."[195] The war happened to come at a time when the domestic industry had developed the ability to scale up massively.[196] That scaled-up industry is essentially the American firearms industry that has continued to the present.

Next came the Winchester M1873, "The Gun that Won the West."[197] The Winchester M1873 and then the M1892 were lever actions; the former had a magazine capacity of six to twenty-five, depending on caliber and configuration, while the latter than ten or eleven rounds in tubular magazines.[198] There were over 720,000 Winchester 1873s made from 1873 to 1919.[199]

Manufactured in Maine, the Evans Repeating Rifle also came on the market in 1873.[200] The innovative rotary helical magazine in the buttstock held thirty-four rounds.[201] It was commercially successful for a while, although not at Winchester's or Colt's levels. Over 12,000 copies were produced.[202]

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189. R.L. WILSON, WINCHESTER: AN AMERICAN LEGEND 32 (1991) (emphasis omitted) (quoting a Winchester advertisement "of the late 1860s").

190. WILLIAMSON, *supra* note 187, at 49.

191. GARAVAGLIA & WORMAN, *supra* note 2, at 124, 128. The Winchester Model 1866 was produced until 1898. FLAYDERMAN, *supra* note 183, at 306; PIRKLE, *supra* note 180, at 44.

192. WILSON, *supra* note 189, at 35.

193. FLAYDERMAN, *supra* note 183, at 306.

194. *See* THOMSON, *supra* note 162, at 307.

195. *Id.*

196. *See id.* at 307–08.

197. *Model 1873 Short Rifle*, WINCHESTER REPEATING ARMS, http://winchesterguns.com/products/rifles/model-1873/model-1873-current-products/model-1873-short-rifle.html (last visited Nov. 25, 2017).

198. PIRKLE, *supra* note 180, at 107; *Model 1892 Short Rifle*, WINCHESTER REPEATING ARMS, http://www.winchesterguns.com/products/rifles/model-1892/model-1892-current-products/model-1892-short-rifle.html (last visited Nov. 25, 2017).

199. FLAYDERMAN, *supra* note 183, at 307. The Model 1873 was Pa Cartwright's gun on the 1959–73 television series *Bonanza*. JIM SUPICA ET AL., TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM 108 (2013).

200. FLAYDERMAN, *supra* note 183, at 694.

201. DWIGHT B. DEMERITT, JR., MAINE MADE GUNS & THEIR MAKERS 293–95 (rev. ed. 1997); FLAYDERMAN, *supra* note 183, at 694. A later iteration of the rifle held twenty-five or twenty-eight rounds in the buttstock. *See* DEMERITT JR., *supra*, at 301.

202. FLAYDERMAN, *supra* note 183, at 694.

Meanwhile, Colt's and Smith & Wesson were doing a booming business with their revolvers. As patents expired, many other companies began making revolvers.

While five- or six-shot revolvers were taking over the handgun business, inventors were already at work on what would be the next major step in handgun development: a handgun with greater capacity. Pin-fire revolvers with capacities of up to twenty or twenty-one entered the market in the 1850s, but were more popular in Europe than America.[203] For revolvers with other firing mechanisms, some models held more than seventeen rounds.[204] The twenty-round Josselyn belt-fed chain pistol was introduced in 1866, and various other chain pistols had even greater capacity.[205] Chain pistols did not win much market share, perhaps in part because the large dangling chain was such an impediment to carrying the gun.[206]

Eventually, the ammunition capacity issue would be resolved by the use of a rectangular box magazine to store ammunition. It could have greater capacity than a revolving cylinder or a tube, and it was more reliable than the alternatives. The first handgun to use a detachable box magazine was the ten-round Jarre harmonica pistol, patented in 1862.[207] Starting in the 1890s, the box magazine would become common for handguns.

The muzzleloading musket of 1791 in expert hands could fire up to five shots per minute. With a Sharps rifle of the early 1850s, anyone could now fire nine shots per minute. With a revolver or a repeating rifle, that rate of fire could be doubled, tripled, or more. And the new guns had much greater range and accuracy than their predecessors. Invented in the early seventeenth century, breech-loading repeaters in the mid-nineteenth century became an ordinary consumer good. As far as the historical record indicates, no one asserted that better guns showed a need for more stringent gun control.

The combination of the new mass producers catering to consumers and the enormous federal government demand for firearms during the Civil War spurred innovation.[208] From 1856–1865, firearms accounted for 64.8% of all American patents.[209] During the eighteenth century, there had been five English patents for breech-loading firearms. The first American

203. *See* SUPICA ET AL., *supra* note 199, at 48–49; *see also* WINANT, *supra* note 169, at 67–70 (discussing different firing methods and ammunition capacities of pepperboxes).

204. *See, e.g.*, WINANT, *supra* note 169, at 104–07.

205. *Id.* at 204, 206.

206. *See id.* at 204.

207. *Id.* at 156–57. The Jarre magazine stuck out horizontally from the side of the firing chamber, making the handgun difficult to carry in a holster, which perhaps explains why the gun never had mass success. SUPICA ET AL., *supra* note 199, at 33.

208. THOMSON, *supra* note 162, at 95.

209. *Id.* at 69–70, 95.

breech-loading patent was awarded in 1811 to John H. Hall, a machine tool inventor. By 1860, there were over a hundred American breech-loading patents, and by 1871 over 700—four times the rest of the world, combined.[210]

II. EARLY COLORADO: SURVIVAL AND SOVEREIGNTY

A. The Gold Rush

"Although the conditions [the Colorado pioneers] encountered were frontier, their psychological state could be described as optimistic and entrepreneurial. The key to early Colorado history lay in the juxtaposition of this condition and this attitude."[211]

In the towns that were embarkation points for the West, argonauts bought supplies for their journey to Pike's Peak country.[212] Guidebooks detailed the routes, equipment, and practices that would be necessary for the trip, and for making a start in Colorado. Advertisements in the guidebooks tell us something about the arms that were available. An advertisement from a firearms manufacturer and retailer in Glenwood, Iowa, offered "The best GUNS and PISTOLS, BOWIE KNIVES, SCABBARDS, BELTS, FLASKS, &c., ... All kinds of ammunition constantly on hand."[213] Some emigrants already had their own firearms, for whom the store offered, "[a]ll kinds of repairing done on the shortest notice."[214] As the wholesale agent for a large Connecticut manufacturer, a store in Kansas City advertised "GUNPOWDER!"[215] The store promised "FUSE AND PERCUSSION CAPS ALWAYS ON HAND."[216]

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210. CHARLES B. NORTON, AMERICAN BREECH-LOADING SMALL ARMS: A DESCRIPTION OF LATE INVENTIONS, INCLUDING THE GATLING GUN, AND A CHAPTER ON CARTRIDGES 11, 19 (New York, F.W. Christern 1872).

211. LAMAR, *supra* note 2, at 225.

212. Pike's Peak was the best-known geographic feature of Colorado. *See* DUANE A. SMITH, THE BIRTH OF COLORADO: A CIVIL WAR PERSPECTIVE 6 (1989). It was a name for the entire area, even though the peak itself is near Colorado Springs, about 60 miles south of the gold finds near Denver. *Id.*

213. LUKE TIERNEY, HISTORY OF THE GOLD DISCOVERIES ON THE SOUTH PLATTE RIVER 33 (Pacific City, Smith & Oaks 1859). Tierney was better informed than most guidebook authors, since he had participated in the 1858 expeditions. WEST, *supra* note 2, at 125.

214. TIERNEY, *supra* note 213, at 33.

215. O.B. GUNN, NEW MAP AND HAND-BOOK OF KANSAS & THE GOLD MINES 65 (LeRoy R. Hafen ed., W.S. Haven 1952) (1859).

216. *Id.* Percussion caps were the primer to ignite the gunpowder. Today, the primer is part of a complete "round" of ammunition, which consists of the primer, gunpowder, shell casing, and lead bullet. Before that, the percussion cap primer was a separate item, and was loaded separately from the bullet and gunpowder. As noted above, modern ammunition was just entering the market in the late 1850s.

The Kansas City store was a wholesaler for Hazard Powder Company, based in Hazardville, Connecticut, near Enfield. At the time, the company was manufacturing 12 tons of "sporting powder" and 16 tons of blasting powder every day. EDWARD CHANNING ALLEN II, COLONEL AUGUSTUS G. HAZARD AND THE HAZARD POWDER COMPANY 7, 9 (2012). The fuses would presumably be for blasting in mining operations. The gunpowder could be used mining and for firearms.

For recommended supplies, one guidebook suggested the following for a group of four men for six months: "2,000 gun caps [ammunition primers] . . . 1 case [gun]powder," plus a variety of knives.[217] Everyone would need a "good rifle and revolver—the first for game, and both for protection against marauders."[218] On the trail, "small companies" should "join together for mutual interest and self-protection."[219] Another guide, also for four persons for six months, recommended "2,000 gun and pistol caps (Eley's water-proof)" plus assorted knives.[220] The model of rifle "depends in a great measure upon the taste of the individual. Light sporting rifles, with fancy stocks, are not suitable to withstand the rough usage of the plains—neither should too heavy rifles be taken."[221] The author considered Hawkens rifles to be "preferable to any other."[222] "Revolvers can be obtained at prices varying according to the sharpness of the person trading for them."[223]

On the trail, "[e]very person, excepting the officers, should be compelled to perform guard duty . . . . [I]t requires some self-control to crawl out of warm and dry blankets, shoulder a rifle, and walk four hours in the rain, withont [sic] grumbling at the guard captain . . . ."[224] Guards were constantly necessary whenever the stock (mules and oxen were best) were detached from the wagons; the risk of a stampede caused by buffalo was greater than one incited by Indians.[225]

If Indians came upon some emigrants, the best approach was to feed a small group, or to feed the leading men of a large group. Trading with Indians for needed moccasins, robes, or belts was fine, "but keep your arms in good order, and always ready for use. Be kind, and yet cautious, and you will have no trouble with them."[226] Of the emigrants, "[m]ost

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217. GUNN, *supra* note 215, at 44.

218. *Id.* at 45.

219. *Id.*

220. WILLIAM B. PARSONS, THE NEW GOLD MINES OF WESTERN KANSAS 21–22 (2d ed. 1859). Parsons had participated in the 1858 gold discovery expeditions, so he knew what he was writing about. WEST, *supra* note 2, at 125.

Eley is an English manufacturer, long renowned for superior quality. *See* C.W. HARDING, ELEY CARTRIDGES: A HISTORY OF THE SILVERSMITHS AND AMMUNITION MANUFACTURERS 5 (2006).

221. BLANCHARD, *supra* note 156, at 23.

222. *Id.*

223. *Id.* Another guidebook contained an advertisement for the Russell, Majors, and Waddell dry goods store in Leavenworth, Kansas, whose wares included "guns, pistols, knives, etc." TIERNEY & PARSONS, *supra* note 156, at 234 (quoting L.J. EASTIN, EMIGRANT'S GUIDE TO PIKE'S PEAK 8 (Leavenworth, L.J. Eastin 1859)).

224. BLANCHARD, *supra* note 156, at 29–30. Similar advice is in TIERNEY & PARSONS, *supra* note 156, at 264 (summarizing the advice contained in NATHAN HOWE PARKER & D.H. HUYETT, THE ILLUSTRATED MINERS' HAND-BOOK AND GUIDE TO PIKE'S PEAK, WITH A NEW AND RELIABLE MAP, SHOWING ALL THE REGIONS OF WESTERN KANSAS AND NEBRASKA 59–60 (St. Louis, Parker & Huyett 1859)).

225. BLANCHARD, *supra* note 156, at 30.

226. *Id.* at 33.

came well armed. No outfit was complete without a revolver, a diarist noted."[227]

With the Gold Rush came the establishment of towns such as Denver, Auraria, Golden, Georgetown, and Colorado City (now part of Colorado Springs). Besides miners, emigrants were merchants, farmers, or others who hoped to participate in the growth of a new territory.[228]

B. Making New Governments

As of 1858, the land that would become the State of Colorado was part of four territories: Kansas (whose capital was Topeka), Utah (Salt Lake City), New Mexico (Santa Fe), and Nebraska (Omaha). The major area of settlement was within the Territory of Kansas, near or in the Front Range. The territorial legislature of Kansas in 1855 created Arapahoe County, and in 1859 divided Colorado into five counties.[229] But the territorial government of Kansas had little influence in Colorado. It was busy with a civil war in eastern Kansas, between pro-slavery and anti-slavery forces.[230] There was a Kansas judge for Colorado, but he never went to Colorado.[231] None of the territorial governments could do much to assist remote Colorado. The settlers were on their own.

Moreover, Colorado and the rest of western Kansas were still Indian country by treaty, so Kansas lacked authority even to attempt to organize county governments there.[232] Nevertheless, after the reports of the 1858 gold discovery, Kansas Governor James W. Denver commissioned several men to set up a county government; they included Arapahoe County

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227. WEST, *supra* note 2, at 134–35 (also noting that the diarist doubted that most argonauts could hit a target twenty paces distant).

228. *See, e.g.*, LAMM & SMITH, *supra* note 2, at 15; LEONARD & NOEL, *supra* note 2, at 9–10; WEST, *supra* note 2 at 250–54.

229. ERICKSON, *supra* note 2, at 3.

230. *See* JAY MONAGHAN, CIVIL WAR ON THE WESTERN BORDER: 1854–1865, at 12–14 (1955). The Kansas Territory was created in 1854 by the Kansas-Nebraska Act. Kansas-Nebraska Act, ch. 59, §§ 19, 37, 10 Stat. 277, 283–84, 290 (1854). The act left the slavery issue to a vote of the settlers, which led to much violence by "border ruffians" from the slave state of Missouri. *Id.* § 1, 10 Stat. at 277; MONAGHAN, *supra* note 230, at 12–14. Anti-slavery emigrants defended themselves with "Beecher's Bibles," Sharps rifles that were shipped from the Massachusetts Emigrant Aid Society, in boxes with Bibles to conceal the rifles underneath.

231. *See* ERICKSON, *supra* note 2, at 3.

232. *See* Treaty of Fort Laramie with Sioux etc., 1851, art. 5, Sept. 17, 1851, 11 Stat. 749, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 594–96 (granting the Cheyenne and Arapahoe territory between the North Platte and the Arkansas Rivers, between the Rocky Mountains and the Smoky Hill area of Kansas); *see also* 1 HALL, *supra* note 2, at 209 (noting that the organic act for the Kansas Territory expressly excepted any areas where Indians had title). Indeed, in 1863, the U.S. government surveyor general refused to confirm Coloradans' land titles until Indian claims to the area were extinguished. AFTON ET AL., *supra* note 2, at xv. Such claims were confirmed by Congress in 1864. *See infra* note 244 and accompanying text.

The Treaty of Fort Laramie was signed by three Arapaho chiefs and four Cheyenne ones. Treaty of Fort Laramie with Sioux etc., 1851, *supra*, at art. 8. Other signatories were Sioux, Crows, Assinaboines, Mandans and Gros Ventre, and Arickarees. *Id.* (quoting Treaty of Fort Laramie with Sioux etc., 1851, *supra*, at art. 8). Among the terms were that the signatory tribes not war against each other. *Id.* at 594 (Treaty of Fort Laramie with Sioux etc., 1851, *supra*, at art. 1).

Sheriff Edward W. Wynkoop and Treasurer John Larimer.[233] In November 1858, Larimer and others organized the Denver Town Company.[234] Separately, Arapahoe County officers were elected in March 1859.[235] (Denver was part of Arapahoe County until the adoption of the home rule constitutional amendment in 1902.[236]) The newly elected county officers did not wait for consent or orders from Kansas before taking office.[237]

Whatever role Kansas had in the government of the Colorado ended on January 29, 1861, when Kansas was admitted to the Union, with its present western boundary, the 102nd degree of western longitude.[238]

The first governments were created by the people themselves, as "miner's districts" in the mining regions, as "claims clubs" in farming areas,[239] and as "town companies."[240] These voluntary associations

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233. ERICKSON, *supra* note 2, at 4. Both men are namesakes of streets in lower downtown Denver. Wynkoop's obituary called him "one of the finest pistol shots in the world." CAROL TURNER, FORGOTTEN HEROES & VILLAINS OF SAND CREEK 28 (2010) (quoting Wynkoop's obituary published in the *Denver Republican*). For more on Wynkoop, see text accompanying notes 260, 378, 466, 618.

234. 1 HALL, *supra* note 2, at 182. The first whites to settle the site had dubbed it "St. Charles." *See id.* But many of the town founders had gone east for the winter, and those who remained were cajoled or coerced into accepting the new organization of Denver. *See id.* James Denver was not terribly impressed by the honor of being the city's namesake, and he only visited Denver once in his life. *Id.* Even if he had been flattered, he had no political benefit to confer; unbeknownst to the Denver settlers, he had resigned as Kansas Territorial Governor on Oct. 10, 1858. 2 HALL, *supra* note 2, at 327.

235. ERICKSON, *supra* note 2, at 5; 1 HALL, *supra* note 2, at 183.

236. COLO. CONST. art. XX, § 1.

237. 1 HALL, *supra* note 2, at 183.

238. Kansas disclaimed the portion of the Kansas Territory that lay in Colorado. The Kansans had debated between "Big Kansas" or "Little Kansas," and the majority had decided on the latter, partly to keep the state capital in a more easterly location. *See* Francis H. Heller & Paul D. Schumaker, *The Kansas Constitution: Conservative Politics through Republican Dominance*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 490, 496–97. The Little Kansas advocates also defeated efforts to claim part of what is now the State of Nebraska. *Id.* The citizens of eastern Kansas wanted to the state capital nearby, and feared that a state stretching all the way to Rocky Mountains would need a capital further west than they desired. *Id.*; Calvin W. Gower, *Kansas Territory and Its Boundary Question: "Big Kansas" or "Little Kansas,"* 33 KAN. HIST. Q. 1, 3, 8 (1967), https://www.kshs.org/p/kansas-historical-quarterly-kansas-territory-and-its-boundary-question/13180.

239. *See, e.g.*, JOLIE ANDERSON GALLAGHER, A WILD WEST HISTORY OF FRONTIER COLORADO: PIONEERS, GUNSLINGERS & CATTLE KINGS ON THE EASTERN PLAINS 37 (2011) (discussing the formation of the El Paso Claim Club, whose jurisdiction included Colorado City, which later became Colorado Springs).

240. The first miners' court was created in the Gregory District of Gilpin County, in 1859. ERICKSON, *supra* note 2, at 9. Subsequent courts followed the Gregory model. *Id.*; 1 HALL, *supra* note 2, at 205 (discussing the Gregory meeting, followed by a July 9th meeting to elect local officers, including Richard Sopris as President and Charles Peck as Sheriff). The Gold Hill district was organized by a mass convention on July 23, 1859. 3 HALL, *supra* note 2, at 291. Boulder's town company organized on February 10, 1859. *Id.* at 292.

For an example of early mining town law, see WILLIAM TRAIN MUIR, LAWS OF THE NEVADA MINING DISTRICT 1861 (1962). Nevadaville was 2.5 miles south of Central City, Colorado. Nolie Mumey, *Nevadaville*, *in id.*, at 1 n.1. Its maximum population was about one thousand. *Id.* at 9.

The preamble to the Nevadaville laws explained that they were adopted by we the people in a mass meeting because we "have no civil government extended to us, by the Authorities of the United States, or of the Territory in which we now reside." *Id.* at 26. The laws created the Office of Sheriff, with the same powers as a Kansas sheriff. *Id.* at 44. Likewise, civil or criminal laws would be based on Kansas, to the extent that they were not changed by the Nevadaville enactments. *Id.* at 50.

recorded and certified property ownership, provided courts for settling disputes, and organized vigilance committees for law enforcement.[241] Some towns elected their own legislatures.[242] They created "people's courts" for criminal prosecutions.[243] The decisions of the miner's districts were later ratified in the first session of the territorial legislature.[244] They were also approved by the Colorado Territorial Supreme Court.[245] By accepting and integrating the decisions of the *ad hoc* miners' courts and other early bodies, the developing territorial courts provided continuity of law.[246]

Strictly speaking, the entire settlement of Colorado had been of questionable legality; whatever lands were ceded by Indian treaties belonged to the federal government, which had never enacted any law for transfer of title to settlers.[247] Congress recognized the *fait accompli* in 1864 and gave clear title to all Colorado settlers.[248]

In January 1859, U.S. Representative Alexander Stephens (D-Ga.) introduced a bill into the thirty-fifth Congress to create the Territory of Jefferson, which would comprise much of modern Colorado plus a great deal of land to the north.[249] Stephens (who would later become Vice President of the Confederate States of America) had been a leading advocate of bringing Kansas into the Union as a slave state, so anti-slavery representatives were wary, and the bill was not enacted.[250]

In response to the request of mass conventions in Denver and Auraria on September 24, 1859, a convention of eighty-eight delegates assembled

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A typical mining district provision punished "[a]ny person shooting or threatening to shooting another, or using or threatening to use any deadly weapons, except in self-defense . . . ." ERICKSON, *supra* note 2, at 9–10 (quoting laws of the Spanish Bar District, in Clear Creek County). The language should not be read hyper-literally. A butcher's knife is a deadly weapon; the law did not mean to forbid "use" of a butcher knife for cutting meat.

241. ERICKSON, *supra* note 2, at 9; GALLAGHER, *supra* note 239, at 37.

242. *See, e.g.*, 1 HALL, *supra* note 2, at 205.

243. *See, e.g.*, ERICKSON, *supra* note 2, at 9.

244. *See* Hensel, *supra* note 2, at 13–18.

245. Sullivan v. Hense, 2 Colo. 424, 429 (1874); GUICE, *supra* note 2, at 117 ("Hallett's recognition of the validity of mining district rules was one of the earliest and most important by a state or territorial court. Since the Colorado miners entered the public domain with no legal authority, the validation of mining district rules was actually a departure from the English common law. Under the common law, some type of permission from the central government would have been prerequisite to valid claims."). Similarly, in a water law case, Chief Judge Hallett explained that the common law must be modified to fit local conditions. *See infra* note 564 and accompanying text.

246. *See* LAMAR, *supra* note 2, at 257–58.

247. *See* LEONARD & NOEL, *supra* note 2, at 28.

248. *Id.*

249. H.R. 835 sec. 1, 35th Cong. (1859); *see also* CONG. GLOBE, 35th Cong., 2d Sess. 657 (1859) (noting that Committee on Territories had reported the bill to the full House, with a favorable recommendation).

A competing bill, to create a Territory of Colona, was introduced by anti-slavery Republican Schuyler Colfax, of Indiana. BERWANGER, *supra* note 2, at 3. It was not enacted. *Id.* As Speaker of the House (1863–1869) and Vice-President (1869–1873), Colfax always took a friendly interest in Colorado, and visited it twice. He is the namesake of Colfax Avenue, in Denver.

250. *See* H.R. 835 sec. 1, 35th Cong. (1859); *see also* MARK STEIN, HOW THE STATES GOT THEIR SHAPES TOO: THE PEOPLE BEHIND THE BORDERLINES 232 (2011).

in Denver on October 10, 1859, to draft a constitution for a provisional government for the "Territory of Jefferson."[251] The territorial constitution was adopted by popular vote and officers elected on October 24.[252] The convention had been presented with a written protest that there was no legal authority to separate from Kansas, and that doing so "will abrogate all legal rights, and throw the country upon the results of a gigantic Vigilance Committee."[253] The convention and the people did not agree.[254] When Kansas Territorial Governor Samuel Medrey found out about what Coloradans had done, he sent them an order instructing them to elect county officers under the laws of Kansas.[255] "This order being disapproved, it was wholly ignored."[256]

Not putting all their eggs into the provisional basket, the citizens of Arapahoe County elected Richard Sopris as their delegate to the Kansas legislature on December 9, 1859.[257]

Provisional Governor Robert Steele addressed the opening of the Jefferson legislature on November 7, 1859. He explained that the people had been denied protection of life and property; being sovereign, they had taken measures for their security.[258]

The provisional legislature created the first legal code for Colorado. The code imposed additional punishment on burglars who carried a firearm, and left legitimate use of firearms entirely unimpaired.[259] The

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251. Wharton, *supra* note 2, at 17. Auraria (southwest of Cherry Creek) and nearby Denver (northeast of Cherry Creek) had originally been rivals. 4 HALL, *supra* note 2, at 25. They were consolidated by a popular vote on Apr. 3, 1860. *Id.*

252. *See* Wharton, *supra* note 2, at 19. The vote was 1,852 in favor of the provisional government, and 280 against. *Id.*

253. ERICKSON, *supra* note 2, at 12–13 (quoting a written protest filed by H.P.A Smith); *see also* LEONARD & NOEL, *supra* note 2, at 23.

254. *See* 1 HALL, *supra* note 2, at 209 ("No attention whatsoever was paid to this remonstrance."). "Note the dashing boldness of these resolute pioneers . . . taking measures without precedent, without authority of law, and without the slightest prospect for ratification, for the creation of an independent commonwealth." *Id.* at 185.

255. *Id.* at 210.

256. *Id.*

257. *Id.* at 170.

258. Governor Steele continued:

> A vigilance committee, the first resource of an isolated and exposed community, was organized, and certain offences occurring during the winter and spring were taken cognizance of. But a more perfect form of government than was afforded by a vigilance committee was needed . . . . The only resource left us was in the exercise of that inherent right of self-government which every community of American citizens is held to possess.

2 HALL, *supra* note 2, at 516 (quoting Governor R.W. Steele, Address at the House of Representatives of the Territory of Jefferson (Nov. 7, 1859)).

Steele was remembered in the nineteenth century as a "universally venerated pioneer . . . the first of the great historic figures in the history of Colorado." 4 HALL, *supra* note 2, at 562.

259. Provisional Laws and Joint Resolutions, Passed at the First and Called Sessions of the General Assembly of Jefferson Territory, ch. 11 sec. 37 (1860).

Jefferson legislature also organized a territorial militia, comprising the Jefferson Rangers (from Auraria) and the Denver Guards.[260]

Jefferson Territory claimed to comprise not only what would later become Colorado, but also the Nebraska panhandle, southern Wyoming, and some of eastern Utah.[261] With no legal authorization—except from the self-governing people of Colorado—Jefferson Territory elected a territorial delegate to Congress. The provisional government did some good, and certainly does not seem to have caused a decline in law and order.

However, the provisional government was mostly disregarded outside of Denver, and even in the city "it was powerless to enforce its decrees. The chief reliance of the citizens lay in the Committee of Safety."[262]

The Jefferson legislature granted Denver City a municipal charter, and the city's officers were elected on December 19, 1859.[263] But the officers were desultory about setting up a functioning government, so in September 1860, a series of public meetings adopted a proposed structure of government for Denver; it was submitted to the voters in October 1860, and overwhelmingly adopted.[264] In that same election, city officers were chosen.[265]

As of 1860, Denver had five competing court systems.[266] Forum shopping was common.[267] Meanwhile, "the mountain counties stood by their Miner's courts, and as much of the Provisional Government as suited them."[268] Other Coloradans created judicial districts for what they called

260. WHITFORD, *supra* note 2, at 38–39. These units disbanded after Congress created the Territory of Colorado. *Id.* at 39. The Denver Guards were mounted and comprised one hundred men. Wharton, *supra* note 2, at 33. Their First Lieutenant was Edward Wynkoop. *Id.*

261. *See* STEIN, *supra* note 250, at 230. The provisional boundaries were 37° to 43° of northerly latitude, and 102° to 110° of westerly longitude. *See* H.R. 835 sec. 1, 35th Cong. (1859). The 1861 boundaries of the Colorado Territory (and later, the State) were 37° to 41° North, and 102°03' to 109°03' West. *See* COLO. CONST. art. I (expressing longitude in terms of degrees west of Washington). The sizes of most western states are based on Thomas Jefferson's principle that states should be equals, so that states are approximately equal in height, breadth, or both. STEIN, *supra* note 250, 54–55.
The Jefferson provisional government, aware of its tenuous status, did not attempt to collect taxes. *Id.* at 232. The legislature did pass a one-dollar poll tax, which the miners resolved not to pay. LAMAR, *supra* note 2, at 187.

262. 1 HALL, *supra* note 2, at 247.

263. Wharton, *supra* note 2, at 20.

264. *Id.* at 65–66.

265. *Id.* at 66. Once a federally authorized territorial legislature was set up, it granted Denver a charter, effective November 8, 1861. *Id.* at 80.

266. ERICKSON, *supra* note 2, at 15. There were the courts of the Jefferson Territory, of Kansas, the Denver legislative council's courts of common pleas and appeals (more influential than the Jefferson or Kansas courts), the people's courts for criminal cases (organized ad hoc to hear capital cases brought by vigilance committees), plus the Arapahoe County Claim Club. 3 HALL, *supra* note 2, at 267, 269. "For two years or more the Territorial, county and city affairs were so intermingled it was difficult to draw the distinctions between them." *Id.* at 267.

267. ERICKSON, *supra* note 2, at 15.

268. W.B. Vickers, *Territorial Organization*, *in* LEGISLATIVE, HISTORICAL AND BIOGRAPHICAL COMPENDIUM OF COLORADO 144, 145 (Denver, C.F. Coleman's Publ'g House 1887).

"Idaho Territory."[269] In short, there were multiple governments in Colorado with alleged jurisdiction, and in fact the people of Colorado entirely governed themselves:

> Side by side sat the Idaho "central judicial" officers, the provisional government of Jefferson, the Kansas county officials, the Denver people's government, scores of miners' courts, and local governments and vigilante committees. Never had frontier democracy blossomed so vigorously. With popular sovereignty in the saddle, the northern part of Bent's old empire was already a far cry from the tradition-bound and caste-conscious territory of New Mexico. A new kind of democratic, middle-class, commercial-minded frontier had arrived on the borders of the Spanish Southwest.[270]

Colorado was the periphery of the periphery. Very soon, "the people of Colorado had through necessity come to see themselves as a distinct people."[271] As Territorial Secretary Frank Hall later wrote, they were "a free and radically independent people."[272]

Bills to create a Colorado Territory were introduced in both houses of the thirty-sixth Congress in January 1860.[273] On February 2, 1861, the full Senate took up the bill.[274] The Senate changed the name from "Idaho" to "Colorado," and transferred the northernmost part of New Mexico to the Colorado Territory.[275] In a compromise, the Organic Act said nothing

269. *See* LAMAR, *supra* note 2, at 187 (crediting creation of these districts to a convention held in Central City in October 1860).

270. *Id.* at 187–88. The Colorado pioneers "were as well-versed in self-government as any people in world." *Id.* at 185. The majority were from Kansas, Nebraska, Iowa, and Missouri, where "[d]uring the turbulent fifties they had learned much about local self-government, town founding, and territorial organization . . . . [B]y 1859 they were all sophisticated practitioners of popular sovereignty." *Id.*

271. Vicky Bollenbacher, *Two Sides of Colorado, Amplified Through Constitutional Redesign*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 595, 596. Bollenbacher's point is consistent with the observations of other historians. Bollenbacher is not, however, a reliable guide to the 1876 constitution. She claims that in the Constitution, Indians were not citizens, black people could not vote, and the voting age was 18. *Id.* at 595, 598. These claims are incorrect. The 1876 constitution says nothing about Indians. *See generally* COLO. CONST. (1876). The voting age was twenty-one and had no racial barrier. *Id.* art. VII § 1 (repealed 1988). Males could vote in all elections and women could vote in school board elections. *See id.* art. VII, §§ 1, 2 (repealed 1988) (empowering the legislature to hold a referendum on broader female suffrage).

272. 1 HALL, *supra* note 2, at 369.

273. *Id.* at 244–45. The name "Jefferson" was unacceptable to Republicans, since Jefferson had founded the Democratic Party. Among the other names considered were Tampa, Idaho, San Juan, Lula, Arapahoe, Weappollao, Tahosa (Dwellers on the Mountain Tops), Lafayette, Columbus, Franklin, Colona, Montana, and Centralia. *Id.* at 245, 246 n.*.

274. *Id.* at 258.

275. *Id.* at 258–59.

about slavery.[276] The House ratified the Senate bill.[277] It became law with President Buchanan's signature on the last day of the same month.[278]

President Lincoln was inaugurated on March 4, 1861. He appointed William Gilpin the territorial governor, and Gilpin arrived in May.[279] Gilpin was already familiar with Colorado, having been part of John C. Frémont's second expedition.[280] He loved Colorado and believed the future of civilization lay in the great lands from the Mississippi Valley to the Rocky Mountains.[281]

In 1861, the settlers voted on whether to seek statehood. The vote was 2,007 for territory and 1,649 for statehood. Nebraska in 1860 had also voted to be a territory and not a state, "thereby providing the first indication of a strong desire to limit the cost of government, a theme that reemerged in later constitutional debates."[282] Another Colorado vote in 1864 had the same result.[283] In Nebraska and Colorado, territorial government might not be ideal, but the federal government would bear the expense; this was considered acceptable until territorial government became unbearably corrupt during the Grant Administration, as will be described *infra* in Section II.D.2.

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276. *Id.* at 259–63. There was no black slavery in Colorado, but in the 1860s, the Utes were running a slave trade in southern Colorado, selling captured members of other tribes. *See* text accompanying notes 558–60.

277. *Id.* at 263.

278. *Id.* at 263; Hensel, *supra* note 2, at 47, 51; LAMAR, *supra* note 2, at 189. The territory was named for the Colorado River. LEONARD & NOEL, *supra* note 2, at 23. Legally, what we call the Colorado River was the Grand River until Congress changed the name in 1921. BERWANGER, *supra* note 2, at 6 n.3. That is why the name for the county that contains the river's headwaters is Grand County. However, the settlers had called the river the "Colorado" since early days. *See id.* The far southwestern portion of the Nebraska Territory (i.e., Julesburg to Fort Morgan) was given to Colorado, since the economy there was tied to Denver and the mining towns. BERWANGER, *supra* note 2, at 5. Very few whites lived in the far eastern part of the Utah Territory. Congress, ever suspicious about Brigham Young's theocracy, transferred that region to Colorado. This was Utah Territory land from the Continental Divide to the 109th degree of western longitude.

The southern boundary line of the Utah Territory was used as Colorado's southern boundary. To keep the boundary line straight, a portion of northern New Mexico (east of the Continental Divide) was transferred to Colorado. *See* LAMAR, *supra* note 2, at 190. This gave Colorado a partly Spanish-speaking character, which endures to the present.

279. LAMAR, *supra* note 2, at 190.

280. *Id.* at 191.

281. *See generally* HUBERT HOWE BANCROFT, HISTORY OF THE LIFE OF WILLIAM GILPIN: A CHARACTER STUDY (San Francisco, The History Co. 1889) (providing a biographical account of William Gilpin). "Outside of William Clark [of Lewis & Clark; later, territorial governor of Missouri], Andrew Jackson, and Brigham Young, Gilpin is possibly the most remarkable man ever to be appointed territorial governor." LAMAR, *supra* note 2, at 190. Growing up in Philadelphia and England, he had received an outstanding education from private tutors. *Id.* Yet he sold his books to head west, where he accidentally ran into, and then joined the Frémont expedition. *Id.* at 191. He traveled as far as Oregon, served as Major in New Mexico during the Mexican War, and made the development of the West his life's mission. *Id.* at 191–92. He was the "'John the Baptist of the West.'" *Id.* at 192.

282. Christopher W. Larimer, *A Self-Righteous and Self-Sufficient Method for Governing: How the Nebraska Constitution Preserves a Way of Life*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 529, 531.

283. SMITH, *supra* note 212, at 205 (1,520 votes for statehood, and 4,672 against).

C. The Civil War

Shortly before Gilpin's arrival, the American Civil War began in April 1861, when the Confederates attacked Fort Sumter, South Carolina. "With the federal government otherwise occupied, Colorado was left to save itself, with the governor's aid."[284] "There was, [Gilpin] warned, no place for Coloradans to retreat; they would be compelled to stand and fight."[285] Yet the new territorial government of Colorado was broke. On August 26, 1861, Gilpin "wrote a desperate but futile letter to Secretary of War Cameron, asking for arms to be sent to the territory." Gilpin stated that the people "are utterly destitute of arms, ammunition, or any weapons for self-preservation."[286] They would fight, if they had the means, for "[e]nergy, loyalty, and bravery preeminently belong to the mountain people. To conquer their enemies appears to them more glorious than to perish."[287]

The first session of the territorial legislature convened on September 9, 1861.[288] Governor Gilpin's address urged prompt creation of a territorial militia.[289] "The citizen must be also a soldier, and armed."[290] An effective military and judiciary, Gilpin told Coloradans, were the "bulwark of their liberties."[291]

Gilpin's August letter about the complete absence of arms had been hyperbole. There were arms to be had, and Gilpin meant to have them. Based on his own authority, which was not entirely clear, he issued warrants that were used to buy guns.[292] "Gilpin's obsession with weapons had resulted in an 'arms race' that summer, as he attempted to purchase as many as possible, lest they fall into the hands of southerners. Inflated prices, if nothing else, were the result."[293] With neither men nor weapons

284. LAMM & SMITH, *supra* note 2, at 20.
285. *Id.*
286. *Id.* (quoting Gilpin's letter to Secretary of War Simon Cameron dated August 26, 1861).
287. *Id.* (quoting Gilpin's letter to Secretary of War Simon Cameron dated August 26, 1861).
288. *See id.* at 16.
289. *Id.* at 17.
290. *Id.* (quoting William Gilpin, Governor of Colorado, Address at the First Session of the Colorado Territorial Legislature (Sept. 9, 1861)).
291. COLTON, *supra* note 2, at 173.
292. *See* LAMM & SMITH, *supra* note 2, at 19–22; *see also* 1 HALL, *supra* note 2, at 272.
293. LAMM & SMITH, *supra* note 2, at 20. "As most of the men in the country had either a rifle or a heavy shot gun, a comparatively large number of such arms was soon collected, but as scarcely any two were alike they were poorly adapted for use by organized troops." WHITFORD, *supra* note 2, at 40. Gilpin's team would buy "anything from double-barreled shotguns to ladies' pocket derringers." GALLAGHER, *supra* note 239, at 55.
In 1861, Confederate sympathizers were also attempting to purchase arms and ammunition. They posted notices near Denver City and the mining camps, offering to pay top dollar for firearms, gunpowder, and percussion caps. 1 HALL, *supra* note 2, at 275. A pro-confederate wagon train of guns and other supplies being taken to Indian country was intercepted by Coloradans, who turned the Confederates over to federal authorities at Fort Wise. LAMAR, *supra* note 2, at 199.
Pro-"secesh" sentiment was greatest in southern Colorado, where many of the new immigrants were from Georgia, a state "with an important mining heritage." GUICE, *supra* note 2, at 27. Southern

coming from Washington, Gilpin had to raise a military force on his own. The First, Second, and Third Colorado Volunteers were embodied. "[P]atriotic Coloradans eagerly rallied to the colors. Locating sources of revenue was another matter."[294]

The Colorado Volunteers' guns had been supplied by Colorado's civilian firearms businesses, as well as the businesses in the states from whence Coloradans had come. If there had been no gun businesses, Colorado would have been defenseless.[295]

Gilpin issued drafts for $375,000.[296] When the U.S. Treasury refused to honor them, there was great consternation in Colorado.[297] Eventually, in the spring of 1862, the Treasury agreed to pay the drafts.[298] In the meantime, relentless attacks from the *Rocky Mountain News* and the *Colorado Republican* had made Gilpin so unpopular that President Lincoln had to appoint a new governor in May 1862.[299]

The Third Colorado Volunteers were summoned to "the States" in February 1862, leaving Colorado's defenses weaker.[300] The First Colorado Volunteers might be called out of the territory at any moment. Accordingly, local defense units were created. Denver had its Governors Guards, Blackhawk had the Elbert Guards, and Montgomery (in Park County) had the Home Guards.[301]

In March 1861, New Mexican secessionists had declared that the portion of the New Mexico Territory below the 34th parallel was now part

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Colorado also had a good number of immigrants from Tennessee and Kentucky. For a Southerner, the closest trailhead for Colorado was the Santa Fe trail. It led to southern Colorado.

Early in the Civil War, on April 24, 1861, some men raised a Confederate flag above the downtown Denver merchandise store Wallingford & Murphy. WHITFORD, *supra* note 2, at 39. A crowd quickly gathered, with Union men in the majority. *See id.* Samuel P. Logan mounted the roof and tore down the flag. *Id.* Logan would later serve as a Captain in the Colorado Volunteers, First Regiment. *Id.* No such flag was raised again in Colorado. *Id.*

294. LAMM & SMITH, *supra* note 2, at 20.

295. The first federal arms supplied to the Colorado Volunteers were "few in number and inferior in quality." COLTON, *supra* note 2, at 44. As of 1862, the Colorado Volunteers' primary arms were Sharps rifles. *See* OVANDO J. HOLLISTER, COLORADO VOLUNTEERS IN NEW MEXICO 1862, at 112 (Richard Harwell ed., The Lakeside Press 1962) (1863). Hollister's book provides the whole story, from enlistment and the long dull days in a camp in Denver, though the fighting in New Mexico and the return to Colorado. *See* Richard Harwell, *Introduction* to HOLLISTER, *supra*, at xiii, xix–xxiii. The book was first published in 1863 as HISTORY OF THE FIRST REGIMENT OF COLORADO VOLUNTEERS, and republished in 1949 as BOLDLY THEY RODE: A HISTORY OF THE FIRST COLORADO REGIMENT OF VOLUNTEERS (The Golden Press 1949) (1863). Hollister had a long career as a journalist and married the sister of Vice President Schuyler Colfax. *Id.* at xiii, xx–xxi. He also served a U.S. Collector of Internal Revenue for Utah. *Id.* at xxi–xxii.

296. LAMM & SMITH, *supra* note 2, at 21.

297. *See id.*

298. *Id.* at 23. The federal government paid only the drafts that were still in the hands of their original holders. WHITFORD, *supra* note 2, at 55. Anyone who had bought a draft was out of luck, unless the original holder could be persuaded to submit a claim. *Id.*

299. LAMM & SMITH, *supra* note 2, at 21–22.

300. SMITH, *supra* note 212, at 111.

301. *Id.*; *see also* WHITFORD, *supra* note 2, at 44.

of "Confederate Territory of Arizona."[302] Confederate Lieutenant Colonel John Baylor was appointed Confederate Territorial Governor.[303]

Texans, led by General Henry Hopkins Sibley, invaded New Mexico in January 1862.[304] His plan was to capture Fort Craig (in southern New Mexico) and Fort Union (farther north), and then march into Colorado.[305] There, he would raise Confederate volunteers from the quarter or third of the sympathetic Colorado population, and capture the gold fields.[306] Once Colorado was secured, the next step would be to head west.[307] Utah was expected to be neutral, or perhaps even sympathetic to the Confederacy.[308] Sibley aimed to take Nevada, southern California (where there was plenty of Confederate sympathy), and maybe northern California.[309] From there, the objective was the northern Mexican states of Chihuahua, Sonora, and Baja California.[310] Mexico was busy fighting a French invasion that had begun in 1861, so there was hope that it might yield its lightly populated north, which was semiautonomous.[311]

Even partial success for Sibley's Army of New Mexico would have been a catastrophe for the Union.[312] First of all, Colorado and California gold bullion were absolutely essential for the federal government being able to borrow money to finance the war. President Lincoln called the gold "the life-blood of our financial credit."[313] Besides obtaining the gold, the Confederacy would also impede the federal government's communications with the Pacific West.

Even worse, Sibley's success could change the attitude of neutral powers, who might overtly support the Confederacy if the secessionists could prove they were winning. Near Colorado, in present-day Oklahoma, were the Five Civilized Tribes, who had been removed from the Southeast

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302. JOHN TAYLOR, BLOODY VALVERDE: A CIVIL WAR BATTLE ON THE RIO GRANDE, FEBRUARY 21, 1862, at 5 (1st ed. 1995). At the time, Arizona was part of the New Mexico Territory. The 34th parallel is just below Socorro, New Mexico, so the Confederate Territory was about forty percent of the modern states of New Mexico and Arizona.

303. WHITFORD, *supra* note 2, at 30. He proclaimed the Confederate government on August 1, 1861, and later claimed most of the rest of the New Mexico Territory for the Confederacy. *Id.*

304. *See* ROBERT LEE KERBY, THE CONFEDERATE INVASION OF NEW MEXICO AND ARIZONA 1861–1862, at 63 (1958).

305. *See* COLTON, *supra* note 2, at 40–41.

306. *See id.* at 9, 41.

307. TAYLOR, *supra* note 302, at 12.

308. *Id.*

309. Jerome C. Smiley, *Preface* to WHITFORD, *supra* note 2, at 10, 13; TAYLOR, *supra* note 302, at 12. Most American settlers in the Southwest had come from the South, so there was some reason for the Confederacy to expect sympathy for a Confederate conquest. KERBY, *supra* note 304, at 50.

310. *See* Smiley, *supra* note 309, at 11–12 (reporting plans that were disclosed after the war by Major Trevanian T. Teel, one of Sibley's officers).

311. *See generally* ALFRED JACKSON HANNA & KATHRYN ABBEY HANNA, NAPOLEON III AND MEXICO: AMERICAN TRIUMPH OVER MONARCHY (1971); STUART F. VOSS, ON THE PERIPHERY OF NINETEENTH-CENTURY MEXICO: SONORA AND SINALOA, 1810–1877 (1982).

312. *See* WHITFORD, *supra* note 2, at 33. It was also known as Sibley's Brigade. *Id.* "No volunteers more hardy, courageous and efficient ever entered the service of the Confederacy." *Id.*

313. Smiley, *supra* note 309, at 12.

in the 1830s.[314] They formally allied with the Confederacy, which had offered them very favorable terms, including perpetual control of their lands and affirmation of their right to own slaves.[315] Soon, other tribes in Oklahoma joined the Confederacy.[316] The Comanche and Wichita did not promise to fight the Union, but they did sign a treaty recognizing the Confederacy, not the Union, as sovereign where they lived.[317]

Confederate diplomats were attempting to woo other tribes who were remaining neutral for the time being. But even if the tribes stayed neutral, the Civil War might be a good time to drive out the whites.[318] Indeed, in August through December 1862, the massive Santee Uprising of Sioux in Minnesota would force 40,000 white settlers to flee.[319] In Texas, Indians took advantage of the Civil War to push back the frontier of white settlement by 150 miles to the southeast.[320]

To the west, Brigham Young's theocracy in Utah, which the Mormons called "Deseret," was almost entirely free of federal influence.[321] Young offered some platitudes in support of the Union, but the Latter-Day Saints were keeping a keen eye on the possibility of their own secession.[322]

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314. In the view of whites, the Five Civilized Tribes were the Cherokee, Chickasaw, Choctaw, Creek, and Seminole. The white view that other Indians were savages was disputed by Benjamin Franklin. "Savages we call them, because their manners differ from ours, which we think the Perfection of Civility; they think the same of theirs." BENJAMIN FRANKLIN, REMARKS CONCERNING THE SAVAGES OF NORTH AMERICA (Passy 1784), http://founders.archives.gov/documents/Franklin/01-41-02-0280.

315. PRUCHA, *supra* note 2, at 261.

316. *See id.* at 261–62.

317. *See id.* at 262–63.

318. *See* GRINNELL, *supra* note 2, at 129.

319. FEHRENBACH, *supra* note 2, at 458–59. "In Colorado, then the greatest center of population of all the plains country, a like fear was felt that the Indians generally would follow the example of the Minnesota Sioux." GRINNELL, *supra* note 2, at 129. "Intelligent Indians saw in the Civil War the opportunity, while the whites were killing one another, to drive the intruders out of the land of their fathers or exterminate them." COLTON, *supra* note 2, at 121. Governor Gilpin reported in October 1861 that the Indian population west of the Arkansas were supportive of the Georgians in southern Colorado who favored secession. *Id.* at 148. However, some Indians from there enlisted in the Union army. *Id.* In May 1862, it was learned that the Confederates were negotiating with the Comanche and other tribes to gain Indian support (or at least neutrality) for Confederate attacks on Union forts on the Arkansas River: Fort Wise (in southeastern Colorado) and Fort Larned (in Kansas). GRINNELL, *supra* note 2, at 127–28.

320. HALEY, *supra* note 26, at 85.

321. In Mormon scripture, "deseret" is said to be an ancient name for the honeybee. *See Ether* 2:3 (Book of Mormon) ("And they did also carry with them deseret, which, by interpretation, is a honey bee . . . ."); Kevin L. Barney, *On the Etymology of Deseret*, BY COMMON CONSENT (Nov. 3, 2006), http://www.bycommonconsent.com/2006/11/bcc-papers-1-2-barney. It represents the cooperative and hardworking spirit of the Mormon pioneers. *Id.* The official symbol of Utah is the beehive. *Id.*

322. *See* LAMAR, *supra* note 2, at 285–302. Indeed, in 1862, the Mormons proclaimed statehood, and warned that they were prepared to remove "the federal yoke" and forcefully to assert their rights of self-government. JOHN ALTON PETERSON, UTAH'S BLACK HAWK WAR 32 (1998). Although the Utah Territory was nominally governed by federal appointees, the Mormons set up a "Ghost State" government, with Brigham Young as Governor, and this ghost government had far more effective power than did the federal territorial government. *See id.* at 13, 32.

Most dangerous of all, the news that vast western territories had been taken by the Confederacy might affect the attitudes of neutral France and Great Britain.[323] Both nations saw strategic interests in weakening the United States, and they inherently had a more economically harmonious relation with the South, whose economy was based on agriculture exports and manufactured goods imports. The core Confederate strategy was based on winning diplomatic recognition from at least one of these great powers.[324] French recognition of the independent United States in 1778 had been a sine qua non for the success of the American War of Independence;[325] the Confederate States of America aimed to emulate that example. Governor Gilpin had plenty to worry about.[326]

More broadly, both sides of the 1860 federal election had agreed that if Southern slavery could not expand, it would inevitably die for economic reasons. Accordingly, the Confederacy viewed New Mexico as essential to its long-term viability if the secessionists prevailed in the war.[327]

Marching north from El Paso along the Rio Grande, General Sibley's Texans met Union forces on Feb. 21, 1862, at Valverde, New Mexico, near Fort Craig. The federals included the regular army, the New Mexico militia, New Mexico volunteers (some of them commanded by Kit Carson), and part of the Second Colorado Infantry, who had marched south in December 1861, from Cañon City.[328]

The Coloradans were responsible for the far-left side of the Union line. Their first taste of battle was a cavalry charge by Texas lancers, who carried nine-foot poles with one-foot blades.[329] When the Texan horsemen

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The 1847 Mormon Migration to the Great Salt Lake had intentionally moved the Mormons outside the United States, into Mexican territory over which the government in Mexico City exerted very little influence. Because of the U.S. 1848 victory in the Mexican War, Utah and much of the rest of the southwest was sold by Mexico to the United States, in the Treaty of Guadalupe-Hidalgo.

323. Smiley, *supra* note 309, at 13; SMITH, *supra* note 212, at 25.

324. *See generally* AMANDA FOREMAN, A WORLD ON FIRE: BRITAIN'S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR (2d ed. 2012); HOWARD JONES, BLUE & GRAY DIPLOMACY: A HISTORY OF UNION AND CONFEDERATE FOREIGN RELATIONS (Gary W. Gallagher & T. Michael Parrish eds., 2010).

325. *See generally* TOM SHACHTMAN, HOW THE FRENCH SAVED AMERICA: SOLDIERS, SAILORS, DIPLOMATS, LOUIS XVI, AND THE SUCCESS OF A REVOLUTION (2017).

326. *See* GUICE, *supra* note 2, at 28.

327. MARTIN HARDWICK HALL, SIBLEY'S NEW MEXICO CAMPAIGN 151 (Univ. N.M. Press 2000) (1960) (noting Southern concern that if the Confederate States of America were hemmed in by free Union territory, then slavery would "sting itself to death"); JONES, *supra* note 324 (Republicans and Democrats agreed with Lincoln's view that preventing the territorial expansion of slavery would lead to its "ultimate extinction," because cotton depletes the soil of nitrogen).

328. *See* TAYLOR, *supra* note 302, at 26; WHITFORD, *supra* note 2, at 35, 43. After the Confederate threat was removed, Carson served as a federal army commander in 1864, forcing the Navajo in southern New Mexico to move to a miserable reservation at Bosque Redondo, in eastern New Mexico. *See* PETERSON, *supra* note 322, at 3, 212.

329. *See* TAYLOR, *supra* note 302, at 67.

closed within 100 feet, the Coloradans opened fire.[330] The Texans took heavy casualties and fell back.[331]

But the day belonged to the Texans and the Union army was forced to retreat.[332] The seventy-one Colorado Volunteers suffered a fifty-six percent casualty rate of dead, wounded, or missing.[333] The Confederates then waltzed into Albuquerque and Santa Fe without opposition.[334]

The Union commander, Colonel Edward Canby, knew that without reinforcements, Sibley's Texans would soon take Fort Union, and New Mexico would be lost. He dispatched a message to Governor Gilpin asking for aid. The message reached Denver on March 1.[335]

As soon as permission was obtained from the federal commander at Fort Leavenworth, Kansas, the Coloradans hurried south. The First Regiment of Colorado Volunteers left from Camp Weld in Denver, where they had spent a dull winter with poor rations.[336] They were soon joined by other forces from Fort Wise in southeastern Colorado.[337] They completed a 400-mile forced march from Denver in just thirteen days, including a thirty-six-hour march covering ninety-two miles.[338]

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330. *Id.* at 68.

331. *Id.* at 68–70.

332. *See id.* at 85–96 (chronicling the ending of the Battle of Valverde); COLTON, *supra* note 2, at 33–34. The New Mexicans did not fight well because of their "traditional fear of Texans." HALL, *supra* note 327, at 87. They surrendered quickly, giving the Texans their arms in exchange for being allowed to go home. *Id.*

The Texans brought their own arms, supplemented by what Sibley bought for them in the open market. *Id.* at 27. So they were "armed with practically every type of small arm in existence: squirrel guns, bear guns, sportsman's guns, single and double-barreled shotguns, navy revolvers, six-shooters, Minié muskets, common rifles, and many others." *Id.* Plus several howitzers. *Id.* at 27–28. These were augmented with about 250 firearms, mainly rifles, captured after the victory at Valverde. *See id.* at 77.

333. TAYLOR, *supra* note 302, at 104.

334. LAMAR, *supra* note 2, at 103.

335. TAYLOR, *supra* note 302, at 106.

336. *See* COLTON, *supra* note 2, at 42–44; LAMAR, *supra* note 2, at 200–01. Camp Weld was named for Lewis Ledyard Weld, the first Secretary of the Colorado Territory, appointed by President Lincoln. PROPST, *supra* note 2, at 43. Besides being the namesake of Weld County, he designed Colorado's great seal, and used his family motto as the Colorado motto: *Nil Sine Numine* (Nothing Without Providence). *Id.*; Wharton, *supra* note 2, at 34. He was a nephew of Theodore Dwight Weld, a leading abolitionist. BERWANGER, *supra* note 2, at 9.

337. *See* COLTON, *supra* note 2, at 45. "Bent's New Fort" had been turned into a military post, and named for Virginia Governor Henry A. Wise. Charles C. Post, *Diary*, *in* OVERLAND ROUTES TO THE GOLD FIELDS, 1859: FROM CONTEMPORARY DIARIES 25, 46 n.25 (LeRoy R. Hafen ed., 1942) [hereinafter OVERLAND ROUTES TO THE GOLD FIELDS]. Owing to Virginia's 1861 secession, the name was changed in 1862 to "Fort Lyon," for Major General Nathaniel Lyon, who gave his life fighting for the Union at Wilson's Creek, Missouri, on August 10, 1861. *See* STEPHEN B. OATS, CONFEDERATE CAVALRY WEST OF THE RIVER 16–17 (1961); *see also* Post, *supra*, at 46 n.25. Because of floods, the fort was moved in 1867 to a location near Las Animas, Colorado. *Id.* The facility later became a state prison, and presently is a rehabilitation center for homeless people with substance abuse problems. *Fort Lyon*, COLO. DEP'T LOC. AFF., https://www.colorado.gov/pacific/dola/fort-lyon (last visited Dec. 24, 2017).

338. SMITH, *supra* note 212, at 26. In New Mexico, the Coloradans had to make their way through "a bitterly cold and furious windstorm, a mountain hurricane, which showered and blinded them with driven snow, dust, and sand." WHITFORD, *supra* note 2, at 78.

Everyone reconnoitered at Fort Union by March 10.[339] There, they were finally given proper equipment, with standardized rifles, ammunition, and uniforms.[340] Soon, on March 26–28, 1862, the Battle of Glorieta Pass was fought in the Sangre de Cristo Mountains southeast of Santa Fe.[341]

> Having cowed the Southern sympathizers in Denver and elsewhere and having chased off several Texas raiding parties, the Colorado volunteers were a far more formidable body than their New Mexico counterparts. Made up of miners and frontiersmen and a sprinkling of former Kansas free-soilers, the companies possessed officers who seemed not to know the meaning of caution or fear.[342]

"The men were uncommonly hardy and well seasoned, and not in the habit of being afraid."[343]

The men of the Texas Mounted Rifles fought well. So did the New Mexico militia and the Colorado infantry. While the fighting on the front lines was mostly a draw, if one had to declare a winner, it would be Sibley and the Texans.

But the fighting in the rear changed everything. On the third day of battle, New Mexicans spotted the Confederate baggage train. Five companies of Colorado infantry and cavalry, plus two federal companies, descended steep mountainsides for a surprise attack on the supply train. "They crawled, slid and were lowered by ropes and leather straps while carrying their guns."[344] They lit the supply wagons on fire, spiked the cannons, and killed or ran off hundreds of horses and mules.[345] "This was the irreparable blow that compelled the Texans to evacuate the Territory. Its audacity was the principle cause of its success."[346] Without food or supplies, the Confederates limped to Santa Fe and eventually back to Texas.[347]

A Texan soldier morosely wrote to his wife, "Instead of Mexicans and regulars, [the Coloradans] were regular demons, that iron and lead had no effect upon, in the shape of Pike's Peakers from the Denver City Gold mines . . . . Had it not been for the devils from Pike's Peak, this country

339. WHITFORD, *supra* note 2, at 78–79.
340. *Id.* at 79.
341. *See* SMITH, *supra* note 212, at 26–27.
342. LAMAR, *supra* note 2, at 104.
343. WHITFORD, *supra* note 2, at 50.
344. COLTON, *supra* note 2, at 70.
345. *Id.* at 71–73; *see also* Leo Oliva, *Chivington and the Mules at Johnson's Ranch*, WAGON TRACKS, Aug. 1992, at 16, 16–17 (stating that most mules were run off).
346. HOLLISTER, *supra* note 295, at 117.
347. *See* COLTON, *supra* note 2, at 75–76, 81–99.

would have been ours."[348] The Battle of Glorieta Pass, "the Gettysburg of the West," had saved Colorado and New Mexico for the Union.[349]

The Colorado Volunteers then consolidated with the federal army and harried the Texans back to Texas.[350] Along the way, they almost mutinied because the federal commander, Colonel Edward Canby was not as aggressive as they wanted to be.[351] The Colorado Volunteers spent the rest of the year in New Mexico fighting Indians. They arrived back in Denver for a victory parade in January 1863.[352] Some of them were demobilized, and others chose to be sent to the States, where they fought in Kansas, Missouri, and Arkansas, including against "bushwhackers" and "jayhawkers"—Confederate guerillas.[353]

These guerillas were turning into robbery gangs that would remain active even after the war ended.[354] One of these gangs preyed on the South Park in July 1864 and declared its intention to pillage Denver.[355] They were apprehended by a local *posse*.[356] Among the group that hunted down the marauders was Wilbur Fiske Stone, future justice of the Colorado Supreme Court.[357]

"Quite a number of small bands of guerillas and bandits were operating at this time in southern Colorado."[358] Not all of them were affiliated with the Confederacy, the most notorious and cruel were the Espinosa brothers; racist serial killers who murdered over thirty victims in

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348. HOLLISTER, *supra* note 295, at 262–65 (quoting Letter from George M. Brown to his wife (Apr. 30, 1862) (originally published in *Denver News*)). Brown had been captured and paroled (allowed his freedom, based on his promise not to fight any more). COLTON, *supra* note 2, at 54 n.10. While his letter was being carried through New Mexico, a Union officer discovered it, which led to its newspaper publication. *Id.*

349. *See* Robert McCoy, *Forward* to WHITFORD, *supra* note 2, at 1, 1; P.G. NAGLE, GLORIETA PASS inside front jacket (1999).

The Colorado Volunteers were nicknamed "Gilpin's Pet Lambs." *See* Harwell, *supra* note 295, at xxiv. The Texans were "Baylor's Babes," named for the Texan Lieutenant Colonel who had authorized Sibley to raise an army for a western offensive, and who claimed to rule as Confederate Governor over New Mexico and Arizona. *See id.* After three days of fighting at Glorieta Pass,

> [n]ight fell upon the scene and the Babes and the Lambs each sought their own corner. The Lambs found theirs all right, but the Babes did not. It appeared that a part of the Lambs had been there during the fight and destroyed their commissary and transportation, totally. There being no grub in New Mexico in general way, there certainly was none now since armies had been sustained by her during the Winter, so the Babes had to go home to get something to eat. The Lambs accompanied them to the door, and wished them a safe journey. And so ended the war of the Babes and the Lambs in the Rocky Mountains.

Id. at xxiv–xxv.

350. ESTERGREEN, *supra* note 2, at 233.

351. LAMAR, *supra* note 2, at 105. Canby could have destroyed the retreating Confederates, but he would have taken major losses in his own forces, thus leaving New Mexico vulnerable to a second invasion. KERBY, *supra* note 304, at 114–16. Canby and Sibley were brothers-in-law. *Id.* at 52.

352. *See* HOLLISTER, *supra* note 295, at 256.

353. 1 HALL, *supra* note 2, at 295–99; *see also* SMITH, *supra* note 212, at 239.

354. *See* Wharton, *supra* note 2, at 54.

355. *Id.*

356. *Id.*; WHITFORD, *supra* note 2, at 141; *see also* GALLAGHER, *supra* note 239, at 68–73.

357. 1 HALL, *supra* note 2, at 315–16.

358. Wharton, *supra* note 2, at 54.

the area between Pueblo and Park Counties.[359] One brother was killed by a *posse*; the other escaped, but was later tracked and killed by a group of miners.[360]

D. Indian Wars

1. Plains Indians

The Confederate danger was diminished by the summer of 1862, but the Indian problem was getting much worse. There were three trails leading to the Colorado settlements: in the southeast, a branch of the Santa Fe Trail; in the center, the Smoky Hill Trail, from Fort Leavenworth, Kansas, to Denver; and in the north, the South Platte Trail, which traversed Nebraska and then dropped down to Denver. Goods were transported in wagons drawn by oxen or mules.[361] The greatest share of immigrants, imported goods, and Colorado exports moved via the South Platte Trail.[362]

On February 18, 1861, the Treaty of Fort Wise granted the United States most of northeastern Colorado, including Denver.[363] But not all chiefs had signed it.[364] Neither side made much effort to obey it.[365]

The white settlers, clustered along the Front Range and in mining towns, could not survive a cutoff of their trade routes with the States. The territory was not self-sufficient in food, and imports were essential for

359. *See id.*; GALLAGHER, *supra* note 239, at 63–67; 1 HALL, *supra* note 2, at 378–81.

360. GALLAGHER, *supra* note 239, at 63–67; 1 HALL, *supra* note 2, at 380–81; *see also* Wharton, *supra* note 2, at 54.

361. 3 HISTORICAL COMPENDIUM, *supra* note 2, at 70.

362. *See* PROPST, *supra* note 2, at 34.

The Smoky Hill Trail was the shortest, but in the western portion, there was little water, and it was easy to get lost in the rolling hills.

The Arkansas River Trail was an extension of the Sante Fe Trail, and thus required traveling through Missouri and Kansas.

To get to the South Platte Trail, a person would follow the Overland Trail west from Ft. Kearney, Nebraska, and then branch off to the southwest when the person arrived at the South Platte River. The large majority of emigrants to Colorado came via the South Platte Trail. There was always water, and the trail was easy to follow. The main difficulty was the sandy stretches that made wagon movement arduous.

The Overland Trail was used by settlers traveling to California and Oregon in the late 1840s and early 1850s. *See* JOHN PHILLIP REID, POLICING THE ELEPHANT: CRIME, PUNISHMENT, AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL 1, 21, 73–76, 91–93 (1997) (explaining how Overland Trail migrants successfully maintained law and order among themselves; homicides were few, but firearms accidents were common, as many of the migrants had just purchased firearms but had not taken the time to learn how to use them safely).

363. Treaty with the Arapaho and Cheyenne 1861 art. 1, Feb. 18, 1861, 12 Stat. 1163, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, 807.

364. LEONARD & NOEL, *supra* note 2, at 16–17. Indeed, the Cheyenne signatories, such as Black Kettles, said that they were signing for themselves, and not on behalf of non-participating Cheyenne. AFTON ET AL., *supra* note 2, at xv. The Arapaho chief Little Raven did sign, but later said that he did not understand what the treaty meant. GRINNELL, *supra* note 2, at 126 n.6. The treaty had been signed in February 1861, but was not ratified by the U.S. Senate until August, nor proclaimed by the President until December. 2 INDIAN AFFAIRS, *supra* note 2, at 807. "So, for some time even after the treaty, the town lots carried titles that were maintained with guns." BRENNEMAN, *supra* note 2, at 27. Which was similar to how things had been in Colorado before the whites arrived.

365. TURNER, *supra* note 233, at 107.

survival. Irrigation was just beginning to be developed in semi-arid Colorado, so nearly all agriculture was near the rivers.[366] This was not enough to feed the population. The mountain mining towns were even more precarious, since snow might close the wagon trails to the mines for extended periods. In January and February 1862, Gilpin County mining had to stop due to a shortage of gunpowder.[367]

Not long after the Civil War began, the Smoky Hill Trail and the Santa Fe Trail became too dangerous to use.[368] Federal troops there were sent east, leaving travelers vulnerable to Confederate guerillas and to Indians in the river valleys.[369] The South Platte Trail was the only lifeline connecting Denver to the States.

There had always been occasional Indian raids on wagon trains, stage coaches, station stops, homes, and farms.[370] By May 1862, "it became apparent that Arapaho, Cheyenne, and other Indian tribes were stealthily preparing for war."[371] In June, a show of force by the Second Colorado Volunteers halted Indian raids along the South Platte River.[372]

An incidental cause of Indian attacks on whites was inter-Indian wars. War parties on their way to combat often harassed whites.[373] Whoever lost the battle would be straggling home, and inclined to replenish their loss of horses by taking some from the whites, and forcing whites to give them supplies.[374] For example, in 1862, 600 Arapahoe and Sioux, returning home after a battle against the Utes, took everything movable from a ranch at Hartsell Hot Springs.[375] Colorado territorial governor John Evans attempted, without much success, to stop the Ute versus Cheyenne/Arapaho wars.[376]

A more direct cause of increased bellicosity was a change in the Indian agent. Indian treaties typically provided for annual federal delivery

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366. *See* HISTORICAL COMPENDIUM, *supra* note 2, at 105; Wharton, *supra* note 2, at 58 (in 1866, 136 miles of irrigating ditches were constructed, at a cost of $1,000 per mile); *see also id.* at 60 ("There is no certainty in any crop without the land to be irrigated . . . .") BERWANGER, *supra* note 2, at 11 (stating that in the early days, irrigation extended no further than half a mile from watercourses). According to the *Rocky Mountain News*, which was always a Colorado booster, the territory could have been self-sufficient in food by 1865, if a locust plague had not wiped out most of the crops that year and the year before. *Id.*; 1 HALL, *supra* note 2, at 449; 2 HALL, *supra* note 2, at 216 (locusts came Aug. 26, 1864, "destroying all late crops").

367. SMITH, *supra* note 212, at 33 (also noting that the shortage ended in mid-March, when the trails re-opened).

368. *See* BERWANGER, *supra* note 2, at 12–13. So, even more traffic went via the South Platte Trail. *See id.*

369. *Id.* at 13.

370. *See, e.g.*, SMITH, *supra* note 212, at 114 (discussing crimes in Boulder County during a "time of apparent peace").

371. COLTON, *supra* note 212, at 149.

372. *Id.*

373. GRINNELL, *supra* note 2, at 130–31.

374. *Id.*

375. 4 HALL, *supra* note 2, at 464.

376. GRINNELL, *supra* note 2, at 131.

of goods and food to the signatory tribes. The tools, food, and other items were intended, in part, to provide a starting point for the Indians to be less dependent on hunting, and to take up agriculture. Albert Gallatin Boone (a grandson of Daniel) had treated the Indians fairly when he was agent, as had his predecessor, Acting Indian Agent Jim Beckwourth, a mountain man.[377] But Boone was replaced by Samuel Colley, who along with his wife stole much of the annuity, and sold it for their own profit, putting the Cheyenne and Arapaho close to starvation.[378] Even when Indian agents were honest, Congress sometimes cut the annuities from what the treaties had provided, or neglected to appropriate funds for the annuities.[379]

Yet as historian Elliott West explains, even if distribution of Indian annuities had been perfect, war was inevitable for environmental reasons. To begin with, the annuities provided only a modest amount of food.[380] More importantly, the acquisition of horses and firearms had dramatically changed the Cheyenne way of life in a manner that was ultimately unsustainable.[381]

Pre-horse and pre-gun, the Cheyenne has been agriculturalists in the upper Midwest. Their main service animal was the dog, which needed the same food resources that the Cheyenne did.[382] The horse, in contrast, fed on prairie grass.[383] Thus, the horse amounted to major new source of energy, and brought with it a tremendous increase in standard of living.[384] Instead of walking from place to place, with dogs pulling loads on travois,

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377. *See* GALLAGHER, *supra* note 34, at 104; *see also* ELINOR WILSON, JIM BECKWOURTH: BLACK MOUNTAIN MAN AND CHIEF OF THE CROWS, 167–68 (1972). Boone had first come to Colorado in 1824–25, as part of a hunting and trapping expedition in Middle Park. 2 HALL, *supra* note 2, at 249. He had "a pretty thorough knowledge of most of the Indian tongues," founded the town of Booneville (twenty miles south of Pueblo), and passed away in Denver in 1884, "the last of a noble race, and a fit descendant of famous ancestors." *Id.* at 250. Jim Baker visited him on the last day of his life. *Id.*

378. GALLAGHER, *supra* note 34, at 104–05. Theft by Indian agents was a constant problem in the nineteenth century. The honest agents, like Boone, were the minority. In 1865, Major Edward Wynkoop was appointed Indian agent for the Cheyenne and Arapaho, who respected him for fair dealing. *See* PROPST, *supra* note 2, at 100. He had previously tried to persuade Colonel Chivington not to perpetrate the Sand Creek Massacre. *See id.*

The enduring, fatal problem in white-Indian relations was racial generalizations on both sides:

> The hostility that was thus growing up between Indians and white men was racial. To the white man an Indian was an Indian, and the white man who had been robbed or threatened by an Indian felt himself justified in taking vengeance on the next Indian he saw, without regard to whether he had been injured by that man or by men of that tribe. In the same way if an Indian had been killed by a white man the members of his tribes were ready to revenge the injury on the next white man that came along. Thus it came about that persons innocent of any fault were constantly punished for the harm done by one of their race. The guilty never suffered. As a result of this feeling neither the Indians nor white men felt they could trust one of the opposite race, and each held the other always in suspicion.

GRINNELL, *supra* note 2, at 100.

379. *See, e.g.*, WEST, *supra* note 2, at 282 (discussing Indian complaints in 1861 about failure to deliver the annuities promised in the Treaty of Fort Laramie).

380. *See id.* at 279.

381. *See id.* at 49–52.

382. *See id.* at 50–51.

383. *See id.*

384. *See id.* at 49–52.

Indians with horses for personal transportation and for pack animals were much more mobile.[385]

However, once the Cheyenne adopted a full-time life of hunting and warfare, they needed a minimum of six horses per person, and ten per person was preferable.[386] From 1800 to 1830, when the plains enjoyed unusually good rainfall, this was no problem. The Indian population on the high plains skyrocketed from the late eighteenth century to 1850.[387] But the late 1840s and thereafter had less rain and several droughts.[388] In the summer, when grass was abundant, this was not a problem, but it was in the winter.[389] Winter survival on the open plains was impossible, so in the cold months the Cheyenne would break into small groups, and spend the winters in river valleys, cliff sides, and other areas with natural shelters and trees.[390] At the end of the winter, the Indian horses that had survived the winter would be scrawny and near starvation.[391] In the spring, there would again be enough food for them, and they would be ready for hunting in the summer.[392]

By the 1850s, the once-abundant cottonwood trees in the winter areas were being consumed for firewood faster than they could regrow, while the grass there was eaten so low it could not regrow.[393] Even before the whites started migrating, hunting pressure thinned the buffalo herds and made them ever more difficult to locate.[394] The problem was aggravated by the harvesting of buffalo robes for trade with the whites. White travelers made the problem even worse; river trails were denuded of trees, and grass was eaten up for a mile or more in both directions.[395] Heavy traffic along the trails frightened away the buffalo herds.[396] As of 1859, there were four U.S. Army forts on the high plains, but by 1865 there were fifteen—all of them located near critical rivers and all of them consuming the wood, grass, and other resources in the area on a permanent basis.[397]

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385. *See id.* at 50.

386. Indian horses, often called "ponies," were smaller than the whites' horses. Unlike the whites' horses, the Indian ponies could survive on a diet solely of prairie grass. However, the hard demands of long-distance hunting, fast riding on a chase, and hauling villages from place to place was too much for any single pony on a continuous basis, so the ponies had to be rotated in service.

387. WEST, *supra* note 2, at 67–69.

388. *Id.* at 89–90.

389. *Id.* at 84.

390. *See id.* at 84, 87.

391. *See id.* at 87.

392. *See id.* at 86–87.

393. *See id.* at 229–30.

394. *See id.* at 193; *see also* AFTON ET AL., *supra* note 2, at xv (discussing Yellow Wolf's observation of the declining buffalo population in 1846).

395. WEST, *supra* note 2, at 230, 233.

396. T.J. STILES, CUSTER'S TRIALS: A LIFE ON THE FRONTIER OF NEW AMERICA 271–72 (2016).

397. WEST, *supra* note 2, at 275, 291 ("Indians were furious precisely because the army sat in places that could support the soldiers and nobody else.").

Ironically, the 1840 Plains Indian peace agreement made things even worse.[398] In the agreement, most of the plains tribes (but not the Pawnee nor the mountain-based Utes) agreed to make Colorado a noncombat zone for trade and hunting.[399] This resulted in so much buffalo hunting that, by the 1850s, it was difficult to find buffalo within a hundred miles of the Rocky Mountains.[400] This led to a decline in the Indian–white trade in buffalo robes that had been the main economic tie between them.[401]

Kansas was not covered by the peace agreement. This was good for the buffalo population there, some of which had fled Colorado.[402] But the wars were taking a toll on the Indians.[403] The intertribal warfare was fierce. Participants included many tribes with no connection to Colorado, some of whom came from further east after being been forced out of their previous lands.[404] Of course the Cheyenne also continued to fight the Utes, whose main territory was the Rocky Mountains.[405]

By 1855, there were only two adult Arapaho, Southern Cheyenne, and Comanche males for every three adult females.[406] On a per-capita basis, the inter-Indian wars were three or four times deadlier than the U.S. Civil War, the deadliest war, by far, in U.S. history.[407]

All of the Indian population was being devastated by epidemics resulting from contact with whites, and by the depletion of the food supply.[408] The whites urged them to take up agriculture, but this was not a viable option.[409] For Indian agriculture to succeed in Colorado, the whites would have had to give the Indians extensive lands near the rivers, and these were precisely the lands that the whites were taking for themselves.[410] Almost every major white–Indian battle in Colorado took place near one of the environmentally crucial river areas.[411]

Some Indians, such as the Cheyenne Chief Black Kettle or the Ute Chief Ouray, recognized that overwhelming white numerical superiority made the whites unstoppable in the long run. The only thing to do was to

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398. *See supra* notes 58–65 and accompanying text.
399. *See* WEST, *supra* note 2, at 77.
400. *Id.* at 192.
401. *See id.* at 260.
402. *See id.* at 192.
403. *Id.* at 78.
404. *See id.* at 255 (including Sac and Fox, Osages, Potawatomies).
405. *Id.* at 286. The Utes also lived in northwestern New Mexico, far northeastern Arizona, a little bit of southern Wyoming, and, of course, in Utah, which is named for them.
406. *Id.* at 256. Southern Cheyenne were those below the Platte River. JABLOW, *supra* note 20, at 63. Most of the Cheyenne activity in this Article involves the Southern Cheyenne. The division of the Cheyenne took place around 1830. *Id.* at 60–65.
407. WEST, *supra* note 2, at 256.
408. *Id.* at 87–91.
409. *Id.* at 260–62.
410. *Id.* at 261–62.
411. *See id.* at 274 (providing a map with the battle locations between Indians and whites).

try to survive on the basis of whatever unequal terms the whites would impose.

Yet many Indians wanted something better. As Stiles writes:

> Armed resistance was a rational policy option . . . . Their existence was based on war. They had won their lands in fierce aggression against other peoples . . . . Signing treaties had only brought more pressure on the critical river valleys. It was natural to think that force—a familiar tool—might work where diplomacy has failed.[412]

Many of the fighters agreed with Black Kettle's assessment of the situation, that in the long run, no amount of military success against the whites would permanently drive them out of the plains or stop their growing encroachments. Still, many Indians decided that it was better to die fighting than to submit.[413] "Live free or die" is the New Hampshire state motto.[414] It expresses a widely shared attitude of many Americans of all races, certainly including many Plains Indians.

Raiding increased in 1863, apparently for obtaining arms.[415] Additionally, "[m]any of the Indians in Colorado obtained firearms and ammunition from Mexican traders of New Mexico and from corrupt, mercenary Americans, and probably encouragement and material aid from Confederate officials."[416] Indians raids on freighting, combined with a drought in the summer of 1863, drove food and provision prices in the mountain towns "to famine prices, and it was but little better in Denver."[417]

Governor John Evans tried to arrange a September meeting with the Cheyenne, Arapaho, and Sioux to buy peace by supplying provisions, but no one came.[418] There was a meeting between Elbridge Gerry (an emissary from Evans) and Bull Bear, a Cheyenne.[419] When Gerry acknowledged that the whites wanted Indians to live like whites (that is, as farmers), Bull Bear replied, "Well, you can just go back to the Governor and tell him we are not reduced that low yet."[420] In November, Governor Evans ordered a halt in firearms and ammunition sales to Indians; since the order was

412. STILES, *supra* note 396, at 285.
413. BERWANGER, *supra* note 2, at 27.
414. N.H. REV. STAT. § 3:8 (2017).
415. COLTON, *supra* note 2, at 150; 1 HALL, *supra* note 2, at 324–26.
416. COLTON, *supra* note 2, at 150.
417. 1 HALL, *supra* note 2, at 306.
418. COLTON, *supra* note 2, at 151; LEONARD & NOEL, *supra* note 2, at 17.
419. PROPST, *supra* note 2, at 50; *see* COLTON, *supra* note 2, at 151. Gerry was a relative of the famous Founder of the same name (signer of the Declaration of Independence; U.S. Vice-President under James Madison). Augusta Hauck Block, *Lower Boulder and St. Vrain Valley Home Guards and Fort Junction*, 16 COLO. MAG. 186, 188 (1939). He was married to an Indian woman, the sister of Chief Red Cloud. *Id.*; *see also* PROPST, *supra* note 2, at 63–64 (discussing Gerry's prior marriages).
420. LEONARD & NOEL, *supra* note 2, at 17. Bull Bear would continue fighting until 1874, only surrendering in Texas when he and his warriors were surrounded and ran out of ammunition. HALEY, *supra* note 26, at 193.

indiscriminate, even friendly Indians had a harder time obtaining food that winter.[421]

The Colorado War began on April 12, 1864, with a clash between federal troops and Cheyenne Dog Soldiers who were accused of stealing mules.[422] The Dog Soldiers were the leading Cheyenne military society.[423] Large-scale attacks by the Cheyenne and Arapaho soon followed.[424] Meanwhile, the small number of federal troops guarding the South Platte route were moved down to Fort Lyon (the new name for Fort Wise), on the Arkansas River in southeastern Colorado, because of fears of imminent Confederate attack.[425] In May, much of Denver and Auraria were destroyed by a flood of the Cherry Creek, making Colorado's survival all the more precarious.[426]

For many young Indian men who were wondering whether to fight, an answer was soon provided by an incident in western Kansas. In 1863, Cheyenne Chief Starving Bear had been part of an Indian delegation that traveled to Washington and met with President Lincoln.[427] After amicable discussion, Lincoln had given Starving Bear a peace medal.[428] The next May, back in Kansas, Starving Bear's camp was approached by the U.S. Army.[429] Wearing his peace medal, Starving Bear and a companion slowly rode out to parlay with the soldiers.[430] The army opened fire and killed both of them.[431] Both sides claimed victory in the ensuing battle.[432]

At a nearby camp was Starving Bear's brother Bull Bear, a leader of the Dog Soldiers.[433] The death of his brother convinced Bull Bear that it

421. PROPST, *supra* note 2, at 50–51.

422. WEST, *supra* note 2, at 287.

423. *See* STILES, *supra* note 396, at 271. The other Cheyenne warrior societies were the Kit Foxes, Crazy Dogs, Elk Scrapers, Red Shields, and Wolf Soldiers. *Id.*
The Dog Soldiers lived separately from other Cheyenne, favoring the Kansas area between the Republican and Smoky Hill Rivers; they developed a close friendship with the Sioux. BERWANGER, *supra* note 2, at 27; WEST, *supra* note 2, at 198. The Dog Soldiers were so named because during battle, their best fighters might tie themselves to a rope that attached to a stake in the ground. *See* JOHN H. MONNETT, THE BATTLE OF BEECHER ISLAND AND THE INDIAN WAR OF 1867–1869, at 41 (1992). Immobile, the warrior provided a fixed spot to which other warriors could rally—to stand and fight, or die trying. *See id.* George A. Custer wrote that they were "fine-looking braves of magnificent physique, and in appearance and demeanor more nearly conformed to the ideal warrior than those of any other tribe." GEORGE ARMSTRONG CUSTER, MY LIFE ON THE PLAINS OR, PERSONAL EXPERIENCES WITH INDIANS 125 (Univ. of Okla. Press 1962) (1874).
Although the Dog Soldiers were originally a group of warriors, they later became a band, including families. AFTON ET AL., *supra* note 2, at xvii. The Arapaho had a similar warrior society, the Dog Men, who also staked themselves to a fixed spot on the battlefield, from which they could not retreat unless released by another warrior. *See* TRENHOLM, *supra* note 20, at 79.

424. *See* COLTON, *supra* note 2, at 151–52; *see also* MONAHAN, *supra* note 2, at 147–65.

425. LAMAR, *supra* note 2, at 211.

426. *See* 1 HALL, *supra* note 2, at 309.

427. WEST, *supra* note 2, at 289.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

was time for all-out war with the whites, and many young men agreed, joining the Dog Soldiers.[434] "At least the Dog Soldiers were independent for the moment. And if death waited on everyone, there were better ways to find it than Starving Bear's."[435]

On June 11, 1864, the young Hungate family, who had a ranch near the future town of Elizabeth near Denver, was attacked, raped, murdered, and brutally mutilated, including the small children.[436] A general panic in the Denver area ensued.[437] In July, the stage stops along the South Platte were hit hard.[438] On the South Platte Trail, "[f]or the next four years it would not be safe to travel in groups of less than fifty to one hundred."[439] The Santa Fe trail was also hit.[440]

On August 11, 1864, Territorial Governor John Evans issued a proclamation: "All citizens of Colorado, whether organized or individually, [were] empowered to go in pursuit of the hostiles . . . and kill and destroy them wherever found, and to capture and hold to their own private use and benefit all the property they could take."[441] Declaring martial law, the Governor initiated recruiting for the Third Colorado, with an enlistment term of 100 days.[442] In Denver, the entire militia—every able-bodied male of at least sixteen years—was called into service; many were put to work building a chain of block houses on the city's perimeter.[443] Likewise in Boulder, the townspeople dug defensive trenches and constructed the adobe Fort Chambers near Boulder Creek.[444] Citizens also erected forts in Huntsville (today, Larkspur), Pueblo, and Colorado City (now, Colorado Springs).[445] In the St. Vrain area, the settlers built Fort Junction, organized the Lower Boulder and St. Vrain Valley Home Guard, and were given handguns and rifles by the federal government.[446] Pueblans temporarily safeguarded their women and children in a former saloon while the men constructed an adobe fort.[447]

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434. *See id.*
435. *Id.* at 289–90.
436. COLTON, *supra* note 2, at 153.
437. *See id.*
438. *Id.* One author suggests that the perpetrators were four Arapaho, one of whom was angry at having been required to return some stolen animals. TRENHOLM, *supra* note 20, at 180.
439. PROPST, *supra* note 2, at 60.
440. COLTON, *supra* note 2, at 145.
441. 1 HALL, *supra* note 2, at 326–27. "The conflict is upon us," said Evans, "and all good citizens are called upon to do their duty for the defense of their homes and their families." TRENHOLM, *supra* note 20, at 183. The Governor also emphasized the importance of *not* molesting friendly Indians. *See id.*; COLTON, *supra* note 2, at 154; 1 HALL, *supra* note 2, at 326–27.
442. SMITH, *supra* note 212, at 213. At least initially, their arms were "old guns that had been bought in Europe, and men were short of even such basics as blankets and food." PROPST, *supra* note 2, at 67.
443. Wharton, *supra* note 2, at 54.
444. MONAHAN, *supra* note 2, at 171.
445. GALLAGHER, *supra* note 34, at 102–03.
446. Block, *supra* note 419, at 188.
447. *See* 3 HALL, *supra* note 2, at 453.

Elbridge Gerry brought news that massive and coordinated Indian attacks were planned.[448] But when the Indians found out that their plan had been discovered, the attacks were called off.[449]

Mail service from the States was blocked by the Indians on August 15, and could not be reopened until September 29.[450] More importantly, "[t]he halting of supply trains caused prices to soar, and starvation threatened."[451] When the Governors of Kansas and Colorado asked for federal troops, they were told by the federal commander of the Trans-Mississippi Theater, General Samuel R. Curtis, "We have none to spare, you must protect yourselves."[452]

As of August 1864, Indian raids on thoroughfares were in progress from Texas to British Columbia and from the Missouri River to the Rocky Mountains.[453]

Cheyenne Chief Black Kettle, who blamed the conflicts on a minority of bad men on both sides, traveled to Denver to attempt to arrange a truce in September 1864, but the Camp Weld Council accomplished nothing.[454] As Black Kettle admitted to Governor Evans, the chiefs who wanted peace could not control the many warriors who wanted to fight.[455] Evans told them to go to Fort Lyon, which they did; there, they received mixed signals about whether they were under U.S. Army protection.[456] According to some whites, the Cheyenne were playing a double game; while some of them fought, others feigned friendliness with the whites, the better to procure more arms and ammunition.[457]

Raids on the South Platte Trail and the Santa Fe Trail continued.[458] The telegraph line along the South Platte Trail—Colorado's means of

448. Block, *supra* note 419, at 188.

449. *Id.* Gerry was therefore dubbed "the Paul Revere of Colorado." PROPST, *supra* note 2, at 64.

450. TRENHOLM, *supra* note 20, at 184–85. During this period, outbound mail from Denver was sent to San Francisco by stage coach, and from thence by ship to Panama, and from Panama to New York City, for distribution to the States. *Id.* at 186.

451. COLTON, *supra* note 2, at 156.

452. 1 HALL, *supra* note 2, at 328. Likewise, Secretary of War Edwin M. Stanton told Colorado, "in effect, 'Fight it out among ourselves; we are too busy with more weighty affairs to give you any attention or assistance.'" *Id.* at 330–31.

453. *Id.*

454. 1 HALL, *supra* note 2, at 339–40; *see also* MONAHAN, *supra* note 2, at 175–76.

455. MONAHAN, *supra* note 2, at 178–79; *see also* MONNETT, *supra* note 423, at 42 (Cheyenne chiefs had no authority to prevent warriors from fighting).
The problem was endemic during the Plains Wars. White negotiators suffered from the "fallacious but pervasive notion . . . that the signatory chiefs held strict command authority over the entirety of their tribes." STAN HOIG, WHITE MAN'S PAPER TRAIL: GRAND COUNCILS AND TREATY-MAKING ON THE CENTRAL PLAINS 12 (2008). Likewise, "many times the federal government exercised little control over its citizens or military forces on the distant prairie." *Id.*

456. 1 HALL, *supra* note 2, at 341–44.

457. *See id.* at 327–30; WOOTTON, *supra* note 2, at 265.

458. *See* MONAHAN, *supra* note 2, at 165.

communication to the outside—was sliced repeatedly.[459] "Cut off, the Colorado mining camps were almost starving."[460] Colorado was not the only territory in deep trouble. "During 1864, virtually every wagon train proceeding down the Canadian River to New Mexico was attacked."[461]

The Plains Indians custom was not to war during the winter because their ponies lacked sufficient grass. Some warriors took winter quarters at the Sand Creek camp, where Black Kettle had earlier led a group. On November 29, 1864, Sand Creek was attacked by the Third Colorado Volunteers. Most officers made no effort to discriminate between friendly Indians and hostiles. The commander, Colonel John Chivington, ordered the deliberate killing of women and children, which was contrary to U.S. Army practice and law. Anglo-Indian and inter-Indian warfare had often been characterized by the killing of noncombatant women and children, but even in this context, the scale of slaughter at Sand Creek was atrocious.[462] Among the victims was Left Hand, an Arapaho chief who had advocated peace with the whites.[463]

There is no doubt that the Sand Creek encampment included warriors who were taking a break.[464] White scalps—including those of children and the elderly—were discovered in some teepees and brought back to Denver.[465]

Militarily speaking, the Sand Creek Massacre was close to useless. Shortly before the massacre, Fort Lyon commander Edward Wynkoop, who had a very positive relationship with the Indians, had been replaced by the much harsher Major Scott Anthony.[466] Anthony had no objection to Sand Creek per se, but he thought that Chivington should have followed up by heading into western Kansas to fight the Dog Soldiers. In the winter, the Indians' grass-fed ponies were malnourished at best, and so the Indian warriors were at their weakest. Meanwhile, Fort Lyon had been provided with plenty of larger, U.S. horses. These horses needed grain fodder, and

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459. *Id.* The telegraph line to Denver had been opened in October 1863. 1 HALL, *supra* note 2, at 303. Starting in 1861, Denver had begun to receive overland mail deliveries, via the Pony Express. *Id.*

460. FEHRENBACH, *supra* note 2, at 460. Flour went from nine dollars per hundred pounds to forty-five. PROPST, *supra* note 2, at 62. "Sugar, tea, and many other items were simply unobtainable." *Id.*

461. FEHRENBACH, *supra* note 2, at 463.

462. *See infra* note 466 and accompanying text. The U.S. government so admitted. *See infra* note 473 and accompanying text. "It will not do, as some have done, to fall back to the atrocities of the Indians upon our people as a justification." 1 HALL, *supra* note 2, at 351. By such reasoning, President Lincoln would have been justified in mistreating Confederate prisoners of war, as the Confederates had done to Union prisoners at the notorious Andersonville camp. *Id.*

463. MARGARET COEL, CHIEF LEFT HAND: SOUTHERN ARAPAHO 292–93 (1st ed. 1981). Left Hand was wounded at Sand Creek, and later died from the wounds. *Id.*

464. WEST, *supra* note 2, at 296, 299.

465. 1 HALL, *supra* note 2, at 355; WOOTTON, *supra* note 2, at 266.

466. *See* WEST, *supra* note 2, at 297–99.

the army had brought in plentiful supplies, precisely so that American cavalry could advance deep into the plains.[467]

Instead of attempting a decisive stroke against the Dog Soldiers, Chivington led his Third Cavalry on a search for Little Raven's peaceful band of Arapaho.[468] Not finding them after a few days, he took the Colorado Third back to Denver, and proclaimed that he had won a great victory at Sand Creek. Immediately, several other officers of the Third Cavalry denounced the massacre. A U.S. Army investigation and congressional hearings soon followed. Captain Silas Soule, one of the officers who testified against Chivington, was assassinated on a dark street in Denver, and the perpetrator escaped.[469]

Sand Creek was the most counterproductive act in the history of the Colorado territorial government. The perpetrators had ignored warnings about radicalizing and uniting the Indians. Those warnings immediately came true. Some Cheyenne, led by Black Kettle, headed south of the Arkansas River, to live with the Kiowa and Comanche, and get away from the war.[470] But many others began planning a counterstrike. Messengers bearing war pipes were sent to the Sioux. At Solomon Fork, Kansas, "the Sioux smoked the war pipe."[471]

The old mountain man Jim Beckwourth visited the Indians to urge them to call off the war, because the whites were as "numerous as leaves on the trees." He later testified to Congress:

> "We know it," was the general response of the council. But what do we want to live for? The white man has taken our country, killed all our game; was not satisfied with that, but killed our wives and children. Now no peace. We want to go and meet our families in the spirit land . . . . We have raised the battle-axe until death.[472]

The hundred-day enlistments of the Colorado volunteers from the past September expired in late December 1864.[473] The federal army, namely the Eleventh Kansas Volunteer Cavalry, was all that was left.[474]

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467. *Id.* at 306–07.

468. *Id.* at 306.

469. TURNER, *supra* note 233, at 92–95.

470. MONAHAN, *supra* note 2, at 199; PROPST, *supra* note 2, at 74.

471. MONAHAN, *supra* note 2, at 198. "The tribes were united and committed as they had never been before, and it would not be long before the frontiersmen of the Platte would feel their wrath." PROPST, *supra* note 2, at 71.

472. WILSON, *supra* note 2, at 179–80 (quoting S. EXEC. DOC. NO. 39-26, at 68–74). The mixed-race son of a Virginia white man and a slave, Beckwourth was the most famous non-Indian person of color in early Colorado. *Id.* at 5. He "was an expert shot and could handle dagger, lance, and bow." *Id.* As a fur trader, he lived with the Crow Indians for eight years, and his valor in battle made him one of their chiefs. Beckwourth served as a guide for the Third Colorado on the expedition that led to the Sand Creek Massacre. *Id.* at 175. He later testified under oath that he had done so only because Colonel Chivington had threatened to hang him if he refused. *Id.*

473. *See* MONAHAN, *supra* note 2, at 200.

474. *See id.*

Just days after Sand Creek, raids began along the Platte.[475] They massively escalated, starting January 6, 1865.[476] At Bulen's Ranch, a stagecoach station near Julesburg, a war party of at least 500 Indians attacked a stage coach, and sacked the station.[477] After the station had been restocked, they attacked it again on February 2, and this time burned it to the ground.[478] In January through February, large and coordinated war parties of Cheyenne, Arapaho, and Sioux ravaged the South Platte Trail. Most surviving whites in the area fled, and almost every building along the trail was burned to the ground. Two hundred miles of settlements were wiped out.[479]

While Governor John Evans was in Washington, acting Governor S.H. Elbert telegraphed him to urge him to send 5,000 federal troops, or else the whites would have to leave Colorado.[480]

With the supply trains halted, "the cost of several food items" soared "to almost starvation prices."[481] A huge convoy of 105 wagons and 300 men was able to leave Denver on January 14.[482] But a concentrated force like this could not protect all the supply stations.[483]

In the wake of Sand Creek, Coloradans had been reluctant to volunteer for the militia.[484] So the federal army commander, Colonel Thomas Moonlight, declared martial law on February 6.[485] One consequence was many new volunteers for territorial militia, some of whom did not want to be drafted by the U.S. Army.[486] Some were teenage boys.[487] So martial law was lifted on February 20.[488] The militia defended the South Platte Trail from February through April, and well-guarded commerce resumed.[489]

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475. *See* WEST, *supra* note 2, at 307.

476. *See* MONAHAN, *supra* note 2, at 201–05.

477. *Id.*

478. AFTON ET AL., *supra* note 2, at 234.

479. *See* MONAHAN, *supra* note 2, at 208–22. The notable exception was the Godfrey Ranch. It has been built like a fortress and had loopholes in the walls through which the defenders could shoot rifles. GALLAGHER, *supra* note 34, at 113–14. It also had a well on the inside, so that flaming arrows from the Indians could be extinguished. *Id.*

480. COLTON, *supra* note 2, at 159 (telegram of Jan. 7, 1865).

481. *Id.*; *see also* Wharton, *supra* note 2, at 56 ("Supplies and provisions raised to famine prices, and the poor of Denver were reduced to such a strait, that an idea of a descent upon the provision stores of the city was seriously entertained.").

482. COLTON, *supra* note 2, at 160; *see also* GALLAGHER, *supra* note 34, at 112 ("With every man armed and seventy-five soldiers guarding them, the big train slowly crawled east").

483. COLTON, *supra* note 2, at 160.

484. 1 HALL, *supra* note 2, at 359–60.

485. MONAHAN, *supra* note 2, at 225.

486. *Id.* The volunteers "were poorly supplied with arms, ammunition and clothing, which articles, many were required to supply themselves with, in addition to the horses they rode." Wharton, *supra* note 2, at 56.

487. MONAHAN, *supra* note 2, at 227.

488. COLTON, *supra* note 2, at 160.

489. *See* MONAHAN, *supra* note 2, at 225–28.

Meanwhile, the Indian warriors headed north to fight the Crow.[490] They returned for another series of raids in April 1865. But this time, they encountered larger bodies of federal troops. Back in the States, the Civil War was coming to a close. Some Confederate prisoners were given their freedom in exchange for Western service in the U.S. Army.[491] There were enough of these "galvanized rebs" to deter major attacks; there were a few raids in the summer, although the telegraph line was cut most of the time.[492]

The U.S. Army had also learned the importance of Pawnee scouts, who were happy to help fight the Sioux and Cheyenne, having always been their mortal enemies.[493] In August, an entrepreneur opened up the Smoky Hill Trail from Denver east through central Kansas for reliable travel and commerce by digging wells for station stops.[494] But the new Butterfield Overland Despatch route cut through the heart of the remaining buffalo country and inflamed the Indians even further.[495] Indian activity drove freight prices so high "that it came near to bankrupting the country."[496]

Governor Evans was ordered to resign in July 1865 by Secretary of State William Seward, due to Evans's responsibility for the Sand Creek Massacre.[497]

Some Cheyenne and Arapaho signed the Treaty of Upper Arkansas on October 14, 1865. It included a U.S. government condemnation of the "gross and wanton outrages" at Sand Creek and also provided

490. AFTON ET AL., *supra* note 2, at 246. They were joined in the anti-Crow campaign by Arapaho and Lakota Sioux. *Id.*

491. MONAHAN, *supra* note 2, at 228.

492. *See id.* at 228, 232–36.

493. *See* HYDE, *supra* note 20, at 269; PROPST, *supra* note 2, at 95. The first Pawnee scouts were recruited in 1864. AFTON ET AL., *supra* note 2, at 258. They initially used muzzleloading Springfield rifled muskets, and were issued Spencer repeating carbines in 1866. *Id.* Some of the displaced tribes from the east, such as the Delaware, also served as army scouts. *Id.* at 104. Other Indians who helped the Army fight the Cheyenne were the Osage and Kansas (Kaw). *Id.* at 55.

494. PROPST, *supra* note 2, at 96.

The Smoky Hill Trail was not new, but it had been hard to use because of its long western stretch with no water and difficult navigation. *See supra* note 363 and accompanying text.

495. WEST, *supra* note 2, at 308–09.

496. 1 HALL, *supra* note 2, at 305.

497. TURNER, *supra* note 233, at 36 (quoting Letter from William H. Seward, U.S. Sec'y of State, to John Evans, Governor of the Territory of Colo. (July 18, 1865)).

reparations.[498] Three days later, the Apache joined the treaty.[499] The next day, the Comanche and Kiowa signed a similar treaty.[500]

Yet while some Cheyenne were accepting the U.S. offer for new, smaller reservations, others were conducting more attacks along the South Platte. Because of imminent danger, federal soldiers trained the armed citizens of Julesburg.[501] The Colorado War is usually said to have ended in 1865; and 1866 was relatively quiet.[502] Still, attacks continued along the South Platte Trail, mostly the part east of Julesburg, in Nebraska.[503] In the 1866 Fetterman Fight, near Fort Kearney, Nebraska, all eighty-one U.S. soldiers present were killed.[504]

Starting in May 1867 and continuing all summer, Cheyenne, Arapahoe, Kiowa, and Sioux "struck hard both along the Smoky Hill route and the Platte River road."[505] An October 19, 1867 treaty at Medicine Lodge, Kansas, provided for the Kiowa and Southern Cheyenne to give up their 1865 treaty right to a reservation in Kansas, to move to reservations in Indian Territory (today, the State of Oklahoma), and forbade them to hunt north of the Arkansas River.[506] But many Cheyenne did not accept another round of surrendering their homeland. There were more battles in Colorado with the Cheyenne (occasionally with Sioux allies) in 1867–

498. Treaty with the Cheyenne and Arapaho, 1865, art. 6, Oct. 17, 1865, 14 Stat. 703, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 889–90 ("The United States being desirous to express its condemnation of, and, as far as may be, repudiate the gross and wanton outrages perpetrated against certain bands of Cheyenne and Arrapahoe Indians, on the twenty-ninth day of November, A.D. 1864, at Sand Creek, in the Colorado Territory."). The treaty made various land grants, free of taxation, to named chiefs, widows, or persons who had lost a parent. *See id.* The October 14, 1865, treaty is known as the Treaty of the Little Arkansas. MONAHAN, *supra* note 2, at 239. Signed in Kansas, it provided for reservations. Treaty with the Cheyenne and Arapaho, *supra*, at arts. 2–3. However, the Kansas state government did not allow a reservation. PRUCHA, *supra* note 2, at 271.

499. Treaty with the Apache, Cheyenne, and Arapaho, 1865, Oct. 17, 1865, 14 Stat. 713, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 891–92.

500. *See* Treaty with the Comanche and Kiowa, 1865, Oct. 18, 1865, 14 Stat. 717, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 892–95. The terms included a reservation in Texas, but the federal government owned no Texas land, and the State of Texas declined to accept a reservation. PRUCHA, *supra* note 2, at 271.

501. *See* MONAHAN, *supra* note 2, at 239.

502. *See* AFTON ET AL., *supra* note 2, at 286–321 (listing all known Cheyenne military actions from April 1864 to July 1869).

503. *See* MONAHAN, *supra* note 2, at 239–40.

504. *Introduction* to EYEWITNESS TO THE FETTERMAN FIGHT: INDIAN VIEWS 3, 3–4 (John H. Monnet ed., 2017).

505. MONNETT, *supra* note 423, at 75.

506. *Id.* at 65. As a result, the buffalo tended to stay north of the Arkansas, so Indians who abided by the treaty were unable to hunt. *See id.* The white negotiators orally promised that guns and ammunition for winter hunting would be provided, but only a few defective revolvers were supplied. *See* HOIG, *supra* note 55, at 11.

1869.[507] "Hundreds of whites were killed in the post-Civil War years north of the Arkansas River."[508]

While the Cheyenne Dog Soldiers were warring against the whites in the 1860s, they did not neglect enemy tribes.[509] They also fought the Pawnees, Kaws (Kansas), Osages, Shawnee, Delawares, Omahas, Poncas, Crows, Shoshoni, and (most relevantly for Colorado) the Utes.[510]

"[T]he years of 1868 and 1869 were, statistically, the worst two years, from the white man's point of view, experienced on the plains."[511] When Colorado hay was being harvested in 1868, Indians "began to be very active and sniped off white people here and there. This caused all homesteaders to keep their guns primed . . . ."[512]

In August 1868, Arapaho and Cheyenne raided up and down the Arkansas River and also in Larimer County.[513] U.S. House Speaker and Republican Vice Presidential nominee Schuyler Colfax was touring the Colorado mountains on the day that the attacks began.[514] A friendly group of Utes escorted Colfax and his party back to Colorado Springs safely.[515] In Colorado Springs, "the gunsmiths' shops were jam-full. The Springs

507. *See* PROPST, *supra* note 2, at 102–25. Some of the Indian battles with whites in Colorado include Fisher's Creek (Trinidad, June 4, 1854 involving Jicarilla Apaches), Pueblo (Dec. 25, 1854 involving Ute and Apache), Saguache Creek (March 19, 1855 involving Ute and Apache), Chicosa Arroyo (Trinidad, April 25, 1855 involving Ute and Apache), Poncha Pass (April 29, 1855 involving Ute), Blackwater Spring (Eads, July 11, 1860 involving Kiowa and Comanche), Fremont's Orchard (Orchard, April 12, 1864 involving Cheyenne), Eayre's Fight (Flagler, Apr. 15, 1864 involving Cheyenne), Cedar Canyon (Sterling, May 3, 1864 involving Cheyenne), Hungate Massacre (Parker, June 11, 1864 involving Arapaho), Sand Creek (August 11, 1864 involving Arapaho), White Butte Creek (Sterling, October 10, 1864 involving Cheyenne), Sand Creek Massacre (Chivington, November 29, 1864 involving Cheyenne and Arapaho), Julesburg (January 7, 1865 involving Cheyenne and Lakota Sioux), Valley Station (Sterling, January 7, 1865 involving Cheyenne and Lakota Sioux), American Ranch (Merino, January 14, 1865 involving Cheyenne and Lakota Sioux), Godfrey's Ranch (Merino, January 14–15, 1865 involving Cheyenne and Lakota Sioux), Julesburg (February 2, 1865 involving Cheyenne and Lakota Sioux), Spring Canyon (Campo, June 14, 1865 involving Kiowa and Comanche), Big Timber (Arapahoe, June 11, 1867 likely involving Cheyenne), Rule Creek (Toonerville, September 10, 1868 involving Cheyenne), Big Sandy Creek (Aroya, September 15, 1868 involving Cheyenne), Beecher's Island (Wray, Sept. 17–21, 1868 involving Cheyenne), Dog Creek (Laird, July 8, 1869 involving Cheyenne), Summit Springs (Sterling, July 11, 1869 involving Cheyenne and Lakota Sioux), Milk Creek (Meeker, September 29–October 5, 1879 involving Ute), and Meeker Massacre (September 29, 1879 involving Ute). *See* GREGORY F. MICHNO, ENCYCLOPEDIA OF INDIAN WARS: WESTERN BATTLES AND SKIRMISHES 1850–1890, at 26–27, 30, 32–33, 77–78, 134–37, 141–42, 149–50, 154, 157–65, 173–74, 197, 220, 222–24, 234–36, 327–28 (2003). This listing does not include inter-tribal battles, and it does not purport to be a complete list of Anglo-Indian battles. *Id.* at 1.

508. FEHRENBACH, *supra* note 2, at 483.

509. AFTON ET AL., *supra* note 2, at 200.

510. *Id.* Indeed, fighting Indians was preferable to the Cheyennes, for Indians readily engaged in hand-to-hand combat, which offered the greatest opportunity for individual valor, whereas whites preferred to fight behind fortified positions, or with long-range weapons. *Id.*

511. TRENHOLM, *supra* note 20, at 225.

512. Block, *supra* note 419, at 189.

513. *See* BERWANGER, *supra* note 2, at 31; 1 HALL, *supra* note 2, at 456–57.

514. *See* 1 HALL, *supra* note 2, at 457.

515. *Id.*

was arming itself in haste."[516] Arapaho roamed through the town, but having "looked over the town's military preparedness," they "promptly announced that they were after their traditional enemies, the Utes."[517] They took 150 horses when they left.[518] Near Bijou Basin in El Paso County, fifty white scouts were surrounded by 500 Indians.[519] After "Texas Bill" rode through Indian lines to escape and summon aid, the Indians departed, shortly before the arrival of a white force from Denver.[520]

Although difficult, the situation in Colorado was considerably milder than in western Kansas.[521] After seventy-nine Colorado settlers had been killed, acting Colorado Governor Frank Hall asked U.S. General Philip Sheridan for assistance.[522] Militias were embodied throughout Colorado.[523] Sheridan raised a special cavalry force of fifty Kansans, designating them as U.S. Army scouts.[524] In mid-September the scouts were ambushed at Beecher Island, a sandbar on the Arikaree River (near the modern town of Wray, Colorado), and nearly destroyed.[525]

During September, the Indians continued raids against isolated settlers in El Paso County, killing about twenty persons, taking scalps and driving off 500 head of cattle.[526] At the time, the Indians had long range rifles, giving them an advantage over many whites.[527]

To the southeast, U.S. Lieutenant Colonel George Armstrong Custer attacked the Cheyenne at Washita in Indian Territory in November 1868 and killed peaceful Indians, including Black Kettle, as well as warriors who were encamped with them.[528] But many Cheyenne kept fighting.[529]

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516. R.B. TOWNSHEND, A TENDERFOOT IN COLORADO 217 (Stephen J. Leonard & Thomas J. Noel eds., Univ. Press of Colo. 2008) (1923).

517. MONNETT, *supra* note 423, at 70.

518. BERWANGER, *supra* note 2, at 31.

519. 3 HALL, *supra* note 2, at 344.

520. *Id.*

521. *See* MONNETT, *supra* note 423, at 70.

522. *See* 1 HALL, *supra* note 2, at 457–58.

523. *See* MONNETT, *supra* note 423, at 70–71 (noting that Colorado lacked arms to supply the militias).

524. *Id.* at 72.

525. *Id.* at 1. The sandbar, which has since been washed away, was named "Beecher Island" in honor of the scouts' second-in-command, who was killed in the battle. *Id.* at 2. He was a nephew of the abolitionist Massachusetts preacher Henry Ward Beecher. *Id.* at 81. The federal army also sent a "train of guns and ammunition" to Denver, "for use in arming the citizens." 1 HALL, *supra* note 2, at 462. It arrived on October 29, 1868. *Id.*

526. 3 HALL, *supra* note 2, at 344–45.

527. *See id.* at 345 ("The settlers were not provided with long range rifles as were the Indians.").

528. STILES, *supra* note 396, at 317–18. The battle was fought on November 27. *Id.* at 317. Custer's forces killed all adult males. *Id.* at 318. Unlike at Sand Creek, the women and children were taken prisoner, rather than killed. *See id.* During the battle, the Cheyenne executed their two white prisoners: a woman and her child. MONNETT, *supra* note 423, at 61.

529. STILES, *supra* note 396, at 321 (the army estimated 1,400 Cheyenne at large after Washita). Black Kettle had been "instrumental in saving countless lives," both Indian and white. THOM HATCH, BLACK KETTLE: THE CHEYENNE CHIEF WHO SOUGHT PEACE BUT FOUND WAR Kindle pos. 3362, Conclusion (2004). He is honored as the namesake of the Black Kettle National Grasslands, near Washita.

Guided by Pawnee scouts and also by a young tracker named William Cody, the U.S. Fifth Cavalry defeated Cheyenne led by Tall Bull at Summit Springs, Colorado, in July 1869.[530] The commander of the military Department of the Missouri wrote in his 1869 annual report that "[i]t is believed . . . that there are no hostile Indians on the Plains of Kansas or Colorado."[531] Yet in 1870, as the Kansas Pacific railroad was laying tracks toward Denver, the construction crews were attacked at ten locations in far east-central Colorado, near the present town of Kit Carson.[532] Eleven workers were killed, nineteen wounded, and 400 head of livestock were taken.[533] U.S. General John Pope attempted, with limited success, to protect the construction crews, and the line was eventually completed.[534]

Douglas County, Colorado, originally extended to the Kansas border.[535] During the pre-statehood days, the pioneers of Douglas County had been the most "frequently exposed to Indian depredations, horse and cattle thieves."[536] "Widely scattered, they became an easy prey to both."[537] Yet they built forts and stockades to protect women and children, "and with trusty rifles themselves drove their enemies across the border. As for the white desperadoes, they were pursued and shot, or if captured, hanged to the nearest tree."[538]

The removal of Colorado's Plains Indians to reservations outside the state did not mean the end of their warfare in Colorado. The U.S. Army did nothing to stop hunters who, starting in 1873, were illegally shooting the buffalo to extermination in Indian lands in Oklahoma and Texas.[539] Combined with the typical federal government failure to supply adequate provisions, the destruction of the buffalo brought the Indians near starvation.[540] So in 1874, the Cheyenne, Comanche, Arapaho, and Kiowa rose up in the Red River War. The main theaters of battle were Texas, Oklahoma, and Kansas, but Cheyenne warriors also attacked southeastern

530. JAMES T. KING, WAR EAGLE: A LIFE OF GENERAL EUGENE A. CARR 101–13 (1963); GALLAGHER, *supra* note 239, at 120–24; STILES, *supra* note 396, at 323. When Cody later became a professional entertainer in Buffalo Bill's Wild West show, the Battle of Summit Springs was the climax of the spectacle. MONNETT, *supra* note 423, at 192. The Dog Soldiers may have been defeated, but they were not eliminated as a military force. For example, they were active in the Red River War of 1874–75. HALEY, *supra* note 26, at 96.

531. KING, *supra* note 530, at 118 (second alteration in original) (citing Maj. Gen. J.M. Schofield to Bvt. Maj. Gen. G.L. Hartsuff (Oct. 23, 1869), National Archives Records Service, Record Group 94, Adjutant General's Office).

532. BRENNEMAN, *supra* note 2, at 53–54.

533. *Id.* at 54.

534. 1 HALL, *supra* note 2, at 490–91.

535. It thus included most of modern Elbert County, the northern part of Lincoln County, and all of Kit Carson County. NOEL, *supra* note 2, at 68–73.

536. 3 HALL, *supra* note 2, at 337.

537. *Id.*

538. *Id.*

539. HALEY, *supra* note 26, at 24–31.

540. Among their other grievances was that the federal government was not supplying them with enough firearms and ammunition. *Id.* at 10–11.

Colorado.[541] Among the notable incidents of the war were the Short Massacre (in Kansas) and the Hennessey Massacre (in Oklahoma).[542] The uprising was so serious that U.S. Army central command was moved from Washington to St. Louis.[543]

On June 25–26, 1876, a few days before Coloradans would vote on ratification of their proposed new constitution, General Custer attacked a camp of Sioux and Northern Cheyenne at Little Big Horn, in the future state of Montana. The federal forces were wiped out in one of the worst defeats in U.S. military history.[544] Then in 1878, Dull Knife and Little Wolf led Cheyenne who left the Oklahoma reservations and raided as far north as Nebraska, although not in Colorado.[545]

By the time that Coloradans were drafting and voting on their proposed constitution, including its right to arms, the Plains Indian wars had shown that firearms can be used for mass killing. Sand Creek was the most notorious example, perpetrated by whites, and there were many other examples, many perpetrated by Indians. So it might have been understandable for the Colorado Constitution to omit a right to arms, or to limit the types of firearms that might be possessed, or to exclude Indians, who (at the time) were not citizens. Yet Coloradans adopted a different approach, as will be described in Part IV.

2. The Utes

During the 1860s, the Utes were mostly at peace with the Colorado whites.[546] Instances of Utes killing or harassing whites were hardly unknown, but there was no general warfare. The Utes were, however, at

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541. *See id.* at 78, 95. In response, Las Animas County summoned its posse comitatus. *See* text at note 832–33 *infra*. Arapaho participation in the war was small-scale, compared to the activities of the other tribes. TRENHOLM, *supra* note 20, at 248–49.

542. HALEY, *supra* note 26, at xx–xxi, 97–98, 139–46. One of the perpetrators of the Short Massacre (a/k/a Lone Tree Massacre) was Buffalo Calf Woman, whose family had been murdered at Sand Creek. *Id.* at 139.

543. *See id.* at 183.

544. In the Indian Wars, Custer's loss of 260 troops was eclipsed only by St. Clair's Defeat, in 1791 in western Ohio, with the loss of 600 soldiers—at the time, two-thirds of the U.S. Army.

545. *See generally* STAN HOIG, PERILOUS PURSUIT: THE U.S. CAVALRY AND THE NORTHERN CHEYENNES (2002). The 1878 raids were by Northern Cheyenne who hated living on the reservation on Oklahoma. The raids helped lead to the establishment of a separate Northern Cheyenne reservation in Montana in 1884. GALE ENCYCLOPEDIA, *supra* note 19, at 222.
In modern times, Colorado's most famous Cheyenne is former U.S. Senator Ben Nighthorse Campbell. *See generally* HERMAN J. VIOLA, BEN NIGHTHORSE CAMPBELL: AN AMERICAN WARRIOR (1993).

546. Some Utes had been in a usually friendly treaty relationship with the United States since the late 1840s, following defeats at the hands of federal soldiers led by Kit Carson. LAMAR, *supra* note 2, at 208–09; Treaty with the Utah, 1849, Dec. 30, 1849, 9 Stat. 984; 2 INDIAN AFFAIRS, *supra* note 2, at 585–87. As was typical of treaties at this time and in the subsequent two decades, the Indians agreed to stop being nomads, and to settle down. *Id.* at 586 ("[T]o cease the roving and rambling habits which have hitherto marked them as a people . . . ."). The provision was completely ignored, and the U.S. made virtually no effort to enforce it. It was not until the 1870s that the U.S. government began a serious effort to confine the Utes to reservation land. *See* discussion *infra* Section II.D.2.

war with the Cheyenne, Sioux, and Arapaho in the 1860s and 1870s.[547] Indeed, after 1873 victories against the Arapaho, and in 1874 against the Cheyenne and Sioux, the returning Ute warriors celebrated with Scalp Dances in Denver.[548]

In the 1863 Treaty of Conejos, a thousand Utes led by Chief Ouray agreed to leave the lower San Luis Valley, in favor of the Uncompahgre region, in exchange for annuities.[549] The standard Indian treaties of the era promised annual deliveries of supplies to the signing tribe and also promised certain tradesman to live with the tribe. Usually this included a blacksmith, who at the time often had some gunsmithing skills.[550] The Ute treaty specifically provided that the blacksmith must repair guns.[551] This was similar to an 1857 treaty with the Pawnee.[552]

Tensions increased in 1864–1865. The rations promised by the treaty didn't come, and game was scarce in the winter. Some Utes went to southern Colorado homes and intimidated settlers into giving them food.[553]

Then in April 1865, the Black Hawk War had commenced in the Utah Territory, pitting the Utes against Mormon settlers.[554] The most intense part of the war ended in 1867, but fighting continued until 1872.[555] The

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547. SIMMONS, *supra* note 2, at 120–21 (1868 war with Cheyenne and Arapaho); *id.* at 139 (1870 war with Sioux in the Upper Arkansas Valley).

548. *Id.* at 141.

549. Treaty with the Utah–Tabeguache Band, 1863, Oct. 7, 1863, 13 Stat. 673; 2 INDIAN AFFAIRS, *supra* note 2, at 856–59; MONAHAN, *supra* note 2, at 132 (number of Utes); COLTON, *supra* note 2, at 151; SIMMONS, *supra* note 2, at 117. As was common in the nineteenth century, the Ute annuity was not fully and regularly delivered. GALLAGHER, *supra* note 34, at 120.

550. VESTAL, *supra* note 92, at 152 (describing the blacksmithing skills of mountain man Jim Bridger).

551. 2 INDIAN AFFAIRS, *supra* note 2, at 858 ("The Government also agrees to establish and maintain a blacksmith-shop, and employ a competent blacksmith, for the purpose of repairing the guns and agricultural implements which may be used by said band of Indians."). The Ute in turn agreed not to furnish arms to any tribe "not in amity with the United States." *Id.* at 857.

552. Treaty with the Pawnee, 1857, art. 4, Sept. 24, 1857, 11 Stat. 729; 2 INDIAN AFFAIRS, *supra* note 2, at 765 ("[T]wo complete sets of blacksmith, gunsmith, and tinsmith tools . . . . [T]wo blacksmiths, one of whom shall be a gunsmith and tinsmith; but the Pawnees agree to furnish one or two young men of their tribe to work constantly in each shop as strikers or apprentices, who shall be paid a fair compensation . . . ."). For a list of gunsmiths employed by the War Department in 1832 to aid friendly Indians, see RUSSELL, *supra* note 66, at 365–66.

553. SIMMONS, *supra* note 2, at 120–21; PETERSON, *supra* note 273, at 211 (1863 Conejos Treaty mostly ignored by whites). This happened again in the winter of 1866–67. SIMMONS, *supra* note 2, at 125.

554. *See* PETERSON, *supra* note 322, at 121–22.

555. *See id.* at 340–42, 368–71. As the Utes well knew, the Mormons were fearful of calling for federal military assistance, because once the troops had dispatched the Indians, they might crack down on the Mormon theocracy, and impose effective federal control. To prevent federal intervention, deceptive Mormon reports to Washington downplayed the intensity of the Black Hawk War. The federal government did not appear to mind leaving the Mormons to fight alone. *Id.* at 3–5. The Mormon militia that was raised for the war was known as the Nauvoo Legion. *Id.* at 13–14. Finally, in 1872, the federal army did intervene. The army not only suppressed the Indians, it outlawed the Nauvoo Legion. *Id.* at 374.

Previously, Indian relations with Mormons had been much better than with any other group of whites, *id.* at 5–7, partly because of Mormon scripture that Indians (the Lamanites) were descendants of a lost tribe of Israel, and would eventually become Latter Day Saints, *id.* at 22–23.

Black Hawk War made the Utes of southwestern Colorado much more hostile to whites, and the area was a fertile recruiting ground for Utes to join the Black Hawk War; southwestern Colorado was also a transit zone for the enormous quantities of livestock that the Utes captured during the war, to be sold in Santa Fe.[556] One side effect of the war was greatly increased Ute raids of Colorado livestock.[557]

The Utes were also unhappy with an 1865 proclamation by President Johnson shortly after the end of the Civil War that outlawed Indian slavery and the Indian slave trade.[558] This was a serious economic blow to the Utes, who had long been selling captives from other tribes as slaves.[559] Until the ratification of the Thirteenth Amendment in December 1865, slavery was legal in the New Mexico Territory, and the Ute's slave trade continued in the San Luis Valley after 1861, when northern New Mexico became part of the new Colorado Territory.[560]

Overt hostilities broke out in 1866 when Chief Kaneatche led Ute raids in Las Animas County in 1866, until forced to retreat by a U.S. Cavalry force.[561] Farther west, Kit Carson reported that the Utes in the Four Corners area were "a powder magazine" ready for "a spark."[562]

In 1868, Territorial Governor Alexander Cameron Hunt and Kit Carson negotiated a new agreement with the Utes that was "the most generous treaty ever made between the U.S. government and any Native

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Black Hawk, a Ute, assembled a large pan-Indian coalition for the war. *Id.* at 10–11. The main theater of operations was Sanpete and Sevier Counties, in central and eastern Utah, where Utes were angry at their treatment by Mormon settlers; the Black Hawk warriors did not consider themselves to be at war with the Mormons as a whole. *Id.* at 12.

556. *Id.* at 184–87, 198–200. Some of the livestock captured in Utah were brought to southern Colorado. SIMMONS, *supra* note 2, at 128. Arms and ammunition sales by Colorado whites were an important supply for the Black Hawk warriors. PETERSON, *supra* note 322, at 187, 193–94. So were Mexican traders in the San Luis Valley. *Id.* at 198. All such trade was contrary to federal law prohibiting unlicensed trading with Indians. *Id.*

557. PETERSON, *supra* note 322, at 198–99.

558. SIMMONS, *supra* note 2, at 121.

559. *Id.* at 33, 121.

560. *Id.* The territory had hardly any black slaves, but several thousand Indian ones. MARTIN HARDWICK HALL, SIBLEY'S NEW MEXICO CAMPAIGN 6 (Univ. of N.M. Press 2000) (1960); PETERSON, *supra* note 322, at 65 (estimating about 4,000 slaves in New Mexico as of the mid-1860s). The Jan. 1, 1863, Emancipation Proclamation did not by its terms apply to either the Colorado or New Mexico Territories, because neither were in rebellion against the United States. The Thirteenth Amendment was ratified on Dec. 6, 1865, outlawing all slavery throughout the U.S.
The Apaches were also active slave traders. WEST, *supra* note 2, at 45. Farther south, the Comanche Empire, which dominated the region from Arizona to Louisiana until about 1850, also carried on a thriving slave trade. PEKKA HÄMÄLÄINEN, THE COMANCHE EMPIRE 2 (2008). However, neither the Apache nor the Comanche slave trade appears to have been very active in Colorado.

561. 4 HALL, *supra* note 2, at 93.

562. PETERSON, *supra* note 322, at 211. An attempt was made in 1866 to get the Utes to agree to settle down and take up ranching and agriculture, which they had first promised to do in the 1849 treaty. 2 INDIAN AFFAIRS, *supra* note 2, at 586. But the Utes explained that if they were sedentary, their enemies would know where they were and be able to find them and kill them. The Utes would not consent to stop roaming until their enemy tribes were on reservations. P. DAVID SMITH, OURAY: CHIEF OF THE UTES 68 (1986).

American group."[563] The Hunt Treaty was generous partly because the Governor wanted to keep the Utes from allying with the Arapaho and Cheyenne, leaving Colorado completely surrounded by hostiles.[564]

The new Consolidated Ute Reservation was for Utes in Colorado and New Mexico. It encompassed the western thirty percent of Colorado.[565] However, the Indian agents appointed to deliver annuities to the Utes were especially bad, and much of what the Utes had been promised was filched before delivery.[566] The problem was even worse because Governor Hunt, who was much respected by the Utes, had been replaced by Edward M. McCook, whose main interest in the governorship was stealing the annuities. Territorial Secretary Frank Hall later described McCook's annuity thefts as "a scheme of rascality and plunder without a parallel in our annals."[567]

McCook's terrible governance eventually convinced many Coloradans that territorial government had become a problem and statehood was the solution. "It is interesting to note that virtually every new state that had undergone the territorial experience had reacted in a similar way by clipping gubernatorial wings."[568] Thus, article IV of the 1876 Colorado Constitution would divide executive power among seven elected officers,[569] require biannual reports from executive departments on expenditures,[570] forbid pay raises during a constitutional officer's term,[571] and mandate legislative participation in executive pardons.[572]

The boundaries of the reservation, based on straight lines of latitude and longitude, were incomprehensible to the Ute. Many refused to move

563. BERWANGER, *supra* note 2, at 38–39; ESTERGREEN, *supra* note 2, at 272–73; Treaty with the Ute, 1868, Mar. 2, 1868, 15 Stat. 619; 2 INDIAN AFFAIRS, *supra* note 2, at 990–96. Hunt served as Governor from May 1867 to June 1869. He had come to Colorado in 1858. BERWANGER, *supra* note 2, at 55–56.

564. BERWANGER, *supra* note 2, at 38–39.

565. Not including land fifteen miles or farther north of the fortieth parallel. In other words, the northern border was mostly in-between the Yampa and White Rivers. The eastern border was about ten miles west of Aspen. SIMMONS, *supra* note 2, at 131–33. The Utes gave up claims to North Park, Middle Park, the San Luis Valley, and the Yampa River Valley, all of which had mostly been taken by the whites already. SMITH, *supra* note 562, at 72–73.

566. SIMMONS, *supra* note 2, at 137–38.

567. 3 HALL, *supra* note 2, at 18; *see also* LAMAR, *supra* note 2, at 247–48; 2 HALL, *supra* note 2, at 166–69. McCook complained that the Hunt Treaty treated Indians better than whites. Under the federal Homestead Act, a settler could acquire 160 acres of land (which was fine in eastern Kansas, but insufficient to make a living in semi-arid Colorado). In contrast, Ute Reservation amounted to over 2,000 acres per Ute, who at the time numbered no more than 6,000. SMITH, *supra* note 562, at 85, 91, 108 (noting the reservation was over fourteen million acres).
Ulysses Grant was personally an honest man, but he was willfully blind to the thievery of his friends. 3 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE BEGINNINGS OF CRITICAL REALISM IN AMERICA, 1860–1920, at 30 (Univ. of Okla. Press 1987) (1930). The vast corruption that Grant tolerated was described as "The Great Barbecue." *See id.* at 23–31.

568. LAMAR, *supra* note 2, at 254.

569. COLO. CONST. art. IV, § 1 (amended 1956).

570. *Id.* art. IV, § 16.

571. *Id.* art. IV, § 19.

572. *Id.* art. IV, § 7.

to the reservation. The Utes who were already inside the reservation had no compunction about leaving—sometimes for hunting and sometimes for raids on isolated white settlements.[573] Nor did the whites have much respect for reservation boundaries, whose borders they violated by settling or prospecting.[574]

After the discovery of silver and gold in the San Juan Mountains in 1871, whites began to flood in. During 1872 negotiations, Chief Ouray and other Utes refused to cede more territory. The federal government even issued orders that the U.S. Army remove illegal white immigrants in the San Juans, but the orders were quickly rescinded.[575]

The Utes did sign the 1873 Brunot Agreement, ceding the mining regions, about a quarter of the reservation, while reserving hunting rights in the ceded areas.[576] But the illegal immigration into the remaining reservation could not be contained. Nor could Utes be contained to the reservation; for example, in 1878, a large band of hunters led by Chief Shawano killed Joseph McClane, a resident of Cheyenne County, on the far eastern plains.[577]

In the September 29, 1879 Meeker Massacre, White River Utes killed Indian agent Nathan Meeker and nine other men, and took their wives and children hostage.[578] Governor Pitkin called out the state militia, who joined federal forces from Wyoming in war against the Utes.[579] The ultimate result was congressional passage of the 1880 Ute Removal Act, drastically

573. SIMMONS, *supra* note 2, at 140–42; *see also* 3 HALL, *supra* note 2, at 345 (noting the 1878 Ute summer encampment at Garden of the Gods).

574. SIMMONS, *supra* note 2, at 138.

575. SMITH, *supra* note 562, at 91–92, 104–06.

576. Brunot Agreement with the Ute Indians, ch. 136, art. 1–2, 18 Stat. 36, 37 (1874); BERWANGER, *supra* note 2, at 39; 2 HALL, *supra* note 2, at 189–92. The ceded area was most of the modern counties of Archuleta, Hinsdale, Dolores, La Plata, Montezuma, Ouray, San Juan, and San Miguel. SMITH, *supra* note 562, at 114. Initial white attempts to settle in the Animas River and San Juan region had begun in 1860, but had ended in failure, as no valuable finds of minerals were made, and the settlers were forced out by the Utes. 2 HALL, *supra* note 2, at 192–97.

The 1873 document was styled as an "agreement" rather than a "treaty" due to an 1871 federal statute that forbade treating Indian nations as sovereigns. Indian Appropriations Act of 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."). Perhaps surprisingly, courts in the twentieth century were unwilling to cast aside the pre-1871 treaties; instead, they remain an important component of the rule of law, by which the United States defines itself. *See* PRUCHA, *supra* note 2, at 386–88 (a key motive for the statute was the desire of the House of Representatives to be able to vote on agreements with Indians, since treaties need ratification only from the Senate). The fight between the House and Senate over this issue delayed the passage of appropriations for Indian annuities until the final days of the forty-first Congress and prevented the passage of any Indian appropriation bill in the fortieth Congress (1867–69). *Id.* at 295–305.

577. 4 HALL, *supra* note 2, at 89.

578. SIMMONS, *supra* note 2, at 186–87.

579. *Id.* at 188–89. "Like most difficulties with this and other Indian nations, it was directly ascribable to the neglect and indifference of the Indian Bureau at Washington." 2 HALL, *supra* note 2, at 494. *See generally* ROBERT SILBERNAGEL, TROUBLED TRAILS: THE MEEKER AFFAIR AND THE EXPULSION OF UTES FROM COLORADO (2011) (providing a detailed account of the events of 1879–1881).

reducing the Colorado reservation and ordering many Utes to go to the Uintah Reservation in Utah.[580] Through the 1910s, some Utes, including those led by Chief Colorow, ventured off the reservation to hunt in Colorado, which sometimes resulted in violent skirmishes with whites.[581] Indeed by 1895, off-reservation hunting by Utes was so extensive as to raise concerns about the extermination of elk, deer, and other game.[582]

Like the Cheyenne's Black Kettle, the Ute Chief Ouray had been a great warrior in earlier days. Like Black Kettle, he recognized the whites' overwhelming demographic advantage and pragmatically tried to make the best deals possible for his people, although he knew he was dealing from a position of weakness.[583] But among the Utes, like the Cheyenne, the authority of a single chief, or even several chiefs, was limited to whoever chose to follow them, and many young men chose to stand and fight.[584]

The Ute reservations in Colorado were greatly reduced by the 1880 Removal Act, and then whittled thereafter.[585] What remains today are the Ute Mountain Ute Reservation and the Southern Ute Indian Reservation, both in far southwestern Colorado.[586]

In the twenty-first century, Utes have asserted their Brunot hunting rights, which provided that "[t]he United States shall permit the Ute Indians to hunt upon said lands so long as the game lasts and the Indians are at peace with the white people."[587] The Colorado Department of Parks and Wildlife has negotiated agreements with Utes allowing them to hunt in Brunot areas outside the normal hunting seasons, at levels consistent with wildlife sustainability.[588]

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580. SIMMONS, *supra* note 2, at 191.
Ouray died in 1880, at age 47. *Id.* at 192. He is the namesake of Ouray County. The Uintah Reservation, in Utah, is now the Uintah and Ouray Reservation.
Ouray's widow, Chipeta, outlived him by half a century. Although the Utes were ill-treated in the late nineteenth century, Chipeta was celebrated in southern Colorado during the early twentieth century. *See* CYNTHIA S. BECKER & P. DAVID SMITH, CHIPETA: QUEEN OF THE UTES 202–03 (2003) (noting Chipeta met with President Taft). Today, she is remembered by several place names in Colorado and Utah. *Id.* at 253–54.

581. SIMMONS, *supra* note 2, at 204–06. In a 1914 incident, about a hundred Utes hunting off-reservation near Rangely were rounded up by civilians and returned to Utah. *Id.* at 228.

582. 4 HALL, *supra* note 2, at 66. Until 1914, the federal Commissioner of Indian Affairs was willing to ignore Ute off-reservation hunting. The crackdown in 1914 seems to have been provoked by the Utah Utes asking for more rations during a particularly hungry time. BECKER & SMITH, *supra* note 580, at 221–22.

583. *See* SIMMONS, *supra* note 2, at 193.

584. *See id.* at 179 (discussing White River Utes in 1875–1878).

585. Act of June 15, 1880, ch. 223, 21 Stat. 199; SIMMONS, *supra* note 2, at 217 (discussing the 1895 Hunter Act).

586. *See generally* RICHARD K. YOUNG, THE UTE INDIANS OF COLORADO IN THE TWENTIETH CENTURY (1997) (describing the development of differing cultural and political views between the two reservations, starting in the 1890s).

587. Brunot Agreement with the Ute Indians, ch. 136, art. 2, 18 Stat. 36, 37 (1874).

588. MEMORANDUM OF UNDERSTANDING BETWEEN UTE MOUNTAIN UTE TRIBE AND THE STATE OF COLORADO CONCERNING WILDLIFE MANAGEMENT AND ENFORCEMENT IN THE BRUNOT

E. Law and Order

Meanwhile in the towns, law and order issues had to be addressed. Although Colorado would later become a great agriculture and ranching state, we should not think of gold rush Colorado as rural. Except for Indians, the large majority of people lived in towns that were either base camps for miners (e.g., Gold Hill, in Boulder County) or commercial centers for supplying the miners and other inhabitants (e.g., Denver, Golden). The core criminal problem was that among the people who had moved to Colorado were "roughs" from Kansas, Missouri and elsewhere, leaving areas where they already had a criminal record and seeking new opportunities for predation.[589]

Individual self-defense was a necessity. In 1859, "[a]ll carried deadly weapons, to protect themselves from the lawless."[590] One new arrival in June 1864 wrote, "I do not enjoy living in a country where every man you meet, thinks it is safe to carry a loaded pistol. The practice is universal in all parts of Colorado."[591]

Although individual self-defense was necessary, it was not sufficient in the eyes of Coloradans. Communities had to organize for collective self-defense. As described in Section I.B., this collective community organization had to be ad hoc, by the pioneers themselves. Neither the federal government, the Kansas territorial government, nor any other external organization had more than a minor capacity to construct functioning government in Colorado.

Early Colorado never devolved into the anarchy that had characterized California in its own early gold rush years, a decade before. Because about thirty percent of Colorado's miners had experience in California, they understood the importance of creating effective local self-government immediately.[592] Thus, the miners' districts were quickly

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AREA (2013); BRAD WEINMEISTER, COLO. PARKS & WILDLIFE, BIGHORN SHEEP MANAGEMENT PLAN, DATA ANALYSIS UNIT RBS-20 18 (2012); SOUTHERN UTE INDIAN TRIBE, 2017–2018 BRUNOT AREA HUNTING & FISHING PROCLAMATION FOR BRUNOT AREA HUNTING & FISHING BY SOUTHERN UTE TRIBAL MEMBERS (stating tribal hunting regulations for Southern Utes in Brunot area).
During the latter decades of the twentieth century, Indian tribes had success in reasserting treaty right for hunting and fishing. PRUCHA, *supra* note 2, at 385; Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443. U.S. 658 (1979); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968) (generating two follow-up cases of the same name).

589. HISTORICAL COMPENDIUM, *supra* note 2, at 144; LAMAR, *supra* note 2, at 184.

590. 1 HALL, *supra* note 2, at 207; *see also* RICHARDSON, *supra* note 88, at 305 ("[F]ully half the citizens wore sixshooters . . . .").

591. SMITH, *supra* note 212, at 234; LEONARD & NOEL, *supra* note 2, at 27. The man was Nathaniel Hill, who had been a professor of chemistry at Brown University. He discovered an improved method of smelting, which made him rich and contributed greatly to Colorado's prosperity. He was later elected to the U.S. Senate. SMITH, *supra* note 212, at 201, 249.

592. LAMAR, *supra* note 2, at 186.

established.[593] Experienced code writers traveled from town to town, helping to create local law.[594]

The early informal courts were not contrary to law and order. Instead, they were the foundation of the Colorado judiciary. Gilpin County's first sheriff recalled how the first judge of the Miners' Court was selected:

> [A young prospector] was in partnership with a bunch of the boys that were sluicing some ground up in Russell Gulch. He never did take kindly to the hard work around the sluice boxes, so the boys told him off to be the camp cook. Now that didn't work out very well, either, for [he] was always reading Blackstone or some law book, and forgetting about his cooking, and there was many a dish of beans scorched because he was too much interested in a book.[595]
>
> Well, as I say, he wasn't much of a cook, and completely no good as a placer miner, so the boys made him into a Judge. (Here the Old Sheriff chuckled). I must say that as the years have piled up, he has made a damn good one.[596]

The Miner's Court Judge was Moses Hallett.[597] He later served in the Territorial Council (the legislature) 1863–1866,[598] as Denver City Attorney,[599] and as Chief Judge of the federal Territorial Court 1866–1877.[600] There, he created the foundation of Colorado water law.[601] In 1877, he was appointed U.S. District Judge for the District of Colorado and served until 1906.[602]

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593. *Id.*

594. *Id.*

595. LAFAYETTE HANCHETT, THE OLD SHERIFF AND OTHER TRUE TALES 8–9 (1937).

596. *Id.* at 9.

Placer gold is the gold that has eroded from the mountains, and can be found in streams. "Placer" is the Spanish word for "pleasure." WEST, *supra* note 2, at 106.

597. HANCHETT, *supra* note 595, at 8.

598. He served on the Council (the upper house) of the third Territorial Assembly in 1864 and in the fourth Assembly in 1865. 2 HALL, *supra* note 2, at 537, 539.

599. As City Attorney: April 1, 1863 to April 1, 1864, and April 1, 1865 to April 1, 1866. *Id.* at 524.

600. *Hallett, Moses*, FED. JUD. CTR., https://www.fjc.gov/history/judges/hallett-moses (last visited Dec. 20, 2017).

601. Judge Hallett explained that the common law doctrine in favor of riparian rights, which had developed in Great Britain and the eastern U.S., where water is plentiful, could not be applied in arid Colorado, where beneficial use of water is essential to the survival of the community:

> [R]ules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.
>
> . . . .
>
> When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them.

Yunker v. Nichols, 1 Colo. 551, 553, 555 (1871).

602. The court was created by the Act of June 26, 1876, ch. 147, 19 Stat. 61. During and after his service on the District Court, Judge Hallett taught at the University of Colorado Law School and became Dean Emeritus. *Hallett, Moses*, *supra* note 600. He is the namesake of Hallett Hall at the University.

Wilbur Fiske Stone came to Colorado as a miner in 1860.[603] An early photograph of Stone shows him with a lever action rifle and a large knife in a belt sheath.[604] He was elected to the territorial legislature in 1862 and 1864[605] and was an assistant U.S. attorney in 1862–1866.[606] In 1877, he became a justice of the Colorado Supreme Court.[607] During the early days of Cañon City, he helped organize the people's court there.[608] Fremont County in 1860–1863 was beset by "a gang of horse and cattle thieves."[609] Because of danger from these "roughs," people usually wore pistols and bowie knives.[610] Justice Stone later recalled, "As to the character and results of these people's courts I can sum it all up by declaring that, if their administration was not always strictly law, it was rarely ever anything else than acknowledged justice."[611]

On the whole, the mining districts were successfully self-sufficient in criminal justice. The miner's courts and people's courts hanged murderers; lesser criminals were whipped, had half their heads shaved, and were banished.[612] The result was public safety: "No miner locked the doors to his cabin, though there might be hundreds or thousands of gold dust within, and wholly unguarded."[613] The mining districts did not feel much need for additional government.

The 1876 Republican State Convention was about to nominate Hallett as its candidate for Colorado Supreme Court, until it was pointed out that Hallett would likely be named to the federal bench. 2 HALL, *supra* note 2, at 331. He was appointed on Jan. 9, 1877, by President Grant. *Id.* at 361. Unlike most judges, Hallett did not allow "smoking, card playing, hats, or guns" in his courtroom. ERICKSON, *supra* note 2, at 48.

603. ERICKSON, *supra* note 2, at 86.

604. *Id.* at 12 (reprinting Colorado Historical Society photo no. 10036730).

605. 2 HALL, *supra* note 2, at 539–40 (Representative from Park County); 4 HALL, *supra* note 2, at 565–66.

606. 4 HALL, *supra* note 2, at 566.

607. Stone had been a Democratic nominee for the Supreme Court in 1876 but had lost in what was a mostly Republican year statewide. *Id.* One of the winners, Justice E.T. Wells, resigned after serving for one year. A special meeting of Colorado lawyers nominated Stone for the vacancy, and both political parties acceded to the result. Stone served as a Justice until 1886. *Id.* In 1891, President Benjamin Harrison appointed Stone to a commission to investigate the Spanish land grants in the southwest, which had wrapped up huge amounts of land in continuing disputes over title. Stone spoke Spanish, French, and German, and he went to Madrid to investigate the origin of claims to 12 million acres, the 1748 Peralta grant from the King of Spain. Stone's investigation revealed that the Peralta claim was a fraud. ERICKSON, *supra* note 2, at 86–87. Towards the end of his life, Stone edited a four-volume *History of Colorado*, published in 1918. *Id.* at 88.

608. ERICKSON, *supra* note 2, at 86. Stone's co-author of the code for the People's Court was George Hinsdale. 4 HALL, *supra* note 2, at 566. In 1868, Hinsdale and Stone co-founded the *Colorado Chieftain* newspaper, now known as the *Pueblo Chieftain* newspaper. *Id.*; 1 HALL, *supra* note 2, at 477.

609. ERICKSON, *supra* note 2, at 10.

610. *Id.*

611. *Id.*

Stone was personally aware that firearms could be misused. In 1876, when he was serving as a Territorial Judge, a body of armed men removed him from a train and detained him for several hours, while treating him respectfully. They were unsuccessfully attempting to prevent him from issuing a ruling in a railroad case that day. 2 HALL, *supra* note 2, at 418–19.

612. Townspeople were authorized to shoot the offender on sight if he returned. SMITH, *supra* note 212, at 74.

613. 1 HALL, *supra* note 2, at 481 (describing Spanish Bar mining settlement, near Clear Creek).

Denver, however, with its larger population, had a much worse crime problem, and it wanted a regular territorial government to be established.[614] During the city's first two years, it had fifteen murders.[615] The frequent shootings in saloons and gambling dens were usually ignored as a problem that voluntary combatants brought on themselves. But the bad men did not always confine themselves to fighting each other. For one thing, "the community was infested with horse thieves, whose depredations were of almost daily occurrence."[616] There were many "lawless characters" who "rejoiced in being denominated 'holy terrors.' . . . [T]hese desperadoes conceived the idea that they ought to and would run the town."[617] Vigilance committees, informal people's courts, and a formal People's Tribunal in Denver did their best to maintain public safety.[618]

"Uncle Dick" Wootton was an experienced mountain man who had been induced to open a merchandise store in Denver in exchange for a grant of 160 acres of land.[619]

It was the first Denver building constructed of hewn logs, and, for a time, was the only two-story building in Denver City.[620] Wootton recalled that "[t]he scoundrels and thieves came pretty near running the country until the vigilantes organized."[621] The first instance involved a Hungarian who murdered his brother-in-law to take his gold dust.[622] When the corpus delecti was discovered by some Mexican[623] boys, the man was apprehended, and confessed. A jury of twelve was quickly assembled; the defendant had good counsel, but the confession settled the matter, and the jury voted for him to be hanged that day.[624]

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614. *Id.* at 219–21.

615. BRENNEMAN, *supra* note 2, at 15.

616. RONZIO, *supra* note 2, at 62.

617. 1 HALL, *supra* note 2, at 183.

618. Another problem arose on January 30, 1860, when some claim jumpers began erecting buildings on land that was owned (but unimproved) by others. Both sides were heavily armed, and some shots were fired, almost killing the Denver Sheriff. However, attorney Edward Wynkoop, representing the jumpers, worked out a compromise by which the jumpers would abandon their claims, in return for compensation for the expenses they had incurred. The "War against the Jumpers" ended peacefully. BRENNEMAN, *supra* note 2, at 17; RONZIO, *supra* note 2, at 21–23.

619. WOOTTON, *supra* note 2, at 244. Wootton lived in Denver for four years, moving to southern Colorado in 1862. *Id.* at 251–52. Mountain men tended to shorten the appellations of their fellows, so Richens Wootton was known as "Dick" to his fellow trappers, and as "Uncle Dick" to the younger generation. *Id.* at 17–18.

620. *Id.* at 244. The April 11, 1859, public assembly that began the effort to seek statehood was held in Wootton's second story. *Id.* at 249 n.103.

621. *Id.* at 247.

622. *Id.*

623. As described above, parts of early Colorado and all of New Mexico had once been part of the United States of Mexico. In the 1848 Treaty of Guadalupe-Hidalgo, the United States of America purchased New Mexico, part of Colorado, and other Southwestern land. The treaty allowed all Mexican inhabitants to remain, and offered them American citizenship, if they wanted it. Some but not all Mexicans accepted. Early Colorado writers used "Mexican" to encompass all persons of Mexican ancestry, regardless of whether they citizens of the U.S. or of Mexico. *See supra* note 88.

624. WOOTTON, *supra* note 2, at 247.

According to Wootton, the execution "was the first of a series which revolutionized Denver society."[625] In the next few months several notorious criminals were hanged, and others decided to leave town.[626]

In next-door Auraria, the "Bummers"—a gang of thieves—had been stealing property in December 1859 and January 1860. Things came to a head when they filched a bunch of turkeys from a Mexican's wagon. A citizens committee was appointed, and they gathered testimony that various Bummers, including William Todd ("Chuck-a-luck") and William Karl ("Buckskin Bill") were guilty. In response, the Bummers paraded in the streets with their arms and threatened to burn the city—no small threat for a city built of flimsy wood, which would in fact suffer a disastrous fire in 1863. They were faced down by the Jefferson Rangers, a militia unit that had embodied on January 18, 1860. After some nonlethal violence between the two sides, the Bummers decided to accept the offer to leave town within five hours, never to return, under penalty of hanging. "A few nights of vigilant guard was maintained, and thus ended the famous 'Turkey War.'"[627]

The jurisdiction of the popular courts was questionable, but there was nobody else to exercise jurisdiction. Indeed, in one case a murder defendant had been transported to eastern Kansas at great expense, only to have the state judge declare that he had no jurisdiction over the defendant, and no other court did either. The case was eventually heard by a Colorado people's court.[628] These courts were effective and fair:

> The country was, in fact, peaceable and law-abiding, with the exception of that dangerous class common to the border . . . . [T]hese roughs were kept in check by the fear of summary punishment. Miners' courts in the mountains had been supplemented by people's courts in the valleys. The proceeding of the latter were as open and orderly as those of the former; indeed, they approached the dignity of a regularly constituted tribunal.
>
> They were always presided over by a magistrate, either a Probate Judge or a Justice of the Peace. The prisoner had counsel and could call witnesses, if the latter were within reach.[629]

According to William Byers, who moved to Denver in 1859 and founded the *Rocky Mountain News*, "We never hanged on circumstantial evidence. I have known a great many such executions, but I don't believe

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625. *Id.* at 248.
626. *Id.*
627. RONZIO, *supra* note 2, at 23–24; 1 HALL, *supra* note 2, at 222.
628. STEPHEN J. LEONARD, LYNCHING IN COLORADO 1859–1919, at 24–25 (2002); RICHARDSON, *supra* note 88, at 292 (noting that defendant James Gordon's Colorado custodians saved him from a lynch mob in Kansas).
629. HISTORICAL COMPENDIUM, *supra* note 2, at 146.

one of them was unjust."[630] Byers and his employees, by the way, were always armed for defense against persons irate about their articles.[631] One of the most notable men to serve as a judge of a people's court was Alexander C. Hunt, who later served as territorial governor.[632]

Outside of the popular courts, there were instances in which vigilantes took it upon themselves to inflict summary punishment (hanging, whipping, or banishment) with no legal process provided to the accused. One motive was that the people's courts were supposedly too lenient.[633]

Pueblo County's vigilantes were "a respectable and earnest body of men."[634] In Colorado, as was typical in the West, vigilantes were not a spontaneous rabble, but were organized by the middle- and upper-class men of the area.

In an exhaustive study of lynching in Colorado, historian Stephen Leonard defines lynching very broadly; he includes the people's courts and even *posses* (which by definition were led by sheriffs).[635] With this definition, he counts 175 "lynchings" in Colorado history.[636] Of these, he

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630. ERICKSON, *supra* note 2, at 183. Frank Hall, who served as Territorial Secretary from 1866-74 and Acting Governor in 1868, concurred: "There is not an instance upon our records where an innocent person, nor one whose guilt was not clearly established, suffered injury at their [vigilante] hands." 1 HALL, *supra* note 2, at 473; *see also id.* at 220 (there was not known "a single instance wherein any man was unfairly tried or punished"); 2 HALL, *supra* note 2, at 533, 541 (noting Hall's service; also noting that he was a Black Hawk representative to the Territorial House, elected in 1865). Hall credited the 1868 vigilante executions of two notorious Denver outlaws with "a salutary and enduring effect. . . . [T]here was no more orderly community on the frontier than Denver in the succeeding two years." 1 HALL, *supra* note 2, at 472–73.

631. *See* LAMAR, *supra* note 2, at 186–87. The *News* had criticized Charley Harrison for what it called the "cold-blooded murder" of a black man known as Professor Stark. Harrison's friends kidnapped *News* publisher William Byers, but Harrison told them to let Byers go. Harrison advised Byers to "arm yourself for protection against those sonsofbitches." BRENNEMAN, *supra* note 2, at 18. After Byers was released, two ruffians went back to the *News* building and started shooting at it. They were driven off by return fire from the *News*, and from a crowd of citizens, which captured them. WHARTON, *supra* note 2, at 179–80.

Thereafter, Byers and his staff were constantly armed at work. BRENNEMAN, *supra* note 2, at 18.

> About the first question Byers asked of an employee in those days was whether he could handle a gun to good advantage, and a printer who was handy in this respect stood well with the proprietors of the paper, even though he had a multitude of shortcomings as a compositor.

WOOTTON, *supra* note 2, at 245. "The establishment was always in a state of armed neutrality. Printers and editors were moving arsenals, with revolvers at their belts and shot-guns standing beside their cases and desks." RICHARDSON, *supra* note 88, at 293. The offending *News* article was printed on July 25, 1860, and the attack on the *News* took place on July 31. WHARTON, *supra* note 2, at 177–79. *See generally* GALLAGHER, *supra* note 239, at 46–50 (accounting the complete incident).

Denver soon had three daily newspapers, and their employees were also well-armed, for "no journalist who aims to tell the truth is wise to step into these streets without some display of fire-arms, unless partial to having his nose pulled or being made a target." RICHARDSON, *supra* note 88, at 297.

632. He served a judge in Denver in 1860 and was later appointed Territorial Governor by President Grant. FORBES PARKHILL, THE LAW GOES WEST 17, 98, 139–40 (1956). Hunt had previously been a California gold miner. *Id.* at 139.

633. LEONARD, *supra* note 628, at 156.

634. 3 HALL, *supra* note 2, at 453.

635. *See id.* at 6, 15–29, 119–20.

636. *Id.* at 6.

finds only three lynchings based on "weak evidence" before the 1870s[637]—by which time the practice was on its way out, as will be explained below.

Leonard offers several reasons why lynching existed. First of all, he says it was legitimated by the people's courts.[638] But this is questionable, as there is quite a difference between an immediate hanging and a process that involves trials, witnesses, cross-examination, juries, and sometimes acquittals. Second, the jails in Colorado were of poor quality.[639] Often, they were converted buildings from which escape was easy.[640] It was possible for lynch mobs to break into jails and extract their target.[641] Third, some law enforcement officers were in fact leaders of undercover criminal gangs.[642] Fourth, the formal court system in the early days was not very good. Unfortunately, this did not change when the Territory of Colorado was established in 1861, and three federal territorial judges were appointed. One was a Confederate sympathizer who fled the territory after his efforts to promote secession failed. Another did virtually no work, and the third was conscientious.[643]

The quality of the federal judiciary did improve after 1866 as Coloradans succeeded in pressuring Presidents to appoint well-qualified locals, such as Moses Hallett and E.T. Wells, rather than easterners in search of sinecures.[644] But the federal court had a huge backlog of cases, and the appeals process (to the three district judges, sitting en banc as territorial Supreme Court Justices) took many years.

The third judicial district comprised the southern half of the state, and it was something of a moveable feast with the judge, court officers, lawyers, parties, and witnesses traveling through the south, camping out along the way, and holding a mobile court in small adobe houses or whatever facility could be found.[645] Allen Brandford was its first judge and Moses Hallett the second.[646]

Colorado Supreme Court Justice Wilbur Fiske Stone later recalled that the traveling lawyers and judges had "more fun, legal and unlegal, than the Bench and Bar have ever seen since in the effeminate days of

637. *Id.* at 165–72 tbl.A.1.

638. *Id.* at 28.

639. *Id.* at 106.

640. LEONARD, *supra* note 628, at 106. A secure territorial prison was opened in 1871. BERWANGER, *supra* note 2, at 124.

641. *See, e.g.*, LEONARD, *supra* note 628, at 118; TAYLOR, *supra* note 2, at 130, 134.

642. *See* LEONARD, *supra* note 628, at 107.

643. GUICE, *supra* note 2, at 27–32, 63–66, 79; PARKHILL, *supra* note 632, at 19–24; LEONARD, *supra* note 628, at 41–42 (all discussing the poor quality of territorial bench pre-Hallett).

644. President Andrew Johnson appointed Hallett in response to a memorial from the territorial legislature, which wanted Hallett because he was a local man who understood local issues, such as mining law, and because of "his eminence as a lawyer, and his identification with the higher interests of the people." 4 HALL, *supra* note 2, at 463.

645. ERICKSON, *supra* note 2, at 43–44.

646. TAYLOR, *supra* note 2, at 78.

railroads and fine court houses."[647] It may have been interesting, but one itinerant judge was hardly enough to bring law and order to southern Colorado. If effective justice was to be established, the people of Colorado would have to tax themselves to create a criminal justice system much larger than what the federal government was willing to provide. That would happen eventually, but not in the 1860s.

R.B. Townshend, a professor from England who lived in Colorado for a decade as a traveler and rancher, had a keen understanding of early vigilantism, and why it became a problem. In December 1869, Townshend was in the brand new small town of Evans in Weld County. The town had sprung up at the terminus of the first railroad line into Colorado.[648] Evans was dominated and terrorized by "toughs from Cheyenne."[649] One day, a tough shot and killed in cold blood an old man who ran a boarding house.[650] The killer tried to flee on horseback, but was quickly apprehended by the townspeople, who had armed and organized themselves beforehand for such an occasion.[651] The murderer could not be held in the improvised jail, "for there was no building in the town that could resist a determined assault for five minutes[.]"[652] For the moment, the murderer was surrounded by ten men with cocked revolvers.[653] But what if the toughs attempted a rescue?

Richard Sopris had served as a judge in people's courts in Denver.[654] In 1878, he would be elected Denver mayor, and re-elected in 1879.[655] He happened to be in Evans and was chosen by acclamation to convene a people's court, starting with all the townspeople, who were now in the streets.[656] After receiving popular assent, he selected a jury.[657]

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647. ERICKSON, *supra* note 2, at 44 (quoting Wilbur F. Stone, *Pioneer Bench and Bar in Colorado*, REP., COLO. B. ASS'N, ELEVENTH ANN. MEETING AT FORT COLLINS, JULY 2 & 3, 1908, at 110).

648. The railroad to Evans was completed on Dec. 13, 1869. 1 HALL, *supra* note 2, at 436.

649. TOWNSHEND, *supra* note 516, at 110.

650. *Id.* at 112.

651. *Id.* at 110–11, 119–20.

652. *Id.* at 111.

653. *Id.* The murderer was being held by a deputy sheriff, but the townspeople knew that the county jail could not withstand an attack by the toughs. The deputy yielded custody when a vigilante pointed a handgun at him, thus providing a face-saving excuse for him to comply. *Id.* at 114–16.

654. *See id.* at 113.

655. 4 HALL, *supra* note 2, at 569. Sopris had also been elected as the first President of a Miner's District in Gilpin County, and as Colorado's delegate to the Kansas territorial legislature. *See supra* Section II.B, note 208 and p. 27. He had served as Captain in the First Colorado, the volunteer regiment that won the Battle of Glorieta Pass. WHITFORD, *supra* note 2, at 48, 123–24. Sopris was a leader in creating Denver city government during the pre-territorial days, and was later elected Sheriff of Arapahoe County in 1865 and 1867. 4 HALL, *supra* note 2, at 569. He "was one of the most conspicuous of the Colorado pioneers. His name appears at every stage of our early annals[,]" including the "organization of numerous mining camps, the formation of local governments, in Denver, Auraria, Central City, Gregory, Jackson, in the San Juan country, and in the gallant record made by the First Regiment of Colorado Volunteers" at Glorieta Pass. 1 HALL, *supra* note 2, at 523. He arrived in Colorado on March 15, 1859, age 45, from Indiana. 2 HALL, *supra* note 2, at 563.

656. TOWNSHEND, *supra* note 516, at 112–13.

657. *Id.* at 113–14.

A young lawyer was found, and he was ordered to represent the defendant.[658] Witnesses were summoned, sworn, and examined.[659] The perpetrator did not have much to say in his defense, except that he had not meant to hurt the decedent—which was not credible, since he had shot the decedent in the head at close range.[660] The jury convicted, and when Judge Sopris asked the crowd for the punishment, they chose hanging.[661] It was carried out immediately.[662] The leader of the vigilance committee gave a short speech urging the rest of the toughs to leave town.[663]

They did, "some in their haste walking all the way to Denver to get clear of a spot so ominous to them. The rowdyism, the displaying of revolvers and shooting at lamps out of bravado, stopped instanter."[664] Evans immediately became a peaceful town.[665]

Townshend's initial impression of actions like those in Evans was favorable, but after five years of living in the Colorado territory, he changed his mind.[666] "Whenever atrocious murderers are hanged as soon as caught, there arises at once a strong presumption that a manslayer, who is left to be dealt with by an ordinary jury, has probably much to excuse him. This feeling vastly increased the difficulty of getting juries to convict."[667] Moreover, horse thieves and cattle thieves, knowing that if caught they would be hanged, "never hesitate to shoot, thinking they may as well be hanged for killing a man as for killing a calf. . . . The remedy is worse than the disease."[668]

This was not universally true. Townshend wrote favorably about "a cowmen's vigilance committee" that enforced laws against cattle thievery. This included upholding the law that unbranded stray cattle became the property of the trustees of the public school fund.[669]

Perhaps the remedy was for a time the only one available; but once the superior remedy of formal criminal courts had actually begun to function well, continuing resort to the first remedy harmed the second remedy. We can see the development in Wilbur Fiske Stone; at one time he was the well-armed creator of the people's court in Canon City, which dispensed summary justice to the violent criminals of Fremont County. In 1877, he became Associate Justice of the Colorado Supreme Court. At all

658. *Id.* at 116.
659. *Id.* at 116–19.
660. *Id.* at 119, 122.
661. *Id.* at 123.
662. *Id.* at 124–27.
663. *Id.* at 127–28.
664. *Id.* at 129.
665. *Id.*
666. *Id.*
667. *Id.* at 130.
668. *Id.*
669. *Id.* at 225–26.

times he was upholding law and public safety; the means of doing so had changed by 1877, because Colorado now had a good formal court system.

Stephen Leonard writes that people's courts or lynching (which he conflates) were abandoned in the larger and wealthier towns (starting with Denver) as those towns developed connections with the rest of the nation and sought to project a peaceable and respectable image.[670] Thus, in the 1870s lynching was mostly in small and isolated towns.[671] The exception was Leadville, which was new and booming in the 1870s thanks to silver and going through growing pains not unlike Denver two decades earlier.[672]

Everywhere in Colorado lynching was falling out of favor by the end of the decade; vigilantes had previously operated in daylight, with no effort to disguise themselves. By the end of the decade, they wore masks, and did their business in the dark.[673] Lynching was much rarer after 1880 and nearly extinct by the early twentieth century.[674] This was in great contrast to the American Southeast, where lynching soared in the latter two decades of the nineteenth century; while the Southeast had a long history of lynching, it was not until the 1886 that the majority of persons lynched there annually were black.[675]

While Colorado's formal court system had its early problems, it eventually overcame them. As the territory had grown, "Colorado's judicial system, unlike New Mexico's, was generally competent and professional."[676] This made vigilantism relatively uncommon, compared to the rest of the Southwest.[677]

For whatever reason, "every visitor after 1870 commented that Colorado was tame . . . ."[678] By the early 1870s, Colorado Springs "was the most quiet, orderly little town in those days you ever saw, at least for anyone who didn't deliberately run his head into mischief."[679] Many people thought that Colorado had much less crime than in the early days; they attributed the improvement to the salutary effects of the early people's

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670. LEONARD, *supra* note 628, at 70–71. Lynching "fell into disrepute" in Pueblo County after the construction of a solid new jail in the early 1870s. 3 HALL, *supra* note 2, at 458.

671. LEONARD, *supra* note 628, at 54.

672. *Id.* at 48 ("Leadville's skimpy police force was either unable or unwilling to protect citizens."). Leadville had been booming as a silver city, and the usual collection of ruffians had moved in, to the terror of the good citizens. A vigilance committee in 1879 hanged several of them and persuaded the rest to leave. 2 HALL, *supra* note 2, at 454–55. Atrociously, in 1875 a Leadville judge was murdered after he attempted to crack down on vigilante activities. LEONARD, *supra* note 628, at 54.

673. LEONARD, *supra* note 628, at 67.

674. *See id.* at 53.

675. *Lynchings: By Year and Race*, UMKC, http://law2.umkc.edu/faculty/projects/FTrials/shipp/lynchingyear.html (last visited Dec. 23, 2017).

676. LAMAR, *supra* note 2, at 257.

677. *Id.*

678. *Id.* at 246.

679. TOWNSHEND, *supra* note 516, at 215. Mischief-seekers went to the bars in the old part of town (Colorado City), where they "might easily come in for a shooting scrape." *Id.*

courts, and to the increasing numbers of women and children, who induced men to behave better.[680] Other than an oft-ignored law against carrying concealed weapons in towns (discussed below in Section VI.A), peaceful Colorado had little gun control.

As will be discussed below, the 1876 Colorado Constitution right to arms reflects the challenges of territorial days and the vision for the future: the right to arms for self-defense may not be questioned; there is a separate, second right to arms "in aid of the civil power *when thereto legally summoned* . . . ."[681] This means, as will also be discussed below, answering a summons to serve in the militia, or in a sheriff's *posse*. The right to arms "in aid of the civil power" does *not* include participating in a lynching. Whatever the necessities of territorial and pre-territorial days had been, the new State of Colorado expected that exercise of the right to bear arms "in aid of the civil power" would be orderly and regularized. Perhaps the 1876 constitution's implicit rebuke to lynching helped delegitimize the practice.

F. Early Colorado Arms Businesses

Firearms trade in Colorado was first conducted by the Indians, as described in Section I.A. Later, the mountain men became itinerant firearms vendors to the Indians. When trading posts, most notably Bent's Fort, were established, they became locations for firearms commerce.[682] Much more firearms commerce came to Colorado along with the gold rush. The first major gold veins were found in the vicinity of Gregory's Diggings, in the mountains of what would become Gilpin County. A diarist who arrived there in June 1859 found "itinerant gunsmiths" and "extempore blacksmith shops" among the many businesses.[683]

As noted above, the famous Hawken Shop from St. Louis opened in Denver in 1860.[684] Another early firearms maker in Colorado was Freund & Brother, which made a .48 caliber rifle with a 33-inch barrel.[685] Denver inventor Frank Freund was awarded seven patents for various

680. BERWANGER, *supra* note 2, at 103–04.

681. COLO. CONST. art. II, § 13 (emphasis added).

682. *See supra* Section I.B.

683. *Diary of E.H.N. Patterson*, in OVERLAND ROUTES TO THE GOLD FIELDS, *supra* note 337, at 185. As noted, some blacksmiths could do gunsmithing.

684. Samuel Hawken opened a gun shop in Auraria in January 1860. BAIRD, *supra* note 132, at xvii. William S. Hawken took over the shop in 1861. *Id.* Samuel returned to St. Louis in 1861, after he had accomplished his purpose of restoring his health by breathing pure Colorado air. *Id.* at xvii, 29. William's Denver shop was still in operation as of 1862, and the customers included Daniel W. Boone (a descendant of the famous pioneer). *Id.* at 38.

685. GARAVAGLIA & WORMAN, *supra* note 2, at 109.

improvements in firearms in 1873–1875.[686] Denver's 1866 business directory listed at least seven firearms businesses.[687]

Among the firearms entrepreneurs in early Colorado were:

Carlos Gove. "Carlos Gove was probably the most famous Western gunsmith and rifleman."[688] Born in New Hampshire, he apprenticed with a Boston gunsmith, served in the Seminole War in Florida, set up gunsmith businesses in Iowa and Missouri, and moved in Colorado in 1860.[689] His first gun shop was opened in 1862, at 16th & Larimer. By 1865, he had moved to 12 Blake Street.[690] Among his customers was Buffalo Bill.[691]

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686. *See* INVENTORS IN THE COLORADO TERRITORY AND THEIR U.S. PATENTS: AN ANNOTATED INDEX (Dina C. Carson ed., 2016) at 313 (Patent no. 153,432, improvement in breech-loading firearms); *id.* at 350–77 (no. 160,762, improvement in breech-loading fire-arms; no. 160,763, improvement in metallic-cartridges; no. 160,819, improvement in sights for fire-arms; no. 162,224, improvement in breech-loading fire-arms; no. 162,373, improvement in pistol-grip attachment for the stocks of fire-arms; no. 162,374, guard-lever and means for operating the breech-block of breech-loading fire-arms).

687. RONZIO, *supra* note 2, at 73 (four outfitting and second-hand stores: S.T Hawkins & Co, A.H. Boyd, D. Marsh, Wm. Turch & Co.); *id.* at 248–51 (listing gunsmiths C. Gove, J.M. Hamilton, P. Hand, J. Jordan, E. Pfisterer, all on Blake Street, or on a cross-street within a block of Blake; plus "Gun Store" M.L. Rood, on F Street between Blake and Wazee).

Not every store that sold guns specialized in guns. Tappan & Co. supplied "quartz mill furnishing," which included "rubber belting, hose & packing" along with "gas fixtures and fire arms," plus agricultural, mining, and mechanical tools. Wharton, *supra* note 2, at 56. Tappan was a Captain in the First Colorado regiment. *Id.* at 91.

688. HANSON, *supra* note 96, at 84.

689. *Id.* at 84–85.

690. GARAVAGLIA & WORMAN, *supra* note 2, at 102; HANSON, JR., *supra* note 104, at 85. Nearly all the business of the city was conducted on Blake Street. Wharton, *supra* note 2, at 79.

For a map showing the changes in downtown Denver street names and numbering from 1860 to 1985, see RONZIO, *supra* note 2, at 25. Before 1887, the downtown Denver blocks east of Cherry Creek were numbered based on their distance from the Creek. Since 1887, they have been numbered based on their distance east from Auraria (whose western border is the South Platte River). BRENNEMAN, *supra* note 2, at xi. So the old 340 Blake St. would now be 1540 Blake.

691. HANSON, JR., *supra* note 104, at 85.

R.B. Townshend, a professor from Wales who sojourned in Colorado, recalled an event at Gove's shop. Townshend had "struck up quite a friendship with Gove, an elderly man very keen on guns of all sorts." TOWNSHEND, *supra* note 516, at 50. Townshend has bought his .36 caliber Navy Colt revolver from Gove and practiced with it at a butt in Gove's backyard. *Id.* at 50–51. One day, Gove was gunsmithing a Springfield rifle—made by the federal armory in Springfield, Massachusetts. Army deserters sometimes took their rifle with them, and then traded it to a rancher for a set of civilian clothes. The rancher might want to change the sights on the rifle and would bring it to a gunsmith. Townshend saw Territorial Governor McCook come into Gove's store, and spot the Springfield that Gove was working on. Suspecting that the Springfield had come from a deserter, Gov. McCook announced that he would be making a claim on it. "Not by a jugful you won't," Gove fired back. "This was put into my hands by a ranchman, and back into his hands I'll deliver it. You may be governor of this Territory all right, but you can't seize the property of no private citizen through me." *Id.* at 51–52. McCook desisted. *Id.* at 52. Townshend recalled:

> What did amuse me was the gloriously independent position of the man of the shop, the gunsmith, to the man holding the highest office in the Territory, one appointed by President Grant himself. His standpoint was absolute equality as between man and man. Yes, as a stranger there had already told me: "Denver's the capital of Colorado, and Colorado's the freest country on God's earth."
>
> And when I heard Gove talk so, I began to think it looked like it.

Id.

In 1865, Gove advertised "a fine lot of breechloading guns—the Henry and Spencer's Rifles, Repeating Sixteen Shooters, Smith and Wesson Rifles, Colt's Navy and Dragoon Revolvers, Remington's Dragoon Revolvers: a lot of hunting knives . . . ."[692] Dragoon revolvers were large handguns, well-suited for use on horseback. Gove also manufactured single- and double-barreled rifles with telescopic sights, "which I warrant in point of power and accuracy second to none."[693]

By 1874, Gove had moved to 340 Blake and advertised "all the latest improved Breech Loading Rifles, Shot Guns and Pistols, including Gove's improved Remington, Sharp's, Winchester's, Maynard's and Wesson's Central Fire Sporting Rifles—Colt's new improved Army and Pocket Cartridge Revolver[], Smith & Wesson's and other Pistols, Union Metallic Cartridges," a wide variety of other ammunition, plus "Rodgers and Westenholm's Hunting, Sportsmen's and Pocket-Knives . . . . N.B. A Lot of new U.S. Breech Loading Needle Guns, 50 calibre, for Central Fire Cartridges."[694]

Gove's "improved Remington" was his own design, which made the lever action better able to extract an empty cartridge case from the firing chamber.[695] The "central fire" cartridges sold by Gove were what we today called "centerfire." They were invented in 1867. With an improved ignition system, their shells had thicker walls. Stronger walls increased how much gunpowder could be used in a cartridge and resulted in bullets that flew much faster and farther than ever before.[696]

The .50 caliber rifle had come to Colorado before Gove received his 1874 lot. Frontiersman Richard Townsend called his .50 caliber Sharps "about the best rifle going in 1870." He let a Ute Indian friend shoot it at a card nailed to a tree. The Ute hit the card with every shot. Townsend then fired and hit the nail holding the card.[697]

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692. GARAVAGLIA & WORMAN, *supra* note 2, at 102 (reprinting an advertisement in the *Rocky Mountain News* from May 10, 1865).

693. *Id.* at 107 (noting 1866 ad that repeated the 1865 text, and added language about telescopic rifles).

694. *Id.* at 137 (reprinting an ad published in the 1874 Denver City Directory).

695. *Id.* at 163.

696. ALEXANDER ROSE, AMERICAN RIFLE: A BIOGRAPHY 171 (2008). The first metallic cartridges, such as those used in Volcanic rifle, were rimfire. They contained a fulminate inside the rim of the cartridge base. When the firing pin struck the cartridge base, it detonated the fulminate. The fulminate in turn ignited the gunpowder. The expanding gas from the burning gunpowder pushed the bullet through the barrel and propelled it downrange. In the centerfire, the fulminate is contained in a short cylinder in the middle of the case's base. *Id.* Centerfire and rimfire cartridges are both still in use today; generally, centerfire cartridges are more powerful.

697. TOWNSHEND, *supra* note 516, at 151–52.

Morgan Rood. Born in Michigan, Rood moved to Denver in the early 1860s. He manufactured and sold "all types of sporting equipment and fine single, double, and even three-barreled rifles."[698]

Le Cavalier. Although we do not know his first name, we do know that he once worked for Rood. When he set up his own business, he was willing to sell guns to the Ute Indians, who were legally, and in practice mostly, at peace with the white settlers. Rood disapproved of Le Cavalier's Indian sales.[699]

Denver Arsenal. We know that they were business in 1866 and sold carbines (smaller, lighter rifles) "at prices ranging from $1.00 to $4.60."[700]

John P. Lower. Born in Philadelphia, he apprenticed for Joseph C. Grubb, a maker of fine pistols and rifles.[701] In 1858, he became a traveling sales representative for Grubb, and by 1868 he was selling in Colorado and Wyoming.[702] In 1872–1875, Carlos Gove and he were partners of the Gove & Co. store.[703] Thereafter, he opened his own business, John P. Lower's Sportsmen's Depot, at 381 Blake.[704] Among his customers were Jim Bridger, Jim Baker, and Grand Duke Alexis of Russia.[705] His store was a notable trading place for Ute Indians.[706] His sons eventually became partners in John P. Lower & Sons, which was "well known throughout the state."[707]

The Sportsmen's Depot was the largest Colt retailer in the region.[708] A photograph of part of Lower's inventory shows "a Winchester lever

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698. HANSON, JR., *supra* note 104, at 85; *see also* GARAVAGLIA & WORMAN, *supra* note 2, at 107; RONZIO, *supra* note 2, at 84 (photo of M.L. Rood store on 15th, between Blake and Wazee). Rood's advertisement in the 1866 Denver business directory listed his location as "F Street below Blake." The ad stated:

> Manufacture Single Double and Three Barrel Gain Twist Rifles: also, Six-Shooting Rifles of my own patent. All kinds of repairing done with neatness and dispatch, and all work warranted. I have and keep constantly on hand an assortment of Breech-Loading Rifles, revolvers, Derringer's, cartridges of all kinds, powder, lead, caps, knives, flasks, gun wads [for shotgun ammunition], game bags, etc. A fine lot of double-barreled shot guns, and everything kept in any gun store west of the Missouri river. Also, target and telescopes made to order and warranted. All orders will receive prompt attention. A liberal amount of patronage solicited.

Wharton, *supra* note 2, at 84.

699. HANSON, JR., *supra* note 104, at 85. Peace with the Utes had been partially secured in part by an 1863 treaty. *See* text accompanying notes 549–52.

700. GARAVAGLIA & WORMAN, *supra* note 2, at 111.

701. HANSON, JR., *supra* note 104, at 88.

702. 4 HALL, *supra* note 2, at 504; HANSON, JR., *supra* note 104, at 88.

703. *Id.*

704. GARAVAGLIA & WORMAN, *supra* note 2, at 156, 194; 4 HALL, *supra* note 2, at 504; HANSON, JR., *supra* note 104, at 88.

705. HANSON, JR., *supra* note 104, at 88.

706. *Id.* at 88, 164; 4 HALL, *supra* note 2, at 504.

707. 4 HALL, *supra* note 2, at 504. As of 1895, when Hall wrote his volume four, the store continued to be a successful business. *See id.*

708. According to a display of one of Lower's guns at the National Sporting Arms Museum, in Springfield, Missouri. The displayed firearm is a finely engraved Colt 1873 Single Action Army

action, a Frank Wesson single shot, and a Sharps sporter."[709] Using a Sharps M1878 single-shot Borchardt rifle in an 1882 exhibition, Lower put fifty out of fifty shots into a target at 200 yards. The rifle was a big seller in Denver.[710]

Supplementing the local merchants, mail order businesses sold arms nationwide, including in Colorado.[711] For example, in the December 21 and 28, 1861, issues of *Harper's Weekly*, Coloradans perused Tiffany and Company's advertisement for swords "warranted to cut wrought iron."[712] Starting in 1894, the mail-order catalogue of Sears, Roebuck & Co. offered a wide variety of firearms.[713]

In 1875, a new gun arrived on the market, the Ballard rifle. According to one reviewer, even though the Ballard was a single shot, its loading mechanism was so simple and reliable that it could fire more shots faster than a Winchester or Henry.[714]

The 1877 *Colorado Business Directory* indicates a thriving statewide firearms business.[715]

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revolver, which Lower gave to his business associate, part time Deputy Sheriff Henry J. Hernage, about 1888.

709. GARAVAGLIA & WORMAN, *supra* note 2, at 156 (reprinting photo from Denver Public Library, western history collection).

710. *Id.* at 157.

711. A 1927 federal statute forbade mail-order handguns, but even that only applies to the U.S. Postal Service, and not to other delivery services. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059 (codified at 18 U.S.C. § 1715 (2012)). The federal Gun Control Act of 1968, as amended, requires most retail firearms sales to be conducted in-person, at the licensed dealer's fixed place of business. 18 U.S.C. § 922(c) (2012) (stating the limited circumstances for delivery to remote buyers). 18 U.S.C. § 923(j) (2012) (a licensed dealer is also allowed to sell at gun shows, under the same terms as storefront sales, such as background checks and keeping records of buyers and of firearms).

712. SMITH, *supra* note 212, at 44–45.

713. *Chronology of the Sears Catalog*, SEARS ARCHIVES, http://www.searsarchives.com/catalogs/chronology.htm (last visited Dec. 23, 2017) (firearms added in 1894).

714. GARAVAGLIA & WORMAN, *supra* note 2, at 169–70. Introduced in 1875, and advertised, inter alia in the *Pueblo Chieftain* in June 1877. *Id.* at 168. At the time, the newspaper was known as the *Colorado Chieftain*. *Id.* at 170.

715. COLORADO BUSINESS DIRECTORY AND ANNUAL REGISTER FOR 1877, at 59–60 (1877) (Ouray, powder and fuse); *id.* at 80–81 (Boulder, four powder businesses, one sportsmen's goods business); *id.* at 84 (Canon City, gunsmith A.E. Rudolph); *id.* at 95 (Central City, five powder businesses); *id.* at 103 (Colorado Springs, gunsmith William Converse); *id.* at 108B (ad for Gove's store as agent for Oriental Powder Mills); *id.* at 112 (Del Norte, gunsmith S. Duprez); *id.* at 123 (Denver, ammunition from John P. Lower and M.L. Rood); *id.* at 132 (Denver, gunsmith Charles Kiessig); *id.* ("Guns, Rifles, and Pistols" from Gove, Lower, and Rood); *id.* at 139 (Denver, powder, F.J. Stanton); *id.* at 162 (Georgetown, powder); *id.* at 177 (Greeley, gunsmith Edward Lowndes); *id.* at 208 (Pueblo, gunsmith O.H. Viergutz); *id.* at 225 (Trinidad, two gunsmiths: H. Kliemeken, E. Winterstein); *id.* at 227 (Walsenburg, gunsmith Louis Sporleder); *id.* at 229 (West Las Animas, gunsmith Charles Hardesty).
There were also a huge number of blacksmiths; at the time, many blacksmiths had gunsmithing skills. There were also many outfitting and mining supply stores, some of which presumably sold powder and/or arms. Second-hand guns were also available from pawnbrokers.

III. THE COLORADO CONVENTION AND ITS SYSTEM OF GOVERNMENT

A. The Colorado Convention

Congress passed the Colorado Enabling Act on March 3, 1875, the final day of the congressional session.[716] President Grant immediately signed it, having called for Colorado's admission in his December 1873 written message to Congress.[717]

The Colorado Constitutional Convention ("Convention") convened on December 20, 1875, at the corner of 15th and Blake Streets in downtown Denver. They met in the Odd Fellows Hall, above the First National Bank.[718] The Convention finished its work by unanimously adopting a proposed constitution on March 14, 1876.[719] The Convention was a half-block from the Gove's and Lower's gun stores. Gove's store could hardly be missed, since it was advertised by a huge banner that was strung over the street.[720]

In 1875, a group of eighteen men had published a book proposing a state constitution based on the principles of utilitarian philosopher Jeremy Benthem.[721] The Convention was aware of the book but did not adopt its proposal.[722] Like many books of the time, it contained advertising on the final pages. The final page contained a large ad for Lower's gun store, with "all kinds of Latest Improved Breech Loading Guns, Rifles, PISTOLS, COLTS and SMITH & WESSON'S REVOLVERS, SHARP'S, WESSON'S, WINCHESTER AND REMINGTON RIFLES . . . ."[723]

The thirty-nine delegates were twenty-four Republicans and fifteen Democrats. At the time, southern Colorado was more Democratic and Catholic, while the north was more Republican and Protestant. The dividing line was the Palmer Divide, an east-west ridgeline north of Colorado Springs.[724]

On most issues, including the Bill of Rights, partisan divisions were not important. Wilbur Fiske Stone—a Democrat, delegate, and future

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716. Enabling Act, ch. 139, 18 Stat. 474 (1875).

717. Ulysses S. Grant, President of the U.S., Fifth Annual Message (Dec. 1, 1873) ("[Colorado] possesses all the elements of a prosperous State, agricultural and mineral, and, I believe, has a population now to justify such admission."). The Presidents from Jefferson to Taft delivered their State of the Union report in writing, not with a speech.

718. Hensel, *supra* note 2, at 102.

719. E.T. Wells, *State Constitutional Convention*, *in* HISTORICAL COMPENDIUM, *supra* note 2, at 147, 165–66.

720. GARAVAGLIA & WORMAN, *supra* note 2, at 110. Gove's store was as 340 Blake, and Lower's Sportsmen's Depot was at 381 Blake. In the street numbering of the time, these locations were between 14th and 15th Streets. *See supra* notes 624, 634 and accompanying text.

721. *See* DRAFT OF A CONSTITUTION PUBLISHED UNDER THE DIRECTION OF A COMMITTEE OF CITIZENS OF COLORADO, FOR CONSIDERATION AND DISCUSSION BY THE CITIZENS OF THE CENTENNIAL STATE iii–v (Univ. of Mich. 2006) (1875) [hereinafter DRAFT OF A CONSTITUTION].

722. Wells, *supra* note 719, 147, 152–53.

723. DRAFT OF A CONSTITUTION, *supra* note 721, at 60.

724. It divides the drainages of the South Platte and Arkansas Rivers.

Colorado Supreme Court justice—recalled "there was no politics in it at all."[725] As Stone put it, the "lines between Democrat and Republican were very lightly drawn in those days."[726] E.T. Wells, a Republican delegate and a territorial judge, wrote that on "no occasion whatever" did "personal acrimony or partisan feeling" impede the Convention.[727] On issues where there was controversy—such as votes for women or whether to acknowledge the deity in the preamble—the divisions did not break down along party lines.[728]

The fundamental problem for the Convention to solve was not a partisan one. Rather, it was the inherent tension in what the delegates wanted. They knew they did not want a "do nothing" government. To the contrary, their constitution ordered the creation of state institutions for higher education, for care for the insane, and for the blind, deaf, and mute.[729] The delegates required the establishment of "a thorough and uniform system of free public schools," and that such schools not be racially segregated.[730] The Framers created a commissioner of mines, and ordered the general assembly to enact laws prohibiting child labor in mines, and to enact laws for safe working conditions in the state's most important industry.[731] The Convention wrote the first American constitution to mention forests, instructing the general assembly to "enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state."[732] This was an early manifestation of the Colorado ethos of conservation.[733] The conservation

725. Hensel, *supra* note 2, at 101 (citing an interview with Stone in the *Denver Post* from Oct. 22, 1911).

726. *Id.* Newspapers agreed that partisan politics had played no role in the Convention. *Id.* at 101 n.27 (citing DENV. TIMES (Mar. 8, 1976); DAILY ROCKY MOUNTAIN NEWS (Mar. 8, 1876); COLO. BANNER (Boulder) (Mar. 16, 1876); COLO. TRANSCRIPT (Golden) (May 24, 1876)). The *Daily Rocky Mountain News* was a Republican newspaper, while the Boulder and Golden newspapers were Democratic. *Id.*

727. HISTORICAL COMPENDIUM, *supra* note 2, at 166; *see also* 2 HALL, *supra* note 2, at 295 (after the Convention officers were elected, "no spectator could have supposed, from anything seen or heard in the assembly or in any outer room, that party politics had ever been so much as dreamed of in the loft of the mansard roof occupied by the convention."); *id.* at 296 (the Convention heeded its President's admonition against the "slightest semblance of partisanship or sectional spirit." It has neither "time, opportunity, or inclination to rethresh the oft cudgeled sheaves of party politics").

728. In a compromise, the Preamble begins, "We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe . . . ." COLO. CONST. pmbl.

729. *Id.* art. VIII, §§ 1, 5.

730. *Id.* art. IX, §§ 2, 8.

731. *Id.* art. XVI, §§ 1–2. The General Assembly was also allowed (but not mandated) to enact laws for mine drainage, and to provide for the science of metallurgy and mining to be taught in state institutions of learning. *Id.* §§ 3–4.

732. *Id.* art. XVIII, § 6. Consistent with the environmental ethos expressed in 1876, the people of Colorado amended the Constitution in 1992 to provide that lottery revenues would be used for public lands. *Id.* art. XXVII, § 1 ("Great Outdoors Colorado"). Colorado is the only state to dedicate its lottery revenues to the outdoors. Most other states use the money for the general fund, or for education. Bollenbacher, *supra* note 271, at 602.

733. The first game laws were enacted in 1877 and 1883, setting seasons and bag limits for some animals. SIMMONS, *supra* note 2, at 205. Game wardens were appointed starting 1891. *Id.* at 206. Starting in 1903, the Colorado Fish and Game Commission began charging one dollar for hunting

imperative may have resulted in part from knowledge of how the Indians (and, later, the whites) had overused the woodlands along the rivers of the plains.[734]

The new constitution further provided that the general assembly "shall" enact "liberal homestead and exemption laws,"[735] "shall" pass arbitration laws,[736] and "shall" enact laws against "spurious, poisonous or drugged spirituous liquors."[737]

Yet while the Convention had a list of things it mandated the legislature to do, at the same time, the Convention profoundly distrusted the legislature. In the words of one scholar, "The delegates created a legislature and then, as though they regretted their work, they took most discretionary authority from it."[738]

The 1876 Convention was meeting in "the post-Civil War era, when popular distrust of legislatures was at its height."[739] The early American state constitutions had been terse statements of principles, with only a broad outline for the structure of government—similar to the U.S. Constitution.[740] At the federal level, the short constitution seemed to be working well enough, since Congress could only exercise the enumerated powers that it had been granted. At the state level, where legislatures could legislate on almost any topic, special legislation for the benefit of powerful interests—especially, railroads—had been rampant. Starting in the 1830s, the new state constitutions and new constitutions adopted in older states were much more aggressive about constraining legislative discretion.[741]

The Colorado Constitution went especially far to hem in the government, with the longest state constitution up to that point in American history. (As amended, the Colorado Constitution remains the one of the longest, reflective to Coloradans' inclination to instruct their government exactly what it should do and cannot do.) Article V, creating the Colorado House of Representatives and Senate, is much longer than Article I of the U.S. Constitution, which creates the Congress. Article V contains many procedural restrictions on the process of enacting legislation.[742] Legislative sessions were limited to forty days, with no

licenses and using the revenue to promote hunting and to conserve species at sustainable levels. LEONARD & NOEL, *supra* note 2, at 153.

734. *See supra* text accompanying notes 381–411.

735. COLO. CONST. art. XVIII, § 1.

736. *Id.* art. XVIII, § 3.

737. *Id.* art. XVIII, § 5 (repealed 2008).

738. Hensel, *supra* note 2, at 133. One gets the sense that the Convention wished that it didn't have to create a legislature. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION 4 (2011).

The mistrust was well placed. *See infra* text accompanying note 933.

739. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 199 (1998).

740. *Id.* at 61–62, 66.

741. *Id.* at 118–21.

742. COLO. CONST. art. V, § 6 (General assembly may not fix its own compensation); *id.* art. V, § 8 (legislators may not hold other office); *id.* art. V, § 9 (no changes in salaries or per diem to be

legislative sessions in even-numbered years.[743] A variety of constitutional provisions outlaw taxing, spending, or borrowing on behalf of corporations or other private interests.[744] Later, the first constraints on the legislature would be bolstered by amendments, adopted by the people.[745]

As one historian summarized, the Convention believed "that permitting too much freedom to govern was a far greater threat than possibly clogging the government's effectiveness in order to shield the people from their own rules. If the turnstiles blocked efficiency they also checked exploitation and rascality."[746]

The people of the Colorado Territory adopted the Colorado Constitution on July 1, 1876: 15,443 in favor and 4,052 opposed. Voter turnout was low because opposition was almost nonexistent.[747] One can say the same thing about the Colorado Constitution that has been said about the 1870 Illinois Constitution, from which Colorado drew heavily: "strong public support was a result of negative public sentiment regarding the state government in general and support for the apparent spirit of bipartisanship under which the document was written."[748]

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effective until a new legislature takes office) (repealed 1974); *id.* art. V, § 14 (sessions must be public); *id.* art. V, § 17 (no bill may be altered from its original purpose); *id.* art. V, § 19 (no bills except appropriations may be introduced after twenty-fifth day of session; no bill to take effect for ninety days, except for emergency legislation with supermajority approval) (amended 1950); *id.* art. V, § 20 (no bill may be passed unless heard by a committee); *id.* art. V, § 21 (bills, except general appropriations, may contain only a single subject, clearly expressed in the title); *id.* art. V, § 22 (bills must be read at length, on three separate days, in each house; amended to two separate days) (amended 1950); *id.* art. V, § 23 (no accepting of amendments or conference reports except by recorded vote, to be published in the house's journal); *id.* art. V, § 24 (no amendment or revisions of laws by reference to title; full text must be published); *id.* art. V § 25 (no local or special laws on twenty-three specified subjects, including "protection of game and fish"); *id.* art. V, § 28 (no bill giving extra compensation to a public officer or contractor); *id.* art. V, § 29 (legislature and other government departments must use low bid for supplies; no public officer may have an interest in supply contracts); *id.* art. V, § 30 (no extending the terms of public officers) (repealed 1974); *id.* art. V, § 31 (revenue bills must originate in House); *id.* art. V, § 32 (general appropriations bill must contain only the ordinary expenses of the three branches; other appropriations may have only a single subject); *id.* art. V, § 33 (no money to be paid from State Treasury, except by appropriation); *id.* art. V, § 34 (no appropriations to organizations not under state control); *id.* art. V, § 35 (no delegation of power to supervise municipal functions); *id.* art. V, § 36 (no bill may authorize certain investments by trustees); *id.* art. V, § 38 (no obligation or liability of a person or corporation can be diminished by the General Assembly); *id.* art. V, § 40 (no vote-trading on bills); *id.* art. V, §§ 41–42 (no influence-selling) (§§ 41–42 repealed 1974); *id.* art. V, § 43 (legislators may not vote on matters in which they have a personal interest).

743. COLO. CONST. art. V, § 6 (1876) ("No session of the General Assembly, after the first, shall exceed forty days."); *id.* art. V, § 7 (alternate year sessions only, except when the Governor calls a special session). The constitution exempted the first General Assembly from the forty-day limit. That assembly sat for 140 days. 2 HALL, *supra* note 2, at 362.

744. *See, e.g.*, COLO. CONST. art. X, § 13; *id.* art. XI, § 1; *id.* art. XV, § 12.

745. Most importantly: Initiative and referendum, COLO. CONST. art. V, § 1; GAVEL (Give a Vote to Every Legislator), *id.* art. V (scattered sections of art. V), and the Taxpayer's Bill of Rights, *id.* art. X, § 20.

746. Hensel, *supra* note 2, at 120.

747. 2 HALL, *supra* note 2, at 328 (noting that farmers and miners were in peak activity periods).

748. Jeremy Walling, *Understatement and Development of Illinois Constitutionalism*, *in* CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 411; *see also* JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818–1970, at 73, 83 (1972) (two main factors in overwhelming

Colorado's Fourth of July celebrations in 1876 may have been the most exuberant in the nation. A large parade in Denver was led by the Colorado militia, with officers on white horses and the troops on black ones. Each of the thirty-eight states was honored with its own float.[749] On August 1, 1876, President Ulysses Grant issued the proclamation making Colorado the thirty-eighth state.[750]

The right to arms provision is in the spirit of the 1876 Convention's attempt to hem in the legislature from every side. The Colorado right to arms is the most verbose, detailed, and strongly worded of any constitutional right to arms up to 1876. It attempts to leave little to implication. Before we examine the arms rights section in detail, let us first consider the structure and general interpretive principles of the constitution.

B. Rights Come First

The 1876 Colorado Convention looked carefully at the constitutions of other states. Missouri's new 1875 constitution was closely studied, and it provided a model for several provisions, including the right to arms. When Missouri's original 1820 constitution was written, Missouri was entering the Union as a slave state. Perhaps not surprisingly, the Bill of Rights was the last article in the constitution. But when Missouri adopted a new constitution in 1875, rights came first: "Clearly, limiting government had taken precedence over establishing political institutions and distributing political power to those institutions."[751]

This approach is more consistent with the theory of government envisioned in the Declaration of Independence. As paragraph two of the Declaration explains, all people have inherent rights, "endowed by their Creator."[752] The purpose of government is to protect those rights. "First come rights and then comes government," as Randy Barnett summarizes.[753]

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approval of the 1870 Constitution were "dissatisfaction with the performance of the Illinois state government" and the proposed constitution being "a bipartisan document").

749. Hensel, *supra* note 2, at 230.

750. Ulysses S. Grant, Proclamation 230—Admission of Colorado Into the Union (Aug. 1, 1876), *in* Gerhard Peters & John T. Woolley, The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=70540.

751. RONALD BRECKE & GREG PLUMB, *Missouri Constitutionalism: Meandering Toward Progress, 1820–2004*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 205. Similarly, when Ohio replaced its 1802 constitution in 1851, the Bill of Rights was moved to the beginning of the document. "[B]efitting the Jacksonian model, the bill of rights precedes both the letter and the spirit of the parts of the constitution granting power to the different branches." JAMES J. WALKER, *The Ohio Constitution: Normatively and Empirically Distinctive*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 455.

752. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

753. RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 63 (2016).

Colorado agreed. As in the 1875 Missouri Constitution, Colorado's article I defines the boundaries of the state.[754] Then article II declares the Bill of Rights.[755] Before specifying any structure for government, Colorado and Missouri gave priority to the inherent rights of the people. The structure of Colorado's constitution suggests that when there is a close question between the rights of Coloradans and the powers of their government, the former should prevail.

Unlike the federal Bill of Rights, the Colorado Bill of Rights does not begin by enumerating specific freedoms. Instead, the Bill of Rights first declares the principles of government.[756] These are meant to inform the understanding of everything that follows—namely the enumerated rights, and then the structure and operation of the government.

C. Rights and Duties

Article II is the only article of the Colorado Constitution with a preamble, which begins: "In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare . . . ."[757]

Rights and duties are closely linked. The right to a jury trial cannot exist if citizens fail to perform their duty of jury service. A good citizen has the duty to pay taxes. At the same time, citizens have the right not to be taxed in violation of the constitutional rules for taxation. The American Revolution began in part because Americans asserted their right not to be taxed without their consent;[758] the Colorado Constitution provides the system for obtaining consent for taxation.[759]

A governmental system that was all duties and no rights would have no liberty, and would be the antithesis of a legitimate government. A governmental system that was all rights and no duties would soon collapse, thus endangering the rights that every legitimate government is created to defend. The Colorado right to arms is for the personal right of defense, *and* for the performance of the duty to defend the civil power, as will be described below.

D. The Sovereign Right to Alter the Government

After the preamble, article II, section 1 states:

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754. COLO. CONST. art. I; MO. CONST. of 1875, art I.
755. COLO. CONST. art. II; MO. CONST. of 1875, art. II.
756. COLO. CONST. art. II, §§ 1–3.
757. COLO. CONST. art. II, pmbl.
758. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) ("For imposing Taxes on us without our Consent[.]").
759. *See* COLO. CONST. art. X, § 20.

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.[760]

The people, not the government, possess the sovereignty. The government is the delegated agent of the sovereign people. This has been the bedrock principle of American government since 1776.[761] It is very different from the views in some other nations, where the government is considered to possess the ultimate sovereignty.[762]

Section 2 of the Bill of Rights affirms the sovereign people's right to alter or abolish the government:

> The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.[763]

This is the universal human right asserted by paragraph two of the U.S. Declaration of Independence in 1776 and by the Texan Declaration of Independence of 1836.[764] Section 2 rejects the notion that government is prior to the people or that the government receives its authority from God. Instead, government exists only by the choice of the people, as their agent to carry out certain functions that they choose, and in the manner they, as sovereigns, specify.

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760. COLO. CONST. art. II, § 1.

761. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[T]hat whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . ."); U.S. CONST. pmbl. ("WE THE PEOPLE of the United States . . . do ordain and establish this CONSTITUTION for the United States of America."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274 (1964) ("The people, not the government, possess absolute sovereignty.") (quoting James Madison's report in support of the 1798 Virginia Resolution against the federal Sedition Act).

762. *See, e.g., N.Y. Times Co.*, 376 U.S. at 274 ("This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects."); Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, 53 L. & CONTEMP. PROBS. 61, 69 (1990) (noting in Japan, the "Rule of Law" refers to the people's obligation to obey the government, and is thus "an ideology to legitimize domination").

763. COLO. CONST. art. II, § 2.

764. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); THE TEXAS DECLARATION OF INDEPENDENCE para. 4 (Tex. 1836). Before the Republic of Texas joined the United States, southeastern and central Colorado were claimed by independent Texas. *See* CARL UBBELOHDE ET AL., A COLORADO HISTORY 52 (9th ed. 2006); *see also* note 95.

The principle of the power to alter government is expressed in many other state constitutions.[765] Colorado's language is similar to the 1875 Missouri Constitution.[766]

The Missouri and Colorado wording is distinctive because it provides guidance about what an entirely new government would be: the new government must be "not repugnant to the constitution of the United States."[767] This means that the new state government could not do things that the U.S. Constitution forbids states to do, such as coin money, enact ex post facto laws, or grant titles of nobility.[768]

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765. *See, e.g.*, in order of statehood: DEL. CONST. pmbl. ("[T]herefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government."); N.J. CONST. art. I, ¶ 2 ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it."); S.C. CONST. art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government."); OHIO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary . . . ."); ARK. CONST. art. 2, § 1 ("All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper."); IOWA CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."); CAL. CONST. art. II, § 1 ("All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."); MINN. CONST. art. I, § 1 ("Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good."); ORE. CONST. art. I, § 1 ("[T]hat all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such a manner as they may think proper."); NEV. CONST. art. 1, § 2 ("All political power is inherent in the people[.] Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require it."); N.D. CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require."); MONT. CONST. art. II, § 2 ("The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary."); IDAHO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary . . . ."); WYO. CONST. art. 1, § 1; ("All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper."); UTAH CONST. art. I, § 2 ("All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.").

766. MO. CONST., art. II, § 2 (1875) ("That the people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.").

767. COLO. CONST. art. II, § 2; MO. CONST., art. 1, § 3.

768. *See, e.g.*, U.S. CONST. art. I, § 10.

Most fundamentally, the U.S. Constitution requires that all states have a "Republican Form of Government."[769] Thus, Colorado's section 2 affirms that any new Colorado government would be republican in nature. The 1890 Mississippi Constitution and the 1907 Oklahoma Constitution would contain similar language.[770] With different language, the Texas Constitution of 1873 also affirmed that any new government would be republican.[771]

Contrast Colorado's section 2 with the "No Alteration Oath" that had been required in Great Britain, by which the swearer abjured "taking arms" against the king's government and swore "that I will not at any time endeavour any alteration of the government either in church or state."[772] Similarly, the mandatory "Non-Resistance Oath" stated "I A.B. do declare and believe that it is not lawful upon any pretence whatsoever to take arms against the king . . . ."[773] The American Founders were familiar with the Church of England's teaching that people must always submit to government, and that active resistance (such as armed revolution) was immoral, and so was passive resistance (nonviolent disobedience, such as practiced by Quakers).[774]

Thus, only a year after the British had signed the treaty conceding American victory in the American Revolution, New Hampshire's constitution (1784) felt the need to argue the point about nonresistance. New Hampshire specifically denounced the "doctrine of nonresistance" as

769. U.S. CONST. art. IV, § 4.

770. MISS. CONST. art. III, § 6 ("Provided, Such change be not repugnant to the constitution of the United States."); OKLA. CONST. art. II, § 1 (same).

771. TEX. CONST. art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.").

772. 1 MARK GOLDIE, ROGER MORRICE AND THE PURITAN WHIGS: THE ENTRING BOOK OF ROGER MORRICE 1677–1691, at 520 (2007). The oath was imposed on Dissenting ministers (non-Anglican Protestants) starting in 1665. *Id.*

773. *Id.* at 519; *see also* 13 Car. 2 stat. 2, c. 1 (1661) (Gr. Brit.) (imposed on borough officeholders); 14 Car. 2 c. 3 (1662) (Gr. Brit.) (imposed on militia); 14 Car. 2 c. 4 (1662) (Gr. Brit.) (imposed on clergy); 17 Car. 2 c. 2 (1665) (Gr. Brit.) (imposed on former members of Dissenting clergy).

774. *See, e.g.*, JOHNSON ET AL., *supra* note 2, at 206–19 (discussing rejection of nonresistance by American Revolutionaries; and influential ministers such as Jonathan Mayhew and Simeon Howard, who explicated the religious expression of duty to resist tyranny).

"absurd, slavish, and destructive of the good and happiness of mankind."[775] Tennessee copied this language for its 1796 Constitution.[776]

During the years leading up the Revolution, and during the Revolution, Great Britain had also asserted that even if Americans had inherent rights, including the right to alter the government (by force if necessary), Americans had voluntarily surrendered those rights to the British Parliament. The Declaration of Independence retorted that such rights were "unalienable."[777] Many state constitutions in the Founding Era and Early Republic followed suit, specifically stating that the right to alter was "indubitable," "inalienable," or "indefeasible." Or sometimes all three.[778] This continued through 1819.[779] The 1819 constitutions were adopted just a few years after Americans re-won their independence in the War of 1812, which ended in 1815 with Andrew Jackson's victory at the Battle of New Orleans.[780]

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775. N.H. CONST. pt. 1, art. 10 ("Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.").

776. *See* Lewis L. Laska, *The Tennessee Constitution: An Unlikely Path Toward Conservatism*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 359. The language is retained in the present constitution, from 1870. TENN. CONST. art. I, § 2.

777. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

778. VT. CONST. ch. 1, art. 6 ("That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged to be most conducive to the public weal." (copying language from 1777 Constitution of the Republic of Vermont)); VA. CONST. art. 1, § 3 ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.").

779. ALA. CONST. art. I, § 2 ("That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient." (adopted 1819, carried forward into later constitutions, including 1875 and the current constitution, from 1901)); CONN. CONST. art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient." (adopted 1818)); ME. CONST. art. I, § 2 ("All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it." (adopted 1819, effective 1820)).

780. *See* ROBERT V. REMINI, THE BATTLE OF NEW ORLEANS: ANDREW JACKSON AND AMERICA'S FIRST MILITARY VICTORY 194–95 (1999) (Although the battle took place two weeks after a peace treaty had been signed in Belgium, unbeknownst to the combatants, if the British had captured New Orleans, they might have refused to leave, just as they refused to evacuate forts in the American West, notwithstanding their 1783 peace treaty with the United States).

Thereafter, American constitutions kept affirming the right to alter the government, but apparently did not feel the need to put the argument defending this right into state constitutions. The one exception was West Virginia, which seceded from Virginia during the Civil War. The West Virginia Constitution copied the Virginia Constitution's point that the right to alter is "indubitable, inalienable, and indefeasible."[781] That West Virginians for two and half centuries had consented to be part of Virginia did not deprive them of their right to change their minds.

Like most other new states after 1819, Colorado apparently felt so confident about the obvious right to alter the government that did not feel a need to argue on behalf of the right. As noted, Colorado is one of five states that tells us what any altered government must look like: a republican form of government, compliant with the U.S. Constitution.

Three state constitutions have language not adopted in Colorado, which might seem to rule out armed revolution as a last resort. South Dakota specifies that the alteration of the government must be by "lawful and constituted methods."[782] North Carolina's 1868 Constitution stated that any alteration "shall be exercised in pursuance of law," essentially promising not to make a second armed attempt at secession.[783] Rhode Island, based on unique historical circumstances, made a similar point, although more elliptically.[784]

Unquestionably, seeking alteration through the ordinary legal channels is to be preferred. Yet as the American and Texan Revolutions

781. W. VA. CONST. art. III, § 3 ("Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."); Robert E. DiClerico, *The West Virginia Constitution: Securing the Popular Interest*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 221 (noting that section 3 is nearly verbatim from 1776 Virginia Declaration of Rights).

782. S.D. CONST. art. VI, § 26 ("All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper.").

783. N.C. CONST. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.").

784. R.I. CONST. art. I, § 1 ("In the words of the Father of his Country, we declare that 'the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.'"). Washington did not mean that statement as ruling out revolution in every circumstance. As of 1775, the British Constitution was widely considered the freest in the world; that did not stop Washington from leading a revolutionary army.
Rhode Island had not adopted a constitution after the Revolution and had instead relied on its colonial charter. This served to keep Rhode Island government under the control of a narrow group. A constitution was not adopted until 1842, following an attempted revolution, the Dorr War. So, the 1842 Rhode Island Constitution implicitly rebukes the defeated revolutionaries.

had demonstrated, a government that does not want to rule by consent may prohibit such peaceful alteration, leaving the people no recourse but forcible resistance. The American revolutionaries had considered their armed resistance to be lawful under the highest principles of natural law and the common law.[785] Of course the British government did not agree. Section 2 adopts the American point of view.

E. The Sole and Exclusive Right of Governing Themselves

While affirmations of the right to alter the government are common, the Colorado Constitution makes a unique declaration: "The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state . . . ."[786] Three states have similar language, but there are important differences. The Mississippi, Missouri, and North Carolina constitutions assert the sole and exclusive right "to regulate the internal government and police thereof."[787] In contrast, the Colorado right of self-governance is not limited to certain things. The Colorado right is the full right "of governing themselves."[788] Further, Colorado's Sole and Exclusive Clause goes beyond the clause in other states: Colorado is a "free, sovereign and independent state."[789]

The "sole and exclusive" language should not be taken hyper-literally. Colorado certainly recognized that laws of the United States would govern Coloradans in part. Sovereignty in Colorado was necessarily mixed.[790] Under the U.S. constitutional system, the federal and state government are each delegated portions of the sovereignty possessed by the people. Coloradans never understood the Sole and Exclusive Clause to mean that they could send or receive ambassadors, issue patents, or perform other sovereign functions of the federal government. At the same

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785. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration of Independence sets forth a legal argument as to why the British government has forfeited its legal right to rule America: by injuring rather than defending the inherent human rights that all legitimate governments must protect. *Id.*

786. COLO. CONST. art. II, § 2.

787. MISS. CONST. art. III, § 6 ("The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States."); MO. CONST. of 1875, art. I, § 2 ("That the people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness: Provided, Such change be not repugnant to the Constitution of the United States."); N.C. CONST. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.").

788. COLO. CONST. art. II, § 2.

789. *Id.*

790. *See, e.g.*, THE FEDERALIST, No. 51 (James Madison) (Because in the proposed Constitution the people divide sovereignty between federal and state governments, "a double security arises to the rights of the people.").

time, they adopted a uniquely strong Sole and Exclusive Clause, a powerful affirmation of States' Rights.[791]

As detailed above, Coloradans had long exercised what they considered to be their rights to govern themselves, starting with the ad hoc governments they created during the gold rush.[792] In the territorial period, Coloradans strongly opposed the appointment of federal territorial officers from outside the territory. "Coloradans fervently believed that no outsider could understand them."[793]

Today, defying federal statutes based on an overbroad interpretation of congressional power "[t]o regulate Commerce . . . among the several States,"[794] Colorado has created a strictly regulated system for the lawful cultivation and retail sale of medical and recreational marijuana.[795] Colorado's statutes aim to ensure that Colorado marijuana commerce will be only intrastate.[796] In the spirit of the Sole and Exclusive Clause, Colorado's marijuana regulations govern something that in 1876 was considered a state matter, far beyond Congress's enumerated powers.[797]

When the voters of Colorado adopted constitutional amendments for the regulated sale of medical marijuana (2000) and recreational marijuana (2012), they in essence ordered state government officials to conspire to violate the federal Controlled Substances Act.[798] Given total quantities involved in this "conspiracy" (tons of marijuana, and many millions of dollars), the Colorado government officials are, arguably, committing

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791. One of the 1859 guidebooks for emigrants had forecast that the West would "open a new field for the elucidation of the great principle of squatter sovereignty"—that is, the people who settle a land will govern it themselves. BLANCHARD, *supra* note 156, at 51–52. When the people were ready to take their place among the States, they would say to the Americans of the Atlantic and Pacific shores, "Behold our mountain land! the place where Freedom first seeks a refuge from the wiles of tyranny, and from which she will last be driven out—Patriotism and heroism are at their highest standard in mountain lands!" *Id.* at 53–54. Geography does influence political culture and individual character. No one can deny that outdoorsmanship—which has always been central to the Colorado way of life—fosters of spirit of self-reliance and independence.

792. Or starting even earlier, in the self-governance of Colorado's Indian tribes.

793. BERWANGER, *supra* note at 2, at 57; *see also id.* at 137.

794. U.S. CONST. art. I, § 8, cl. 3.

795. *See* COLO. CONST. art. XVIII, §§ 14, 16.

796. *See* COLO. REV. STAT. § 11-33-126 (2017) (requiring marijuana financial services cooperatives to conduct due diligence to thwart out-of-state diversion); § 12-43.3-901 (outlining certain anti-diversion provisions in the Colorado Medical Marijuana Code); § 12-43.4-901 (outlining certain anti-diversion provisions in the Colorado Retail Marijuana Code); § 18-18-406.3 (setting forth anti-diversion provisions for medical marijuana use); § 24-32-117 (awarding state grants to local governments for the purpose of diversion prevention); § 24-32-119 (awarding state grants to law enforcement in order to support investigation and prosecution of gray and black market marijuana activity); § 24-33.5-516(2)(f) (requiring Division of Criminal Justice to study diversion out of state); § 25-1.5-106(1)(d) ("The general assembly hereby declares that it is imperative to prevent the diversion of medical marijuana to other states."); § 39-28.8-101 (establishing a registration system for marijuana retailers, designed to prevent diversion).

797. *See* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56, 59 (2010) (under original public meaning, interstate commerce power does not encompass sales of products within a single state).

798. *Compare* COLO. CONST. art. XVIII, §§ 14, 16, *with* 21 U.S.C. § 812 (2012) (listing "[m]arihuana" as a Schedule I controlled substance).

federal felonies that qualify them as drug "kingpins," subject to very severe mandatory sentences.[799]

Yet consistent with the "sole and exclusive right" of Coloradans to govern themselves, state executive branch officials and the Colorado General Assembly have obeyed the Colorado Constitution, and created a carefully controlled, highly taxed, government-supervised system for the production and retail sale of marijuana. "Sole and exclusive" indeed.

F. The Natural Right of Self-Defense

The final part of the Colorado Constitution's trilogy of bedrock principles is section 3 of the Bill of Rights:

> All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.[800]

Colorado's article II, section 3, copies a provision which first appeared in the 1780 Massachusetts Constitution. That constitution begins with what became the classic American formulation of the nature of government, copied by many later state constitutions:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.[801]

Colorado is one of thirty-five states whose constitutions expressly affirm that human rights are inherent, natural, or otherwise *not* the mere creation of positive law. Often, the affirmations of inherent rights include the enumeration of self-defense.[802]

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799. *See* 21 U.S.C. § 848.

800. COLO. CONST. art. II, § 3.

801. MASS. CONST. pt. I, art. I.

802. ALA. CONST. art. I, § 1 (describing the equality and rights of men and their "inalienable rights . . . life, liberty and the pursuit of happiness"); ALASKA CONST. art. I, § 1 ("[A]ll persons have a natural right to life, liberty . . . ."); ARK. CONST. art. 2, § 2 ("All men . . . have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty . . . ."); CAL. CONST. art. I, § 1 ("All people . . . have inalienable rights. Among these are enjoying and defending life and liberty . . . ."); DEL. CONST. pmbl. ("Through Divine goodness, all people have by nature the rights . . . of enjoying and defending life and liberty . . . ."); FLA. CONST. art. I, § 2 ("All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty . . . ."); HAW. CONST. art. I, § 2 ("All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty . . . ."); IDAHO CONST. art. I, § 1 ("All men . . . have certain inalienable rights, among which are enjoying and defending life and liberty . . . ."); ILL. CONST. art. I, § 1 ("All men . . . have certain inherent and inalienable rights among which are life, liberty . . . ."); IND. CONST. art. 1, § 1 ("[A]ll people are . . . endowed . . . with certain inalienable rights; that among these are life, liberty . . . ."); IOWA CONST. art. I, § 1 ("All men and women . . . have . . . inalienable rights . . . of enjoying and defending life . . . ."); KAN. CONST. bill of

The Colorado Supreme Court has relied on section 3 to uphold rights of contractual choice, use of property, or the practice of professions.[803] A modern application has been the right to move about freely, including via automobile.[804]

Section 3 resolves an issue that has been subject to debate under the U.S. Constitution, following the *District of Columbia v. Heller*[805] decision about the U.S. Second Amendment.[806] *Heller* upheld the right to keep and bear arms for self-defense.[807] Does this mean that a government could prohibit *unarmed* self-defense, such as fighting back with hands and feet? Or could a government prohibit self-defense entirely, and thereby remove

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rights, § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty . . . ."); KY. CONST. § 1 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right of enjoying and defending their lives and liberties . . . ."); ME. CONST. art. I, § 1 ("All people . . . have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life . . . ."); MASS. CONST. pt. I, art. I ("All men . . . have certain natural, essential, and unalienable rights . . . enjoying and defending their lives . . . ."); MO. CONST. art. I, § 2 ("[A]ll persons have a natural right to life . . . ."); MONT. CONST. art. II, § 3 ("All persons . . . have certain inalienable rights . . . and the rights of . . . defending their lives . . . ."); NEB. CONST. art I, § 1 ("All persons . . . have certain inherent and inalienable rights; among these are life . . . and the right to keep and bear arms for security or defense of self, family, home, and others . . . ."); NEV. CONST. art. I, § 1 ("All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life . . . ."); N.H. CONST. pt. I, art. 2 ("All men have certain . . . inherent rights--among which are . . . defending life . . . ."); N.J. CONST. art. I, ¶ 1 ("All persons . . . have certain natural and unalienable rights, among which are those of . . . defending life . . . ."); N.M. CONST. art. II, § 4 ("All persons . . . have certain natural, inherent and inalienable rights, among which are the rights of . . . defending life . . . ."); N.C. CONST. art. I, § 1 ("[A]ll persons . . . are endowed by their Creator with certain inalienable rights; that among these are life . . . ."); N.D. CONST. art. I, § 1 ("All individuals . . . have certain inalienable rights . . . defending life . . . to keep and bear arms for the defense of their person, family, property, and the state . . . ."); OHIO CONST. art. I, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life . . . ."); OKLA. CONST. art. II, § 2 ("All persons have the inherent right to life . . . ."); PA. CONST. art. I, § 1 ("All men . . . have certain inherent and indefeasible rights . . . defending life . . . ."); S.D. CONST. art. VI, § 1 ("All men . . . have certain inherent rights . . . defending life . . . ."); UTAH CONST. art. I, § 1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties . . . ."); VT. CONST. ch. I, art. 1 ("That all persons . . . have certain natural, inherent, and unalienable rights, amongst which [is] . . . defending life . . . ."); VA. CONST. art. I, § 1 ("That all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life . . . ."); W. VA. CONST. art. III, § 1 ("All men . . . have certain inherent rights . . . [t]he enjoyment of life . . . ."); WIS. CONST. art. I, § 1 ("All people . . . have certain inherent rights; among these are life . . . ."); WYO. CONST. art. 1, § 2 ("In their inherent right to life . . . .").

803. *See* Olin Mathieson Chem. Corp. v. Francis, 301 P.2d 139, 147, 149, 152 (Colo. 1956) (establishing that the Fair Trade Act may not be used to control the price at which a retailer sells ammunition; legislature may not abridge the right to contract); Chenoweth v. State Bd. of Med. Exam'rs, 141 P. 132, 134–36 (Colo. 1913) (holding that a physician's license to practice may not be revoked because he advertised); Willison v. Cooke, 130 P. 828, 831–32 (Colo. 1913) (finding that an ordinance may not require consent of nearby property owners for the construction of a store that complies with all building code and zoning rules).

804. People *ex rel.* J.M., 768 P.2d 219, 221 (Colo. 1989); People v. Nothaus, 363 P.2d 180, 214 (Colo. 1961); *cf.* Dominguez v. City & Cty. of Denver, 363 P.2d 661, (Colo. 1961) (arguing that a person behaving innocently may not be ordered to give an explanation for why he is on the streets at a late hour), *overruled by* Arnold v. City & Cty. of Denver, 464 P.2d 515, 517 (Colo. 1970).

805. 554 U.S. 570 (2008).

806. *See id.* at 573 (considering "whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution").

807. *Id.* at 635.

the predicate for the right to arms? A unanimous Seventh Circuit panel has made the latter argument.[808] I have argued that the Second Amendment implicitly guarantees the right of self-defense (armed and unarmed), just as the First Amendment implicitly guarantees the right of association.[809] Whatever is the correct answer under the Second Amendment, the answer in Colorado is clear: self-defense is a natural right.

One modern application of section 3 has been in regard to the licensed carrying of concealed handguns. Colorado's constitutional right to keep and bear arms expressly exempts concealed carry from the right.[810] Accordingly, the 2003 Concealed Carry Act states that one purpose of the new law is to protect the self-defense rights, which are guaranteed in section 3.[811]

The principles in sections 1 through 3 are the foundation of government in Colorado. They are prior to everything except the boundaries of the state. They must be kept uppermost in mind when interpreting what follows in the Colorado Constitution, especially the Bill of Rights.

G. The Militia

As will be discussed in Part IV, the Colorado right to arms expressly safeguards the natural right of self-defense. Often, this is a right to be exercised by an individual when attacked by a criminal. Sometimes, the natural right of self-defense must be exercised collectively, as Coloradans had to do in the pre-statehood days, and sometimes thereafter. Although the Colorado right to arms section does not specify the bodies that will be responsible for collective self-defense, other parts of the constitution provide for the existence of two such bodies. The first of these is the state militia.

The 1848 Wisconsin constitution had not organized a state militia, but instead left the matter to the legislature.[812] In contrast, the Colorado

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> Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the [S]econd [A]mendment protects only the interests of law-abiding citizens. Our hypothetical is not as far-fetched as it sounds.

Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009) (citation omitted), *rev'd sub nom.* McDonald v. City of Chicago, 561 U.S. 742 (2010).

809. *See* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 449–51 (2014); David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 248 (2008).

810. COLO. CONST. art. II, § 13.

811. COLO. REV. STAT. § 18-12-201(1)(e) ("[T]he issuance of a concealed handgun permit is based on a person's constitutional right of self-protection . . . .").

812. John Zumbrunnen, *Wisconsin: Rejection, Ratification, and the Evolution of a People*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 460, 467.

Convention considered the militia of such fundamental importance that article XVII is devoted to it.[813]

Colorado's constitution defines the state militia as all able-bodied males aged eighteen to forty-five.[814] This parallels the federal definition and the constitutions of many other states.[815] By putting the definition of militiamen in the constitution, the Convention seems to have worked to ensure that the militia could never be narrowed to only a small subset of the people. A narrow militia would be a "select militia"—the bane of the American Founders and of the Colorado Convention.

Following a tradition that had been favored by Americans since colonial days, Colorado provided that each company of militia would elect its own officers.[816] The equipment, including arms, should facilitate militia service alongside the regular army: "The organization, equipment and discipline of the militia shall conform, as nearly as practicable, to the regulations for the government of the armies of the United States."[817]

Ever since the early colonial period, even though laws required able-bodied men (and sometimes women) to have their own arms suitable for community defense, the government of a locality, colony, or state would sometimes provide its own supply of "public arms." The public arms and ammunition could be loaned to militiamen who could not afford their

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813. *See* COLO. CONST. art XVII.

814. *Id.* art. XVII, § 1 (unchanged since 1876).

Some scholars of the original U.S. Constitution and the Bill of Rights have emphasized a theory of "civic republicanism." They accurately point out that in the Italian city-states of the Renaissance, and in seventeenth century England, universal militia service was considered an essential part of civic virtue. A few modern scholars put so much weight on the civic republican element of the Second Amendment that they deny the existence of any right to arms, except for militia service. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 563–86 (1991) (comparing the perspectives of modern American scholars on the Second Amendment, in light of historical English and Italian republican political theories).

Other scholars acknowledge the civic virtue element of the Second Amendment, but also point out the human rights element, of personal self-defense. They argue that the Second Amendment includes civic republicanism (in the first clause) and human rights (in the main clause). *See, e.g.*, David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 602 (1986).

The U.S. Supreme Court's *District of Columbia v. Heller* favors the latter approach: recognizing the importance of militias does not degrade the right of self-defense. *See* 554 U.S. 570, 599 (2008).

A republicanism-only arms right would limit the right to citizens only, for the same reason that only citizens may serve on juries. Juries and militias are part of a republican polity's self-governance, and persons who are not part of the polity may not participate in the governance. As described below, Colorado rejected this narrow model for arms rights, by choosing not to limit arms rights to citizens only.

815. *See* 10 U.S.C. § 246(a) (2012).

816. COLO. CONST. art. XVII, § 3.

817. *Id.* art. XVII, § 2. A major early statehood use of the militia was by Governor Frederick Pitkin (1879–83), who declared martial law in Leadville during an 1880 miners' strike. LAMAR, *supra* note 2, at 255 (citing Dudley Taylor Cornish, *The First Five Years of Colorado's Statehood, 1876–1881*, 25 COLO. MAG. 179, 183 (1948)). Frank Hall later wrote that Governor Pitkin, while sincerely reacting to a clamor from many residents of Leadville, had over-reacted; the disturbances caused by some malcontents could and should have been suppressed by local law enforcement, without necessitating the expense of calling forth the militia. 2 HALL, *supra* note 2, at 460–64.

own.[818] The public arms were also a ready reserve for militiamen whose personally owned arms might be broken, such as during combat. Public arms could also be issued even to militiamen who had their own arms, so that a militia unit would have uniform, interchangeable, high-quality modern arms. As detailed *supra*, Colorado's territorial governments did attempt to maintain public arms, but quality was often low and quantities insufficient. Public arms are addressed in article XVII, section 4: "The General Assembly shall provide for the safe-keeping of the public arms, military records, relics and banners of the State."[819] The provisions of article XVII were typical of many state constitutions of the time.[820]

H. The Office of Sheriff

Article XIV of the 1876 constitution provides for county governments and their officers.[821] Among the officers of the county is the sheriff, who is to be elected by the people.[822] When the first English colonists had begun arriving in America, sheriffs in England were usually appointed, not elected.[823] That began to change in America, starting with some sheriff elections in Virginia counties in the mid-seventeenth century.[824] By the time that Colorado's 1876 convention met, the principle of electing sheriffs had been widely established in state constitutions.[825]

As was understood and undisputed in the nineteenth century, sheriffs have a variety of common law powers, which are indefeasible.[826] Among the most venerable of these powers is the authority to summon a posse comitatus. This term is often anglicized as "the power of the county."[827] It is the common law power of a sheriff (and sometimes other officials) to summon any or all able-bodied males in his jurisdiction to assist the sheriff in law enforcement.[828]

The posse comitatus power is at least as old as the reign of the Anglo-Saxon King Alfred the Great in the eighth century.[829] Based on centuries

818. Sometimes these loans were short-term. Other times they amounted to a gift.

819. COLO. CONST. art. XVII, § 4.

820. Also common in other states, although not universal, was an express exemption for conscientious objectors, provided that the exemption was only during peacetime, and that objectors must pay an "equivalent"—a fee for the exemption. *Compare id.* art. XVII, § 5, *with* OR. CONST. art. X, § 2 (adopted 1857, unchanged since). James Madison had included a conscientious objector provision in his draft of the Second Amendment, but it was deleted by the Senate, on the reasoning that conscientious exemptions were appropriate, but should be left to legislative discretion. Hardy, *supra* note 814, at 610–11.

821. COLO. CONST. art. XIV.

822. *Id.* art. XIV, § 8.

823. David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 780–82 (2015) [hereinafter Kopel, *Posse Comitatus*].

824. *Id.* at 786–87.

825. *See id.*

826. *Id.* at 787.

827. *Id.* at 789.

828. *Id.* at 789–90.

829. *See id.* at 790.

of Anglo-American common law, the sheriff's posse comitatus discretion is near-absolute. He or she may decide whom, within the county, to summon, and what sorts of arms should be brought to service.[830] A *posse* cannot summon itself. In the nineteenth century, duly-summoned *posses* aided the civil power around the nation, as they had been doing from time immemorial.[831] For example, one of the delegates to the Colorado Convention was Casimiro Barela, who as Sheriff of Las Animas County in 1873, had summoned a *posse* that pursued and captured a fugitive who was wanted on charges of murder and robbery.[832] The next year, Sheriff Barela raised a thirty-man *posse* to deal with Comanche, Kiowa, and Cheyenne raids in the Dry Cimarron region southeast of Trinidad.[833] One of the most notable uses of the *posse* during early statehood came around the time of the 1893 Depression, when a Julesburg *posse* stopped a hijacked train.[834]

IV. THE RIGHT TO ARMS IN THE COLORADO CONSTITUTION

The Colorado Convention delegates drew on a variety of state constitutions for models, especially Illinois (1870), Missouri (1875), Nebraska (1875), and Pennsylvania (1873).[835] Nebraska and Illinois had many provisions that were adopted in Colorado, but neither state had a right to arms. Indeed, of the thirty-seven states that had joined the Union prior to Colorado, twelve did not have a constitutional right to arms in

830. *Id.* at 804–08.

831. *Id.* at 792, 798–804.

832. JOSÉ E. FERNÁNDEZ, THE BIOGRAPHY OF CASIMIRO BARELA 35-36 (A. Gabriel Meléndez trans., 2003) (1911).

833. TAYLOR, *supra* note 2, at 152–53. This may have been related to the Red River War, which mostly took place in north Texas. *See id.*

834. LEONARD & NOEL, *supra* note 2, at 102–04. Julesburg had four different locations during the nineteenth century, all within a few miles of each other. By 1890, the present location had been established. 4 HALL, *supra* note 2, at 321.

Colorado historians writing in the nineteenth century tend to treat *posses* as very ordinary things, so it seems unlikely that all *posse* uses were recorded by historians. Among some notable *posse* uses in Colorado were: GALLAGHER, *supra* note 239, at 42–44 (1859 Denver *posse* hunts for fleeing murderer); 1 HALL, *supra* note 2, at 236–38 (1860 Denver *posse* pursues three men who murdered a man in a saloon); CAROL TURNER, NOTORIOUS JEFFERSON COUNTY: FRONTIER MURDER & MAYHEM 68 (2010) (1868 *posse* finds a notorious desperado in Golden); GALLAGHER, *supra* note 239, at 99 (1868 *posse* led by a U.S. Marshal captures murderer and head of a horse-thief ring, near Cache la Poudre River); BERWANGER, *supra* note 2, at 102 (1870 Longmont *posse* catches murderer and stage coach bandit, and kills him in a shootout); SIMMONS, *supra* note 2, at 182 (1878, *posse* assists federal troops chasing Ute raiders in Middle Park); 2 HALL, *supra* note 2, at 381–84 (1879, *posses* involved in settling a conflict between two railroads, obviating the need for militia intervention); 3 HALL, *supra* note 2, at 54–56 (1879 *posse* of cowboys in Garfield County, to resist raids by Ute Chief Colorow); 4 HALL, *supra* note 2, at 160–61 (1881, in Del Norte, sheriff organizes men who track and apprehend infamous gang of stagecoach robbers); D.A. BROCKETT, WICKED WESTERN SLOPE: MAYHEM, MISCHIEF, & MURDER IN COLORADO 111 (2012) (1887 manhunt for train robbers near Grand Junction); SIMMONS, *supra* note 2, at 205 (1887 Garfield County *posse* breaks up a Ute Indian hunting camp); LEONARD, *supra* note 628, at 91 (1888 *posse* defends jail against a thousand-man lynch mob; they succeed until electrical wires are cut, allowing the mob to enter in the dark).

835. Hensel, *supra* note 2, at 105–06, 220. Delegates also discussed the constitutions of Alabama, Arkansas, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Texas, Vermont, West Virginia, and Wisconsin. *Id.* at 106 n.8, 220 n.17. Hensel's thesis remains the best scholarly analysis of early Colorado constitutional history.

1876.[836] Apparently the Colorado Convention did not want a constitution without the right, and the Convention turned to Missouri for a model. The 1875 Missouri Constitution right to arms was the longest such provision in any state constitution at the time. Missouri integrated several features that Colorado wanted: the strongest available language for guaranteeing the right; distinguishing personal defense from community defense, and specifying that the right to arms protects both purposes; making it clear that community defense is not only through militia service; making it clear that community defense was to be led by appropriate legal officials, and not be freelancing, and authorizing restriction or prohibition of the carrying of *concealed* arms.[837]

Like the U.S. Bill of Rights, the Colorado language does not treat rights as a gift from the government. Rather, rights preexist government. As in the phrasing of the Second Amendment, the phrasing of the Colorado Constitution treats the right to arms as already in existence.[838] The text safeguards the right to arms but does not create it.

A. "The Right of No Person"

Like the rest of the Bill of Rights, the right to arms was not controversial. The Colorado Convention made only one significant change from the Missouri model. Colorado expanded the guarantee to cover every "person," not just the "citizen."[839]

This is consistent with the immigrant-friendly attitude of the Convention. When the proposed constitution was sent to the people for

836. JOHNSON ET AL., *supra* note 2, at 738–48. Nebraska, the state that joined just before Colorado, was the last state not to have a right to arms in its original constitution. All 12 states that joined after Colorado had a right to arms right from the start. Of the dozen states that had no right to arms as of 1876, half of them (including Nebraska and Illinois) later amended their constitutions to include the right. *Id.*

Nebraska added its arms right in 1988 by citizen initiative. Along with approximately contemporaneous additions for due process, equal protection, and a prohibition on suspension of habeas corpus, the Nebraska amendments "indicate a strong desire on the part of Nebraskans to maintain their independent and autonomous nature absent any external interference." Larimer, *supra* note 282, at 546; *see also* NEB. CONST. art. I, § 3 ("the right of the people to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, and recreational use").

837. *See* MO. CONST. of 1875, art. II, § 17 ("[T]he right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.").

838. District of Columbia v. Heller, 554 U.S. 570, 592 (2008); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (right to arms is not "in any manner dependent upon [the U.S. Constitution] for its existence").

839. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DEC. 20, 1875, at 90, 204–05 (1907). The 1896 Utah Constitution had more ambiguously said that "The people have the right to bear arms . . . ." UTAH CONST. art. I, § 6 (amended 1984). Decades later, the Utah Supreme Court held that legal aliens had no right to arms and suggested that the Utah right to arms did not apply to individuals. State v. Vlacil, 645 P.2d 677, 679–80 (Utah 1982). In response, the people of Utah amended the state constitution. *See* 1984 Utah Laws, 2d Sp. Sess., S.J.R. 3 ("The individual right of the people . . . .").

ratification, it was printed in English, German, and Spanish for "inhabitants of the State who speak those languages and who may be unable to read and understand the English language."[840] Similarly, the constitution required that until at least 1900, state statutes be printed in Spanish and German, as well as English.[841]

Another alien-friendly provision of the Bill of Rights was section 27, which guaranteed aliens the same property rights as citizens.[842] It was hoped that the provision would attract immigrant capitalists.[843] By statute, immigrants would be allowed to vote as soon as they declared their intent to naturalize.[844]

Consistent with the text of the constitution, the Colorado Supreme Court has enforced the arms rights of noncitizens. There is no doubt that a state may reserve the fish and game of a state for the benefit of its citizens.[845] After World War I, under the influence of xenophobia and the Ku Klux Klan, many states adopted gun control laws aimed at legal resident aliens. In 1921, the Colorado legislature banned gun ownership by aliens, ostensibly to prevent them from hunting.[846]

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840. COLO. CONST. art. XVIII, § 8 (amended 1990).

841. This had become the practice of the Territorial Legislature. *See, e.g.*, ESTATUTOS REVISADOS DE COLORADO, EN FUERZA DE LEY DESPUES DE LA SUSPENSION DE LA SESION NOVENA DE LA ASEMBLEA LEGISLATIVA (E. T. Wells & Fred. J. Stanton eds., 1872) (Spanish); ALLGEMEINEN GESETZE DES STAATES COLORADO (William M. Clark ed., 1877) (German).
The convention delegate behind the mandate for multilingual publication of statutes was Casimiro Barela, who had sponsored the bill in the Territorial Legislature for Spanish language statutory publication. FERNÁNDEZ, *supra* note 832, at 16–18, 38–42. Barela was elected to the first statehood Senate in 1876 and served as a state senator until he was defeated in a 1916 election. *Id.* at xviii–xxix.

842. COLO. CONST. art. II, § 27.

843. Hensel, *supra* note 2, at 135. In contrast, California's 1879 constitution had an entire article titled "Chinese." It authorized the legislature to remove Chinese from cities and towns or to limit Chinese to certain areas therein, forbade corporations to employ "any Chinese or Mongolian," and forbade governments to employ Chinese. The stated rationale was that the presence of foreigners who are ineligible for citizenship (per U.S. law at the time) was dangerous. CAL. CONST. art. XIX (repealed 1952).

844. BERWANGER, *supra* note 2, at 148.

845. *See, e.g.*, Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 390–91 (1978); Corfield v. Coryell, 6 Fed. Cas. 546, 549–50 (C.C.E.D. Pa. 1823) (No. 3230).

846.

> That from and after the passage of this act, it shall be unlawful for any unnaturalized foreign-born resident to hunt for or capture or kill, in this state, any wild bird or animal, either game or otherwise, of any description, excepting in defense of persons or property; and to that end it shall be unlawful for any unnaturalized foreign-born resident, within this state, to either own or be possessed of a shotgun or rifle of any make, or a pistol or firearm of any kind. Each and every person violating any provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25) nor more than two hundred and fifty dollars ($250), or by imprisonment in the county jail not less than ten (10) days or more than three (3) months, or by both such fine and imprisonment; *Provided*, That in addition to the before-named penalty all guns of the above-mentioned kinds found in possession or under control of an unnaturalized foreign-born resident shall, upon conviction of such person, be declared forfeited to the state of Colorado, and shall be sold by the fish and game commissioner as hereinafter directed.

COMPILED LAWS OF COLORADO 1921 § 6882, at 1775 (1922).

In the 1936 case *People v. Nakamura*,[847] the Colorado Supreme Court struck down the ban on alien arms.[848] The Colorado Attorney General argued that the right to arms is only a "collective" right and not a "personal" one.[849] Obviously this argument was difficult to square with the text of the Colorado provision.

Nakamura had been caught while illegally poaching,[850] so the Court could have upheld Nakamura's conviction, since his activity was something that the state did have power to prohibit. The dissent urged this approach, but the majority held the statute facially void, and thus restored the constitutional rights of aliens.[851]

In 1889, Montana adopted its statehood constitution, copying the Missouri–Colorado model. As to who enjoys the right, Montana chose the Colorado approach with rights for every "person."[852] The next year, Mississippi wrote a new constitution and took the Missouri approach. So, in Mississippi, noncitizens were excluded from the right to arms.[853]

In modern case law, bans on legal resident aliens keeping or bearing arms have been held to violate the Fourteenth Amendment.[854] Bans on *illegal* aliens keeping or bearing arms have been upheld under the Second Amendment.[855]

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847. 62 P.2d 246 (Colo. 1936).

848. *Id.* at 247.

849. *Id.* at 246–47.

850. *See id.* at 246 (defendant pled guilty to the fist count, unlawful possession of three pheasants).

851. *Id.* at 247–48 (Bouck, J., dissenting); *id.* at 247 (majority opinion) (holding that the legislature may ban aliens from hunting, but because the statute applies to arms for defense, it "contravenes the constitutional guaranty and therefore is void").

852. MONT. CONST. of 1889, art. III, § 13 ("The right of any person to keep or bear arms in defense of his own home, person and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."). This section was later reenacted verbatim in the 1972 Montana Constitution. MONT. CONST. art. II, § 12.

853. MISS. CONST. art. 3, § 12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the Legislature may regulate or forbid carrying concealed weapons."). The 1890 version was more specific than its predecessors, but also marked a retreat for 1868 language that had encompassed "persons." MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); MISS. CONST. of 1832, art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and the State."); MISS. CONST. of 1817, art. I, § 23 (same language as 1832).

854. *See, e.g.*, Fotoudis v. City & Cty. of Honolulu, 54 F. Supp. 3d 1136, 1141–42 (D. Haw. 2014) (striking firearms prohibition for legal aliens); *cf.* Fletcher v. Haas, 851 F. Supp. 2d 287, 303 n.20, 305 (D. Mass. 2012) (striking prohibition on carry permits for legal aliens under the Second Amendment, incorporated to the states via the Fourteenth Amendment).

855. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 246–48 (2017).

B. *"To Keep and Bear Arms in Defense of His Home, Person and Property,"*

Like the Second Amendment, the Colorado Constitution uses the phrase "keep and bear arms." One earlier case in Tennessee had stated that the phrase "bear arms" has a military-only connotation, so that "bear arms" means only carrying arms while in militia, and not carrying arms for personal defense.[856] The Colorado Constitution does not take this approach. In Colorado, the right to bear arms is for every "person" in defense of "home, person, or property."

C. *"Or in Aid of the Civil Power When Thereto Legally Summoned"*

After affirming the right to possess and carry arms for defense of home, person, and property, the Colorado Constitution adds a separate reason why arms are protected: so that persons will be able to come to the aid of the civil power. According to legal historian David Hardy, the federal Second Amendment combines civic republicanism and human rights philosophy.[857] Civic republicans in the Renaissance Italian city-states, and later in Great Britain, extolled the militia, in which almost all able-bodied men bore arms to defend the community.[858] An enduring and constructive Western political philosophy, civic republicanism often considers how respect for individual rights (e.g., owning arms) can promote the common good (e.g., militia defense of a community).

The first clause of the Second Amendment is civic republicanism (the well-regulated militia). The main clause is the human rights tradition: the natural right of every creature to defend itself.[859] James Madison was writing in the language of his time; some modern readers have found it confusing. The Colorado right to keep and bear arms is written more directly. The right to keep and bear arms for self-defense belongs to every person, and so does the right to keep and bear arms for community defense. Each purpose is of fundamental importance, which is why they are inscribed in the Bill of Rights.

One type of keeping and bearing arms "in aid of the civil power when thereto legally summoned" is service in the militia. In Colorado, the need for the militia was freshly in mind. Preventing a repetition of the near-

856. Aymette v. State, 21 Tenn. (2 Hum.) 154, 156–58 (1840). The U.S. Supreme Court, however, has expressly rejected *Aymette*'s "odd reading" of the phrase. District of Columbia v. Heller, 554 U.S. 570, 613 (2008).

857. *See* Hardy, *supra* note 814, at 604–15.

858. *See id.* at 626 n.328; NICCOLÒ MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 99–101 (Ninian Hill Thomson trans., Kegan Paul, Trench & Co. 1883) (1531); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA 77–78 (1656).

859. The human rights tradition can be traced backwards from American Founders such as Jefferson and Madison to Protestant thinkers to Thomas Aquinas (thirteenth century), and to the republics of the Greeks, the Romans, and the Hebrews. *See generally* DAVID B. KOPEL, THE MORALITY OF SELF-DEFENSE AND MILITARY ACTION: THE JUDEO-CHRISTIAN TRADITION (2017). The human right of self-defense is also found also found in other religious traditions, such as those of East and South Asia. *See generally* David B. Kopel, *Self-Defense in Asian Religions*, 2 LIBERTY L. REV. 107 (2007).

conquest of 1862 would be one benefit of a strong constitutional right to arms. Able to arm themselves, Coloradoans would be better able to defend their state, in the militia.

To Coloradans, the grave danger of an insufficiently armed public was not theoretical. Between 1861 and 1862, Colorado had been menaced by the slave power of the Confederacy. Barely, Coloradans had obtained enough arms and armed men to retain their sovereignty. Throughout the 1860s, the Colorado settlers were under Indian attack, and in 1864 and 1865, they had nearly been wiped out. A prudent, forward-thinking policy would aim to ensure that the people's militia would never again be scarce of arms.

At the 1875 Missouri Convention, a speaker had explained the harmony of the Second Amendment and the Missouri language (which Colorado copied):

> How is this to be construed? Simply a right of the citizen of a state to carry a pistol, sabre or musket? . . . The right belongs to every state, not only that its citizens shall always be free to own arms & to carry arms, but also to put those citizens thus armed & equipped in an organization called militia.[860]

The militia is not the only means by which the civil power may summon aid. Another means is the posse comitatus. The constitution mandates that there be County Sheriffs, elected by the people.[861] Under common law, they could summon the posse comitatus, as needed.

The constitutional language "in aid of the civil power when thereto legally summoned" presumes that there is functioning civil power capable of summoning. The Colorado Constitution was intended to create enduring civil power—to defend civil liberty and to foster public goods such as education. If civil power ceased to exist, then whatever people did to defend themselves or their communities would be beyond the scope of what the Colorado Constitution addresses. People would simply be exercising the natural rights recognized in sections 1–3 of the Bill of Rights.

As intended, the constitutional right to arms has helped to keep the civil power functioning effectively. Today, seventeen Colorado County Sheriffs have formal posses, composed of volunteers who receive special training.[862] They aid the sheriff on everything from security at the county fair to road control during weather emergencies to hostage situations.[863]

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860. 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 119 (Isidor Loeb & Floyd C. Shoemaker eds., 1930).

861. COLO. CONST. art. XIV, § 8.

862. *See* Kopel, *Posse Comitatus*, *supra* note 823, at 810–11.

863. *Id.* at 817–23.

In the past several decades, there have been two notable situations in which larger posses, composed of all available volunteers, have been summoned. In 1977, a posse summoned by the Pitkin County Sheriff thwarted the escape of serial killer Ted Bundy, after Bundy escaped from the Pitkin County Courthouse by jumping from a window during a court recess.[864] In 1998, a Hinsdale County posse blocked the escape of two criminals on an interstate crime spree, who had murdered Sheriff Roger DeCourcy at a traffic stop.[865]

The Missouri–Colorado language thus guarantees the ownership of arms that are suitable for *posse* or militia service, and not solely the types of arms that might be suitable for personal self-defense. There is a good argument that arms suitable for the one are also well-suited for the other. But to the extent that there is any divergence, Missouri and Colorado protect both.

Donald Lutz has written that "constitutionalism is an advanced technique for handling conflict."[866] In Colorado, one of the advanced techniques is that persons will be armed, to defend themselves in an instant, and to defend their communities when lawfully summoned to do so.

D. "Shall be Called Into Question;"

This language is somewhat similar to the Second Amendment's "shall not be infringed." It is nearly the same as the language of the Fourteenth Amendment, ratified in 1868:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.[867]

This states the matter firmly. There are many things that the U.S. government may do. Repudiating its debt is not one of them. Unless Section 4 of the Fourteenth Amendment is repealed or revised, the U.S. government cannot fail to perform its legal obligation to pay its debts. There is no wiggle room for evading debt if the government argues that debt repudiation would pass intermediate scrutiny, or some other standard. The question is off the table. The Fourteenth Amendment's language has served the nation well, by assuring creditors that U.S. debts will always be repaid, no matter what.

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864. *Id.* at 812–13.
865. *Id.* at 813–15.
866. LUTZ, *supra* note 3, at 14.
867. U.S. CONST. amend. XIV, § 4.

Missouri's 1875 use of "called in question" was a change from its 1820 language that the right "cannot be questioned."[868] A 1945 revision improved the flow: "[T]he right of every citizen . . . shall not be questioned . . . ."[869] The phrase "shall not be questioned" was first used for the right to arms in the 1790 Pennsylvania Constitution.[870] Kentucky employed the same words in 1792.[871] Maine in 1819 declared that "this right shall never be questioned."[872]

E. "But Nothing Herein Contained Shall be Construed to Justify the Practice of Carrying Concealed Weapons."

In Colorado, the right shall not be "called in question." With some small differences in phrasing, the language had originated in Pennsylvania in 1790 and been followed by Kentucky in 1792.[873] Given the strong language, in 1822, the Kentucky Court of Appeals declared

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868. *Compare* MO. CONST. of 1875, art. II, § 17 ("That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."), *with* MO. CONST. of 1820, art. 13, § 3 ("[T]he people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defence of themselves and of the state cannot be questioned.").

869.

> That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

MO. CONST. art. I, § 23 (amended 2014).

870. PA. CONST. of 1790, art. IX, § 21 ("That the right of the citizens to bear arms in defence of themselves and the state shall not be questioned."). This language was retained in new constitutions in 1838, PA. CONST. of 1838, art. IX, § 21, and 1874, PA. CONST. of 1874, art. I, § 21. The 1968 constitution slightly revised the language: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." PA. CONST. art. I, § 21. The first constitution, in 1776, had declared: "[T]he people have a right [sic] bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power." PA. CONST. of 1776, ch. I, art. XIII.

871. KY. CONST. of 1792, art. XII, § 23 ("[T]he rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."). The language was kept in 1799, KY. CONST. of 1799, art. X, § 23 (verbatim of 1792), and 1850, KY. CONST. of 1850, art. XIII, § 25 ("[T]he rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms."). The phrasing in 1891 was different: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. § 1.

872. ME. CONST. art. I, § 16 (amended 1987) ("Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.") The constitution was amended in 1987 to remove "for the common defence." ME. CONST. art. I, § 16, *amended by* ME. CONST. amend. CLVII.

873. *See* PA. CONST. of 1790, art. IX, § 21; KY. CONST. of 1792, art. XII, § 23.

unconstitutional a ban on carrying concealed weapons. The court acknowledged that open carry was still allowed, but that did not matter:

> [T]o be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form--it is the right to bear arms in defense of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.[874]

Given "the explicit language of the constitution," the only means to justify a concealed carry ban was to have explicit language allowing such a ban. When creating a new constitution in 1850, Kentucky included such language.[875] Missouri did the same in 1875.[876] The strong language against questioning the right had an express exception for concealed carry. The chairman of the Missouri Convention's Bill of Rights committee explained that the express exception was necessary because the Kentucky Supreme Court had held that "a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited the Legislature from preventing the wearing of concealed weapons."[877]

The canon of construction *expressio unius est exclusio alterius* is that the express mention of one thing excludes another.[878] Expressly giving the government power over *concealed* bearing of arms means that the government does not have a similar power over *openly* bearing arms, or over *keeping* arms.

"[N]othing herein contained shall be construed to justify the practice of carrying concealed weapons"[879] means that nothing contained in the right to arms section is a legal justification for carrying a concealed weapon. This leaves the legislature free to regulate, prohibit, or liberally allow concealed carry, as it sees fit.[880] Thus, at various times Missouri has prohibited concealed carry, has allowed it only with a license, has revised the licensing system, and now allows lawful adult firearms owners to carry

874. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 91–92 (1822).

875. *See* KY. CONST. of 1850, art. XIII, § 25.

876. MO. CONST. of 1875, art. II, § 17.

877. 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, *supra* note 860, at 425, 439 (referring to *Bliss*, 12 Ky. (2 Litt.) 90); *see also* David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1205 (1995).

878. Cain v. People, 327 P.3d 249, 253 (Colo. 2014) (articulating the meaning of *expressio unius est exclusio alterius* and demonstrating its application).

879. COLO. CONST. art. II, § 13.

880. Colorado had copied the 1875 Missouri constitutional text, but Colorado said "shall be construed," whereas Missouri had said "is intended." The Missouri Supreme Court, interpreting language that is functionally identical to Colorado's, rejected the argument that concealed carry constitutional text forbade 2003 Missouri legislature from enacting a system for licensing the carrying of concealed arms by qualified persons. *See* Brooks v. State, 128 S.W.3d 844, 846–48 (Mo. 2004).

concealed without a license, although in fewer places than where open carry or licensed concealed carry is allowed.[881]

In 2003, a Colorado reform law, similar to a statute earlier adopted in Missouri and many other states, made licensing uniform statewide, with licenses to be issued by County Sheriffs. Standards for obtaining a license were made stricter, while persons who met the standards were guaranteed that they would be issued a license.[882] The legislature explained that it was acting to better effectuate self-defense rights, which are guaranteed in article II, section 3.[883]

The Colorado framers understood that arms could be carried openly or concealed. The next-door Territory of Wyoming in 1876 had a statute banning arms carrying in towns, "concealed or openly," except by "a sojourner."[884] (The statute was later revised to prohibit only concealed carry, or open carry with intent to criminally injure another.[885]) Unlike in the Wyoming Territory, the State of Colorado's legislature could prohibit concealed carry only, not open carry.

V. INTERPRETATION

A. What Arms Does the Text Encompass?

It would be silly to contend that any constitutional right includes only the technology of the time the constitution was written. As the U.S. Supreme Court stated in regard to the Second Amendment:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, 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.[886]

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881. MO. REV. STAT. § 571.030.1(1) (2017) (concealed carry is unlawful only in certain locations); *id.* § 571.030.4 (location restrictions not applicable to persons with concealed carry permit); *id.* § 571.101.2(1)–(3) (procedures for issuing permits to all qualified adults, mostly recently amended by S.B. 656, 2016 Gen. Assemb., 2d Reg. Sess. (Mo. 2016)); KEVIN L. JAMISON, MISSOURI WEAPONS AND SELF-DEFENSE LAW 122–31 (2003) (describing history of restrictions on concealed carry in Missouri, prior to the 2003 enactment of a "Shall Issue" law).

882. COLO. REV. STAT. § 18-12-201(3); *id.* § 18-12-203(1).

883. *Id.* § 18-12-201(1)(e); *see* COLO. CONST. art. II, § 3.

884. THE COMPILED LAWS OF WYOMING 352 (J.R. Whitehead ed., 1876) ("[I]t shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said Territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.").

885. REVISED STATUTES OF WYOMING 1253 (J.A. Van Orsdel & Fenimore Chatterton eds., 1899) ("Every person, not being a traveler, who shall wear or carry any dirk, pistol, bowie knife, dagger, sword-in-cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent, or avowed purpose, of injuring his fellow-man, shall be fined not more than one hundred dollars.").

886. District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (citations omitted).

This is all the more true for the 1876 Colorado Constitution because firearms innovation and improvement were so rapid in the quarter-century leading to 1876.

It does seem obvious that technology that *was* in existence at the time a constitutional guarantee was written is encompassed in the guarantee. In Colorado, this would include firearms, edged weapons, blunt weapons, and bows.

Because constitutional rights encompass technological improvements and inventions, the modern right to bows would include compound bows, which use cables and pulleys. The same point would be true for other arms.

For defense of home, person, and property, there is no general "best" type of arm. The appropriate, safest defensive arms can be very different from one person to another, depending on age, strength, dexterity, training, and other factors. For one person, pepper spray might be the best defensive arm; for someone else, a stun gun might be better. One reason there are so many different models of firearms and knives is that ergonomics are so varied among the population. A handgun that is a perfect fit for one person may be a terrible fit for another. Among different firearms, there are trade-offs in cost, reliability, accuracy, simplicity of operation, stopping power, and many other characteristics. What is the best, safest choice of a defensive firearm is a question that can only be answered individually, not collectively.

The second purpose of the Colorado right to arms is "in aid of the civil power." One good model for this type of arms is ordinary law enforcement officers. Their carrying is always "in aid of the civil power."[887] This means the arms of the ordinary sheriff's deputy or police officer— not necessarily the types of arms that are carried by special combat police units, such as flash-bang grenades, machine guns, and so on.

B. Justice Wells's Note to Himself

Ebenezer Tracy Wells moved to Colorado after serving with distinction in an Illinois unit in the Civil War.[888] Quickly he became a prominent lawyer in Gilpin County, the heart of the mining region.[889] He

887. *See* State v. DeCiccio, 105 A.3d 165, 173, 199–201 (Conn. 2014) (adopting ordinary law enforcement officer test to strike ban on transporting privately owned police batons from one home to another); People v. Yanna, 824 N.W.2d 241, 245–46 (Mich. Ct. App. 2012) (striking ban on electric stun guns, in part because of their widespread use by law enforcement); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1534 (1998) (proposing ordinary law enforcement officer test).

888. WM. RAIMOND BAIRD, BETAS OF ACHIEVEMENT 341 (1914).

889. *See* 3 HALL, *supra* note 2, at 409–10.

was elected to the Territorial Legislative Assembly for 1866–1867.[890] The next year, he wrote a compilation of territorial statutes, the "Revised Statutes of 1868."[891] President Grant appointed him associate judge of the Territorial Court in 1871, where he served until 1875.[892] He was a delegate to the 1876 Colorado Convention.[893]

At the request of the Republican party, Wells ran for the Colorado Supreme Court in 1876 and won. However, he had run with the understanding that he could resign and resume his lucrative law practice, which he did in 1877.[894] He later taught Property and Trusts at the University of Colorado law school, wrote a treatise on water law at the request of the Colorado General Assembly, and served as the reporter for the intermediate Colorado Court of Appeals.[895]

Although Wells never ruled on a case involving the Colorado right to arms, some handwritten notes may reflect his thinking. In the Colorado State Supreme Court Library is Wells's copy of the book published by the Convention, containing the proposed constitution, plus the Convention's address to the people.[896] Handwritten notes on the constitution appear on blue lined note paper before the text begins. Item 68 is: "The provision that the right to bear arms shall be [not called?] in question refers only to military arms: not dirks, bowie knives, etc." Along with this, Wells cited a recent case from Texas, *English v. State*.[897]

English v. State held that the Texas Constitution "protects only the right to 'keep' such 'arms' as are used for purposes of war."[898] The Texas Court said the Texas Constitution had the same meaning as the Second Amendment, to which the Court ascribed a military meaning:

> The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster

890. 2 HALL, *supra* note 2, at 541–42. Representative from Gilpin in the sixth session of the Territorial Assembly (Dec. 1866–Jan. 1867). *Id.*

891. 1 HISTORY OF COLORADO 735 (Wilbur Fisk Stone ed., 1918).

892. 19 THE PAPERS OF ULYSSES S. GRANT: JULY 1, 1868–OCTOBER 31, 1869, at 500 (John Y. Simon ed., 1995); 2 HALL, *supra* note 2, at 535 (appointed Feb. 8, 1871); 3 HALL, *supra* note 2, at 282; BAIRD, *supra* note 888, at 341. Wells was a great grandson of Artemus Ward, a revered U.S. Representative and Revolutionary War General. PHILIP J. REYBURN, CLEAR THE TRACK: A HISTORY OF THE EIGHTY-NINTH ILLINOIS VOLUNTEER INFANTRY, THE RAILROAD REGIMENT 184 (2012).

893. HISTORICAL COMPENDIUM, *supra* note 2, at 113.

894. 1 HISTORY OF COLORADO, *supra* note 891, at 428, 735; HISTORICAL COMPENDIUM, *supra* note 2, at 114; 3 L.B. FRANCE, REPORTS OF CASES AT LAW AND IN CHANCERY DETERMINED IN THE SUPREME COURT OF COLORADO TERRITORY AND IN THE SUPREME COURT OF THE STATE OF COLORADO (1911).

895. Dina C. Carson, *Faculty, Staff and Administrators of the University of Colorado, 1877–1921*, 43 BOULDER GENEALOGICAL SOC. Q. 3, 66 (2011).

896. THE CONSTITUTION OF THE STATE OF COLORADO ADOPTED IN CONVENTION, MARCH 14, 1876; ALSO THE ADDRESS OF THE CONVENTION TO THE PEOPLE OF COLORADO (Denver, 1876).

897. 35 Tex. 473 (1872).

898. *Id.* at 475.

> pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.[899]

The military arms-only interpretation was also adopted by courts in Tennessee and Arkansas.[900]

Eminent as Justice Wells was, his short note to himself is not the best interpretation of the text. It was not consistent with the arms habits of Coloradans. We have a good idea of the types of guns that some Colorado gun stores carried. Colorado consumers wanted shotguns, rifles, carbines, repeaters, single-shots, bowie knives, other knives, the biggest dragoon handguns, little pocket revolvers, and ladies' pocket derringers. I have not found any advertising for "the field piece, siege gun, and mortar." Pocket handguns are good for personal defense, and not well-suited for military use.

The military-only rule does not fit with the text of the Colorado Constitution. The text plainly calls out two separate purposes: "in defense of his home, person and property, or in aid of the civil power when thereto legally summoned."[901] A military-only rule could fit only with the second purpose. It is true that some military arms, such as muskets and holster pistols, can be suitable for "defense of home, person, or property." But artillery is not. To follow *English* would mean that a person defending her family from a home invader could use a mortar, but not a bowie knife or a pocket revolver. This seems counterintuitive.

Given that Justice Wells was just writing a note to himself, and not a judicial opinion, it is possible that he might have further developed his views on section 13 if he had ever been presented a case challenging the constitutionality of an arms control.

C. Practices of the Time

Among the sources of original meaning are the practices of the time, as people exercised their rights. During the pre-statehood period,

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899. *Id.* at 476. An earlier Texas case had stated that bowie knives were part of the Texas Constitution right to arms, but extra punishment could be imposed for using a bowie knife in a criminal homicide. Cockrum v. State, 24 Tex. 394, 401 (1859). By adopting a military-only theory, the *English* court was able to remove bowie knives from constitutional coverage: "The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary." *English*, 35 Tex. at 477. To Justice Wells, this seemed the benefit of the military-only rule.
The *English* court bemoaned the Spanish influence on Texas culture, which the court blamed for Texans' affinity for arms. Unlike the common law, Spanish law bore Carthaginian, Visigoth, Arab, and other influences. *Id.* at 479–80. As for Texas's founding traditions, born from its war of independence against Mexico, and its frontier conditions, "[w]e will not say to what extent the early customs and habits of the people of this state should be respected and accommodated, where they may come in conflict with the ideas of intelligent and well-meaning legislators." *Id.*

900. *See* Fife v. State, 31 Ark. 455, 459 (1876); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182–89 (1871).

901. COLO. CONST. art. II, § 13.

Coloradans had witnessed and taken advantage of rapidly improvement firearms technology. Coloradans after 1876 continued to do so.

The firearms improvements between the 1858 gold rush and the 1876 constitution were discussed in Section I.C. The Colorado Founders had every reason to expect that improvements in older types and the introduction of newer types would continue. The newest developments could be confirmed by a short visit to the nearby gun stores of Gove and Lower.

Among the most important innovations after 1876 was modern smokeless gunpowder.[902] Also, there were new firearms with actions that could do the same work as the lever action, but slightly faster (the pump action, bolt action, and semi-automatic action);[903] and the detachable box magazine (faster to reload than a tubular magazine).[904] Before the century was over, an ordinary consumer could buy a semi-automatic handgun and a twenty-round magazine for the handgun.[905]

Although firearms technology advanced during the twentieth century, much of the advances were simply improvements of what was already on the market in the nineteenth. The twentieth century brought better materials, closer-fitting parts, more precise ammunition, and greater quality for lower prices.[906]

When the Second Amendment was framed, handguns existed; most were single-shot and some expensive ones were multi-shot.[907] This is one reason (but not the only reason) why handguns as a class may not be banned today. Likewise, the 1876 exercise of the right to arms in Colorado included pocket revolvers,[908] which suggests that banning small handguns would be unconstitutional.

Similarly, among the most common arms by 1876 were repeaters that could rapidly fire many shots. This suggests that a ban on repeating arms

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902. This made ammunition much more powerful, and people had to buy new firearms to use it. Because smokeless powder made indoor shooting galleries possible, cities revised their firearms discharge laws to allow for indoor target ranges, as discussed *infra* Section VI.C.

903. For example, Marlin pump action repeaters were on the market by the early 1880s. Among their outlets was the Leadville Armory. *See* GARAVAGLIA & WORMAN, *supra* note 2, at 196. The pump action (a/k/a slide action) and bolt action had both been patented before the Civil War but did not become common until later. The semi-automatic action was invented in 1885. In a pump action, bolt action, or semi-automatic, the gun shoots one round every time the trigger is pressed. Thus, they are not machine guns or automatics, which fire continuously as long as the trigger is held.

904. This had been invented in 1862 but was not incorporated in a popular firearm until 1896. David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 856–57 (2015).

905. *Id.* at 857.

906. JOHNSON ET AL., *supra* note 2, at 521–23.

907. *See* David Kopel, *Firearms Technology and the Original Meaning of the Second Amendment*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/03/firearms-technology-and-the-original-meaning-of-the-second-amendment.

908. *See supra* note 293 and text accompanying note 694.

would be invalid, including any ban on the various types of repeating arms that became common in the final two decades of the nineteenth century: pump action, bolt action, and semi-automatic. As discussed above, the eighteen-shot Winchester model 1866 had been a big success for a decade before the Colorado Constitution. Repeating arms with magazine capacities in the high teens and twenties were familiar in 1876 and more would be brought to the market in the remainder of the century.[909]

D. Law and Order After Statehood

By the last two decades of the century, the grave dangers of the territorial days were long gone. The Civil War was over, and there were no threats of secession anywhere. The Indians were mostly finished as military powers; whatever off-reservation Utes might do, they could not pose a risk to the survival of the state.

Although the judicial system was well-established, obviating the need for people's courts, people were still mainly responsible for their own self-protection. As of 1887, Denver's population of 65,000 had only forty-three police officers.[910] Escape from Denver's jail (a converted meat market) was not difficult.[911] Besides that, some of the leadership of Denver's police department in the latter 1880s had a close alliance with a notorious gang of burglars and thieves.[912]

Nevertheless, Denver was much more peaceful than its Eastern image. When Alexander Graham Bell visited, he was surprised to report, "I have not, since I have been here, seen a single buffalo, a single cowboy, a single Indian, and I have been in Denver six hours and I have not been shot at."[913]

In Denver, the largest exercise of the right to keep and bear arms "in aid of the civil power when thereto legally summoned"[914] was probably in 1880. A few days before the general election, a Denver Democrat election parade turned into an anti-Chinese riot; the mob hanged a Chinese man for no reason other than his race.[915] The riot was suppressed with difficulty by

909. *See supra* Section I.C; Kopel, *supra* note 904, at 853–57.

910. LEONARD & NOEL, *supra* note 2, at 66.

911. *Id.*

912. *See, e.g.*, 4 HALL, *supra* note 2, at 447 (describing the Chief of Police of Denver's close connection to burglars and thieves). As a result, the legislature in 1891 put the Denver police under the control of commissioners appointed by the Governor, which led to cleanup of the department. *Id.* at 448. In 1894, Progressive Governor Davis Waite exercised his statutory right to fire Denver's Police and Fire Commissioners. They responded with an armed take-over of the municipal building, leading to an armed siege in which Governor Waite summoned the state militia. This was known as the "City Hall War." The Colorado Supreme Court upheld Waite's authority over the commissioners but criticized him for summoning the militia. *In re* Fire & Excise Comm'rs, 36 P. 234, 239–41 (Colo. 1894).

913. LEONARD & NOEL, *supra* note 2, at 123.

914. COLO. CONST. art II, § 13.

915. 3 HALL, *supra* note 2, at 25–26. One Chinese laundry was protected from the rioters "by a notorious gambler and desperado named 'Jim Moon,' who stood in front with a cocked revolver in

the authorities. To preserve order at the polls a few days later, Denver Sheriff Spangler summoned a posse of 500 men.[916]

In Custer County in 1878, a gang of claim jumpers took over a mine and terrorized the nearby town of Rosita, shooting and severely wounding a local man. The next morning, the authorities closed all the saloons and set up a cordon around the town. "A company of well-armed citizens" confronted and killed one of the gang's leaders, captured the rest, and spared their lives, contingent on their promise to leave and never return.[917]

In the last two decades of the nineteenth century, Las Animas County had a serious crime problem. The county seat, Trinidad, was called "the hardest town in the west . . . ."[918] Even if not literally the hardest, it was hard.[919]

A study of Las Animas County reported a homicide rate of over twenty persons per 100,000 population in 1880–1899.[920] This is about four times the current U.S. homicide rate.[921] It is double the peak national homicide rates of the twentieth century, in 1980 and 1991.[922] However, the Las Animas figure includes the many homicides that were later determined to be lawful, according to grand or petit juries.[923] Firearms were very

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each hand . . . ." *Id.* at 27. As the crowd grew nearer, "he raised his pistols and commanded a halt, saying, 'This Chinaman does my washing, and "By the Eternal!" you shall not harm a hair of his head.'" The mob went elsewhere. *Id.*

916. *Id.* at 27–28.

917. 4 HALL, *supra* note 2, at 109.

918. *See* TAYLOR, *supra* note 2, at 125.

919. *Id.* (calling "hardest town" label "not quite" correct, due to the advanced level of commerce and presence of professionals in town). The town was known as a refuge for criminals from elsewhere, in part because the locals tended to accept whatever story a new arrival told. PAUL D. FRIEDMAN, VALLEY OF LOST SOULS: A HISTORY OF THE PINON CANYON REGION OF SOUTHEASTER COLORADO 96 n.31 (1988). Sheriff Juan Tafoya, one of the original settlers, was murdered while discharging his duties in 1872. 4 HALL, *supra* note 2, at 192.

920. CLARE V. MCKANNA, JR., HOMICIDE, RACE, AND JUSTICE IN THE AMERICAN WEST, 1880–1920, at 40 fig.2.9 (1997) (21.4 in 1880–84; 20.6 in 1885–89; 10 in 1890–94; 26.6 in 1895–99).

921. *See* Criminal Justice Info. Servs. Div., *2015 Crime in the United States*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-1 (last visited Jan. 12, 2018). The 2015 rate was 4.9 homicides per 100,000 population. *Id.* tbl. 1.

922. *See* National Archive of Criminal Justice Data, *Estimated Crime in the United States-Total*, FED. BUREAU INVESTIGATION, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm (select "United States-Total" and "Violent crime rates") (last updated Jan. 26, 2017). The peak U.S. homicide rate in modern times was 10.2 in 1980. *Id.* The peak thereafter was 9.8, having occurred most recently in 1991. *Id.* Although statistics from earlier in the century are less certain, homicide rates during the alcohol prohibition came close to these levels. Douglas Lee Eckberg, *Estimates of Early Twentieth-Century U.S. Homicide Rates: An Econometric Forecasting Approach*, 32 DEMOGRAPHY 1, 1 (1995); *see Homicide Rates 1910-1944*, SCHAFFER LIBR. DRUG POL'Y, http://www.druglibrary.org/schaffer/Library/homrate1.htm (last visited Jan. 4, 2018).

923. *See* MCKANNA, *supra* note 920, at 161; *see also id.* at 30–33 (counting shootings by law enforcement); *id.* at 161 (relying on coroner's records, which do not differentiate lawful and unlawful homicide), *id.* at 95–96 (about 70% of homicide prosecutions resulted in dismissal of charges or a not guilty verdict); *Homicide Rates 1910-1944*, *supra* note 922.

commonly carried, both openly and concealed, and law enforcement paid little attention to the state statute against concealed carry.[924]

Starting in the 1850s, Hispanic families from northern New Mexico had begun settling in the San Luis Valley and were joined by whites in the 1860s.[925] The population mix began to change following the discovery of vast coal mines in southern Colorado. Many immigrants from southern and eastern Europe came to work in the mines. Initially, they were mainly Italians, but over time, a very diverse group of nationalities moved in.[926] Eventually, many brought their families.[927] Sometimes, they lived in company towns, which were more prevalent after 1900 than before.[928]

In some company towns, the only recreational facility was a saloon.[929] The diverse ethnic groups among the miners did not always get along well with each other.[930] And saloons had always had fights for all sorts of reasons. Because of guns and knives, some fights became homicides.[931] To make things worse, the Italian miners were continuing their homeland custom of vendettas, which led to plenty of unsolved homicides.[932]

When the Colorado right to arms was enacted in 1876, Coloradans were well aware that criminals misused guns. The criminal problem was no justification for prohibiting arms. To the contrary, persons were guaranteed the right to defensive arms. Pursuant to the constitutional guarantee, nineteenth-century legislators, while aware of the crime problem, did not infringe on the rights of Coloradans to possess and to openly carry arms, as will be detailed in the next Section.

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924. *Id.* at 25–27, 93, 113. As of 1874, the Trinidad custom was to carry two guns. *See* TAYLOR, *supra* note 2, at 146.

925. FRIEDMAN, *supra* note 919, at 25, 40; 4 HALL, *supra* note 2, at 192. On Christmas Day 1867, a drunken wrestling match between an Anglo and a Hispanic led to several days of inter-racial violence, with order restored after several days by the Sheriff. 1 HALL, *supra* note 2, at 451. This was known as the Trinidad War. BERWANGER, *supra* note 2, at 114.

926. MCKANNA, *supra* note 920, at 113.

927. *See id.* at 83.

Colorado Fuel and Iron Company ("CF&I") was the largest private employer and the largest private land-owner in Colorado. Jay Trask, *Introduction* to STACI COMDEN ET AL., MINING TOWNS IN SOUTHERN COLORADO 7, 7–8 (2013). Perhaps partly in response to the growing number of families, in 1901 CF&I created a Sociological Department, which made many constructive improvements in the company towns; however, a management change in 1908 ended many of the Department's programs. RICK J. CLYNE, COAL PEOPLE: LIFE IN SOUTHERN COLORADO'S COMPANY TOWNS, 1890–1930, at 20 (1999).

928. MCKANNA, *supra* note 920, at 84–85.

929. *Id.* at 89–90.

930. *Id.* at 157.

931. *Id.* at 90. Companies did sometimes expel miners who engaged in alcohol-fueled violence. CLYNE, *supra* note 927, at 88.

932. MCKANNA, *supra* note 920, at 98–101.

VI. ARMS LAWS AFTER RATIFICATION OF THE COLORADO CONSTITUTION

Scrupulous adherence to the 1876 constitution was not exactly the norm in late-nineteenth century Colorado. The era was characterized by

> executive and legislative disrespect for constitutional mandate. There was little effort to keep state expenses within constitutional limits of state revenue. County and state debt ceilings proved meaningless. As if negligence toward tax and debt restrictions were not enough, the legislature compounded this apathy by robbing the inviolate school fund to finance its own illegally excessive appropriations.[933]

Even so, state legislation after 1876 was almost always compliant with the constitutional right to arms.

There were laws punishing use of a firearm or deadly weapon in a violent crime, in dueling, in helping a prisoner escape, and so on. Employing a firearm to commit violent crimes is obviously not part of the right to keep and bear arms. The other types of arms control laws were almost always respectful of article II, section 13.

A. Arms Carrying

As of 1890, a state statute prohibited concealed carry everywhere when done "with intent to assault."[934] Peaceable concealed carry was prohibited "within any city, or town, or village in this state, whether the same be incorporated or not . . . ."[935] Perhaps because of slack enforcement of the ban on concealed carry in towns, an 1891 revision ordered law enforcement officers to arrest all persons carrying concealed in towns. If a law enforcement officer failed to do so, any freeholder could bring a suit for the officer to be fined.[936]

In the nineteenth century, many municipalities enacted concealed carry bans, as the constitution expressly permits.[937] Gunnison banned

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933. Hensel, *supra* note 2, at iii. In the Seventh General Assembly (1887–88), members stole enormous quantities of furniture, stationary, ink, dictionaries, and carpets. They also repudiated the warrants that had been used to purchase the supplies. 4 HALL, *supra* note 2, at 15.

934. 1 MILLS' ANNOTATED STATUTES OF THE STATE OF COLORADO § 1365 (J. Warner Mills ed., 1891) [hereinafter 1 MILLS' ANNOTATED STATUTES]. For prior versions, see THE GENERAL STATUTES OF THE STATE OF COLORADO § 871 (1883); REVISED STATUTES OF COLORADO § 150 (1868); GENERAL LAWS OF THE STATE OF COLORADO § 749 (1877).

935. 1 MILLS' ANNOTATED STATUTES, *supra* note 934, § 1364.

936. LAWS PASSED AT THE EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF COLORADO 129 § 1 (1891).

937. *E.g.*, THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, ch. VI, art. III, § 16 (Alfred C. Phelps ed., 1878) (misdemeanor to carry concealed "any pistol, bowie knife, dagger or other deadly weapon" with a fine of five to fifty dollars); THE REVISED ORDINANCES OF THE CITY OF GREELEY, no. 88, § 17 (C.D. Todd ed., 1908); THE ORDINANCES OF GEORGETOWN ch. VIII, art. IV, § 9 (Edward O. Wolcott ed., 1877).

For similar ordinances in the early twentieth century, see, for example, THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER ch. XXXII, art. 7, §§ 1332–33 (Charles W. Varnum & J. Frank Adams eds., 1906) (banning concealed carry or "in a threatening manner to display" and providing for return

concealed *and* open carry, as did Pueblo in 1879. This was contrary to the constitutional text. Pueblo fixed its law in 1889, prohibiting only concealed carry.[938]

In 1911, the statewide concealed carry statute would be revised in three ways. First, the nineteenth-century ban on concealed carry in towns was expanded to be applicable throughout the state. Second, the nineteenth-century statutes had applied to concealed carrying of "firearms" or "deadly weapons." In 1911, this was restated to prohibit concealed carrying "any firearms, as defined by law, nor any pistol, revolver, bowie knife, dagger, sling shot, brass knuckles, or other deadly weapon."[939] Third, the statute for the first time allowed people to be licensed to carry concealed. The concealed carry ban did not apply to a person who was "authorized to do so" by a police chief, mayor, or sheriff.[940] The licensing systems created by municipalities tended to be highly discretionary.[941] A century later, the general assembly's 2003 Concealed Carry Act created a uniform and objective statewide system for concealed carry permits to be issued by County Sheriffs.[942] The current statewide law preempts all municipal regulation.[943]

B. Loose Gunpowder Safe Storage

In the eighteenth century, gunpowder for firearms was carried loose, such as in a powder horn.[944] To load a muzzle-loading firearm, the user first poured in loose gunpowder from the front of the gun (the muzzle). Then he or she would use a ramrod to shove a round bullet down the muzzle.[945] However, beginning in the early-nineteenth century, loose gunpowder for firearms became obsolete. Paper cartridges came into use;

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of the arm if the defendant pays the fine and does not appeal; forfeited arms to be sold by the police magistrate at public auction); ORDINANCES OF THE CITY OF IDAHO SPRINGS COLORADO ch. XVI, art. II, § 275 (F.L. Collom ed., 1905) (no concealed carry; exemptions include the Mayor and Board of Alderman "when executing their legitimate duties").

938. ORDINANCES OF THE CITY OF PUEBLO no. 523, § 6 (D.A. Highberger & John A. Martin eds., 1908). The book was published at the request of the City Council. *Id.* at 9. The front matter includes a Certificate from the City Clerk attesting that the book is a true copy of the city ordinances. The attestation is dated April 1, 1908. *Id.* The Ordinance states: "Any person who shall, within the limits of the city, carry concealed upon his or her person any pistol, bowie knife, dagger or other deadly weapon, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five nor more than fifty dollars; provided, that this section shall not be construed to apply to any sheriff, constable, marshal, policeman or other officer authorized by law or ordinance to make arrests." *Id.* no. 523, § 6. It was enacted Aug. 19, 1889, as part of Ordinance no. 207. *Id.*

939. 1 MILLS' ANNOTATED STATUTES OF THE STATE OF COLORADO § 1964 (J. Warner Mills ed., rev. ed. 1912).

940. *Id.*

941. *See, e.g.*, THE CODE OF COLORADO SPRINGS 1922, ch. VII, art. 1, § 596 (F. L. Sherwin et al. eds., 1922) (city manager can "grant to any and all such persons as he may think proper, license to carry concealed weapons and may revoke any and all such licenses at his pleasure").

942. COLO. REV. STAT. § 18-12-203.

943. *See id.* § 18-12-201; State v. City & Cty. of Denver, No. 03CV3809, 2004 WL 5212983, at 13–14 (Colo. Dist. Ct. Nov. 5, 2004) (upholding completely preemptive effect of Concealed Carry Act), *aff'd by an equally divided court*, 139 P.3d 635 (Colo. 2006) (mem.).

944. WHELAN, *supra* note 179, at 4–5.

945. *Id.*

they contained the gunpowder and the bullet in a single unit.[946] Metallic cartridges became available in the 1850s and are still the type of cartridge in use today.[947] They contain the bullet, gunpowder, and primer in a single metal case.

Relatively few immigrants to Colorado in the gold rush days, or thereafter, would have needed loose gunpowder for their firearms. Presumably some collectors or poor people had old-fashioned guns that used loose powder. Businesses or hobbyists that manufactured ammunition would of course have large quantities. By far the largest quantities of loose powder would have been possessed for mining, which continued to be the most important economic activity in Colorado. Many municipalities enacted safe storage laws for loose gunpowder. Such laws limited the quantities that could be possessed in a single building, required that gunpowder be stored in sealed tins, and limited gunpowder handling at night, after candles and oil lamps had been illuminated.[948]

Denver was the commercial hub of the Rocky Mountain region,[949] so its merchants were handling large quantities of inbound and outbound powder. A Denver ordinance built on the above model[950] and added detailed rules for safe transport and related activities; for example, powder kegs had to be secured so they did not spill when being transported on city streets.[951]

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946. *Id.* at 8.

947. JOHNSON ET AL., *supra* note 2, at 402.

948. *E.g.*, THE REVISED ORDINANCES OF THE CITY OF GREELEY, *supra* note 937, no. 88, § 27; THE ORDINANCES OF GEORGETOWN, *supra* note 937, ch. V, art. III, § 11 (people may keep no more than fifty pounds of gunpowder; it must be in tin or copper containers of no more than five pounds each; no weighing of gunpowder after the night lighting of lamps, unless in sealed containers). For similar ordinances from the early twentieth century, see ORDINANCES OF THE CITY OF IDAHO SPRINGS COLORADO, *supra* note 938, ch. VIII, art. IV, §§ 105–08; THE CODE OF COLORADO SPRINGS 1922, *supra* note 941, ch. VIII, art. 9, §§ 798–807.

In September 1864, at M.L. Rood's gun shop in Denver, a workman "accidentally discharged a gun, not knowing that it was loaded. The fire from the piece ignited the powder in three or four open kegs, and the result was an instantaneous demolishment of the building and adjoining premises. Fortunately, but one man was fatally injured." RONZIO, *supra* note 2, at 55. The accident was caused by a violation of the cardinal rule of gun safety, which is: Treat every gun as if it is loaded. Bruce Gray, *The Four Cardinal Rules of Safe Gun Handling*, GRAYGUNS (July 19, 2009), https://grayguns.com/the-four-cardinal-rules-of-safe-gun-handling. But there was yet no American organization dedicated to teaching gun safety; the National Rifle Association would not be formed until 1871. WHELAN, *supra* note 179, at 625.

Rood apparently went back into business, presumably with safer practices, since his store is listed in the 1866 Business Directory. RONZIO, *supra* note 2, at 251.

949. LEONARD & NOEL, *supra* note 2, at 12 ("As an inland port on the prairie ocean's western shore, Denver emerged as a supply and service center destined to outlast most of the mining centers.") Denver was "the warehouse and distribution center of the Rockies." *Id.* at 93.

950. THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, *supra* note 938, ch. XV, art. III, §§ 12–14 (gunpowder storage among the "Precautionary Regulations" in Fire Department laws); *see also id.* § 40(18) (City Council may "regulate the storage and transportation of gunpowder, tar, pitch, resin, and other combustible material").

951. THE LAWS AND ORDINANCES OF THE CITY OF DENVER, COLORADO ch. 7, art. 2, §§ 5–12 (Isham White ed., 1886).

C. Firearms Discharge

Some localities forbade firearms discharge within city limits. There were provisions to issue permits for shooting matches.[952] These early ordinances did not have explicit exceptions for defensive firearms use, but a ban on self-defense would obviously have been unconstitutional.[953] There is no known record of any prosecution for lawful defensive use under the firearms discharge ordinances.

As of 1876, gunpowder was the traditional black powder, fundamentally the same as gunpowder had been since its invention many centuries before, albeit with many improvements in manufacturing and quality.[954] Black powder creates a great deal of smoke, so indoor shooting ranges were impossible.

Indoor ranges became practical after 1884, when modern "smokeless" gunpowder was invented.[955] It was more powerful than black powder and much more stable (and hence much less likely be ignited by accident). Smokeless powder burns cleaner than black powder. This made repeating firearms more useful because the user would not have to deal with obscurity caused by a cloud of smoke from the first shot. The more complete burning of smokeless powder also left less residue, so that guns were more accurate, and did not need to be cleaned so often.[956] This was particularly helpful for repeating arms, whose internal parts interact more precisely than the parts for a single-shot firearm.[957]

After Denver was granted home rule by constitutional amendment in 1902, the new city code re-enacted these regulations. THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER, *supra* note 938, ch. XXI, arts. 1–3.

952. *E.g.*, THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, *supra* note 938, ch. 6, art. II, § 1 (also applying to cannons and "any squib, cracker" or anything else "containing powder or other combustible or explosive material"); THE REVISED ORDINANCES OF THE CITY OF GREELEY, *supra* note 937, no. 88, § 26; THE REVISED AND GENERAL ORDINANCES OF THE CITY OF LEADVILLE ch. VII, art. II, § 1 (Daniel Sayer ed., 1881); THE ORDINANCES OF GEORGETOWN, *supra* note 937, ch. VIII, art. II, § 1 (no firearms discharges or other explosions without permission).

953. *Cf.* THE CODE OF COLORADO SPRINGS 1922, *supra* note 941, ch. VII, art. 2, § 607 (firearms discharge exception for any "necessary or lawful act, the same being done in a proper and careful manner").

954. JOHNSON ET AL., *supra* note 2, at 409.

955. *See* TENNEY L. DAVIS, THE CHEMISTRY OF POWDER AND EXPLOSIVES 292 (1943). Blackpowder is a mixture of sulfur, charcoal, and saltpeter. JOHNSON ET AL., *supra* note 2, at 409. Smokeless powder is made from insoluble nitrocellulose, soluble nitrocellulose, and paraffin. DAVIS, *supra*, at 292.

956. For blackpowder, about 35% of the gunpowder is converted into gas (which pushes the bullet down the barrel out the muzzle), and 65% remains as residue. In smokeless powder, 70% becomes gas, and only 30% solid residue (*fouling*). Because smokeless powder is over twice as efficient, the quantity of powder needed is cut in half. Reducing the quantity of gunpowder further reduces the amount of residue, so smokeless powder left only about one-quarter as much residue as did blackpowder. *See* GREENER, *supra* note 160, at 560.

957. *See* BROWN, *supra* note 160, at 11. In a repeating firearm, if the first and second shots leave less residue in the barrel, then the third shot does not have to push past so much residue. There is less interference with the spin and the perfect forward motion of the bullet, so the bullet will exit the muzzle more precisely on its path to the target. *Id.* Additionally, powder fouling creates corrosive salts, which promote rust. So the advent of smokeless powders significantly improved firearms durability. *Id.*

The transition from black powder to smokeless powder took several decades. The first commercial smokeless powder for rifle ammunition was not introduced until 1894.[958] Most people who wanted to start using ammunition with smokeless powder had to buy new guns; smokeless powder creates a stronger explosion than black powder, and hence greater pressure inside the gun's firing chamber. Newer guns, taking advantage of advances in metallurgy, had the strength to handle smokeless powder.[959]

Smokeless powder made possible the creation of indoor shooting galleries, which proliferated in the following decades. It also made shooting more pleasant (much less smoke, and lower recoil because less powder was needed). It thus helped the growth of recreational shooting. Consequently, municipal firearms discharge laws adapted to authorize firearms discharge in shooting galleries and to provide for operation of galleries under the standard licensing system for public places of amusement.[960]

D. Indians

In addition to the revision of the state concealed carry statute, the other notable nineteenth-century gun control statute was also enacted in 1891. The legislature prohibited giving or selling arms to Indians.[961]

Although Indian military activity was much-reduced compared to the 1860s, Colorado still had a problem with off-reservation Utes.[962] In New Mexico and Arizona, the great Apache warrior Geronimo did not surrender until 1886.[963] Meanwhile, the Ghost Dance movement was growing rapidly. The Ghost Dance aimed to create an Indian alliance of resistance and spiritual revival.[964] "The rapid spread of the pan-Indian Ghost Dance caused hysteria among white people and the federal government."[965] One result was Wounded Knee Massacre, in South Dakota, on December 29, 1890, in which U.S. Army forces attempted to disarm the Sioux, and then

958. WHELAN, *supra* note 179, at 302.

959. *See* ROSE, *supra* note 696, at 219 (describing the 1873 invention of decarbonized Bessemer steel, which was much stronger than previous forms of steel).

960. *E.g.*, THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER, *supra* note 938, ch. XXXII, art. 3, § 1277 (firearms and air gun discharge allowed "in shooting galleries or in any private grounds or residence where the projectile fired or discharged from any such gun or device will not traverse any space used in a public way"); *id.* ch. XXXII, art. 4, § 1295 (licensing for shooting matches); *id.* ch. XLVI, §§ 1612–15 (licensing for shooting galleries; pre-license safety inspection of the gallery; no commercial galleries on blocks that are at least two-thirds exclusively residential, without consent of the majority of owners on the block); THE CODE OF COLORADO SPRINGS 1922, *supra* note 941, ch. V, art. 7, §§ 247–50 (licensing for billiard halls, bowling alleys, and shooting galleries).

961. LAWS PASSED AT THE EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF COLORADO, *supra* note 937, at 132 § 1.

962. *See supra* Section II.D.2.

963. EDWIN R. SWEENEY, FROM COCHISE TO GERONIMO: THE CHIRICAHUA APACHES, 1874–1886, at 573 (2010).

964. DAVID HUMPHREYS MILLER, GHOST DANCE vii (1959).

965. SIMMONS, *supra* note 2, at 209.

killed about 200 of them.[966] Perhaps this explains the enactment of the 1891 Colorado statute a few months later.

It is true that as of 1891, most Indians were not citizens.[967] But this was not relevant to the Colorado right to arms, which was for the "person," not only the "citizen."[968] The 1891 law did not outlaw arms *possession* by Indians, only the transfer of arms to Indians. An Indian could lawfully travel to another state or territory, buy a firearm there, and bring it home to Colorado.[969]

The 1876 Colorado Constitution had been free of racial prejudice. Instead, it had insisted that in the public schools, "nor shall any distinction or classification of pupils be made on account of race or color."[970] This

966. *See* JAMES MOONEY, THE GHOST-DANCE RELIGION AND WOUNDED KNEE 869–71 (1973). The Ghost Dance touched Colorado, encompassing the state's only reservations, namely the Ute reservations in the southwest. *See id.* at 653–54 (map). The movement was popular in the Cheyenne and Arapaho reservations in Indian Territory (the future state of Oklahoma). *Id.* at 774–78. The Ghost Dance movement was pan-Indian and messianic, hoping that the whites would vanish, the buffalo would return, and the Indians could resume their old way of life. While this miraculous expectation was peaceful, the Sioux interpretation was more militant, and believed that the ghost shirt rendered the wearer invulnerable to bullets. *See id.* at 791, 831.

967. *See* Elk v. Wilkins, 112 U.S. 94 (1884) (demonstrating that throughout the nineteenth century, Indians born on reservations were considered citizens of their respective tribal nations, not citizens of the United States, even if they had left the reservation). The 1887 General Allotment Act (Dawes Act) allocated Indian lands in severalty, in lots of 40, 80, or 160 acres. Indians who owned landed were granted citizenship, but not voting rights. SIMMONS, *supra* note 2, at 207. This was applied to Colorado's Southern Ute reservation by the 1895 Hunter Act. ch. 113, 28 Stat. 677; SIMMONS, *supra* note 2, at 217–18.

Finally, all Indians were granted citizenship by the Indian Citizenship Act of 1924. *See* Snyder Act, ch. 233, 43 Stat. 253 (1924) ("all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."). Nevertheless, several states, including Colorado, denied voting rights to some adult Indians. Before a state constitutional amendment in 1970, persons residing on federal land (including military bases, and Indian reservations) were not considered Colorado residents for voting purposes. Colo. Const., art. 7, § 1a (barring the denial of the right to vote "because of residence on land situated within this state that is under the jurisdiction of the United States"); Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1, 7 F. Supp. 2d 1152, 1161–62 (D. Colo. 1998) (describing the effect of 1970 amendment on reservation Indians).

968. *See supra* Section IV.A.

969. Federal law did not restrict interstate arms sales until the Gun Control Act of 1968. 18 U.S.C. § 922 (a)(1). The Colorado legislature immediately enacted the requisite legislation, pursuant to the terms of the 1968 federal law, to allow long gun sales from contiguous states. COLO. REV. STAT. §§ 12-27-101 to -104 (repealed 2014) ("It is declared by the general assembly that it is lawful for a resident of this state, otherwise qualified, to purchase or receive delivery of a rifle or shotgun in a state contiguous to this state, subject to [certain] restrictions and requirements . . . ."). In 1986, Congress revised the Gun Control Act to re-legalize all interstate long gun sales, so long as the sale was a face-to-face transaction from a licensed dealer in the state where the buyer did not reside, and complied with the laws of both states. Pub. L. No. 99-308, 100 Stat. 449. Colorado later updated its authorization of contiguous state sales to allow long gun sales from all states. Act of May 2, 2014, ch. 147, 2014 Colo. Sess. Laws 498 (repealing aforesaid statute that long guns may only be bought from contiguous states).

970. COLO. CONST. art. IX, § 8. The 1876 constitution, and not the 1891 statute, better reflected Colorado's character. In the early statehood days:

> Utes, Spanish-Americans, Sante Fe traders, border-state Southerners, Welsh miners, and Union veterans now all lived under a constitution borrowed from Pennsylvania and Illinois. . . . Meanwhile, Texans like Charles Goodnight and German-Americans like Colonel Pfeiffer ranched on Mexican land grants in the southern counties, while whole colonies of

included people whose families or ancestors had once lived in Europe, Africa, Latin America, or Asia (the small Chinese population that had begun settling in Colorado), and of course Indians.

Unfortunately, the national problem of racial prejudice had grown much worse by the 1890s than it had been in the 1870s.[971] The 1891 Indian statute is a confirmation of the Convention's mistrust of legislatures, and is consistent with the legislature's proclivity, during this period, for flagrantly ignoring constitutional commands.[972] By 1891, the legislature was a greater threat to law and order than were the Indians. The legislature's behavior was one reason why the 1892 elections turned the state government upside down, giving Colorado a Populist Governor, forty Populist state legislators, and Populist control of the Colorado Senate.[973] For the remainder of the century, the legislature resumed its custom of not enacting gun laws that touched the constitutional right.[974]

E. Posse Comitatus and Militia

The only other arms control statutes in nineteenth-century Colorado required persons to carry out their duties to aid of the civil power. Posse comitatus service was a common law duty, but the common law had no specific punishment for refusing a summons. Reenacting legislation from territorial days, the state legislature made refusal to serve in the posse comitatus to aid a sheriff or other law enforcement official a criminal

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settlers from New York, Chicago, and St. Louis settled at Longmont and Greeley. Colorado was indeed a frontier melting pot.

LAMAR, *supra* note 2, at 255.

971. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 2–3 (2009) (describing the spread of laws against inter-racial marriage); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 36–37, 40 (2001) (describing the spread of occupational licensing and other laws designed to suppress blacks' economic liberty and prevent free commerce between blacks and whites, such as inter-racial hair cutting).

972. *See supra* note 867.

973. Davis B. Waite was Colorado's first and only Governor who was not a Republican or Democrat. Tom Noel, *Gubernatorial Race Takes Place in History*, DENV. POST (August 26, 2010) (updated May 5, 2016), http://www.denverpost.com/2010/08/26/gubernatorial-race-takes-place-in-history. The 1893 State House had 27 Populists, 5 Democrats, and 33 Republicans. The Senate (elected for four-year terms on an alternating biennial cycle) had 13 Populists, 7 Democrats and 15 Republicans. Populist David Nichol was President of the Senate. Jerry Kopel, *Carry Holly*, JERRYKOPEL.COM (Aug. 8, 2008) (originally published in *The Colorado Statesman*), http://www.jerrykopel.com/2008/Carry-Holly.htm.

974. Shamefully, the Indian sales ban lingered in the statute books until repealed in 1971 as part of a comprehensive recodification of the Criminal Code. *See* Act of June 2, 1971, ch. 121, 1971 Colo. Sess. Laws 388, § 1 (repealing all of title 40, the Colorado Criminal Code); COLO. REV. STAT. § 40-11-3 (1953); COMPILED LAWS OF COLORADO 1921, *supra* note 846, § 6889, at 1776; COLO. REV. STAT. § 1832 (1908). It may not have been much enforced, if at all, but it did serve as an official endorsement of racial discrimination.

offense.[975] Some local laws also provided for the posse comitatus.[976] Separately, other statutes further organized the militia.[977]As of 1900, the above were the only statewide gun control laws in Colorado.[978]

CONCLUSION

Colorado has long had a thriving arms culture. It started with Indians and continued when settlement from the United States began in 1858. Coloradans had no tradition of pacifism; no people could have survived in Colorado if they did.

Before and after 1876, firearms were being invented and improved at an astonishing rate—the greatest period for development in firearms technology in all of history. Guns were more accurate, more powerful, longer range, faster to reload, and had much greater ammunition capacity. Coloradans enjoyed the benefits of all these improvements, partly thanks to the well-stocked firearms stores just down the street from where the Colorado Convention met.

The Colorado Constitution strongly affirms the natural right of self-defense and the right to the people to alter the government. In the Colorado system of government, the rights of the people are prior to the powers of government. Unlike some other states, Colorado chose to put the right to arms in its supreme law. The Convention chose the strongest, broadest, and clearest language available at the time. The right was extended to every "person," not just the "citizen." The right's dual purposes are personal defense and community defense. The latter is to be done under the direction of appropriate civil authorities, such as sheriffs or militia officers.

Partly because the right was expressed so strongly, it was necessary to express what type of gun control was permissible. While open carry is a constitutional right in Colorado, concealed carry is outside the right to keep and bear arms. In the statehood period during the nineteenth century, the general assembly complied with the constitution by enacting no gun

975. 1 MILLS' ANNOTATED STATUTES, *supra* note 934, § 1366. Prior versions were REVISED STATUTES OF COLORADO, *supra* note 934, § 161; GENERAL LAWS OF THE STATE OF COLORADO, *supra* note 934, § 155; THE GENERAL STATUTES OF THE STATE OF COLORADO, *supra* note 934, § 872. The statute was unchanged as of 1908. REVISED STATUTES OF COLORADO 1908, § 1836 (1908) (current version at COLO. REV. STAT. § 18-8-107 (declaring it "a class 1 petty offense" for any person eighteen years or older to "unreasonably refuse[] or fail[] to aid [a] peace officer in effecting or securing an arrest or preventing the commission by another of any offense" when so commanded)).

976. *E.g.*, THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, *supra* note 937, § 10 (Denver Mayor "is hereby authorized to call upon every male inhabitant of said city, over the age of eighteen years to aid in enforcing the laws and ordinances, and in preventing and extinguishing fires, for securing the peace and safety of the city, or carrying into effect any law or ordinance."); THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER, *supra* note 937, § 27 (allowing fine of up to $300 for refusal to serve).

977. As in other states, a small portion of the militia was organized into the state's National Guard and given training and arms.

978. *See* REVISED STATUTES OF COLORADO 1908, *supra* note 975, ch. XXXV (official compilation by the Secretary of State). No new gun controls were enacted by the General Assembly in 1901–08.

control laws other than restrictions on concealed carry. The one exception was the 1891 ban on arms sales to Indians, which seemed to treat Indians as if they had no constitutional rights. Except for that law, the firearms laws of nineteenth-century Colorado appear to have complied with the letter and the spirit of the Colorado Constitution.

ON LITIGATING CONSTITUTIONAL CHALLENGES TO THE FEDERAL SUPERMAX: IMPROVING CONDITIONS AND SHINING A LIGHT

LAURA ROVNER[†]

ABSTRACT

Prisons and jails are the most invisible part of the American criminal justice system. In this hidden world of punishment, no prison is more shrouded in secrecy than the federal Bureau of Prisons' only "supermax" prison—the U.S. Penitentiary-Administrative Maximum known as ADX. Located in a remote area of Colorado, ADX has been described by one journalist as "a black site on American soil." The men at ADX are held in solitary confinement, locked in cells the size of a parking space for twenty-three hours a day, with little or no contact with other people. Some of them have been there for decades.

This Article describes the work of the men at ADX and their lawyers, including the student attorneys at the University of Denver's Civil Rights Clinic, who have dedicated themselves to bringing the conditions at ADX into compliance with the Constitution, human rights principles, and basic human dignity. While the federal courts have found constitutional violations in some of the ADX cases but not in others, the civil rights litigation undertaken by these lawyers and clients has been instrumental in shining a light into this darkest of places.

† Ronald V. Yegge Clinical Director & Professor of Law, University of Denver Sturm College of Law. My thanks to Tommy Silverstein, Omar Rezaq, Mohammed Saleh, Ibrahim Elgabrowny, El-Sayyid Nosair, Mark Jordan, Brittany Glidden, Rhonda Brownstein, Nicole Godfrey, Lisa Greenman, Ed Aro, Deb Golden, and the *Denver Law Review* staff. This Article is dedicated to the men inside the walls of ADX, and to the CRC students who have represented their clients at ADX with skill, grit, and heart—especially Don Bounds (CRC 06-07), who passed away much too soon on June 17, 2015. Don was one of the student attorneys who litigated *Jordan v. Pugh*, discussed infra at Section III.B.1., a happy warrior for constitutional rights and a fighter of injustice wherever he encountered it. We miss you, Don.

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INTRODUCTION

> I think most people take it for granted that they are human, but when you get to the ADX, you realize that being human isn't a birthright.[1]
>
> Prisons do not disappear social problems, they disappear human beings.[2]

Perhaps the most oft-quoted description of the federal supermax prison in Florence, Colorado, was uttered by Robert Hood, its former warden, who called it "a clean version of hell."[3] The description is evocative. In historical Christian depictions, "[h]ell was likened to the carnage in which the decayed and putrid bodies of sinners, rotten with wickedness, infected the air . . . [a] pestilential sewer, the muddy bilge, the 'well' of the abyss . . . the suffocating drain in which the putrefaction of bodies polluted the air and took one's breath away."[4] This raises the question of what it means to describe the American "version of hell" as "clean."[5] Robert Johnson answers: "The pain of the condemned sinner is

1. Eli Hager, *What Life is Like in America's Highest-Security 'Supermax' Prison*, VICE (Jan. 8, 2016, 8:16 AM), https://www.vice.com/en_us/article/gqm384/what-life-is-like-in-americas-highest-security-supermax-prison.

2. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998, 12:00 PM), http://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex.

3. *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast Oct. 14, 2007), https://www.cbsnews.com/news/supermax-a-clean-version-of-hell.

4. PIERO CAMPORESI, THE FEAR OF HELL: IMAGES OF DAMNATION AND SALVATION IN EARLY MODERN EUROPE 15–16 (1987).

5. ROBERT A. FERGUSON, INFERNO 149 (2014) (emphasis omitted).

hot and visible; that of the convicted inmate cool and hidden. The emphasis on cleanliness disguises the nature of punishment in a country that does not want it to be seen."[6]

The nature of punishment dispensed in the U.S. Penitentiary Administrative Maximum (ADX), the federal Bureau of Prisons' (BOP) only supermax prison, is indeed largely unseen. The men imprisoned there are in solitary confinement, locked in cement and steel cells behind double doors for twenty-three hours a day. Most have been there for years, some for decades. Because BOP policy prohibits visits from anyone a prisoner did not know prior to incarceration, the ADX visiting room is frequently empty; some men have not received visits for years.[7] Even when visits do occur—or the two fifteen-minute phone calls per month—ADX prisoners are limited in what they are allowed to say about the prison and their conditions.[8] Mail, too, is censored.[9] And the prison routinely refuses access to reporters[10] and human rights bodies, including the U.N. Special Rapporteur on Torture, who has made repeated requests to the U.S. government for permission to visit, all of which were denied.[11] ADX is, in the words of one journalist, a "black site[] on American soil."[12]

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6. *Id.*

7. AMNESTY INT'L, ENTOMBED: ISOLATION IN THE U.S. FEDERAL PRISON SYSTEM 16 (2014).

8. *See, e.g.*, Alan Prendergast, *Fortress of Solitude*, WESTWORD (Aug. 16, 2007, 4:00 AM), http://www.westword.com/news/fortress-of-solitude-5094844 (describing the difficulty journalists face in reporting on ADX because the denial of access forces them to rely solely on accounts from the prisoners themselves, "and the view from lockdown can be quite limited"). Additionally, Prendergast notes that ADX prisoners "can be punished if they write too freely. They are not supposed to mention other prisoners or provide physical details that might mess with the good order and security of the institution." *Id.*

9. *See, e.g.*, Prison Legal News v. Fed. Bureau of Prisons, No. 15-CV-02184 (D. Colo. filed Oct. 1, 2015) (lawsuit filed by legal news magazine asserting that ADX illegally censored it in violation of the First and Fifth Amendments, the Administrative Procedure Act, and BOP regulations).

10. Alan Prendergast, *Inside ADX: The Federal Supermax Locks Inmates Down and Shuts Reporters Out*, WESTWORD (July 14, 2015, 12:06 PM), http://www.westword.com/news/inside-adx-the-federal-supermax-locks-inmates-down-and-shuts-reporters-out-6908944 ("[C]ontrary to the U.S. Bureau of Prisons' own stated policies, which indicate that media interview requests are to be evaluated on a case-by-case basis, ADX officials have routinely rejected every journalist's effort to obtain face-to-face interviews with supermax prisoners for the past fourteen years, citing unspecified 'security concerns.'"); Prendergast, *supra* note 8 (characterizing ADX as "media-proof" and describing requests made by CNN, The Washing Post, 60 Minutes, and Newsday to interview prisoners at ADX, all of which "were turned down flat").

11. Juan E. Méndez (Special Rapporteur), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/25/60/Add.2, at 124 (2013), http://antitorture.org/wp-content/uploads/2014/03/Report_Observations_Govt_Communications_Replies_2014.pdf; *see also* Stephanie Nebehay, *U.N. Torture Investigator Accuses U.S. of Delaying Prison Visits*, REUTERS (Mar. 11, 2015, 8:14 AM), http://www.reuters.com/article/us-usa-torture/u-n-torture-investigator-accuses-u-s-of-delaying-prison-visits-idUSKBN0M71J820150311.

12. *Amnesty International Challenges America's Most Restrictive Prison*, NBC NEWS (July 6, 2014, 2:46 AM), http://www.nbcnews.com/news/us-news/amnesty-international-challenges-americas-most-restrictive-prison-n156586; *see also* James Ridgeway, *Fortresses of Solitude*,

The secrecy surrounding ADX not only makes it hard to obtain reliable information about the prison's conditions and their effect on the men confined there, the nature of those conditions also makes it exceptionally difficult to effect change inside the walls. Precisely because of that secrecy and resistance to change, conditions of confinement litigation by the men who are imprisoned there has taken on a critically important role. Those who are or have lawyers (jailhouse or otherwise) sometimes win their cases, bringing critical—though often incremental—relief from constitutional violations.[13] But even when plaintiffs do not prevail in their lawsuits against ADX, the litigation still can serve a critical function, chiefly (though by no means solely) by providing increased visibility into a prison where the conditions and their effects on its inhabitants are shrouded in secrecy.

This Article proceeds in three parts. Part I discusses the invisibility of incarceration and gives a brief overview of some of the reasons why we know so little about conditions in American prisons. Part II provides some of the history and context in which the BOP created ADX and attempts to capture some of the experience of being incarcerated there. Part III describes the heightened secrecy that enshrouds ADX and the important role that federal civil rights litigation has played in exposing the conditions of confinement in the prison, including cases brought by the University of Denver's Civil Rights Clinic.

I. PRISON: THE INVISIBLE PART OF THE CRIMINAL JUSTICE SYSTEM

> When a sheriff or a marshall takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.[14]

Although the United States currently incarcerates 2.3 million people,[15] the jails and prisons in which they serve their sentences are the most invisible aspect of the American justice system.[16] As Andrea

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COLUM. JOURNALISM REV. (Mar./Apr. 2013), http://archives.cjr.org/cover_story/fortresses_of_solitude.php (describing supermax prisons and solitary confinement units as "our domestic black sites—hidden places where human beings endure unspeakable punishments, without benefit of due process in any court of law").

13. *See infra* Part III.

14. Warren Burger, *Address by the Chief Justice*, 25 REC. ASS'N BAR CITY N.Y. 14, 17 (Supp. Mar. 1970).

15. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html.

16. *See* Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. J.L. & POL'Y 435, 436 (2014); Bernard Harcourt, *The Invisibility of the Prison in Democratic Theory: A Problem of "Virtual Democracy," in* 23 THE GOOD SOCIETY 6 (2014).

Armstrong has observed, "While we, as a society, may have participated in the reporting, investigation, or prosecution of the crime, society is practically barred from evaluating the punishment itself."[17] Indeed, unless they have a family member or friend who is incarcerated,[18] many Americans know very little about what happens in prison.

This is unsurprising for several reasons. First, prisons are often built in geographically remote locations, making it difficult even for those who want to know about prison conditions to learn much about them.[19] And this is even more true of federal prisons since it is possible—even likely—for a person to be designated to a prison that is far from his family, community, or both. It is a truism that "[p]risons are built to be out of sight and are, thus, out of mind."[20]

In addition to the geographic barriers that inhibit public access to prisons, there are also attitudinal barriers. Though exceptions exist, state and federal prisons are typically secretive places.[21] Michele Deitch demonstrates that very few states involve members of the general public

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17. Armstrong, *supra* note 16, at 437.

18. *See, e.g.*, Tia Zheng et al., *How Many People Do You Know in Prison?: Using Overdispersion in Count Data to Estimate Social Structure in Networks*, 101 J. AM. STAT. ASS'N 409, 409 (2006) (In 2006, a survey was taken of Americans asking, among other things, "'[H]ow many males do you know incarcerated in state or federal prison?' The mean of the responses to this question was 1.0. To a reader of this journal, that number may seem shockingly high. We would guess that you probably do not know anyone in prison. In fact, we would guess that most of your friends do not know anyone in prison either. This number may seem totally incompatible with your social world. So how was the mean of the responses 1? According to the data, 70% of the respondents reported knowing 0 people in prison. However, the responses show a wide range of variation, with almost 3% reporting that they know at least 10 prisoners. Responses to some other questions of the same format, for example, 'How many people do you know named Nicole?,' show much less variation.").

19. *See, e.g.*, MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 13:1 (4th ed. 2009); Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 197 (Marc Mauer & Meda Chesney-Lind eds., 2002).

20. Heather Ann Thompson, *What's Hidden Behind the Walls of America's Prisons*, SALON (Jun. 8, 2017, 4:30 AM), https://www.salon.com/2017/06/08/what-will-hidden-behind-the-walls-of-americas-prisons_partner; *see* Phillipe Brault, *Welcome to Prison Valley: Fremont County, Colorado Has Made Incarceration a Local Specialty Industry*, TIME, http://content.time.com/time/photogallery/0,29307,2009197,00.html (last visited Oct. 25, 2017) (showing an evocative photo essay depicting Fremont County, Colorado, home to thirteen prison complexes). One of the women depicted in the photos, the wife a man incarcerated in Fremont County, notes, "If the prisons weren't here, there wouldn't be anything or anyone here, because they don't have anything to offer." *Id.*

21. The aftermath of Hurricane Harvey, which devastated Beaumont, Texas, including several prisons in the area, provides a recent illustration of how difficult it can be for the public to obtain information about prison conditions. Days after the hurricane, a few prisoners finally were able to contact their family members. They reported knee-high flooding in cells, toilets so backed up that that prisoners were forced to defecate in bags distributed by prison staff, and dehydration caused by a lack of clean drinking water. After these descriptions began trickling out, prison officials put some of the prisons on lockdown, preventing the men inside from calling or e-mailing family members. Reports of retaliation followed. During this time, journalists from *The Houston Chronicle* made requests to visit prisons in Beaumont—to "see with their own eyes what's happening at the facilities." All were denied. *See Texas Prisoners Are Facing Horrid Conditions After Hurricane Harvey & Retaliation for Reporting Them*, DEMOCRACY NOW! (Sept. 8, 2017), https://www.democracynow.org/2017/9/8/texas_prisoners_are_facing_horrid_conditions.

in oversight or even have any external oversight mechanism at all beyond general authority granted to the state department of corrections agency.[22] While some prisons give tours to the public upon request, these are usually carefully scripted and orchestrated to show only the things that prison staff want the public to see.[23] And media access is limited and discretionary.[24]

Open records requests are occasionally a useful vehicle for obtaining information about prison conditions, but "[t]he response to the requests is almost always the same: Public access to the requested documents would threaten the security of the institution," with corrections officials taking the position that releasing the information could result in "prison riots, public disturbances, and increases in violent crime within prison walls."[25] When one group tried to get documents from the BOP, for example, it was denied access to files for fourteen years and obtained them only after litigation.[26]

Nor have the Supreme Court's decisions about public access—particularly media access—to prisons and prisoners helped to increase transparency. In 1974, the Court ruled in *Pell v. Procunier*[27] that prisoners' First Amendment rights to communicate with the press could be limited to written correspondence, and that the press has no First Amendment right to interview any prisoner who is willing to speak with them in the absence of an individualized determination that an interview would not jeopardize security.[28] Although the Court noted that "the conditions in this Nation's prisons are a matter that is both newsworthy

22. Armstrong, *supra* note 16, at 462 (citing Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010)). David Fathi attributes some of this to the fact that incarceration in the United States is wholly decentralized, noting "with each of the 50 states, the federal government, and most of the nation's more than 3000 counties operating its own detention or corrections system," oversight is "spotty and in many jurisdictions nonexistent." David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1460 (2010).

23. *See, e.g.*, Davis Harper, *Notable Narrative: Shane Bauer and "My Four Months as a Private Prison Guard,"* NIEMANSTORYBOARD (July 21, 2016), http://niemanstoryboard.org/stories/notable-narrative-shane-bauer-and-my-four-months-as-a-private-prison-guard ("It's really hard to get information from prisons, or to really have a good idea of what's happening inside. If you get inside, it's for a carefully scripted tour, and if you are concerned with going in and wanting to come back, you have a lot of issues that access journalism faces.").

24. Armstrong, *supra* note 16, at 462; Ridgeway, *supra* note 12 ("With few exceptions, solitary confinement cells have been kept firmly off-limits to journalists—with the approval of the federal courts, who defer to corrections officials' purported need to maintain 'safety and security.' If the First Amendment ever manages to make it past the prison gates at all, it is stopped short at the door to the isolation unit.").

25. Armstrong, *supra* note 16, at 464.

26. Derek Gilna, *After Fourteen Years, BOP Settles Prison Legal News FOIA Suit for $420,000*, PRISON LEGAL NEWS (May 5, 2017), https://www.prisonlegalnews.org/news/2017/may/5/after-fourteen-years-bop-settles-prison-legal-news-foia-suit-420000.

27. 417 U.S. 817 (1974).

28. *Id.* at 824, 835.

and of great public importance,"[29] it held that journalists, the people who might hear prisoner accounts of abuse and share them with the public, "have no constitutional right of access to prisons or their inmates beyond that afforded to the general public."[30] As Senator Ted Kennedy predicted to his colleagues in the Senate, the *Procunier* decision would impact the transparency and accountability of prisons since, as he pointed out, "the public cannot regularly tour the prisons and interview inmates."[31]

Just as prisons are motivated to keep the public out, so too has the public not been especially motivated to go *in*. While society's interest in prison conditions is occasionally piqued when someone is convicted of a high-profile crime and the public wants to know where and under what conditions they will serve their sentence, for the most part, Americans have been remarkably disinterested in this aspect of our justice system.[32] Some have hypothesized that one reason for this is the deeply retributive philosophy that animates our justice system, and in turn, society's indifference to prison conditions—the mentality of "Don't do the crime if you can't do the time"[33] and "lock 'em up and throw away the key." "By keeping those in prison securely hidden from public view and by making sure that the criminals who perform serious crimes never reappear," Ferguson writes, "society confirms that it does not want to think about whatever suffering takes place behind jailhouse walls even if it knows that humiliation, discomfort, crime and physical abuse are prevalent there."[34]

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29. *Id.* at 836 n.7.

30. *Id.* at 834; *see also* Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974) (holding that BOP policy prohibiting personal interviews between reporters and prisoners in federal medium- and maximum-security prisons did not violate the First Amendment).

31. Thompson, *supra* note 20. Another significant blow to the public's access came in 1987 when the Court decided *Turner v. Safley*, in which it held that prisoners' right to speak to the media existed only to the extent that prison authorities did not have a reasonable justification for restricting those rights. 482 U.S. 78, 89 (1987). *See also* J.M. Kirby, *Graham, Miller, & The Right to Hope*, 15 CUNY L. REV. 149, 166–69 (2011) (describing the decline in media use of prisoners' voices and narratives).

32. Heather Ann Thompson, author of *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, said of the public's lack of interest in recent prison uprisings, "it's a little disheartening; we don't see the public banging on the door, saying what is happening inside?" Janine Jackson, *The Public Has a Right to Know About Atrocities Happening Behind Prison Walls*, TRUTHOUT (Aug. 25, 2017), http://fair.org/home/access-is-about-knowing-how-to-get-the-future-right. *See also* Jeff Spross, *Why No One Knows About the Largest Prison Strike in U.S. History*, WEEK (Oct. 18, 2016), http://theweek.com/articles/655609/why-no-knows-about-largest-prison-strike-history.

33. SAMMY DAVIS, JR., KEEP YOUR EYE ON THE SPARROW (BARETTA'S THEME) (Universal Music Corp. 1976); *see also* Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE (Oct. 1, 2003), http://www.slate.com/articles/news_and_politics/jurisprudence/2003/10/violence_silence.html.

34. FERGUSON, *supra* note 5, at 93. This is as true for lawyers as it is for the general public. In his address to the American Bar Association, Justice Anthony Kennedy recognized as much when he told his audience,

> [t]he focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and

II. ADX

> As soon as they come through the door . . . you see it in their faces," former ADX warden Robert Hood said. "That's when it really hits you. You're looking at the beauty of the Rocky Mountains in the backdrop. When you get inside, that is the last time you will ever see it.[35]

There may be no prison in the country where the conditions are more draconian—and more hidden—than ADX. On any given day, about 430 men are incarcerated there, all of them in solitary confinement.[36] ADX opened in 1994, one of four prisons in the BOP's Florence Correctional Complex in Fremont County, Colorado.[37] In 1988, when the BOP was exploring options for where to locate the prison complex, the citizens of Florence (population 2,700), believing that the new prison complex would bring jobs to the town and stimulate its economy, conducted a campaign to raise over $100,000 to buy 600 acres of land at the edge of town to donate to the federal government.[38] The BOP accepted the donation and after an conducting an environmental impact statement and participating in several public forums, the federal government began construction on the four prisons in the summer of 1990.[39]

ADX was the first prison in America built specifically as a supermax, and it remains the only federal supermax.[40] The BOP

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the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case.

Anthony Kennedy, Assoc. J., U.S., Speech at ABA Annual Meeting (Aug. 9, 2003) (transcript available at https://www.documentcloud.org/documents/325931-dcom5.html).

35. Ray Sanchez & Alexandra Field, *What's Life Like in Supermax Prison?*, CNN (June 25, 2015, 8:21 PM), http://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison.

36. In the ADX Step-Down Unit Program, prisoners are allowed a few hours out of their cells each day. Additionally, in the last two years, the BOP has created the "Adult Supervision Unit" at ADX with more out-of-cell time and other "privileges" for those men who the BOP does not believe will ever leave ADX.

37. ERIC WILLIAMS, THE BIG HOUSE IN A SMALL TOWN: PRISONS, COMMUNITIES, AND ECONOMICS IN RURAL AMERICA 56–57 (2011).

38. *Id.* at 55 (explaining that the citizens of Florence took "individual donations, had a competition between local businesses, held a carnival, and polished the whole thing off with a 24-hour radiothon" which ultimately raised $126,000). While the town had hoped the federal prison complex would bring jobs and revitalize its economy, this was not to be. Although federal officials promised that sixty percent of jobs at the prisons would go to the local community, many people in Florence were not qualified for those positions due to age and education restrictions as well as an examination that applicants had to pass to be considered for employment. *Id.* at 86–87. Similarly, "the town's business leaders had expected that the government would spend more money in the town on supplies, but the Bureau of Prisons (BOP) has contracts with big firms for almost everything they buy." *Id.* at 47. Asked about the prisons' economic impact on the town, a former warden at the Florence Correctional Complex observed that "very few prison employees live in Florence and the prison does not buy many goods from local businesses," but noted, "that Texaco on the corner of Highways 67 and 115 must make a killing. I stop there all the time on my way home." *Id.* at 26.

39. *Id.* at 56. The money raised by the town was eventually used to extend utility lines to the prison complex, rather than for the land itself.

40. There may soon be another federal supermax, as the BOP purchased Thomson Correctional Center, a "state-of-the-art, maximum security prison" from the State of Illinois for $165

describes ADX as "the most secure prison in the federal system" which "is designed to house inmates who require an uncommon level of security."[41] The men confined there are described as so dangerous that "video footage of the exterior of the institution would negatively affect the security and orderly operation of the facility."[42]

Many of the first men who were transferred to ADX came from the federal penitentiary in Marion, Illinois.[43] The BOP opened the Marion penitentiary in 1963, the same year the government closed Alcatraz, and within a few years, it had become a replacement for Alcatraz.[44] Alcatraz, a maximum security prison built to deal with "the most incorrigible inmates in [f]ederal prison,"[45] is described by the BOP as a place "where the highly structured, monotonous daily routine was designed to teach an inmate to follow rules and regulations."[46] Marion, where some of the men who had been at Alcatraz were sent, employed a similar philosophy; according to congressional testimony in 1971 by George Picket, then-superintendent of Marion, the prison was constructed to hold 500 "adult male felons who are difficult to control."[47]

In 1968, Marion implemented a behavior modification program called Control and Rehabilitation Effort (CARE), in which "prisoners were put in solitary confinement and otherwise coerced into participating in group 'therapy,' which consisted of intense psychological 'attack sessions.' The purpose was to bring prisoners under the staff's control as

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million in 2012. Aviva Stahl, *New Federal Supermax Prison Will Double Capacity for Extreme Solitary Confinement*, SOLITARY WATCH (Jan. 15, 2015) http://solitarywatch.com/2015/01/15/new-federal-supermax-prison-will-double-capacity-for-extreme-solitary-confinement. While the BOP has provided little direct information about its plans for the prison, the Justice Department referred to the facility as "ADX USP Thomson" in its FY 2014 budget request, an indication that "the prison would function at least in part as a second Administrative Maximum Facility (along with ADX Florence)." *Id.* Additionally, the Morrison Chamber of Commerce now has a page on its website devoted to "The Administrative Maximum Security United States Penitentiary, ADX USP, Thomson, Illinois – Relocation and Employment Information." *AUSP Thompson*, MORRISON CHAMBER OF COM. (last visited Oct. 31, 2017), http://morrisonchamber.com/about-morrison/bop-ausp-thomson. Projected to open at the end of 2017, Thomson will have 1,900 "high-security" beds. *Thomson Prison on Track for 2017 Reopening*, CORRECTIONAL NEWS (Oct. 26, 2016) http://correctionalnews.com/2016/10/26/thomson-prison-track-2017-reopening.

41. Affidavit of ADX Unit Manager Kenneth Fulton, Aug. 6, 2014, United States. v. Ali Charaf Damache, No. 11-420, (E.D. Pa. 2011) (on file with author).

42. Susan Greene, *The Gray Box: The Inhumanity of Solitary Confinement*, COLO. INDEP. (Sept. 25, 2017), http://www.coloradoindependent.com/166847/colorado-solitary-confinement-gray-box-isolation.

43. Marion was built to replace Alcatraz, which closed in 1963.

44. STEPHEN C. RICHARDS, THE MARION EXPERIMENT: LONG-TERM SOLITARY CONFINEMENT AND THE SUPERMAX MOVEMENT 12 (Stephen C. Richards ed., 2015).

45. *Alcatraz Origins*, FED. BUREAU PRISONS (last visited Oct. 31, 2017), https://www.bop.gov/about/history/alcatraz.jsp.

46. *Id.*

47. Comm. to End the Marion Lockdown, *From Alcatraz to Marion to Florence – Control Unit Prisons in the United States*, U. MASS (1992), http://people.umass.edu/~kastor/ceml_articles/cu_in_us.html.

totally as possible and turn them against other prisoners."[48] After a series of protests by men in the CARE program, the BOP created the Marion Control Unit, in which it confined prisoners from throughout the BOP "whose behavior seriously disrupted the orderly operation of the institution."[49] These men were in "administrative"—as opposed to disciplinary—segregation, meaning there was no limit on the amount of time they could be held in solitary confinement; administrative segregation was considered by the BOP to be "an administrative response to the prison's purported inability to manage the prisoner by normal means."[50]

Following a series of strikes by the prisoners to protest their forced participation in Marion's "behavior modification experiment,"[51] the BOP decided to convert all of the Marion housing units to total isolation control units, a plan it implemented in 1983 following the murders of two correctional officers by two prisoners in the control unit.[52] Conditions at Marion during the twenty-three year lockdown were brutal; men were held in isolation in six-by-eight-foot cells with concrete slabs for beds that had rings at each corner that were used to four-point them, sometimes for days at a time.[53] They ate all meals alone in their cells, and their sole educational opportunities were tapes played via closed-circuit television. The only time men left their tiny cells was to exercise in the narrow hallway—alone—for ninety minutes a day.[54] Some units were even more restrictive.[55] In a 1987 report about the conditions at Marion, Amnesty International found that "there is hardly a rule in the

48. *Id.*; *see also* RICHARDS, *supra* note 44, at 13 (describing techniques used to brainwash the men at Marion including "severing the inmate's ties with family, complete isolation, character invalidation, and thought reform" as well as forced use of chemotherapy, Valium Librium, Thorazine, and other "chemical billy-clubs").

49. Comm. to End the Marion Lockdown, *supra* note 47; Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Adams v. Carlson, 368 F. Supp. 1050 (E.D. Ill. 1973). For a series of firsthand accounts from people incarcerated at Marion during the lockdown, see, for example, COMM. TO END THE MARION LOCKDOWN, REFLECTIONS ON TEN YEARS OF THE LOCKDOWN AT USP MARION (1993).

50. Comm. to End the Marion Lockdown, *supra* note 47.

51. For a profoundly disturbing account of the Marion Behavior Modification Experiment, see RICHARDS, *supra* note 44, at 11–14; Eddie Griffin, *Breaking Men's Minds: Behavior Control and Human Experimentation at the Federal Prison in Marion*, 4 J. PRISONERS ON PRISONS, no. 2, 1993, at 1–7.

52. One of those prisoners, Tommy Silverstein, is a client of the Civil Rights Clinic. *See infra* Section III.B.1.

53. Fay Dowker & Glenn Good, *The Proliferation of Control Unit Prisons in the United States*, 4 J. OF PRISONERS ON PRISONS, no. 2, 1993, at 1, 3. "Four-pointing" refers to the practice of chaining a person to a bed by his wrists and ankles. Media accounts during the Marion lockdown report that "guards have the power to chain a man spread-eagled and naked to a concrete bunk for days at a time." Stephen C. Richards, *USP Marion: A Few Prisoners Summon the Courage to Speak*, 4 LAWS 91, 99 (2015) (citing Jackie Leyden, "Marion Prison: Inside the Lockdown!" All Things Considered, National Public Radio (Oct. 28 & Nov. 1, 1986)).

54. Comm. to End the Marion Lockdown, *supra* note 47.

55. *Id.* There were also severe beatings, druggings, forced rectal searches, and other mistreatment in the wake of the murders.

[United Nations] Standard Minimum Rules [for the Treatment of Prisoners] that is not infringed in some way or other."[56]

Reflecting on his decision to institute the permanent Marion lockdown, then-BOP Director Norman Carlson stated, "I decided I had no alternative but to bite the bullet and do it and hope the courts would understand."[57] (They did.[58]) But Marion was not built to be a supermax prison, and operating it as one presented a set of challenges. For example, men had to leave their cells for showers, which meant prison staff had to escort them.[59] And, except for a couple of units, the cell doors had bars (as opposed to solid steel doors), which permitted some conversation between prisoners.[60] Carlson is credited with persuading the federal government to build a new prison that would more effectively isolate prisoners from each other and, for the most part, from prison staff.[61] The result was ADX.

The *New York Times* described ADX as "the apogee of a particular strain of the American penal system, wherein abstract dreams of rehabilitation have been entirely superseded by the architecture of control."[62] According to media reports at the time ADX was being built, a BOP spokesman claimed "that ADX would be 'a more humane environment' than Marion," though a former associate warden conceded that "prisoners might perceive the isolation as a negative."[63] Indeed, when ADX prisoners complained to then-Warden Robert Hood about their conditions, he would tell them, "this place is not designed for humanity."[64]

Tommy Silverstein, one of the Civil Rights Clinic's clients who has been held in ADX since 2005 (and in solitary confinement at other federal prisons since 1983), described his conditions in ADX in a declaration filed as part of his lawsuit against the BOP:

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56. DAVID MATAS, AMNESTY INT'L, ALLEGATIONS OF ILL-TREATMENT IN MARION PRISON, ILLINOIS, USA 14 (May 1987), https://www.freedomarchives.org/Documents/Finder/DOC3_scans/3.allegations.ill.treatment.marion.5.1987.pdf.

57. Michael Taylor, *The Last Worst Place/The Isolation at Colorado's ADX Prison is Brutal Beyond Compare. So Are the Inmates*, SFGATE (Dec. 28, 1998, 4:00 AM), http://www.sfgate.com/news/article/The-Last-Worst-Place-The-isolation-at-2970596.php.

58. *See* Bruscino v. Carlson, 854 F.2d 162 (7th Cir. 1988).

59. Alan Prendergast, *End of the Line*, WESTWORD (July 12, 1995, 4:00 AM), http://www.westword.com/news/end-of-the-line-5055302.

60. *Id.*

61. John Edgar Wideman & Peter Annin, *Doing Time, Marking Race and Inside the New Alcatraz*, *in* BUILDING THE NATION: AMERICANS WRITE ABOUT THEIR ARCHITECTURE, THEIR CITIES, AND THEIR LANDSCAPE 359–60 (Steven Conn & Max Page eds., 2003).

62. Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html.

63. Prendergast, *supra* note 59.

64. Binelli, *supra* note 62.

> I am confined in a cell that is bright all the time since the lights in the hallway never go off, surrounded by walls on all four sides almost all the time, including showers and meals. From my cell, I cannot see or talk to another person, although I can communicate a little by yelling through the vents. I never see another inmate face-to-face without a barrier of some kind separating us. . . . It is spooky how isolated you can be, while still being in such close physical proximity to someone. I know there are other men nearby on my range, I just can't see them.[65]
>
> My cell is approximately 87 sq. feet and contains a concrete bed, concrete desk, shower, sink and toilet. My cell is separated from the hallway by two doors, one of which is solid steel. There is very little natural light in my cell. I am usually confined to my cell for twenty-two hours a day, five days a week, and twenty-four hours a day the other two days a week. I take all of my meals alone in my cell. I am supposed to have outside recreation two or three times a week. Outside recreation . . . takes place inside a small metal cage at the bottom of a poured concrete pit. Inside the cages, there is not enough room to take more than a few steps in any direction.[66]
>
> For 28 years, I have been entombed in concrete and steel, and have not enjoyed anything even remotely resembling open space. I am barely even allowed outside. When outside, I am surrounded by 20' high walls that allow me to view no more than a sliver of sky and nothing of the surrounding landscape. The mental anguish of 28 years of solitary confinement is worse than any physical pain I have ever suffered or imagined.[67]

Frustrated with the difficulty of capturing his experience of ADX in words, Mr. Silverstein, an accomplished artist, drew it:[68]

65. Declaration of Thomas Silverstein ¶¶ 208, 212, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 320.

66. *Id.* ¶¶ 215–19.

67. *Id.* ¶¶ 240–41.

68. This drawing is reprinted here with Mr. Silverstein's permission (and my gratitude).

There are echoes of Mr. Silverstein's words—and his drawing—in those of former ADX Warden Robert Hood, who said of the prison, "This place is not designed for humanity. . . [t]he Supermax is life after death. It's long term. . . . In my opinion, it's far much worse than death."[69]

Other survivors of long-term isolation at ADX have described their experience (when they are able to do so) in similar ways.[70] Anthony McBayne, who spent eight years in ADX, describes being confined to his cell twenty-three hours a day with no meaningful or face-to-face contact

69. Ray Sanchez & Alexandra Field, *What's Life Like in Supermax Prison?*, CNN (June 25, 2015, 8:21 PM), https://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison/index.html.

70. There are too many to recount here. For a sample of others, see, for example, SARAH SHOURD, HELL IS A VERY SMALL PLACE, (Casella, Ridgeway & Shourd eds., 2016); JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST (1981); WILBERT RIDEAU, IN THE PLACE OF JUSTICE (2010); *Voices from Solitary*, SOLITARY WATCH, http://solitarywatch.com/category/voices (last visited Oct. 31, 2017).

with other people. As a result, "I became increasingly withdrawn to the point where the only people I interacted with were the television characters on 'Seinfeld.' I watched 'Seinfeld' four times a day. 'Jerry,' 'Elaine,' 'George,' and 'Kramer' became my best friends, I felt like part of their family. They were the only friends I had."[71] After his release from prison, he was effectively unable to function. He couldn't travel to work because the subway had too many people, causing him panic attacks. Even one-on-one conversations with other people were difficult and confusing for him because he had lost the ability to regularly interact with people. He missed Jerry, Elaine, George, and Kramer.[72] Eventually, when the struggle of being outside became too much, he robbed a bank and went back to prison. Though the BOP put him in an open-population prison this time, he describes avoiding the chow hall and spending most of his time in his cell as he still felt the need to be alone.[73]

Sarah Shourd, held in isolation in an Iranian prison for 410 days, provides one of the most haunting and evocative descriptions of solitary confinement: "At some point you're going to snap. This might be after one week or one year, depending on how you're wired."[74] Explaining that at first, "the scream ripping through your throat" is a "welcome release," she describes being unable to stop until the guards arrive "with tear gas, batons drawn. They come to make you choke on your screams." She continues:

> Days later you've appeared to calm down. To settle in. Yet the scream doesn't stop. You try not to hear it as you brush your teeth, take your meds, force yourself to do push-ups, or attempt to focus on reading a magazine. As long as you're stuck in this coffin that silent scream becomes the backdrop of every moment of your waking life. It could last a month, a decade, or the rest of your life, yet no one will ever hear it but you.[75]

She concludes, "the cruelty—the torture—of solitary confinement targets a part of us perhaps more essential than even our physical bodies: the part that makes us human."[76]

III. SHINING A LIGHT: THE IMPORTANCE OF LITIGATION

> The law does forbid the methodological use of torture. . . . [B]ut how can anyone prove such practices exist when only convicts witness it?[77]

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71. Declaration of Anthony McBayne at 2, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 319-65.
72. *Id.* at 3–4.
73. *Id.*
74. SHOURD, *supra* note 70, at vi.
75. *Id.*
76. *Id.* at ix.
77. ABBOTT, *supra* note 70, at 58.

> We inmates look to the public as sheep look toward their shepherd, we're crying wolf but you don't see him. That doesn't mean the wolf's not there. He's just wearing sheep's clothing so you don't see him. We can't understand why you don't see him but we see him and we smell him, and he stinks like death and repression.[78]

For members of the public seeking to learn about the conditions in ADX, reliable information can be hard to come by. When BOP officials speak about ADX, they do so in a combination of technical language and euphemism that obscures rather than illuminates. For example, at a 2014 Senate subcommittee hearing about solitary confinement, then-director Charles Samuels testified that solitary confinement does not exist in the BOP—including at ADX:

Inmates placed in restrictive housing are not 'isolated' as that term may be commonly understood. All inmates have daily interactions with staff members who monitor for signs of distress. In most circumstances, inmates placed in restrictive housing are able to interact with other inmates when they participate in recreation and can communicate with others housed nearby. They also have other opportunities for interaction with family and friends in the community (through telephone calls and visits), as well as access to a range of programming opportunities that can be managed in their restrictive housing settings.[79]

Five years earlier, the then-warden of ADX testified in a deposition that he did not even know what solitary confinement is. When asked if he considered ADX to be solitary confinement, he answered,

> I do not. . . . I don't have a definition of solitary confinement. I just know what I see on TV. And when they say solitary confinement on TV, they generally have a person in a place that's dark and no contact with anyone. And they open a little slot and slide in a tin plate or something with bread and water or something like that. That's my only frame of reference for solitary confinement. So based on that. My only knowledge of it, at the ADX, those are the differences.[80]

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78. Scott A. Routledge, *Scott A. Routledge/a.k.a Fountain, #02158-090*, *in* REFLECTIONS ON TEN YEARS OF THE LOCKDOWN AT USP MARION, *supra* note 49, at 9, 9.

79. *Hearing on Reassessing Solitary Confinement: The Human Right, Fiscal, and Public Safety Consequences Before the S. Comm. On the Constitution, Civil Rights, and Human Rights* (2014) (statement of Charles E. Samuels, Jr., Director of Fed. Bureau of Prisons). Samuels' credibility about solitary confinement in the BOP was further undermined by his inability to answer Senator Franken's question about the size of a typical segregation cell. Samuels appeared so confused by the question that Franken turned to his colleagues on the subcommittee to ask, "Am I asking this wrong?" *Size of Solitary Confinement Cell*, C-SPAN (Feb. 25, 2014), https://www.c-span.org/video/?c4485257/size-solitary-confinement-cell.

80. Deposition of Ron Wiley at 43:5-7, Saleh v. Fed. Bureau of Prisons, 2010 WL 5464295 (D. Colo. Nov. 23, 2010) (No. 05-CV-02467).

Similarly, in his deposition, a BOP psychologist disavowed any knowledge of the use of solitary confinement in the BOP, and when asked to define the term responded, "Well . . . if we break the words into pieces, [confinement] would mean that a person was confined in a space. And solitary would mean by himself, absent all other engagements."[81] Given that these are the sorts of interpretations BOP officials employ when describing ADX, there is significant risk that the public will be misled as to the actual conditions in the prison.

But accessing the sources necessary to learn about ADX can be exceedingly difficult. For example, in its 2014 report examining the use of solitary confinement in the federal prison system, Amnesty International condemned both the conditions in ADX and "the lack of detailed publicly available information on the facility."[82] In a section entitled, "Restrictions on Access to ADX: Lack of Transparency Regarding BOP Use of Isolation," the report describes repeated requests from both Amnesty International and the U.N Special Rapporteur on Torture to visit the prison, all of which were refused by the BOP.[83] Indeed, in writing its report, Amnesty International relied primarily on "court documents available through lawsuits and other information provided by attorneys representing ADX inmates," because of "a lack of detailed publicly available information on the facility."[84]

Journalists similarly have been prevented from accessing ADX. The Amnesty International report, citing a *Westword* article from 2007, noted that "from January 2002 through May 2007, officials denied every single media request for face-to-face interviews with ADX prisoners, or tours of the facility. . . ."[85] Only after mounting "criticism of lack of access" did the BOP arrange a restricted tour of the prison in 2007 for some journalists with major media outlets. But, the Report noted, "no similar tours are believed to have been arranged since then."[86]

In 2015, when it became known that Boston Marathon bomber Dzhokhar Tsarnaev could be held in ADX, the *Boston Globe* sought to visit the prison.[87] The BOP denied the request and refused to answer any questions about the prison: "'As our primary focus at the ADX is on the day to day operations of the institution, there is, consequently, no allotted time for additional activities, to include personal interviews or tours,'

81. Deposition of Donald Denney at 22–23, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471).

82. AMNESTY INT'L, *supra* note 7, at 5.

83. *Id.*

84. *Id.*

85. *Id.* at 42, n.13.

86. *Id.* (citing Prendergast, *supra* note 8).

87. David Abel, *Colorado Prison 'a High-Tech Version of Hell,'* BOS. GLOBE (Apr. 26, 2015), https://www.bostonglobe.com/metro/2015/04/25/the-alcatraz-rockies/a0BWrZjRpmQatMsfm8FUOL/story.html.

wrote John Oliver, ADX's warden, in a letter to the *Globe*."[88] Nor is direct communication between journalists and ADX prisoners a viable substitute. The news media is not permitted to communicate with ADX prisoners by phone, and letters between ADX prisoners and journalists are "heavily censored or commonly disappear altogether."[89]

Families and friends of those in ADX often fare no better in learning about their loved ones' conditions; they too find that obtaining information directly from the men incarcerated in ADX is extremely difficult.[90] A visit is necessary for all but the briefest of conversations, as telephone calls are limited to fifteen minutes.[91] But ADX policy prohibits a prisoner from having a visit from anyone he did not know prior to incarceration, which significantly limits the number of people who can learn about the conditions at ADX directly from the prisoner himself.[92] Additionally, the remote location of the prison makes it hard for the families and other loved ones who are allowed to visit to actually get there; the closest airport is an hour away and flights can be prohibitively expensive. And some ADX prisoners and their families are reluctant to have visits at all, given that all physical contact—even a brief hug—is strictly prohibited, and visits take place with a thick glass wall separating the prisoner and his visitor, sometimes with the prisoner in full shackles.[93]

Even when visits do occur, ADX prisoners and their families censor the content of their conversations, knowing that all visits are closely monitored by prison staff, the Federal Bureau of Investigation (FBI), or both and that a visit can be terminated if a monitor deems a topic of discussion off-limits.[94] Monitoring takes place on phone calls as well, which are similarly subject to termination based on the monitor's judgment.[95] Mail, too, is censored.[96]

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88. *Id.*

89. Susan Greene, *Federal Supermax in Colo Condemned as Torturous*, COLO. INDEP. (July 16, 2014), http://www.coloradoindependent.com/148263/federal-supermax-in-colo-condemned-as-torturous. Journalist Susan Greene, describing her repeated unsuccessful efforts to interview ADX prisoners or tour the prison: "Years ago, while assigned to cover Area 51 in Nevada, I had better access to a federal airbase that didn't officially exist." Greene, *supra* note 42.

90. Sometimes the reason is self-censorship. As one person in supermax explained, "My philosophy is, I don't care if you have a knife stuck in your back, you tell your mom that you're okay. Seeing how they looked at me on visits, handcuffed, shackled, chained to the floor and behind glass, killed me inside." Greene, *supra* note 42.

91. Additionally, most ADX prisoners are limited to two phone calls per month.

92. FED. BUREAU OF PRISONS, 5267.08, PROGRAM STATEMENT: VISITING REGULATIONS, at 6 (May 11, 2006) ("The visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement, unless such visits could reasonably create a threat to the security and good order of the institution.").

93. Over the years, several men in ADX have told us that they are reluctant to have family members visit because they don't want their families to see them in these conditions.

94. Declaration of Nidal Ayyad ¶ 164, Ayyad v. Holder, No. 05-CV-02342 (D. Colo. Aug. 12, 2013).

95. *Id.* ¶ 165.

An additional level of secrecy exists for the men at ADX who are under Special Administrative Measures (SAMs), severe confinement and communication restrictions imposed by the Attorney General himself and carried out by the BOP.[97] SAMs drastically limit a prisoner's communication and contact with the outside world.[98] Originally, the federal government created SAMs to target gang leaders and prisoners in cases in which "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons."[99] The government initially instituted this ban on communication for prisoners with a demonstrated reach beyond prison.[100] In the wake of 9/11, however, the Justice Department substantially changed the standard for imposing and renewing SAMs. Finding the SAMs application and renewal process burdensome and "unnecessarily static," DOJ relaxed the standards considerably and expanded their use.[101]

Since October 2001, the Attorney General has had the ability to authorize the director of the BOP to implement SAMs upon written notification "that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would

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96. In an article about reporters' access to supermax prisons, including ADX, James Ridgeway recounts a story told to him by journalist Susan Greene about her attempts to send copies of an article she wrote to some of the men inside ADX. "Ironically, once her article was published, she could not send it to her correspondents in ADX, due to a policy against allowing prisoners' names in an article. 'So I redacted all the prisoners' names,' she said, 'and then it came back saying something like, 'You can still see it if you hold it up to the light.' Out of frustration and wanting to be a pain in the ass, I Exacto-knifed out all the names and sent it, and it still didn't get through.'" Ridgeway, *supra* note 12.

97. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2012).

98. *Id.*

99. Scope of Rules: Prevention of Acts of Violence and Terrorism, 61 Fed. Reg. 25,120, (May 17, 1996) (interim rule with request for comments); *see also* Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 84 (2003) (noting SAMs first appear in case law in the context of a case involving the leader of the Latin Kings).

100. For example, in *United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998), the Second Circuit cited 28 C.F.R. § 501.3 in upholding the extraordinarily restrictive conditions of confinement imposed on a leader of the Latin Kings who had a documented history of directing murderous conspiracies from prison and communicating with an extensive network of coconspirators inside and outside of prison. *Id.* at 110. Felipe's communication restrictions, however, were not SAMs, nor were they imposed pursuant to 28 C.F.R. § 501.3. *See id.* at 109. Rather, the restrictions on his conditions of confinement were imposed by the sentencing court pursuant to 18 U.S.C. § 3582(d), which "allows district courts to limit the associational rights of defendants convicted of racketeering offenses." *Id.*; *see also* 18 U.S.C. § 3582(d) (2012).

101. National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062 (Oct. 31, 2001) (extending the maximum initial period for which SAMs can be authorized from 120 days to one year and expanding the category of inmates covered by the rule). The government now had the ability to impose SAMs for a year, whereas previously the period was limited initially to 120 days. *Id.* For renewals, the government did not have to demonstrate that the original reason the person was put under SAMs still existed, just that there was a reason to maintain the measures. 28 C.F.R. § 501.3.

entail the risk of death or serious bodily injury to persons."[102] SAMs "may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism."[103] A prisoner's SAMs recite in detail the nature of this isolation, including, for example, how many pages of paper he can use in a letter or what part of the newspaper he is allowed to have and after what sort of delay.[104] Of the fifty or so people with SAMs who are serving their sentences in federal prisons, the majority are believed to be in ADX.[105]

For ADX prisoners on SAMs, it is even more difficult to learn about the conditions of confinement in which they are held. This is because the SAMs themselves prohibit the prisoner from communicating with anyone other than his lawyer and his immediate family (usually defined to include parents and siblings, as well as a spouse and children).[106] Detailed description of the impact of the SAMs is illegal because everyone in contact with a person on SAMs becomes subject to the SAMs by virtue of the requirement that they not divulge any communication with that person to a third party.[107] As a condition of being allowed to represent a prisoner on SAMs, the Justice Department requires lawyers to sign an affirmation acknowledging the SAMs and agreeing not to repeat publicly anything the lawyer talks about with her client.[108] The same is true for the family members of the person on SAMs; they are also forbidden from talking about their conversations

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102. *Id.* The authority for the SAMs derives mainly from two statutory provisions. *See* 5 U.S.C. § 301 (2012); 18 U.S.C. § 4001 (2012). First, 5 U.S.C. § 301 grants the directors of executive departments the power to create regulations designed to assist them in fulfilling their official functions and those of their departments. Second, 18 U.S.C. § 4001 vests the Attorney General with authority to control federal prisons and allows him to promulgate rules governing those prisons.

103. 28 C.F.R. § 501.3(a).

104. *See, e.g.*, Memorandum for Harley G. Lappin, Dir., Fed. Bureau of Prisons, from the Acting Att'y Gen., United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 16, 2008), ECF No. 21-2 [hereinafter Hashmi's SAMs Document] (limiting Hashmi's correspondence only to immediate family members in letters of no more than three pieces of paper) (on file with author).

105. I say "believed to be" because of the difficulty of obtaining a list of the people who are on SAMs. *See generally* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC & CTR. FOR CONSTITUTIONAL RIGHTS, YALE LAW SCH., THE DARKEST CORNER: SPECIAL ADMINISTRATIVE MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS (Sept. 2017), https://law.yale.edu/system/files/area/center/schell/sams_report.final_.pdf. That said, a 2014 declaration from a BOP official states that as of that date, fifty-five prisoners are on SAMs, of which thirty-five are incarcerated at ADX. Declaration of Christopher Synsvoll, United States v. Damache, No. 11-420 (E.D. Pa. Aug. 6, 2014).

106. *See, e.g.*, Hashmi's SAMs Document, *supra* note 104.

107. *See, e.g.*, *id.* at 9, 11–12 (setting out nondivulgence requirement for Hashmi's legal and nonlegal contacts).

108. *See, e.g.*, *id.* at 1–3. The required attorney affirmation, especially for pretrial defendants under SAMs, has been the subject of some litigation. *See United States v. Reid*, 214 F. Supp. 2d 84, 92–94 (D. Mass. 2002) (defense counsel not required to sign affirmation because to do so conflicts with the Sixth Amendment, even though government modified affirmation requirement to make it subject to judicial determination).

with their relative on SAMs, even with their shared extended family.[109] Lawyers and family members face prosecution if they provide details of any conversation or interaction with the person on SAMs.[110]

The SAMs operate to make an already-hidden set of prison conditions even more invisible, as the only people who have access to or knowledge of those conditions are prohibited from disclosing anything about them. The result is that prisoners in ADX—especially, but by no means exclusively, those with SAMs—are effectively disappeared. For the men at ADX, out of sight can easily lead to out of mind.

A. Prison-Conditions Litigation: A Valuable Tool for Transparency if Litigants Can Navigate the Obstacles

But as Justice Kennedy remarked at his 2003 address to the American Bar Association: "Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States."[111] With respect to the particular role of lawyers in contributing to this problem, he observed:

> The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.[112]

Not only are there few incentives for lawyers to "think about what is behind" the prison door, there are significant disincentives for them to become involved in challenging unconstitutional prison conditions. Prisoners are, as a group, unpopular clients. Lawyers who represent them risk opprobrium from the public, who often do not understand why "those people" have any rights at all—especially if the prisoner has been convicted of anything more serious than a nonviolent drug offense. Representing incarcerated clients is logistically difficult, too, given the barriers that exist to even basic communication between lawyers and clients. For example, telephone calls can take days to arrange, and e-mail—if it is available—is not confidential.[113] Letters can take weeks to

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109. Hashmi's SAMs Document, *supra* note 104, at 11–12.

110. *See United States v. Stewart*, 590 F.3d 93, 105, 110 (2d Cir. 2009) (observing that after a sentencing court implements SAMs, an attorney representing that prisoner who has agreed to comply with the SAMs limitations can be prosecuted for disclosing information obtained from the prisoner in the course of representation).

111. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

112. *Id.*

113. *See* Editorial, *Prosecutors Snooping on Legal Mail*, N.Y. TIMES (July 23, 2014), https://www.nytimes.com/2014/07/24/opinion/24thu3.html (describing the practice of federal prosecutors to review emails between prisoners and their attorneys and noting that "[i]n one case,

arrive. And an in-person meeting with a client is often an all-day (or even a multi-day) commitment, given how far away from metropolitan areas most prisons are coupled with the inevitable delays[114] that are part and parcel of visiting a client in prison (not to mention the searches of lawyers[115] and their belongings).

Especially after Congress passed the Prison Litigation Reform Act (PLRA) twenty years ago, even fewer lawyers are willing to represent clients in conditions of confinement litigation due to caps placed on attorneys' fees,[116] the prohibition against compensatory damages for emotional harm absent proof of a physical injury,[117] the requirement that a prisoner flawlessly exhaust all administrative remedies prior to filing suit,[118] and the ability of defendants to terminate injunctions after two years absent a court finding that there is a "current and ongoing violation" of federal law.[119]

If all this were not enough of a deterrent, judicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win. Under the Eighth Amendment, a prison condition is not unconstitutional unless it amounts to "the wanton and unnecessary infliction of pain."[120] The Supreme Court created a two-pronged test for determining when this standard is met, holding that a plaintiff must show both that he has been deprived of a "basic human need[]"[121] or "the minimal civilized measure of life necessities"[122] (the objective prong) and that prison officials acted with "deliberate indifference"—a mental state that the Supreme Court has likened to "criminal recklessness" (the

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prosecutors read more than 12,000 pages of emails sent by an imprisoned former Pennsylvania senator, and included them in its argument for a harsher resentencing").

114. For an illustration of these kinds of delays, see Rebecca Boucher, *Hell Is Trying to Visit My Jailed Client*, MARSHALL PROJECT (July 28, 2017, 6:00 AM), https://www.themarshallproject.org/2017/07/27/hell-is-trying-to-visit-my-jailed-client.

115. Nearly every prisoners' rights lawyer I know—especially women—has at least one story of prison staff trying to force them to submit to invasive searches of themselves or their belongings as a condition of seeing their incarcerated clients. *See, e.g.*, Deborah Becker & Rachel Paiste, *Female Lawyers Allege Improper Searches on Prison Visits*, WBUR BOS. (Feb. 27, 2015), http://www.wbur.org/news/2015/02/27/woman-lawyers-prison-visits (describing experience of female attorney who was required to lift up her shirt and shake her bra out because prison staff did not believe her underwire bra caused the metal detector alarm to sound). Of course, male lawyers are not immune to this treatment—especially men of color. *See, e.g.*, BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 194 (2014) (correctional officer forces African-American capital defense attorney Bryan Stevenson to submit to strip search as condition of seeing his client).

116. Hourly rates for lawyers are limited to 150% of the Criminal Justice Act rates for criminal defense representation set in 18 U.S.C. § 3006A, which are much lower than market rates that lawyers charge in nonprisoner cases. 18 U.S.C. § 300A(d) (2012).

117. 42 U.S.C. § 1997e(e).

118. *Id.* § 1997e(a).

119. 18 U.S.C. § 3626(b)(1)(3) (2012).

120. Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Wilson v. Seiter, 501 U.S. 294, 297 (1991).

121. *Rhodes*, 452 U.S. at 347. In cases alleging inadequate medical care, the prisoner-plaintiff must show that he has a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 106 (1976).

122. *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 347).

subjective prong).[123] Using this formulation of the objective prong, some of the conditions that federal courts have upheld as constitutional include: double-celling in fifty to fifty-five square foot cells designed for one prisoner;[124] denial of visiting rights for two or more years;[125] being confined in a cell with virtually no running water and a leaking toilet[126] or a flooded cell without a working toilet;[127] six months confinement under conditions of vermin infestation, cells smeared with human waste, and flooding from toilet leaks;[128] deprivation of toilet paper;[129] two days in a strip cell without clothing;[130] deprivation of underwear as part of a "progressive 4-day behavior management program;"[131] and leaving a prisoner who had been attacked in proximity to the eighteen others who attacked him, one of whom stabbed him.[132] Most relevant to the conditions at ADX, several courts have held that long-term or indefinite solitary confinement does not violate the Eighth Amendment.[133]

Prisoners challenging deprivations of civil liberties face an equally difficult standard. Despite the Supreme Court's pronouncement that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country"[134] and that prisoners do not shed all of their fundamental rights such as freedom of speech, freedom to exercise religion, and freedom from unreasonable searches and seizures "at the prison gate," the Court held in *Turner v. Safley*[135] that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[136] The

123. Farmer v. Brennan, 511 U.S. 825, 839–40 (1994).

124. *Rhodes*, 452 U.S. at 348; Benjamin v. Fraser, 343 F.3d 35, 53 (2d Cir. 2003) (reversing order that beds be spaced so that detainees' heads are six feet apart for protection from contagion because there was no showing of "actual or imminent substantial harm").

125. Overton v. Bazzetta, 539 U.S. 126, 134, 136 (2003).

126. Wilson v. Cooper, 922 F. Supp. 1286, 1292 (N.D. Ill. 1996).

127. Dellis v. Corr. Corp. of Am., 257 F.3d 508, 511 (6th Cir. 2001).

128. Beverati v. Smith, 120 F.3d 500, 504–05, 505 n.5 (4th Cir. 1997).

129. Citro v. Zeek, 544 F. Supp. 829, 830 (W.D.N.Y. 1982).

130. Seltzer-Bey v. Delo, 66 F.3d 961, 963–64 (8th Cir. 1995).

131. O'Leary v. Iowa State Men's Reformatory, 79 F.3d 82, 83–84 (8th Cir. 1996).

132. Fisher v. Lovejoy, 414 F.3d 659, 661 (7th Cir. 2005).

133. Silverstein v. Fed. Bureau of Prisons, 559 Fed. Appx. 739, 763 (10th Cir. 2014); In re Long Term Admin. Segregation, 174 F.3d 464, 472 (4th Cir. 1999); Bruscino v. Carlson, 854 F.2d 162, 164–65 (7th Cir. 1988) (holding that conditions in Marion control unit and permanent lockdown were "sordid and horrible" but not unconstitutional); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (supermax confinement only violates Eighth Amendment for prisoners with mental illness). *But see* Settlement Agreement, Ashker v. Governor of California, No. C 09-05796 CW ¶ 26 (N.D. Cal. 2015) (transforming California's use of solitary confinement from a status-based system to a behavior- based system and limiting duration and conditions of isolation), https://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf; Shoatz v. Wetzel, No. 2:13-CV-0657, 2016 WL 595337, at *12 (W.D. Pa. Feb. 12, 2016) (denying prison officials' summary judgment motion on Eighth Amendment claim challenging twenty-two years in solitary confinement).

134. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

135. Turner v. Safley, 482 U.S. 78, 89 (1987).

136. *Id.* The Court established a four-factor test for assessing the reasonableness of a prison restriction: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it," (2) whether a prisoner has "alternative

only constitutional issues to which the *Turner* standard does not apply are claims governed by the Eighth Amendment's Cruel and Unusual Punishments Clause, procedural due process issues,[137] or claims of race discrimination.[138] In applying the standard, the Supreme Court has been extremely deferential to prison officials, noting the "complex and intractable" problems of American prisons and its belief that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[139]

Applying *Turner*, courts have upheld the following restrictions: denial of all magazines, newspapers and photographs to prisoners in a segregation unit;[140] restrictions on incoming correspondence;[141] prisoner-to-prisoner correspondence for the purpose of providing legal assistance;[142] bans on "sexually explicit [but non-obscene] materials," including depictions of nudity in artistic and scientific journals;[143] a rule prohibiting "blatantly homosexual materials";[144] a prohibition against Satanist literature;[145] a ban on solicitation for prison union meetings and union membership;[146] rules barring visits by minors except for children, grandchildren, or siblings of the prisoner;[147] a prohibition against all visiting for indefinite period for prisoners with two disciplinary violations for substance abuse;[148] statutes disenfranchising prisoners;[149] a prohibition against allowing death row prisoner contact visits with his priest and requirement that he take communion through the bars of his cell;[150] a requirement that prisoner in a sex offender treatment program

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means of exercising the right," (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) "the absence of ready alternatives" to the challenged restriction. *Id.* at 90–91 (citing Block v. Rutherford, 468 U.S. 576, 686 (1984)).

137. *See* Wilkinson v. Austin, 545 U.S. 209, 224–25 (2005).

138. Johnson v. California, 543 U.S. 499, 510–14 (2005).

139. *Turner*, 482 U.S. at 84–85, 90 ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of prison officials."); Shaw v. Murphy, 532 U.S. 223, 229 (2001) (describing standard as a "unitary, deferential standard"); *see also* Beard v. Banks, 548 U.S. 521, 530 (2006).

140. *Beard*, 548 U.S. at 533.

141. Thornburgh v. Abbott, 490 U.S. 401, 412–14 (1989).

142. *Shaw*, 532 U.S. at 231–32.

143. Mauro v. Arpaio, 188 F.3d 1054, 1060 n.4 (9th Cir. 1999).

144. Willson v. Buss, 370 F. Supp. 2d 782, 790–91 (N.D. Ind. 2005).

145. Carpenter v. Wilkinson, 946 F. Supp. 522, 531 (N.D. Ohio 1996).

146. Jones v. N. C. Prisoners' Labor Union, Inc., 433 U.S. 119, 136 (1977).

147. Overton v. Bazzetta, 539 U.S. 126, 132–33 (2003).

148. *Id.*

149. Richardson v. Ramirez, 418 U.S. 24, 53–54 (1974); *see also* Simmons v. Galvin, 575 F.2d 24, 44–45 (1st Cir. 2009) (explaining that Massachusetts' constitutional amendment disqualifying prisoners from voting did not violate the Ex Post Facto clause).

150. Card v. Dugger, 709 F. Supp. 1098, 1111 (M.D. Fla. 1988), *aff'd*, 871 F.2d 1023 (11th Cir. 1989). That said, prisoners have been more successful under RFRA and RLUIPA in challenging policies and practices that burden the exercise of religion.

submit to use of penile plethysmograph;[151] a prohibition against prisoners covering their cell windows for privacy while undressing or using the toilet;[152] and a prohibition against allowing prisoners to procreate (either through conjugal visits or via artificial insemination);[153] and other restrictions on prisoners' constitutional rights.

Procedural due process claims for deprivations of prisoners' liberty or property interests are also hard to win due to the standard that prisoners must meet to show both that a given liberty or property interest is protected, and the comparatively low level of process that is due in prison, even where a protected interest is found to exist. In *Sandin v. Conner*,[154] the Supreme Court restricted the legal definition of "liberty" for prisoners to three circumstances: (1) when the right at issue is independently protected by the Constitution; (2) when the challenged action causes the prisoner to spend more time in prison; and (3) when the action imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[155] Since *Sandin*, the most significant area of prison due process litigation has involved the use of solitary or supermax confinement, and courts examining due process claims assess whether the plaintiff's conditions of confinement are "atypical and significant" relative to ordinary prison conditions.[156] The Supreme Court revisited a procedural due process challenge to segregated confinement in *Wilkinson v. Austin*.[157] Because the Court did not articulate a baseline for "the ordinary incidents of prison life," holding that the conditions in the Ohio supermax that were at issue in *Wilkinson* were "atypical and significant under any plausible baseline,"[158] the lower courts continue to wrestle with what baseline to use to determine whether a liberty interest in segregated confinement exists and under what circumstances.[159]

Even where a prisoner-plaintiff is able to establish a liberty interest in his conditions of confinement, the process that is due cannot fairly be described as robust—particularly if the plaintiff is in administrative (rather than disciplinary) segregation, as is the case with the men at ADX (with the possible exception of those in the Control Unit).[160] For prisoners in administrative segregation, the Supreme Court held that due

151. Searcy v. Simmons, 97 F. Supp. 2d 1055, 1063–64 (D. Kan. 2000).
152. Birdine v. Gray, 375 F. Supp. 2d 874, 879 n.14 (D. Neb. 2005).
153. Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (en banc).
154. 515 U.S. 472, 484–86 (1995).
155. *Id.*
156. Wilkinson v. Austin, 545 U.S. 209, 223–24 (2005).
157. *Id.*
158. *Id.* at 223.
159. *See, e.g.*, Orr v. Larkins, 610 F.3d 1032, 1034 (8th Cir. 2010); Marion v. Columbia Corr. Inst., 559 F.3d 693, 699 (7th Cir. 2009); Harden-Bey v. Rutter, 524 F.3d 789, 792–93 (6th Cir. 2008); Iqbal v. Hasty, 490 F.3d 143, 161 (2d Cir. 2007), *overruled on other grounds by* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Richardson v. Joslin, 501 F.3d 415, 419 (5th Cir. 2007).
160. Hewitt v. Helms, 459 U.S. 460, 472 (1983).

process requires only "an informal, non-adversary review of the information supporting [the prisoner's] administrative confinement,"[161] including "some notice of the charges," "an opportunity for the prisoner to present his views" to the decision-maker (orally or in writing) within a reasonable time after the confinement, and "some sort of periodic review" to determine if there is a need for continued segregation.[162]

Considering the difficulty of winning a constitutional claim on behalf of a prisoner coupled with the other challenges of prisoners' rights litigation, it is not hard to understand why many lawyers eschew these cases. Justice Kennedy urges against that instinct. Exhorting lawyers to "stay tuned in" to prisons and corrections, he asserts: "The subject is the concern and responsibility of every member of our profession and of every citizen. This is your justice system; these are your prisons."[163] He continued: "The Gospels' promise of mitigation at judgment if one of your fellow citizens can say, 'I was in prison, and ye came unto me,' does not contain an exemption for civil practitioners, or transactional lawyers, or for any other citizen."[164]

This is all the more necessary when the prison in question is, like ADX, so deeply shrouded in secrecy. Historian Heather Ann Thompson has argued that "throughout American history[,] unspeakable abuse of men and women has been allowed to happen behind prison walls because the public had no access. And, if we pay close attention to what has been happening much more recently behind bars, it is clear that the closed nature of prisons remains a serious problem in this country."[165] It is for that reason that litigation, however difficult or imperfect a tool, is a critically important one, not only as a mechanism for vindicating rights violations, but also because of its capacity to bring some of what has been kept in darkness into the light.[166] Journalist Andrew Cohen, who has reported extensively on the litigation challenging the adequacy of mental health care at ADX,[167] noted as much in writing about a case involving the suicide of a mentally ill man at ADX, explaining that the

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161. *Id.*

162. *Id.* at 476, 472, 477 n.9. Such reviews, however, must be "meaningful and not a sham or fraud." Sourbeer v. Robinson, 791 F.2d 1094, 1101 (3d Cir. 1986); McClary v. Coughlin, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000), *aff'd*, 237 F.3d 185 (2d Cir. 2001).

163. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

164. *Id.*

165. Heather Ann Thompson, *What's Hidden Behind the Walls of America's Prisons*, CONVERSATION (June 4, 2017, 9:45 PM), https://theconversation.com/whats-hidden-behind-the-walls-of-americas-prisons-77282.

166. As Andrea Armstrong has argued, however, transparency does not automatically produce accountability. "Underlying a broad idea of transparency is an assumption that information, once set free, will produce an informed and engaged public that will hold officials accountable," but "this broad version of transparency assumes public interest and ready availability of the desired information. Still," she notes, "transparency, in its most limited form, can foster attention." Armstrong, *supra* note 16, at 460.

167. *See infra* note 401.

case "represents an enormous opportunity for all of us to gain some rare insight into one of the most secret places in America, a prison where hundreds of men go and are never heard from again."[168]

B. The University of Denver's Civil Rights Clinic

In the Civil Rights Clinic (CRC) at the University of Denver College of Law, students and faculty have represented many prisoners challenging their conditions of confinement at ADX. The CRC is one of five clinics comprising the Student Law Office, the College of Law's in-house clinical program.[169] The CRC is an intensive, year-long program in which second- and third-year law students represent clients in civil rights cases in federal court under the supervision of clinic faculty.[170]

Like other law school clinics, the CRC has two primary goals: providing students the opportunity to become responsible, reflective lawyers through working with clients to help solve their legal problems; and providing high-quality legal services to individuals and groups who are otherwise unable to secure representation elsewhere.[171] For the past decade, the focus of the CRC's docket has been on the rights of prisoners confined in state and federal prisons, including ADX.

In representing their clients, CRC student attorneys have taken Justice Kennedy's words to heart, honoring the principle that "this is your justice system; these are your prisons."[172] In keeping with that ideal, they have, through their work with their clients at ADX, sought to change conditions that violate their clients' constitutional rights. While we have not always been successful in the eyes of the courts, through their work, the CRC and its clients have helped to illuminate the inhumane conditions at ADX. Not content to allow "the problems of those who are found guilty and subject to criminal sentence" to be "brush[ed] under the rug," CRC students have worked compassionately

168. Andrew Cohen, *Death, Yes, but Torture at Supermax?*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/death-yes-but-torture-at-supermax/258002.

169. For more about the Student Law Office, *see Clinical Programs*, U. DENV. STURM C.L., http://www.law.du.edu/index.php/law-school-clinical-program (last visited Jan. 1, 2018).

170. CRC students also participate in a seminar designed to help them develop their litigation skills and understanding of the law, as well as the political and social contexts of civil rights litigation. *Id.*

171. To that end, the CRC is a member of the U.S. District Court for the District of Colorado's Pro Bono Panel, a program "consisting of volunteer attorneys willing to represent individuals of limited financial means (not strictly limited to the "indigent") in civil matters whenever requested by the Court and without compensation. As a means to assist attorneys in providing pro bono services, the court has established a panel of attorneys who are members in good standing of the Bar of the district court and who have agreed to accept pro bono appointments to represent pro se litigants (plaintiff or defendant) in civil cases." *Civil Pro Bono Panel*, U.S. DISTRICT CT. DISTRICT COLO.: ATT'Y INFO., http://www.cod.uscourts.gov/AttorneyInformation/CivilProBonoPanel.aspx (last visited Oct. 14, 2017).

172. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

and relentlessly against the government's efforts to "remove the problem from public consciousness."[173]

Much of the CRC's litigation about ADX conditions has challenged the long-term or indefinite solitary confinement to which many of the men there are subjected.[174] CRC student attorneys have represented clients in claims asserting that the regime at ADX violates their clients' rights to due process under the Fifth Amendment, and to be free from cruel and unusual punishment pursuant to the Eighth Amendment. Some of those cases, and the conditions that have been illuminated through the litigation, are discussed below.

1. Due Process – *Saleh v. Fed. Bureau of Prisons* and *Rezaq v. Fed. Bureau of Prisons*

In 2007, the CRC began litigating two separate lawsuits on behalf of four men who had been held in solitary confinement at ADX for years and who seemingly had no hope of transfer to a less-restrictive prison. In the first case, *Saleh v. Fed. Bureau of Prisons*,[175] three Muslim men—Mohammed Saleh, El-Sayyid Nosair, and Ibrahim Elgabrowny—were transferred from high-security open-population prisons to ADX in the wake of the 9/11 attacks.[176] None of them knew why the BOP chose to move them from the open-population prisons in which they had been serving their sentences without incident, nor were they told what they needed to do to get out of ADX. The second case, *Rezaq v. Fed. Bureau of Prisons*,[177] was similar. Omar Rezaq, like the *Saleh* plaintiffs, had initially been designated to an open-population penitentiary by the BOP, but upon his arrival, the prison's captain (supervisor) told him that he did not want Muslims there.[178] Several days later, Mr. Rezaq was transferred to ADX.[179] Like the *Saleh* plaintiffs, Mr. Rezaq never knew why he was put in ADX or what, if anything, he could do to be returned to a regular penitentiary.[180]

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173. Warren E. Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972).

174. *Civil Rights Clinic Cases*, U. DENV. STURM C.L., http://www.law.du.edu/index.php/law-school-clinical-program/civil-rights-clinic/civil-rights-clinic-cases (last visited Oct. 14, 2017).

175. No. 05-CV-02467, 2010 WL 5464295 (D. Colo. Nov. 23, 2010), *report and recommendation adopted*, No. 05-CV-02467, 2010 WL 5464294 (D. Colo. Dec. 29, 2010), *aff'd sub nom.* Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012). The plaintiffs in the case had each filed a separate pro se lawsuit in 2005. When the CRC began representing them, we consolidated their cases.

176. Plaintiff's Motion for Partial Summary Judgment at 26, *Saleh*, 2010 WL 5464295 (No. 05-CV-02467), ECF No. 296.

177. No. 07-CV-2483, 2010 WL 5157317 (D. Colo. Nov. 23, 2010), *report and recommendation adopted*, No. 07-CV-02483, 2010 WL 5157313 (D. Colo. Dec. 14, 2010), *aff'd*, 677 F.3d 1001 (10th Cir. 2012).

178. Plaintiff's Response to Defendants' Supplement to Motion for Summary Judgment at 15, *Rezaq*, 2010 WL 5157317 (No. 07-CV-02483), ECF No. 148.

179. *Id.*

180. Rezaq v. Nalley, No. 07-CV-02483, 2008 WL 5172363, at *11 (D. Colo. Dec. 10, 2008).

None of the four men was provided with a hearing or other opportunity to be heard prior to his transfer to ADX, and all were held at ADX for an extraordinarily long time—the shortest for seven years and the longest for nearly fourteen years.[181] During that time, the BOP repeatedly denied them entry into the ADX Step-Down Program, the sole program that would (purportedly) permit them to leave ADX.[182]

During the litigation of both cases, the BOP provided conflicting information about the purpose of ADX and the type of prisoners it is designed to house. BOP policy states that ADX is intended for male "inmates who have demonstrated an inability to function in a less restrictive environment" because they have threatened others or disrupted the orderly running of the institution.[183] According to the BOP, "the main mission of ADX is to affect inmate behavior" and allow inmates to "demonstrate non-dangerous behavior." This is, as our litigation demonstrated, simply untrue: all four of our clients were placed at ADX despite clear conduct in prison and without any evidence that they had an inability to function in less restrictive, open-population prisons.

Discovery in the cases revealed the following conditions at ADX:

> Individuals housed at ADX are in near-total isolation, spending 95% of their lives alone in their small, concrete cells. In the "general population" unit of ADX, individuals are confined alone for 23 hours a day in cells that measure 87 square feet (approximately the same space as two king-sized mattresses.) In this small space, each cell contains a bed, desk, sink, toilet, and shower, all made from poured concrete. Individuals eat all meals alone inside their cells, within arm's length of their toilet. Each cell has one small window to the outside; however, the only view is of the cement "yard." Prisoners at ADX cannot see any nature, not the surrounding mountains or even a patch of grass. . . .
>
> Contact with others is extremely restricted at ADX. The ADX facility is specifically designed to limit all communication between the individuals that it houses. Accordingly, the cells have thick concrete walls and two doors, one with bars and a second which is made of solid steel. The only "contact" Appellants had with other inmates while housed in the "general population" unit was attempted conversations with prisoners in adjacent cells that took place through the thick cell walls and doors.
>
> Interaction with staff is negligible. Prison staff only speak to a prisoner for a few minutes each week, and prisoners often go for days

181. Defendants-Appellees' Response Brief at 46, Rezaq v. Nalley, No. 11-1069 (10th Cir. July 4, 2011).

182. *Id.* at 19.

183. FED. BUREAU OF PRISONS, DEP'T OF JUSTICE, P5100.08, PROGRAM STATEMENT: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION 17 (Sept. 12, 2006).

> at a time without having more than a few words spoken to them. . . . Any actual interaction usually lasts only seconds and takes places through an inmate's solid steel cell door. Contact beyond a merely functional provision of meals and escort to recreation is not a daily occurrence.
>
> Each and every time an ADX prisoner is permitted to leave his cell, he is restrained with leg irons, handcuffs, and a belly chain. Even on the rare occasions when a prisoner receives a visitor, these restraints must remain on during the entire visit despite the fact that the visit is non-contact, meaning the prisoner and visitor are separated by a plexi-glass barrier. Prisoners in ADX "general population" units are eligible to receive five social visits a month. Yet, due to the remote location of ADX, three of the four [men in the Rezaq and Saleh cases] never received a social visit during the years they were confined at ADX. [The fourth] received only two social visits in the thirteen years he spent at ADX. Even if their families were able to visit them, they would not be able to shake hands, hug, or touch in any way, as no human contact is permitted. Not being able to touch their loved ones, even for a moment, makes the idea of visiting so painful for both the prisoner and his family members that many elect to forego visits altogether.
>
> Formal opportunities for rehabilitation are extremely limited. All educational programming occurs via closed-circuit television in the prisoners' cells. The programming consists of shows being broadcast on the television (sample titles include, "World of Byzantium," "Parenting I and II," and "Peloponnesian War I and II") and the prisoner filling out a short quiz. There is no interaction with an educator or other students for these "classes." The only job available is a three-month orderly position, which entails cleaning the tier. Some prisoners apply for this coveted position repeatedly, but are denied without explanation.
>
> Religious practice is severely curtailed. The only religious services are shown on the closed-circuit television. Group prayer, an essential tenet of Islam [our clients' faith], is strictly forbidden.[184]

For many years, the *Saleh* plaintiffs and Mr. Rezaq were repeatedly denied access to the ADX Step-Down Program, the only means by which a prisoner can transfer out of ADX to an open-population institution.[185] BOP policy states that prisoners will require, at minimum, three years to progress out of ADX.[186] Evidence produced in discovery revealed that most of the men in ADX, including our clients, spend far longer there;

184. This description of the conditions in ADX is taken from the appellate brief of Mr. Rezaq and the *Saleh* plaintiffs. Appellants' Br. at 4–7, Rezaq v. Nalley, No. 11-1069 (10th Cir. July 4, 2011) (internal citations omitted).

185. Rezaq v. Nalley, 677 F.3d 1001, 1006 (10th Cir. 2012).

186. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, FLM 5321.07(1)B, GENERAL POPULATION AND STEP-DOWN UNIT OPERATIONS 6 (Sept. 1, 2015).

fewer than five percent were permitted to complete the program in three years.[187]

During litigation, we also learned there is no maximum amount of time that a person can be confined at ADX.[188] Thus, a prisoner can indefinitely and repeatedly be denied entry into the Step-Down Program, even if he had not received any disciplinary reports. Further, even if a person is in the Step-Down Program, he can be removed and put back in the ADX "general population" for any reason, such as speaking in a tone of voice that the ADX warden finds disrespectful.[189] No hearing or other process is required for removing the prisoner from the Program.[190]

ADX prisoners have no opportunity to participate in the decision of whether they are admitted to the Step-Down Program or allowed to progress through it.[191] Those decisions are made by a committee, and ADX prisoners receive no notice of the committee reviews, nor are they permitted to be present at the committee's meetings or to give input prior to the review.[192] Even if our clients could have participated, however, it became clear that the decision is predetermined, based on factors outside their control. At the time we began litigating the case, the main inquiry of the Step-Down committee was whether the prisoner had "sufficiently mitigated" the reasons for his placement at ADX.[193] Additionally, the lawsuits revealed that "denial can be based on other factors outside of the prisoners' control, such as notoriety, media coverage, or world events."[194] ADX prisoners, including our clients, received no explanation of the reason for a decision to permit or deny them progression into and through the phases of the Step-Down Program. Instead, they received notices containing formulaic language, including that their "reasons for placement have not been mitigated" or that "safety and security" prevented them from being progressed.[195] They therefore had no idea how to alter their behavior in the future to move through the Program and out of ADX.

187. Appellants' Br., *supra* note 184, at 10.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 10–11.
192. *Id.* at 11.
193. Over the course of the litigation, the BOP attempted to moot our clients' cases in several different ways, one of which was to modify the policies governing admission to and through the Step-Down Program—twice. (The second modification was made on the eve of the summary judgment deadline.) In discovery conducted after these policy changes, however, BOP staff testified that the actual processes and considerations of the Step-Down Committee had not changed.
194. Appellants' Opening Br. at 12, Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012) (No. 11-1069).
195. *Id.* at 13.

After several years in isolation at ADX, the *Saleh* plaintiffs and Mr. Rezaq filed lawsuits alleging, among other things,[196] that they were transferred to ADX without due process; and that they continued to be confined in ADX without due process, in violation of the Fifth Amendment. Shortly after the men filed their lawsuits in the U.S. District Court for the District of Colorado, the BOP suddenly began to admit them into the Step-Down Program, despite no changes in their behavior or (obviously) their crimes of conviction.[197]

Additionally, on the eve of the summary judgment deadline, the BOP decided to give retroactive "transfer hearings" to our clients and other men who had been moved to ADX years before without process. The BOP then cited to the hearings to assert that our clients' claims should be dismissed as moot.[198] As we learned in discovery, however, the BOP conducted these retroactive transfer hearings specifically because of our clients' pending litigation.[199] Based on the circumstances of the hearings, including their timing and that every retroactive hearing resulted in a recommendation of continued ADX placement, our clients asserted that the outcomes were predetermined and that the hearings were a sham.

The BOP moved for summary judgment in both the *Rezaq* and *Saleh* cases, asserting that even if our clients had a liberty interest in their lengthy confinement at ADX, they had been provided sufficient process for their transfers to and progression through ADX.[200] Both district courts ruled in favor of the BOP, never analyzing the adequacy of the process because they held that our clients' conditions of confinement at ADX did not give rise to a liberty interest within the meaning of the Due Process Clause of the Fifth Amendment.[201]

Since *Sandin* and *Wilkinson*, courts reviewing procedural due process claims have determined whether a prisoner-plaintiff has established the existence of a liberty interest by assessing whether his conditions are "atypical and significant . . . in relation to the ordinary

196. The *Saleh* plaintiffs also alleged that the BOP violated their right to exercise their religion (Islam) under the First Amendment and the Religious Freedom Restoration Act, 24 U.S.C. §§ 2000bb *et seq*. Those claims were settled.

197. When asked the reason Mr. Saleh was now eligible for the program, the BOP stated only that "the factors which originally led to Mr. Saleh's placement had been sufficiently mitigated." No explanation was provided as to what the reasons were or as to how that mitigation had occurred. Rezaq v. Nalley, Appellants' Opening Br. at 14.

198. Defendant's Motion for Summary Judgment at 2, Saleh v. Fed. Bureau of Prisons, 2010 WL 5464295 (D. Colo. Nov. 23, 2010) (No. 05-CV-02467), ECF No. 295.

199. Appellants' Opening Br., *supra* note 194, at 15–16.

200. Defendant's Motion for Summary Judgment, *supra* note 198; Defendant's Motion for Summary Judgment at 2–4, Rezaq v. Fed. Bureau of Prisons, 2010 WL 5157317 (D. Colo., Nov. 23, 2010) (No. 07-CV-02483), ECF No. 112.

201. *Saleh*, 2010 WL 5464295, at *17; *Rezaq*, 2010 WL 5157317, at *14.

incidents of prison life."[202] In *Wilkinson*, the Supreme Court considered whether the conditions in the Ohio supermax prison (OSP) gave rise to a liberty interest.[203] Observing that OSP is "synonymous with extreme isolation," the Court cited the following conditions in concluding that confinement in OSP constituted a liberty interest: cells with solid metal doors to prevent communication; prisoners take all meals alone in their cells; visitation is rare and physical contact is not allowed; prisoners are deprived of almost any environmental or sensory stimuli and almost all human contact.[204] The Court also noted that placement at OSP was for an indefinite period and that those otherwise eligible for parole lose their eligibility while incarcerated at the prison.[205] While recognizing that in *Sandin*'s wake, the courts of appeals had not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system, the Court declined to do so in *Wilkinson*, concluding that the conditions of the Ohio supermax "impose an atypical and significant hardship under any plausible baseline."[206]

In holding that Mr. Rezaq and the *Saleh* plaintiffs had no liberty interests in their years of ADX confinement, the district courts relied on the Tenth Circuit's decision in *Estate of DiMarco v. Wyoming Dep't of Corrections*.[207] Like the other circuits that wrestled with the baseline question in the wake of *Wilkinson*, the Tenth Circuit was also forced to confront the question in the context of litigation about segregated confinement.[208] Unlike its sister circuits, however, the Tenth Circuit approached the question by creating a nondispositive list of four factors to determine whether a prisoner has a protected liberty interest: (1) whether the segregation furthers a legitimate penological interest; (2) whether the conditions of placement are extreme; (3) whether the placement increases the duration of confinement; and (4) whether the placement is indeterminate.[209] Finding that all four of the factors weighed in favor of the BOP[210] in the *Rezaq* and *Saleh* cases (and that there were

202. *See, e.g.*, Orr v. Larkins, 610 F.3d 1032, 1034 (8th Cir. 2010); Marion v. Columbia Corr. Inst., 559 F.3d 693, 699 (7th Cir. 2009); Harden-Bey v. Rutter, 524 F.3d 789, 792–93 (6th Cir. 2008); Iqbal v. Hasty, 490 F.3d 143, 161–63 (2d Cir. 2007), *rev'd on other grounds sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Richardson v. Joslin, 501 F.3d 415, 419 (5th Cir. 2007).

203. Wilkinson v. Austin, 545 U.S. 209, 210 (2005).

204. *Id.* at 214–15, 223.

205. *Id.* at 215.

206. *Id.* at 223.

207. Saleh v. Fed. Bureau of Prisons, No. 05-CV-02467, 2010 WL 5464295, at *16 (D. Colo. Nov. 23, 2010); Rezaq v. Nalley, No. 07-CV-02483, 2010 WL 5157317, at *14 (D. Colo. Nov. 23, 2010).

208. Estate of DiMarco v. Wyo. Dep't of Corr., Div. of Prisons, 473 F.3d 1334, 1339 (10th Cir. 2007).

209. *Id.* at 1342.

210. Federal prisoners, unlike their state counterparts, are not eligible for parole because in the Sentencing Reform Act of 1984, Congress eliminated federal parole for everyone convicted of a crime after 1987. For that reason, we argued that this third *DiMarco* factor (whether the placement increases the duration of confinement) did not weigh against our clients because unlike the plaintiff

no genuine issues of material fact as to any of them), the district courts granted summary judgment against our clients. Because we believed both that the *Rezaq* and *Saleh* courts incorrectly applied the four-factor test and that the test itself contravened the Supreme Court's holding in *Wilkinson*, we appealed the decisions.[211]

On appeal, we argued that the *DiMarco* test conflicts with Supreme Court precedent and that of other circuits in several ways.[212] First, and most significantly, *DiMarco*'s direction to consider the government's "legitimate penological interest" to determine if a liberty interest exists directly conflicts with *Wilkinson*'s holding that the penological justification for placement of a prisoner in segregation is irrelevant to the liberty interest inquiry: "OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners . . . That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance."[213] Prison officials' penological interest in placing prisoners in the challenged conditions is irrelevant to the liberty interest inquiry because it has no effect on the severity of restraint imposed by those conditions or the duration of time spent in them.[214] Rather, the penological interest in transferring a prisoner into segregation and the legitimacy of that interest is only relevant *after* a liberty interest is found, during any actual due process hearing.[215] Thus, we argued that

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in *Wilkinson*, supermax confinement did not render them ineligible for parole as they were already "ineligible." Nevertheless, the district courts held that this factor weighed in favor of the BOP. *Saleh*, 2010 WL 5464295, at *14; *Rezaq*, 2010 WL 5157317, at *12.

211. The *Rezaq* and *Saleh* cases were consolidated on appeal. Rezaq v. Nalley, 677 F.3d 1001, 1004 (10th Cir. 2012). Yale Law School's Allard K. Lowenstein International Human Rights Clinic filed an excellent amicus brief supporting our clients on behalf of a group of social psychologists, criminologists, and behavioral scientists who study the dynamics of authority and cooperation in group settings, and who have "examined how perceptions of fairness or unfairness in group rulemaking and processes, including punishment and criminal lawmaking, influence behavior." Corrected Brief of Behavioral Scientists et. al. as Amici Curiae in Support of Plaintiffs-Appellants, Urging Reversal at 9, Rezaq v. Nalley, 677 F.3d 1001, 1004 (10th Cir. 2012) (No. 11-1069).

212. By the time of oral argument, only one of the four men was still in ADX; the BOP had transferred the others to Communication Management Units (CMU's) in other prisons, and used those transfers as the basis for a motion to dismiss the appeal. Finding that "other than ADX, the CMUs are the most restrictive facilities in the federal system," the Tenth Circuit observed that "if the inmates' current conditions are a byproduct of their initial transfers to ADX, then long-term consequences may persist and an injunction may serve to eradicate the effects of the BOP's past conduct." *Rezaq*, 677 F.3d at 1009. The court therefore declined to dismiss the appeal as moot, holding that if our clients proved a violation of their due process rights, there was still relief that could be granted "because they have never been returned to their pre-ADX placements" in open-population penitentiaries. *Id.* at 1008.

213. Wilkinson v. Austin, 545 U.S. 209, 224 (2005).

214. Appellants' Opening Br. at 21 (citing *Wilkinson*, 545 U.S. at 223–24) (holding that the touchstone of the existence of a liberty interest is the nature of the conditions).

215. The incompatibility of *DiMarco*'s inclusion of legitimate penological interest in the liberty interest inquiry is further demonstrated by the absence of such a consideration in other circuits' post-*Wilkinson* liberty interest tests. *See, e.g.*, Orr v. Larkins, 610 F.3d 1032, 1034 (8th Cir. 2010); Marion v. Columbia Corr. Inst., 559 F.3d 693, 699 (7th Cir. 2009); Harden-Bey v. Rutter, 524 F.3d 789, 792–93 (6th Cir. 2008); Iqbal v. Hasty, 490 F.3d 143, 161–63 (2d Cir. 2007), *rev'd on*

the penological interest the BOP asserted for transferring our clients to ADX—that they were convicted of terrorism-related crimes—should be considered only during the actual due process hearing itself, not as part of the liberty interest inquiry.

We also argued that the *DiMarco* test does not provide a baseline for comparison, which has resulted in lower courts—including the *Rezaq* and *Saleh* district courts—erroneously using the conditions in the Ohio supermax at issue in *Wilkinson* as a baseline. And we asserted that *DiMarco*—and, by extension, the *Rezaq* and *Saleh* district courts—ignored *Wilkinson*'s direction to give weight to the duration of confinement in segregated conditions.

Unfortunately, and—we believe—erroneously, the Tenth Circuit upheld the district courts' decisions.[216] Finding that it was bound by *DiMarco*'s inclusion of the "legitimate penological interest" factor (despite characterizing the *DiMarco* factors as only "potentially relevant" and "nondispositive" and stating that "we have never suggested that the factors serve as a constitutional touchstone"),[217] the panel found that the BOP's assertions of "national security" and "institutional safety" were sufficient to justify our clients' placement in ADX.[218] The court's holding was partially grounded in its erroneous belief that the liberty interest inquiry is entitled to *Turner*-type deference, as evidenced by its statement that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."[219] The panel therefore concluded that "the BOP should not have to prove segregated confinement is essential in every case," and that this *DiMarco* factor (the legitimacy of the proffered penological interest) weighed in favor of the BOP.[220]

Perhaps the most disturbing part of the court's holding, however, was its determination that "the conditions . . . at ADX are not extreme as a matter of law."[221] The conclusion is understandable only by considering the conditions the court used as a comparator: other supermax confinement.[222] Rather than finding that the similarity to the *Wilkinson* conditions weighed in favor of finding that the conditions are extreme, the court inexplicably found that those conditions weighed

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other grounds sub nom. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Richardson v. Joslin, 501 F.3d 415, 419 (5th Cir. 2007).

216. *Rezaq*, 677 F.3d at 1004.
217. *Id.* at 1012.
218. *Id.* at 1013.
219. *Id.* at 1014 (quoting Sandin v. Conner, 515 U.S. 472, 482 (1995)).
220. *Id.*
221. *Id.* at 1015.
222. *Id.*

against such a finding.[223] Under the panel's holding, it is unlikely that any conditions in the country would qualify as "extreme."

In retrospect, the Tenth Circuit's holding, while profoundly troubling from doctrinal and human rights perspectives, was perhaps foreseeable given that the prison in question was not just any supermax facility—it was ADX. The *Rezaq* court highlighted that fact in several places in its opinion, explaining that "[t]he government opened ADX to house inmates who, like plaintiffs, pose unusual security and safety concerns[,]" which "stem from a uniquely federal penological interest in addressing national security risks by segregating inmates with ties to terrorist organizations."[224] It is telling that in another due process case involving Colorado's *state* supermax prison decided less than a year before *Rezaq*, the Tenth Circuit held that the plaintiff *did* establish a liberty interest in a seven-year period of confinement in administrative segregation—a considerably shorter period than some of the men challenging their confinement in ADX.[225]

2. Eighth Amendment – *Silverstein v. BOP*

At the same time the CRC was representing the men in the *Rezaq* and *Saleh* cases in their due process litigation against ADX, we also represented another client—Tommy Silverstein—in a lawsuit claiming that by holding him in solitary confinement for thirty years, the BOP violated his Eighth Amendment right to be free from cruel and unusual punishment.[226]

The BOP put Mr. Silverstein in solitary confinement following his murder of a correctional officer at the Marion penitentiary in 1983.[227] In the decades that followed, Mr. Silverstein was subjected to a degree and duration of isolation that is almost incomprehensible.[228] He begins his thirty-fifth year of solitary confinement this year. He is sixty-five years old.

In the aftermath of the murder, then-BOP Director Norman Carlson issued a directive that Mr. Silverstein be placed on "non-contact"

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223. *Id.*

224. *Id.* at 1014.

225. Toevs v. Reid, 646 F.3d 752, 756–57 (10th Cir. 2011), *amended by* 685 F.3d 903 (10th Cir. 2012). That said, the court did not go so far as to hold that the plaintiff had "established a liberty interest" because the Colorado Department of Corrections did not appeal the district court's conclusion that the plaintiff showed that "the conditions of his confinement" were "an atypical and significant hardship." *Id.* at 911.

226. Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471, 2011 WL 4552540, at *1, *7 (D. Colo. Sept. 30, 2011).

227. *Id.* at *1–2.

228. While the CRC was litigating Mr. Silverstein's case, there would come a point each year when the students who were representing him realized that Mr. Silverstein had been in solitary confinement for longer than they had been alive. The realization never failed to be jarring—for the students or for me.

status.[229] The BOP transferred him from Marion to the federal penitentiary in Atlanta, where he was put in a tiny, windowless steel cell in the basement of the prison referred to as the "side pocket cell"—a cell so small that Mr. Silverstein could stand in one place and touch both walls with outstretched arms.[230] It had nothing in it besides a bunk and a Bible.[231] Shortly after putting him in the side pocket cell, prison staff began construction on it, welding more bars across the front of it while Mr. Silverstein was inside the cell.[232] It felt, he said, "like I was being buried alive."[233] During his first year in the side pocket cell, Mr. Silverstein was completely isolated and had nothing to occupy his time or his mind.[234] BOP staff did not allow him to have a watch or clock and "bright, artificial lights remained on in the cell" at all times, making it impossible to tell if it was day or night, or what day it was.[235] The only time he was allowed out of the cell was for one hour a week of outdoor exercise, though he could not see anyone or anything of the surrounding landscape.[236]

The BOP held Mr. Silverstein in the side pocket cell for four years before transferring him to the federal penitentiary in Leavenworth, Kansas.[237] He remained there, in extraordinary isolation, for the next eighteen years.[238] While at the United States Penitentiary (USP) Leavenworth, the BOP put him in cells specially constructed to remove him as fully as possible from all human contact—he could not see or hear "any sign of other prisoners," though he knew they must be elsewhere in the prison.[239] Mr. Silverstein's cell was separated from his indoor and outdoor exercise areas by solid steel doors.[240] To permit him to move between areas, prison staff would remotely open the doors so that he could pass through with no human interaction.[241] Prison staff installed cameras in the cells and kept Mr. Silverstein under twenty-four-hour video surveillance, even while he was showering or using the

229. *Silverstein*, 2011 WL 4552540, at *1.
230. Declaration of Thomas Silverstein, *supra* note 65, ¶ 66.
231. *See id.* ¶¶ 67, 73.
232. *Id.* ¶¶ 70–71.
233. Declaration of Thomas Silverstein, *supra* note 65, ¶ 72.
234. *Id.* ¶ 73.
235. *Id.* ¶¶ 74–75.
236. *Id.* ¶ 80.
237. *Silverstein*, 2011 WL 4552540, at *2. He might have remained there even longer except that in 1987, Cuban prisoners at USP-Atlanta rioted, taking prison staff hostage and seizing control of the prison for seven days. During that time, Mr. Silverstein could "move about the prison and interact with other people," even persuading rioters to allow an older correctional officer who was having a heart attack to leave the prison "so he could receive medical attention." "[T]he FBI and the BOP negotiated with the Cuban rioters to turn [Mr. Silverstein] over as a gesture of goodwill," and he was ultimately drugged, seized, and given to BOP officers. Declaration of Thomas Silverstein, *supra* note 65, ¶¶ 96, 98, 100–02, 105–06.
238. *Silverstein*, 2011 WL 4552540, at *2.
239. Declaration of Thomas Silverstein, *supra* note 65, ¶ 126.
240. *Id.* ¶¶ 144–45.
241. *Id.* ¶ 145.

toilet.[242] The cell was illuminated all the time with artificial light.[243] During this time, Mr. Silverstein did not have access to a mirror; only years later when he saw a photo of himself did he know what he looked like.[244] He didn't recognize himself.[245]

Unsurprisingly, over the course of his two decades of isolation in USP Leavenworth, Mr. Silverstein's mental state began to deteriorate.[246] The BOP's own psychological records documented Mr. Silverstein's increasing depression and anxiety, declining cognitive and social skills, and his attempt to live in "near darkness" by covering the light in his cell with whatever he could, behavior that a BOP psychologist described as "sensory deprivation" that was "not a positive indicator."[247] Dr. Craig Haney, one of the expert witnesses in the case, commented that the BOP's psychological records provided "a contemporaneous record of a man in psychological pain, suffering under the conditions of his confinement and struggling to adapt and adjust to the extraordinarily severe deprivations that they imposed on him. Indeed, at times Mr. Silverstein appeared to come dangerously close to—and perhaps sometimes to cross over into—suffering from serious psychological problems that could incur disabling long-term consequences."[248]

In July 2005, the BOP transferred Mr. Silverstein to ADX.[249] By this time, he had been in solitary confinement under a no-human contact order for twenty-one years.[250] During that entire time, Mr. Silverstein had only one disciplinary infraction—a 1988 sanction for not wiping soap off the camera in his cell at Leavenworth. He hoped that his decades of clear conduct would lead to an easing of his isolation. It did not.[251]

At ADX, Mr. Silverstein was put on Range 13, the most restrictive area of the most restrictive prison in the country.[252] The BOP confined

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242. *Id.* ¶ 118.
243. *Id.* ¶ 120.
244. *Id.* ¶ 125.
245. *Id.*
246. *See* Report or Affidavit of Craig William Haney, Ph.D., J.D. at 29–43, Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471, 2009 WL 8514046 (D. Colo. Apr. 13, 2009).
247. *See id.*
248. *Id.* at 43.
249. *Silverstein*, 2011 WL 4552540, at *2.
250. *Id.* at *1–2.
251. Declaration of Thomas Silverstein, *supra* note 65, ¶ 170. If anything, his clear conduct record was used against him by the BOP. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 52. As Dr. Haney noted in his report, BOP records from Leavenworth "acknowledged Mr. Silverstein's '"positive level of adjustment" during the past 9 years' but attributed that positive adjustment primarily to 'his limited contact with others and the avoidance of interpersonal conflict.' Without any apparent hint of irony, however, the Report went on to assert that '[t]o accurately assess his level of change in this area would require additional interpersonal interaction'—precisely the interpersonal interaction that Mr. Silverstein had repeatedly asked to have but which the BOP was refusing to allow." *Id.* (citing SHU Review, March 11, 1997) (citation omitted).
252. *Silverstein*, 2011 WL 4552540, at *2.

only one other person on Range 13, and he and Mr. Silverstein tried to shout to each other for the first few days.[253] Shortly afterward, prison staff constructed a soundproof, solid steel door in the hallway to further isolate each of them from the sound of the other's voice.[254] As at Leavenworth, Mr. Silverstein was allowed access to a cement-enclosed outdoor exercise pit, which he accessed via remote-operated doors, once again eliminating even this limited source of human contact.[255] Indeed, while he was confined in Range 13, invasive strip searches and infrequent haircuts were the only physical contact Mr. Silverstein experienced with other human beings.[256] Dr. Craig Haney, an internationally recognized expert on the psychological effects of solitary confinement, stated that Mr. Silverstein's conditions were "the most isolated form of confinement I have ever encountered."[257] Similarly, our correctional expert observed that "the near total isolation from all human contact is unprecedented in my 38 years of experience in corrections."[258]

Mr. Silverstein's conditions on Range 13 were, if possible, even worse than those at USP Leavenworth.[259] His cell was smaller.[260] And many of the privileges he earned over time at Leavenworth, such as phone calls and art supplies, were taken away.[261] As he had at Leavenworth, Mr. Silverstein repeatedly asked BOP staff what, if anything, he needed to do to be moved out of this extreme isolation.[262] In response, he was told to "just keep doing what you're doing."[263] In the meantime, Mr. Silverstein's cognitive and emotional state continued to deteriorate.[264] As one journalist wrote in 2007, Silverstein's fate "may be the prototype of what the government has in mind for other infamous prisoners—to bury them in strata of supermax security to the point of oblivion."[265]

In November 2007, the CRC filed suit on Mr. Silverstein's behalf, asserting that by confining him in extreme and indefinite isolation for a quarter century, the BOP violated his Eighth Amendment right to be free from cruel and unusual punishment.[266] Five months after we filed the

253. Declaration of Thomas Silverstein, *supra* note 65, ¶ 175.
254. *Id.* ¶ 177.
255. *Id.* ¶¶ 188–89.
256. *Id.* ¶¶ 196–97.
257. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 4.
258. Declaration of Steve J. Martin ¶ 6, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 320-6.
259. *See* Declaration of Thomas Silverstein, *supra* note 65, ¶¶ 179, 185–87.
260. Declaration of Thomas Silverstein, *supra* note 65, ¶ 179.
261. *Id.* ¶¶ 185–87.
262. *Id.* ¶ 203.
263. *Id.*
264. *See* Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 59–64.
265. Alan Prendergast, *The Caged Life*, WESTWORD (Aug. 16, 2007, 4:00 AM) http://www.westword.com/news/the-caged-life-5094837.
266. Complaint ¶¶ 181–84, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 1. We also asserted a Fifth Amendment procedural

lawsuit, the BOP moved Mr. Silverstein from Range 13 to the ADX "general population" unit.[267] He is still in solitary confinement in ADX today.

Seven generations of CRC student attorneys litigated Mr. Silverstein's case before both the U.S. District Court for the District of Colorado and the U.S. Court of Appeals for the Tenth Circuit. After defeating the BOP's motion to dismiss, the students conducted extensive discovery and motion practice, including responding to the BOP's motion for summary judgment. In that motion, the BOP argued that Mr. Silverstein's Eighth Amendment claim should be dismissed because the BOP provided Mr. Silverstein "the minimal civilized measure of life's necessities," which it defined as "food, clothing, shelter, sanitation, medical care, mental health care and reasonable safety from serious bodily harm."[268] The BOP also claimed that holding Mr. Silverstein in extreme isolation for nearly thirty years did not constitute deliberate indifference to a substantial risk of serious mental or physical harm to him.[269]

In response to the BOP's motion, we argued that human interaction and environmental stimulation (as well as sleep) are basic human needs, and that by confining Mr. Silverstein in extreme isolation for thirty years, the BOP deprived him of those things, causing him psychological pain and distress and putting him at substantial risk of serious future harm.[270] Through discovery, we learned that over the course of his three decades in isolation, Mr. Silverstein developed an anxiety disorder and also suffered "cognitive harms, including memory loss and an inability to concentrate and communicate."[271] We also discovered that the BOP knew of these effects of isolation on people in general—and Mr. Silverstein in particular—for the prior fifteen to twenty years.[272]

In analyzing Mr. Silverstein's Eighth Amendment claim, the district court found that because Mr. Silverstein was permitted to make two

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due process claim. *Id.* ¶¶ 171–79. Because the analysis of the due process claim largely mirrors that of the Rezaq and Saleh cases discussed supra, I omit discussion of Mr. Silverstein's Fifth Amendment claim here.

267. *Silverstein*, 2011 WL 4552540, at *2.

268. Defendants' Motion for Summary Judgment at 2, *Silverstein*, 2011 WL 4552540 (No. 07-CV-02471), ECF No. 296.

269. *Id.* at 3.

270. Plaintiff's Response to Motion for Summary Judgment at 21–23, *Silverstein*, 2011 WL 4552540 (No. 07-CV-02471), ECF No. 319.

271. *Id.* at 16.

272. *Id.* at 16–17. We also argued that pursuant to *Hope v. Pelzer* and *Rhodes v. Chapman*, the BOP did not have a legitimate purpose for continuing to isolate Mr. Silverstein, given his age and long period of clear conduct. Instead, a reasonable factfinder could conclude that the BOP was instead motivated by revenge for the officer who Mr. Silverstein killed in 1983 (citing to evidence that prison staff stated that Mr. Silverstein would not leave isolation "until he takes his last breath," and because he could not be executed, the BOP has "no choice but to make his life a living hell") *Id.* at 25–27.

fifteen-minute phone calls per month, have five hours of exercise per week alone in a steel cage or a cement enclosure, and could communicate, on average, one minute per day with prison staff through the solid steel door of his cell, no reasonable factfinder could conclude that he was deprived of social interaction and environmental stimulation.[273] The district court therefore granted the BOP's motion for summary judgment.[274]

We appealed to the Tenth Circuit, asserting that the district court erred by resolving two factual disputes in favor of the BOP: first, whether thirty years of isolation from human contact and environmental stimulation had harmed Mr. Silverstein, and second, whether continuing to hold him in solitary confinement placed him at risk of future harm.[275] Rather than allowing these factual disputes to go to trial, the district court erroneously resolved them in favor of the moving party, finding that Mr. Silverstein was neither harmed by such unprecedented isolation nor was he at risk of future harm.[276]

In an unpublished opinion, the Tenth Circuit upheld the district court's decision that Mr. Silverstein's thirty-year confinement in extreme isolation did not constitute cruel and unusual punishment.[277] Despite recognizing that the conditions in which Mr. Silverstein was confined were the most isolating in the entire federal prison system and that his three decades of solitary confinement was extraordinary,[278] the court nevertheless held that his conditions did not violate the Eighth Amendment.[279]

Most of the court's rationale for its holding was based on security concerns: Mr. Silverstein was convicted of killing two prisoners while in custody in addition to the murder of a correctional officer while he was in custody in 1983, and in the 1980s, had been affiliated with the Aryan Brotherhood.[280] Although thirty-one years passed since the murders, Mr.

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273. *Silverstein*, 2011 WL 4552540, at *20.

274. *Id.* at *23.

275. Appellant's Opening Brief at 8, Silverstein v. Fed. Bureau of Prisons, 559 F. App'x 739 (10th Cir. 2014) (No. 12-1450).

276. *Silverstein*, 559 F. App'x at 739.

277. *Id.* at 764. The Tenth Circuit denied the U.S. Attorney's Office motion to publish the decision.

278. *Id.* at 743, 759. The Tenth Circuit ignored evidence of twenty-two years of Mr. Silverstein's isolation because it (like the district court) limited its consideration to Mr. Silverstein's conditions at ADX. *Id.* at 751–52.

279. *Id.* at 763.

280. *Silverstein*, 559 F. App'x at 759–62. In so doing, the panel went beyond the record and imported information about the Aryan Brotherhood from other cases, improperly relying on this information to resolve a disputed issue in favor of the moving party. *See id.* at 744 n.5 (citing United States v. Mills, 704 F.2d 1553 (11th Cir. 1983)) ("While Mr. Silverstein was not convicted of these two murders, they nevertheless are indicative of the type of gang conduct the BOP believes Mr. Silverstein is involved in.").

Silverstein had been in isolation during that entire time,[281] had clear conduct for nearly twenty-five years, and was in his sixties, the court nevertheless deferred completely to prison officials' claim that *no* lessening of his isolation was possible without threatening institutional safety.[282] Indeed, the court's deference to prison officials was so absolute that it denied Mr. Silverstein a trial in which the district court could consider evidence that there were ways to ease his isolation without jeopardizing security.[283] The beginning and end of the Tenth Circuit's inquiry into the BOP's penological justifications for thirty years of isolation can be summed up by its statement that "the opinion of a prison administrator on how to maintain internal security carries great weight and the courts should not 'substitute their judgment for that of officials who have made a considered choice."[284]

The Tenth Circuit's decision conflicts with Supreme Court precedent holding that the limits imposed on the other constitutional rights of prisoners do not apply to claims of cruel and unusual prison conditions because to do so would thwart the entire purpose of the Eighth Amendment: protecting those who are incarcerated.[285] Accordingly, the Supreme Court held that affording "[m]echanical deference to the findings of state prison officials in the context of the Eighth Amendment would reduce that provision to a nullity in precisely the context where it is most necessary."[286] Despite this, the *Silverstein* court deferred entirely to the BOP's proffered reasons for holding Mr. Silverstein in indefinite isolation, even to the extent of profoundly minimizing or ignoring evidence that conflicted with those judgments.

In addition to the deference the Tenth Circuit gave to the BOP's asserted penological interest in continuing to hold Mr. Silverstein in solitary confinement into his fourth decade, the court also found that the mental health issues he developed during his time in solitary—including an anxiety disorder, cognitive impairment, hopelessness, inability to concentrate, memory loss, and depression—were "minor mental health symptoms" and therefore his thirty years of isolation was not

281. In his declaration, Mr. Silverstein stated, "I do not consider myself to be part of any prison gang. I just want to serve out the remainder of my time peacefully with other mature guys doing their time." Declaration of Thomas Silverstein, *supra* note 65, ¶ 14.

282. *Silverstein*, 559 F. App'x at 744–45, 762–63.

283. *Id.* at 762–63.

284. *Id.* at 754 (quoting Whitley v. Albers, 475 U.S. 312, 322 (1986)). In making this statement, the Court quoted from an Eighth Amendment use of force case, which employs a different—and more deferential—standard. *See Whitley*, 475 U.S. at 320–21.

285. Johnson v. California, 543 U.S. 499, 511 (2005).

286. *Id.* at 511 (quoting Spain v. Procunier, 600 F.2d 189, 194 (9th Cir. 1979)) ("[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment."); *see* Brown v. Plata, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

"sufficiently serious so as to deprive him of the minimal civilized measure of life's necessities."[287]

Not only did the Tenth Circuit disregard the harm Mr. Silverstein had already suffered, it also disregarded the risk of harm that indefinite solitary confinement posed to Mr. Silverstein in the future. In *Helling v. McKinney*,[288] the Supreme Court expressly recognized the "risk of harm" formulation of the objective prong, holding that "[t]he Amendment . . . requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.' . . . [A] remedy for unsafe conditions need not await a tragic event."[289] The Court went on to explain:

> [T]he Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused. . . . It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.[290]

One of the reasons the Tenth Circuit held that indefinite solitary confinement did not pose a constitutionally significant risk of harm to Mr. Silverstein in the future was its determination that in conditions of confinement cases where a plaintiff asserts a future risk of mental harm, "[t]he actual extent of any . . . psychological injury is pertinent in proving a substantial risk of serious harm."[291]

Framing the inquiry this way allowed the panel to disregard extensive evidence of the negative psychological effects of solitary confinement. That evidence included studies documenting a recurring cluster of harms suffered by people in long-term isolation, including "ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory" as well as "a constellation of symptoms indicative of mood or emotional disorders . . . emotional flatness or losing the ability to feel, swings in emotional responding, and feelings of depression or sadness that did not go away."[292] Those studies document that over and over again, people who have spent long periods in solitary report the same symptoms of harm—so much so that researchers refer to this cluster as

287. *Silverstein*, 559 F. App'x at 758.
288. 509 U.S. 25 (1993).
289. *Id.* at 30, 33–34.
290. *Id.*
291. *Silverstein*, 559 F. App'x at 754.
292. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 5.

"SHU syndrome."[293] Harvard psychiatrist, Dr. Stuart Grassian, published research in 1983 (the year Mr. Silverstein was put in solitary) documenting brain function abnormalities of people held in isolation.[294] And, as Dr. Haney noted in his expert report, studies from all over the world detail the "psychologically precarious state of persons confined under penal isolation, [including] the pain and suffering that isolated prisoners endure."[295] Further, "[t]he data that establish these harmful effects have been collected in studies conducted over a period of several decades, by researchers from several different continents who had diverse academic backgrounds and a wide range of professional expertise."[296]

Despite this overwhelming body of evidence, the Tenth Circuit found that there was no triable issue of fact as to whether Mr. Silverstein faced a substantial risk of future harm as he entered his fourth decade of indefinite and extreme isolation—isolation that continues to this day. Moreover, the court's approach to its analysis shifted the inquiry away from the core constitutional question of whether such confinement is inconsistent with the "evolving standards of decency that mark the progress of a maturing society."[297]

3. First Amendment – *Jordan v. Pugh*

In addition to litigation challenging the isolating conditions of ADX, the CRC also has litigated other types of constitutional challenges on behalf of men confined there. The first of these cases was *Jordan v. Pugh*,[298] which involved a First Amendment challenge to a BOP regulation that impermissibly restricted our client's speech.[299] While the case did not challenge the conditions of confinement at ADX, I include it here because it illustrates the lengths to which the BOP will go to prevent prisoners from describing those conditions to the outside world.

Our client, Mark Jordan, was in solitary confinement in ADX for three years when he wrote an essay entitled, *The Social Bonds of the Have-Nots*, which described his prison routine at ADX, the crimes that led to his imprisonment, and his pending murder charges.[300] He mailed the manuscript to *Off!* Magazine, which published the essay under his

293. GREG NEWBOLD, *Foreword: The Phenomenon of USP Marion*, *in* THE MARION EXPERIMENT: LONG-TERM SOLITARY CONFINEMENT AND THE SUPERMAX MOVEMENT viii (Stephen C. Richards ed., 2015).

294. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

295. Report or Affidavit of Craig William Haney, Ph.D., J.D., *supra* note 246, at 2.

296. *Id.* at 4.

297. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

298. 504 F. Supp. 2d 1109 (D. Colo. 2007).

299. *Id.* at 1110.

300. *Id.* at 1115.

name.[301] A copy of the magazine (described by the ADX officer who reviewed it as a "pamphlet") was sent to Mr. Jordan at ADX, and prison staff read it as is customary for all incoming mail.[302] When the article was discovered, Mr. Jordan was issued a disciplinary report for violating a BOP regulation that prohibited prisoners from "act[ing] as a reporter or publish[ing] under a byline."[303] A few months later, Mr. Jordan wrote another essay entitled, *Beware! Surveillance Society*, in which he criticized the DNA Analysis Backlog Elimination Act of 2000, prison officials, and law enforcement generally, and again submitted it to *Off!* Magazine.[304] This time, however, Mr. Jordan asked the magazine to refrain from using his byline and to instead use a pseudonym so that he would not be disciplined again.[305] Once again, however, when ADX staff discovered he "published under a byline"—albeit not his own—Mr. Jordan received another disciplinary sanction for violating the same regulation.[306]

Mr. Jordan filed suit pro se in the U.S. District Court for the District of Colorado, asserting, among other things, that the regulation prohibiting federal prisoners from acting as a reporter or publishing under a byline violated the First Amendment and was facially overbroad in that it violated not only Mr. Jordan's rights, but also those of publishers and members of the public.[307] An accomplished jailhouse lawyer, Mr. Jordan litigated the case himself for over four years, including discovery, an appeal, remand to the district court, and summary judgment. After denying the BOP's motion for summary judgment, U.S. District Judge Marcia Krieger appointed the CRC to represent Mr. Jordan at trial.

Ten days before trial, the U.S. Attorney's Office forwarded to us a memorandum authored by the Assistant Director/General Counsel of the BOP, which purported to "clarify the Bureau of Prisons' position on when to seek disciplinary action against inmates for publishing under a byline."[308] The memo made clear that it "had no effect on the regulation itself" but that the BOP's "current position" was not to discipline a prisoner for per se violations of the regulation, but instead to discipline when there is a "factual basis for concluding the inmate's actions

301. *Id.* Off! Magazine was the official publication of Off Campus College Meeting at the State University of New York at Binghamton.

302. The only exception to this is mail from a prisoner's lawyer. 28 C.F.R. § 540.18 (2017).

303. 28 C.F.R. § 540.20(b) (2010); *Jordan*, 504 F. Supp. 2d at 1112.

304. *See Jordan*, 504 F. Supp. 2d at 1115.

305. *See id.*

306. *Id.*

307. Plaintiff's Response to Order to Show Cause and Request for Oral Argument at 4, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-1239), ECF No. 297.

308. Memorandum from Kathleen M. Kenney to the Regional Directors (Oct. 20, 2006) (on file with author).

jeopardize the Bureau's legitimate penological interests."[309] Significantly, the memo also recited that the BOP's new guidance on enforcement of the regulation was created with the express purpose of "address[ing] a litigation situation in the District of Colorado" and avoiding "having the regulation invalidated by the court."[310] The court rejected the BOP's claim that the memo rendered Mr. Jordan's claims moot, ruling that "[a]lthough it is clear that the Defendants do not desire a trial on the Plaintiff's facial challenge to the constitutionality of 28 C.F.R. § 540.20(b), and have twice tried to render such claim moot," a trial on the merits was necessary to determine the constitutionality of the regulation.[311]

At trial, the BOP asserted three security-related justifications for the regulation. First, they claimed that if a prisoner published under his byline, he might "gain undue stature and power, thereby becoming a 'big wheel,' which creates supervisory and management problems."[312] The BOP also claimed that because the content of published material could be "controversial," it could result in violence, and that prison staff might be unwilling to perform their duties out of fear that they might be included in a prisoner's bylined publication.[313]

The court examined these proffered justifications in light of the *Turner* factors and found them wanting.[314] First, the court considered "whether there is a rational connection between the regulation and a legitimate, neutral penological interest."[315] Observing that "the BOP presented no evidence of any instance where an inmate who published under a byline in the news media became a "big wheel," or more importantly, became a security risk," and that there are other BOP-sanctioned activities that encourage prisoners to write and publish in a variety of venues, the court found that "the existence of a 'big wheel' security risk arising from an inmate's bylined publication . . . is undocumented and speculative."[316] Thus, while the court accepted that maintaining prison security is a legitimate and neutral penological interest, it concluded that there was no "logical connection between the

309. *Id.*

310. *Id.*

311. Order Setting the Matter for Trial at 6, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-1239), ECF No. 301.

312. Memorandum Opinion and Order at 5, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-1239), ECF No. 354.

313. *Id.*

314. *Id.* at 17. As the court recognized, for outgoing correspondence, the Supreme Court has held that the analytical framework set forth in *Martinez* applies rather than the *Turner* framework. *Id.* (explaining the test in Procunier v. Martinez, 416 U.S. 396, 413–14 (1974) in comparison to the test in Turner v. Safley, 482 U.S. 78, 89–90 (1987)). The court therefore analyzed Mr. Jordan's claim under both the *Martinez* and *Turner* tests, and "reache[d] the same conclusion under both analyses." *Jordan*, 504 F. Supp. 2d at 1120.

315. *Jordan*, 504 F. Supp. 2d. at 1119 (citing *Turner*, 482 U.S. at 89–90).

316. *Id.* at 1120, 1122.

blanket restriction on outgoing news media correspondence and prison security."[317] Similarly, the court concluded that there was insufficient evidence that outgoing news media correspondence has or will result in a prisoner conducting a business that could not be adequately addressed by other regulations.[318]

As for the remaining *Turner* factors, the court found that those also weighed in favor of Mr. Jordan. Regarding the impact of accommodating the asserted right on prison resources, staff, and other prisoners, the court found that any burden on the BOP would be from incoming rather than outgoing publications and that the BOP had presented "no evidence that even offers a guess as to how many inmate submissions might be published, how many *more* publications might have to be reviewed by prison officials or at what cost."[319] And in considering whether there were obvious, easy alternatives to the regulation suggesting that the regulation may not be reasonable and instead an "exaggerated response to prison concerns," the court pointed to existing BOP regulations that provide for screening of incoming publications and prohibiting a prisoner from conducting a business.[320] The court therefore held that the regulation violates the First Amendment rights of Mr. Jordan, other federal prisoners, and the press, and issued an order declaring the byline provision of the regulation unconstitutional and enjoining the BOP from punishing any inmate for violation of 28 C.F.R. § 540.20(b)'s provision that "[t]he inmate may not . . . publish under a byline."[321]

That the BOP saw fit to discipline Mr. Jordan—twice—for publishing articles about his experiences in federal prison is profoundly troubling. As the district judge noted in her opinion, other prisoners—even some at ADX—published articles, essays, and even books under their names without receiving any sort of sanction from the BOP.[322] Tellingly, though, those other writings did not concern the prison itself.[323] Nor did the BOP punish Mr. Jordan for other articles he had published that did not discuss the conditions at ADX or elsewhere in the BOP.[324] The BOP's decision to sanction Mr. Jordan for publishing these particular articles is indicative of the culture of secrecy that pervades and surrounds ADX.

317. *Id.* at 1125.
318. *Id.* at 1125–26.
319. *Id.* at 1126 (emphasis in original).
320. *Id.* at 1125–26 (citing *Turner*, 482 U.S. at 89–90).
321. *Id.* at 1126.
322. *Id.* at 1115.
323. Plaintiff's Motion for Leave to Present Testimony of Theodore Kaczynski and Thomas Silverstein at Trial, *Jordan*, 504 F. Supp. 2d 1109 (No. 02-CV-01239), ECF No. 320.
324. *Jordan*, 504 F. Supp. 2d at 1115.

C. Cunningham v. Fed. Bureau of Prisons

> I thought I might be missing something, because it was inconceivable to me that the Bureau of Prisons could be operating in such a blatantly illegal and unconstitutional manner.[325]

A final example of litigation that has been critically important in exposing brutal conditions of confinement at ADX is *Cunningham v. Fed. Bureau of Prisons*,[326] a putative class action lawsuit concerning the diagnosis and treatment of men with mental illness at ADX. The lawsuit, brought by the law firm of Arnold & Porter, LLP[327] and the Washington Lawyers' Committee for Civil Rights and Urban Affairs, asserted two Eighth Amendment claims: first, that the BOP subjected the plaintiffs to a substantial risk of serious harm by failing to adequately screen and diagnose prisoners at ADX for serious mental illness; and second, that the BOP failed to provide adequate mental health treatment to a subclass of men with serious mental illness.[328]

The complaint is excruciating to read. It tells the stories of five named plaintiffs and six interested persons,[329] all of whom have various forms of serious mental illness, including schizophrenia, bipolar disorder, major depression, schizoaffective disorder, post-traumatic stress disorder, and significant intellectual disabilities.[330] The lawsuit alleges that many had been confined at ADX for months or years "with predictably devastating results" as the prison's conditions exacerbate their mental illness.[331] The 143-page complaint describes their suffering in brutal detail:

> Many prisoners at ADX interminably wail, scream, and bang on the walls of their cells. Some mutilate their bodies with razors, shards of glass, sharpened chicken bones, writing utensils, and whatever other objects they can obtain. A number swallow razor blades, nail clippers, parts of radios and televisions, broken glass, and other dangerous objects. Others carry on delusional conversations with voices they hear in their heads, oblivious to reality and to the danger

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325. Binelli, *supra* note 62 (quoting Deborah Golden, one of the lawyers for the plaintiff class in Cunningham v. Fed. Bureau of Prisons, 222 F. Supp. 3d 959 (D. Colo. 2015)).

326. 222 F. Supp. 3d 959 (D. Colo. 2015), *approving settlement,* 2016 WL 8786871 (D. Colo. 2016), *aff'd,* 2017 WL 4176203 (10th Cir. 2017).

327. As of January 1, 2017, the firm's name is Arnold & Porter Kaye Scholer.

328. Complaint ¶¶ 3–4, *Cunningham*, No. 12-CV-01570 (D. Colo. June 18, 2012), ECF No. 1. For a more detailed discussion of the case, including the pre-filing investigation, *see* Deborah Golden, *The Federal Bureau of Prisons: Willfully Ignorant or Maliciously Unlawful?*, 18 MICH. J. RACE & L. 275, 276–77 (2013).

329. The interested persons could not serve as plaintiffs at the time of filing because it was not clear that they had exhausted their administrative remedies as required by the Prison Litigation Reform Act.

330. Complaint, *supra* note 328, ¶ 51.

331. *Id.* ¶ 52.

> that such behavior might pose to themselves and anyone who interacts with them. Still others spread feces and other human waste and body fluids throughout their cells . . . Suicide attempts are common; many have been successful.[332]

The complaint alleges that one of the men, Jack Powers, spent nearly ten years in the Control Unit at ADX, where he

> slowly descended into madness, horribly mutilating himself . . . repeatedly ramming his head into a metal door frame, amputating two fingers, a testicle and his scrotum, tattooing his entire body with a razor blade and carbon paper dust, trying to inject bacteria into his own brain, and slashing his wrist severely enough that he lost consciousness.[333]

Mr. Powers subsequently amputated his earlobes using pencils as tourniquets, and "sawed through his Achilles tendon with a sharp piece of metal, nearly severing it."[334]

Another plaintiff, Michael Bacote,[335] is described as having severe major depressive disorder with psychotic features as well post-traumatic stress disorder. He also is described as "mentally retarded, functionally illiterate, and may be suffering the long-term effects of a serious closed head injury."[336] While in BOP custody, Mr. Bacote has been prescribed medication to treat major depressive disorder and antipsychotic medication for his paranoid ideation.[337]

The complaint also recounts the situation of David Shelby, another prisoner at ADX, who tried to commit suicide for the first time at age sixteen.[338] Almost from that point on, he has continually been in state or federal prison for a variety of crimes, including attempting to mail a package to the President of the United States containing "a modified lightbulb . . . filled with smokeless gunpowder, a pocket knife, and a note reading, 'I think you are doing a good job and I am sending you the pocket knife as a gift and a light bulb so that you won't strain your eyes.'"[339] While undergoing a court-ordered mental health evaluation at the Medical Center for Federal Prison in Springfield, Missouri, Mr. Shelby tried to kill himself again "by ingesting a mouthful of Lysol" and

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332. *Id.* ¶ 5.
333. *Id.* ¶ 54.
334. *Id.* ¶¶ 231–32.
335. Mr. Bacote withdrew as a named plaintiff after the lawsuit was filed. Order Dismissing Claims of Michael Bacote Without Prejudice, Cunningham v. Fed. Bureau of Prisons, 222 F. Supp. 3d 959 (D. Colo. 2015), ECF No. 39.
336. Complaint, *supra* note 328, ¶ 125. Mr. Bacote's Full Scale IQ score was 61, with Verbal and Performance IQs in the first percentile. *Id.* ¶ 129.
337. *Id.* ¶¶ 130–31.
338. *Id.* ¶¶ 279–80.
339. *Id.* ¶ 283. He also attempted to send to Charles Manson a revolver with a fork affixed to its end to be used as a bayonet, a straight razor, and two explosive devices.

"a mouthful of Bon Ami cleanser."[340] He has been diagnosed with bipolar disorder, major depressive disorder, schizotypal disorder, alcohol dependence, and history of head injury (among other conditions).[341]

After being transferred to ADX, Mr. Shelby, who heard the Bob Dylan song *Knocking on Heaven's Door* on the radio and believed it to be a message "calling him home," sat down in the shower in his cell and severely cut "both arms, both legs, and his belly using glass from a broken television."[342] ADX staff bandaged him up and returned him to a solitary cell in the prison.[343] Later that year, Mr. Shelby heard what "he took to be God's voice commanding him to eat his finger."[344] "In response, Mr. Shelby amputated his left pinky finger and cut it into small pieces, which he added to a bowl of ramen soup and ate. When ADX staff discovered him bleeding in his cell, one officer asked him how his finger tasted."[345]

At the time the lawsuit was filed, the federal courts had long held that people with serious mental illnesses could not be constitutionally housed in supermax confinement.[346] Indeed, even the BOP's own policies prohibit the placement of people with serious mental illness in ADX,[347] and federal regulations prohibit confining any person with serious mental illness in a control unit: "prisoners requiring . . . psychotropic medication are not ordinarily housed in a control unit."[348]

The BOP claims that it follows the law and its own regulations. In sworn statements and in international proceedings, the BOP has repeatedly asserted that there are no men with serious mental illness housed at the ADX. For example, in 2012, just after the *Cunningham* case was filed, a Congressional subcommittee held hearings about solitary confinement. Testifying under oath, Charles Samuels, then-director of the BOP, engaged in the following colloquy with Senator Durbin:

> **SENATOR DURBIN:** Mr. Samuels, let me ask you a couple of questions. First, it is my understanding that those who are seriously mentally ill are not supposed to be assigned to supermax facilities, like Florence, Colorado. Is that true?

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340. *Id.* ¶ 285.
341. *Id.* ¶¶ 291–92.
342. *Id.* ¶ 294.
343. *Id.*
344. *Id.* ¶ 296.
345. *Id.*
346. *See* David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 677 (2004) (citing Jones'El v. Berge, 164 F. Supp. 2d 1096, 1126 (W.D. Wis. 2001); Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995)).
347. FED. BUREAU OF PRISONS, *supra* note 183, ch. 7, at 18.
348. 28 C.F.R § 541.41(c)(1) (2017); Complaint, *supra* note 328, ¶ 48 (quoting 28 C.F.R. § 541.46(i)).

> **SAMUELS:** You are correct. Our policy prohibits any inmate who suffers from a serious psychiatric illness to be placed in that confinement.[349]

And this, later in the hearing:

> **SENATOR DURBIN**: Let me get down to some of the more graphic, and I will not go into detail here in the hearing, but it is there on the record. I have read stories about federal inmates and inmates at State facilities in isolation who have clearly reached a point where they are self-destructive. They are maiming themselves, mutilating themselves, doing horrible things to themselves. They are in an environment within that cell that is awful by any human standard. What happens next in the Federal Bureau of Prisons when someone has reached that extreme?
>
> **SAMUELS:** If an individual is exhibiting that type of behavior due to suffering from, you know, serious psychiatric illness, those individuals are not, within our policy, individuals that we would keep at the ADX or in restrictive housing. These individuals are referred to our psychiatric medical centers for care, and we believe that is important, and we would never under any situation believe that those individuals should be continued to be housed in that type of setting.[350]

Nevertheless, the *Cunningham* complaint alleged that "it is common for the BOP to place an incoming prisoner with an existing prescription for psychotropic medication in the Control Unit, where the BOP refuses to administer such medication."[351] The BOP justified the refusal "in Orwellian fashion: it discontinues the prisoner's medication, thereby making the now non-medicated prisoner 'eligible' for placement in the Control Unit. Then, when this newly 'eligible' prisoner requests medication needed to treat his serious mental illness, he is told that BOP policy prohibits the administration of psychotropic medication to him."[352]

The complaint alleged severe deficiencies in mental health staff at ADX; at the time the lawsuit was filed, only two psychologists and a psychiatrist who spent one half-day per week at ADX, were responsible for the mental health of the 450 men housed there, "many of whom have serious chronic mental health issues and many others of whom experience periodic acute mental health crises."[353] The inadequate

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349. *Reassessing Solitary Confinement, Panel I: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 8–9 (2012) (statement of Charles Samuels, Dir., Fed. Bureau of Prisons).

350. *Id.* at 16.

351. Complaint, *supra* note 328, ¶ 49.

352. *Id.*

353. *Id.* ¶ 63.

staffing resulted in ADX prisoners not having timely or meaningful access to mental health professionals, especially in times of crisis.[354] Mental health counseling (or, as the BOP calls it, "psychology programming") "consists of distributing to prisoners books with such titles as 'Anger Management for Dummies,' 'Choose Forgiveness – Your Journey to Freedom,' and 'Why Zebras Don't Get Ulcers.'"[355] Those who are unable to read "have no meaningful access to [even] the negligible therapeutic information" in these workbooks.[356]

For some mentally ill prisoners at ADX, the "treatment" they receive is torture:

> [M]entally ill prisoners, including those in the throes of a psychotic episode, frequently are subjected to barbaric treatment more suited to the dungeons of medieval Europe than to a modern American prison. For example, mentally ill prisoners are routinely "four pointed" -- chained by the wrists and ankles in either a prone or supine position on top of a concrete platform -- often for extended periods. While chained, mentally ill prisoners sometimes are left to urinate and defecate on themselves, and sometimes are denied basic nutrition.[357]

According to the complaint, "[s]ince ADX opened in 1994, at least six prisoners have committed suicide there."[358] Despite this,

> [s]uicide and mental health crisis services at ADX are systematically deficient. Mentally ill prisoners threatening suicide are often goaded by ADX staff members to kill themselves. Prisoners who take steps to slash their wrists or hang themselves generally receive only minimal medical treatment for acute injuries. And instead of receiving mental health intervention, they are punished: they receive

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354. *Id.*

355. *Id.* ¶ 66.

356. *Id.*

357. *Id.* ¶ 70.

> In some cases, ADX staff turn the simple (although cruel and unconstitutional) refusal to feed a prisoner into a deceptive hoax. ADX prisoners, including those in four point restraints, sometimes are put on a disciplinary "sack lunch" nutrition program in which they are fed not standard prison trays but a paper bag containing a sandwich or two and a piece of fruit. Many mentally ill prisoners at ADX who are placed on sack lunch restriction have received their sack (suitably videotaped) being delivered to their cells. But when they open the bags (off-camera) they sometimes are empty. Through this ruse ADX staff produce false video evidence of feeding, raise (if only for a minute) the prisoner's hope for basic nutrition, then smash the often-chained and always hungry prisoner's hopes with a bag of air. Severely mentally ill prisoners at ADX often live near the edge of their emotional endurance, and the empty sack lunch is one of many cruel ploys that, upon information and belief, are used by certain ADX staff members to torture and provoke such prisoners into outbursts that then are used to justify even harsher discipline.

Id. ¶ 71.

358. *Id.* ¶ 85. A seventh man, Robert Knott, killed himself in 2013, after the complaint was filed.

> a disciplinary incident report that sometimes results in a trip to the SHU and loss of privileges.[359]

The complaint continues with an example:

> An ADX prisoner who recently attempted to hang himself in the SHU was violently removed from the room where he tried to commit suicide by a team of correctional officers in riot gear. Incredibly, an ADX psychologist in full riot gear participated in the violent extraction. After a short stay in a "strip cell," a nearly empty cell in which the prisoner is clothed in what is essentially a paper robe, he was returned to the disciplinary segregation cell that precipitated his despair and suicide attempt only days earlier.[360]

Another man, Jose Martin Vega, hanged himself in his cell with a bedsheet. In 2004, Mr. Vega had been diagnosed by an ADX psychologist as having paranoid schizophrenia and was sent to the BOP's medical center in Springfield, Missouri, for a mental health evaluation.[361] In 2006, the BOP transferred Mr. Vega back to the Control Unit at ADX, despite its written procedures that specify that "prisoners currently diagnosed as suffering from serious psychiatric illnesses should not be referred for placement at . . . ADX."[362] The BOP also prevented him from receiving medication and treatment for his serious mental illness and sometimes chained him for days on end.[363] On May 1, 2010, Mr. Vega was found dead in his cell in the Control Unit at ADX.[364] The coroner's report summarizing Mr. Vega's autopsy states that Mr. Vega died as a result of hanging.[365] It also states that information received from the ADX health administrator indicated that Mr. Vega "had a very long psychiatric history."[366]

The BOP filed a motion to dismiss the *Cunningham* complaint, arguing that the allegations did not show "for any plaintiff" that he had a serious mental health need (the objective prong) or that the BOP acted with deliberate indifference to that need (the subjective prong) as

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359. *Id.* ¶ 69.

360. *Id.*

361. *Id.* ¶¶ 89–90.

362. *Id.* ¶ 91 (citing Bureau of Prisons, Program Statement 5100.08, *Prisoner Security Designation and Custody Clarification*, ch. 7, p.18).

363. *Id.* ¶¶ 93–94.

364. Complaint and Jury Demand ¶ 36, Vega v. Davis, 2012 WL 4812024 (D. Colo. May 1, 2012) (No. 12-CV-01144), ECF No. 1. Mr. Vega's brother filed his own Eighth Amendment lawsuit claiming that ADX Warden Blake Davis (and others) failed to provide him necessary mental health treatment, resulting in his suicide. The district court granted the defendants' motion to dismiss, holding that the amended complaint did "not meet the requirements to support a finding that Warden Davis knew that Mr. Vega had a mental condition that required treatment to keep from hanging himself." Vega v. Davis, No. 12-CV-01144, 2015 WL 9583378, at *1 (D. Colo. Dec. 31, 2015). The Tenth Circuit affirmed. Vega v. Davis, 673 F. App'x 885, 885 (10th Cir. 2016); *see also* Cohen, *supra* note 168 (describing Mr. Vega's suicide and the resulting lawsuit).

365. Complaint and Jury Demand, *supra* note 364, at 9.

366. *Id.*

required by the Eighth Amendment.[367] In their motion, the BOP also argued that post-*Ashcroft v. Iqbal*,[368] Tenth Circuit law imposes an additional requirement on prisoners' Eighth Amendment claims: that "allegations by inmates must be viewed in light of the special context of prisons," because "[p]risons are a unique environment, and the Supreme Court has repeatedly recognized that the role of the Constitution within their walls is quite limited."[369] Part of that "special context," the BOP argued, is that "prisoners claiming constitutional violations by officers within the prison will rarely suffer from information asymmetry" because "[n]ot only do prisoners ordinarily know what has happened to them, but they will have learned how the institution has defended the challenged conduct when they pursue the administrative claims that they must bring as prerequisite to filing suit."[370] While this statement is demonstrably false in virtually every conditions of confinement case, it was especially so in *Cunningham* given both the allegations of serious mental illness and intellectual disability of the plaintiffs and the BOP's response to their administrative remedies.[371]

The district court denied the BOP's motion to dismiss.[372] Shortly afterward, counsel for the plaintiff class amended their complaint and the Center for Legal Advocacy (CLA), Colorado's Protection and Advocacy organization ("P&A"), moved to intervene in the case.[373] Pursuant to federal statute, P&As protect and advocate for the rights of people with developmental disabilities.[374] P&As, and CLA specifically, are charged

367. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) at 1–2, 14, Cunningham v. Fed. Bureau of Prisons, No. 12-CV-01570 (D. Colo. Oct. 9, 2012), ECF No. 27.

368. 556 U.S. 662 (2009). The Supreme Court's decision in *Ashcroft v. Iqbal*, and its predecessor, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), imposed on plaintiffs significantly stricter pleading standards than existed previously. *Iqbal*, in particular, requires that in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

369. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), *supra* note 367, at 16–17 (citing Gee v. Pacheco, 627 F.3d 1178, 1185 (10th Cir. 2010)).

370. *Id.*

371. *See, e.g.*, Ex. 2 to Plaintiffs' Response to Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), *Cunningham*, No. 12-CV-01570 (D. Colo. Nov. 21, 2012), ECF No. 37-2. This is illustrated by an attempt by David Hearne, another mentally ill man to file a cop-out (a written request) to ADX officials stating that he was being held at ADX without a hearing or psychiatric meeting (the form he submitted actually says: "Why am I over here at the ADX with out a hearing or psy meat ton"). The BOP's response asserted that Mr. Hearne had made "no specific request for relief." First Amended Complaint at 116–17, *Cunningham*, No. 12-CV-01570 (D. Colo. May 24, 2013), ECF No. 67. Subsequently, Mr. Hearne (who had exhibited symptoms of paranoid schizophrenia since age six and who has lived almost continuously in mental hospitals or correctional facilities ever since) submitted a Request for Administrative Remedy to ADX prison officials requesting treatment for his mental illness. The BOP's response stated that "there is no evidence to support [your] contention that [you] ha[ve] a serious mental illness." *Id.* at 111–12, 117.

372. Courtroom Minutes for Motion Hearing at 3, *Cunningham*, No. 12-CV-01570 (D. Colo. Apr. 23, 2013), ECF No. 58.

373. First Amended Complaint, *supra* note 371, at 1–2, 15.

374. *See* Part C of Subchapter I, Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041–45 (2012). Since 1986, the Center for Legal Advocacy has been the

under federal law with investigating allegations of abuse, neglect, and rights violations of individuals with serious or significant mental illness or emotional impairment who reside in Colorado in particular facilities, including federal prisons.[375] The amended complaint paints a picture of ADX that is even more horrifying than the first one. In addition to the inclusion of CLA as an entity, the amended complaint sets forth allegations related to CLA's constituents.[376] One of the men, Jonathan Francisco, is described as not speaking a word to anyone in the nearly eighteen months since arriving at ADX:

> [R]ather, he spends all day, every day, staring at the wall of his cell. He frequently defecates on the floor of his cell or on a food tray, and smears his feces on himself, his cell or his other surroundings. He ignores other prisoners' attempts to help him, does not communicate with staff, and makes no effort to maintain his health or hygiene. As a result, he lives in squalor, rarely eats and is showered only when ADX staff members force him into a shower enclosure.[377]

According to the complaint, Mr. Francisco's mental illness is so severe that he lacked the capacity even to use the BOP's administrative remedy process—the very process that, according to the BOP, cures any sort of "information asymmetry" between a prisoner and those who incarcerate him.[378]

Four months later, Mr. Francisco's condition deteriorated so badly that CLA filed an emergency motion for preliminary injunction to transfer Mr. Francisco out of ADX to a mental health facility for evaluation and treatment.[379] According to the motion, by then, Mr. Francisco was spending his days standing with his face very near a wall, staring blankly at the surface before him and "obsessively hoard[ing] and handl[ing] his own feces, placing it on food trays, rolling it into balls, making sculptures out of it, and smearing it on his walls and sometimes on his body or in his hair" and, on at least one occasion, consuming it.[380] The BOP's only response was to occasionally force him into a shower stall and to pile sandbags outside his door "in a futile effort to prevent the overwhelming smell of feces emanating from his cell from spreading throughout the part of the prison where he lives."[381]

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eligible P&A to protect and advocate for the rights of people with mental illness in Colorado. *See* 42 U.S.C. §§ 10803, 10805.

375. *See* 42 U.S.C. § 10804(c); 42 U.S.C. § 10805(a)(1)(A) – (B); 42 U.S.C. § 10807.

376. First Amended Complaint, *supra* note 371, at 107–26.

377. *Id.* ¶ 322.

378. *Id.* ¶ 326.

379. Emergency Motion by Plaintiff, Center for Legal Advocacy, for a Preliminary Injunction Ordering Defendant To Transfer ADX Prisoner, Jonathan Francisco, for a Med. Evaluation and Treatment at 2–3, Cunningham v. Fed. Bureau of Prisons, No. 12-CV-01570 (D. Colo. Sept. 30, 2013), ECF No. 99.

380. *Id.* at 2.

381. *Id.* at 3.

During this same period, *after* the *Cunningham* suit was filed, the BOP allowed another ADX prisoner with psychosis to develop severe malnutrition and systemic staph infections so severe that he almost died by the time the BOP finally evacuated him to a medical facility.[382] He, too, had spent months in a "feces-encrusted cell" before the BOP finally attended to him.[383] And just two weeks before counsel filed the emergency motion regarding Mr. Francisco, another ADX prisoner with schizophrenia, who was in acute psychosis, hung himself in his cell.[384]

After CLA filed the motion for preliminary injunction, the BOP transferred Mr. Francisco to a federal medical center.[385] A few weeks later, the parties entered into mediation with U.S. Magistrate Judge Michael Hegarty.[386] Settlement discussions proceeded over the course of the next three years. At the same time, litigation of the case continued, including briefing on the plaintiffs' motion for class certification, a summary judgment motion concerning whether CLA had associational standing, and discovery. In June 2015, three years into the litigation, the plaintiffs filed their Second Amended Complaint.[387] That document recited some "preliminary steps" the BOP took to address the constitutional violations that prompted the lawsuit, including mental health screening of the men at ADX, revising the policy for the care and treatment of prisoners with mental illness at ADX, and creating new "secure facilities" for treatment of prisoners with serious mental illness and transferring some of the men at ADX to those facilities.[388] But it also noted that the BOP's compliance with those newly created policies was inconsistent, and that the men who had not been transferred to the new mental health treatment units were still receiving constitutionally inadequate mental health care.[389]

For example, after purportedly revising the BOP's suicide prevention policy and distributing to ADX prisoners a memo informing them that "[a]nytime you want to speak with a psychologist, let staff know and they will contact Psychology Services to make the necessary

382. *Id.*

383. *Id.*

384. *Id*; *see also* Andrew Cohen, *A Handwritten Letter the Prison System Doesn't Want You To See*, ATLANTIC (Sept. 18, 2013), https://www.theatlantic.com/national/archive/2013/09/a-handwritten-letter-the-prison-system-doesnt-want-you-to-see/279751 (describing suicide of Robert Knott at ADX).

385. *See* Suggestion of Mootness Concerning Emergency Motion by Plaintiff, Center for Legal Advocacy, for a Preliminary Injunction Ordering Defendant to Transfer ADX Prisoner Jonathan Francisco for a Medical Evaluation and Treatment at 2, Cunningham v. Fed. Bureau of Prisons, No. 12-CV-01570 (D. Colo. Oct. 23, 2013), ECF No. 114.

386. Order Approving Settlement at *2, Cunningham v. Fed. Bureau of Prisons, 2016 WL 8786871 (D. Colo. Dec. 29, 2016) (No. 12-CV-01570), ECF No. 391.

387. Second Amended Complaint, *Cunningham*, No. 12-CV-01570 (D. Colo. June 15, 2015), ECF No. 274.

388. *Id.* ¶¶ 7, 16.

389. *Id.* ¶ 8.

arrangements," ADX staff ignored one prisoner who requested emergency psychology services for hours.[390] The man, who was being medicated for severe depression, attempted suicide, was belatedly discovered in the act, and was later issued a disciplinary incident report for attempting to kill himself.[391]

The Second Amended Complaint also recounts the situation of Richie Hill, a severely mentally ill man who was in solitary confinement at ADX for over six years, including after the lawsuit was filed:

> He swallowed objects including rocks, Styrofoam, and radio parts, and was frequently observed eating balls of his own feces. He attempted suicide approximately ten times while at ADX, including once by placing pencil lead, rocks, and pencil particles up his penis. He mutilated his forehead and face by carving pitchforks and 'cannibal marks' into it, and also cut his lips open with staples and put flies into the wounds. He also attempted to gouge out his own left eyeball 'about six times,' often by pushing rocks into it.[392]

After Mr. Hill, who had become severely malnourished, repeatedly begged staff for help with his mental illness and asked to be transferred to "a mental hospital," the chief ADX psychologist "bribed him to withdraw his transfer request by giving him a radio, which he later smashed and ate."[393] Later, Mr. Hill developed a life-threatening staph infection in his legs after he was overcome with a persistent delusion that diamond rings were embedded inside them. To remove the rings, he began digging holes in his legs with his fingers. The wounds became so infected that at one point, a worm emerged from one of them.[394] After several months, Mr. Hill's legs had become so swollen that he was reduced to crawling around his cell, naked, in a pool of his waste, and was so severely starved that he was eating pebbles and balls of his own feces that he rolled with his hands.[395] BOP staff finally transferred him to a medical center where he was diagnosed with severe multiple systemic infections, chronic and acute sepsis, and multiple draining deep sores so severe that his legs nearly required amputation—all of which was in addition to active psychosis.[396]

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390. *Id.* ¶ 17(a).
391. *Id.*
392. *Id.* ¶ 89.
393. *Id.* ¶¶ 90, 93.
394. *Id.* ¶ 92.
395. Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class at 13, Cunningham v. Fed. Bureau of Prisons, No. 12-CV-01570 (D. Colo. Nov. 16, 2016), ECF No. 382.
396. Second Amended Complaint, *supra* note 387, ¶ 95. A BOP mental health record written by the then-chief psychologist at ADX noted nothing out of the ordinary and stated that Mr. Hill "appeared alert and relaxed" and would "continue to be monitored during unit rounds." Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, *supra* note 395, at 13.

As the Second Amended Complaint noted, "that [this] happened at ADX, which houses fewer than 500 of the most closely monitored prisoners on the planet, reflects the depth and breadth of the mental health catastrophe that precipitated this lawsuit."[397] And "the fact that it happened during the pendency of this case reflects a deliberate disregard of the rights, health, and safety" of the men at ADX, and the need for close and continuing court supervision.[398]

"Continuing court supervision" is what the court ultimately ordered. Nearly eighteen months later, counsel for the plaintiff class filed a motion requesting supervision of a settlement agreement (Agreement).[399] After three years of negotiation, including 200 hours of formal mediation, the parties reached a resolution of the lawsuit.[400] As counsel for the parties told Judge Matsch at the final fairness hearing:

> By any measure, ADX is a different place than it was in 2011. . . . Nearly 100 mentally ill men have been transferred to other facilities. BOP has activated three new high security mental health treatment units in other facilities, which now house and care for many people with mental illness who spent years at ADX.[401]

Counsel also noted that "many staff members at ADX and elsewhere within the BOP now understand mental illness better, and deal more humanely with inmates who struggle with mental health problems."[402]

The Agreement established two classes for settlement: a "Screening Class" comprised of "all persons who are confined at ADX at any time" during the compliance period; and a "Treatment Subclass" comprised of all persons who are confined at ADX during the compliance period who have a "Covered Mental Illness," which is in turn defined as "a mental disorder as defined in the most current edition of the *Diagnostic and Statistical Manual of Mental Disorders* that results in classification of the inmate as a CARE2-MH or higher."[403]

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397. Second Amended Complaint, *supra* note 387, ¶ 96.

398. *Id.*

399. Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, *supra* note 395, at 7.

400. *Id.* at 3, 22.

401. Andrew Cohen, *How America's Most Famous Federal Prison Faced a Dirty Secret*, MARSHALL PROJECT (Dec. 5, 2016, 10:00 PM), https://www.themarshallproject.org/2016/12/05/how-america-s-most-famous-federal-prison-faced-a-dirty-secret.

402. *Id.*

403. Addendum to Joint Motion to Approve Settlement at 12–13, Cunningham v. Fed. Bureau of Prisons, No. 12-CV-01570 (D. Colo. Nov. 16, 2016), ECF No. 382-1. The Agreement also established "Mental Health Care Levels", a parallel program to the BOP's medical care levels, through a BOP-wide policy. *See generally* FED. BUREAU OF PRISONS, 5310.16, TREATMENT AND CARE OF INMATES WITH MENTAL ILLNESS (2014).

The Agreement also provides for the development and activation of three high-security mental health treatment units at federal prisons in Atlanta, Georgia, Allenwood, Pennsylvania, and Florence, Colorado, for men who have a history of violent behavior resulting in a referral to ADX.[404] Two of them are "Secure Mental Health Units," which are residential psychology treatment programs that provide mental health treatment for men with serious mental illness who do not require inpatient treatment but do need enhanced mental health treatment and intensive, specialized psychiatric services or psychological interventions in a residential setting.[405] The third unit is a "Secure STAGES" program—a residential, unit-based Psychology Treatment Program for people with certain personality disorders who have a chronic history of self-injury.[406]

The Agreement reemphasizes that men with serious mental illness should not be confined at ADX unless they have "extraordinary" security needs.[407] For those who will remain at ADX, the Agreement requires the hiring of three additional full time psychologists, a psychiatric nurse, and a psychology technician.[408] It mandates the creation of group therapy facilities and areas for private mental health consultations; it also creates an at-risk recreation program and ensures that staff offer the men twenty hours of therapeutic and recreational out-of-cell time each week.[409] And it provides for the creation, revision, and implementation of policies concerning the screening and diagnosis of mental illness, provision of mental health care, suicide prevention, and conditions of confinement to reduce the risk of development or exacerbation of mental illness.[410] The Agreement also requires mental health training of BOP staff.[411]

To ensure compliance with its terms, the Agreement also provides for monitoring by two psychiatrists with correctional mental health expertise.[412] The BOP also must ensure that CLA and the men at ADX know about and are able to communicate with each other, and of the availability of CLA to represent them in connection with complaints concerning compliance with the Agreement.[413] The obligations under the Agreement are effective for three years, unless the plaintiffs consent to

404. Addendum to Joint Motion to Approve Settlement, *supra* note 403, at 18.

405. OFF. OF THE INSPECTOR GENERAL, 17-05, REVIEW OF THE FEDERAL BUREAU OF PRISONS' USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS (2017).

406. Addendum to Joint Motion to Approve Settlement, *supra* note 403, at 18.

407. *Id.* at 5 n.2.

408. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 52 (2016). It also requires the BOP to hire a full-time social worker for the Florence Correctional Complex whose priority is providing re-entry services to the men at ADX who are within one year of their release date. *Id.*

409. *Id.* at 53.

410. *Id.*

411. Addendum to Joint Motion to Approve Settlement, *supra* note 403, at 14.

412. *Id.* ¶¶ 14–15.

413. *Id.* ¶ 19.

termination between two and three years or the court grants a one-time, one-year extension.[414]

In his order approving the Agreement and certifying the settlement class and subclass, U.S. District Judge Richard P. Matsch described the settlement as "a singular achievement," and noted that "the programs, policies, and staffing that has been and will be implemented will advance understanding of the complex relationship between criminal conduct and mental illness and provide some measure of human dignity to the confinement of those who have been shown to be too dangerous to live with others in an open population penal institution."[415] Yet he also observed that "[t]he results that may be achieved by implementing the terms of the settlement agreement will depend upon the willingness of those who are responsible for instituting and abiding by these policies and programs in good faith and the extent to which the tension between inmates and staff is reduced."[416]

In the motion for preliminary approval of the Agreement, counsel for the plaintiffs recounted some of the horrors endured by the mentally ill men at ADX. The motion also describes some of the causes that led to the unspeakable treatment of these men. Chief among them was that ADX staff "were accountable to no one: they ran the prison they proudly called 'the Alcatraz of the Rockies,' housed the supposed worst of the worst, had terminated virtually all press access to the facility following the 9/11 attacks, and were convinced they had all the answers and needed not answer to anyone about anything."[417] Without the *Cunningham* litigation and the extraordinary commitment of effort, time, and resources by plaintiffs' counsel,[418] the public and the courts would have remained ignorant of the treatment of the mentally ill men at ADX, and their situation would have remained unchanged.

CONCLUSION

> We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter

414. *Id.* ¶¶ 80–82.
415. Order Approving Settlement, *supra* note 386, at 8.
416. *Id.* at 9.
417. Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms & Proposed Notice to the Class, *supra* note 395, at 13–14.
418. Arnold & Porter devoted $17 million in attorney time and $1 million in expenses to the case. *Id.* at 27.

> future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.[419]

In discussing some of the litigation involving ADX brought by our clinic and others, I do not mean to suggest that litigation is always—or even frequently—the solution to the myriad problems that exist with the carceral state in general and ADX in particular. Like most public interest lawyers, I know, I have no illusions about the limitations of litigation to bring about social change.[420] This is particularly true when it comes to prison litigation, given the courts' narrowing of constitutional protections for people who are incarcerated.

Chief Justice Burger recognized as much nearly half a century ago when he wrote:

> We must, at the very minimum, dedicate the same attention and concern and expense and manpower that we have lavished on the adversary contest between society and the accused to the processes of correctional institutions. It must be ironic to a prisoner to recall that society spared no expense to afford him - as too often happens - three, four, or five trials and appeals, at enormous costs, but then proceeded to forget his plight. We need not diminish the one to expand the other, but we must not continue this illogical allocation of limited resources to the correctional systems.[421]

But even the cases we do not win are worth bringing—and worth fighting. As Jules Lobel explained, while "the prevailing view of the law is utilitarian, as is the dominant American view of success . . . [t]he utilitarian perspective is premised on a sharp divide between winning and losing, which in turn relies on a separation of law and politics."[422] Thus, he wrote of some of the "unsuccessful" cases he brought:

> While we believed that the law was on our side and hoped the courts would agree, we used law not merely to adjudicate a dispute between the parties but also to educate the public. Even though the political contexts of our challenges made courtroom success highly improbable, we persevered because our purposes were broader than victory alone. We were speaking to the public, not just to the court.[423]

It is my hope and belief that through the cases the CRC litigated with our clients at ADX, we have spoken to the public as well as the

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419. Kennedy, Speech at ABA Annual Meeting, *supra* note 34.

420. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

421. Warren E. Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972).

422. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 3 (2003).

423. *Id.* at 4; *see also* Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2001).

courts. Through their work, generations of CRC students have helped bring to light the brutal conditions in which the federal government imprisons those it deems "the worst of the worst." In doing so, we have won some cases and lost others. But in all of the cases, the students litigated their values by challenging the injustices their clients endured at ADX. In that way, they call to mind Supreme Court Justice William Brennan's explanation for why he continued to pen dissent after dissent opposing capital punishment: each one constitutes a statement of individual conscience.[424] As the newest generation of CRC students prepares for trial later this year in two more ADX cases, I am reminded of and inspired by Norman Cousins's words: "Nothing is more powerful than an individual acting out of his conscience, thus helping to bring the collective conscience to life."[425]

424. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).
425. NORMAN COUSINS, HUMAN OPTIONS 63 (Penguin 1986).

UNITED STATES V. CARLOSS: AN UNCLEAR AND DANGEROUS THREAT TO FOURTH AMENDMENT PROTECTIONS OF THE HOME AND CURTILAGE

ABSTRACT

Through *United States v. Carloss*, the Tenth Circuit Court of Appeals has legitimized a belief that nothing can prevent police from approaching a home to conduct knock-and-talks. A knock-and-talk is a widely used police tactic that allows the police to knock on the door of a home to ask the inhabitant questions without a warrant or probable cause. This Comment argues that the Tenth Circuit should have considered constitutional precedent and protections regarding the home and curtilage, like Judge Gorsuch in his dissent, and the impact such an unclear ruling would have on potential abuses of power and the community. Furthermore, this Comment offers a recommendation to courts on how to evaluate knock-and-talks in a way that protects civilian liberties granted under the Constitution as well as allow police to efficiently and effectively conduct investigations without endangering officer safety.

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INTRODUCTION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

The Fourth Amendment was drafted as a direct response to the English practice of issuing general warrants which allowed officials of the Crown to conduct a broad search of the home to find evidence to incriminate suspects.[2] Today, the Fourth Amendment protects individuals from unreasonable searches and seizures by the government without probable cause and guarantees the "right to privacy" and protection for persons, papers, effects, homes, and curtilages.[3]

Though the Supreme Court has imposed "a presumptive warrant requirement for searches and seizures[,] and generally requires probable cause for a warrantless search or seizure to be 'reasonable[,]'" there are exceptions.[4] Through numerous cases, the Court has carved out many exceptions for purposes of law enforcement.[5] One exception, the implied-license exception, is routinely utilized by police departments to conduct "knock-and-talks," a tactic which involves police approaching a home and entering its curtilage, without a warrant.[6]

Throughout the country, courts have analyzed knock-and-talks differently and have come to different legal conclusions on the practice. Recently, knock-and-talks were analyzed by the Tenth Circuit Court of Appeals. Contrary to historical and constitutional reasoning, the court concluded that "No Trespassing" signs did not revoke the implied license for knock-and-talks.[7] However, the decision was not unanimous; all three Republican-nominated judges[8] came to different conclusions regarding

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1. U.S. CONST. amend. IV.

2. SAM KAMIN & RICARDO J. BASCUAS, INVESTIGATIVE CRIMINAL PROCEDURE 5, 7 (2d ed. 2013).

3. *Id.* at 5–6.

4. Article, *Investigations and Police Practices*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 3, 3 (2015).

5. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 307 (1999); Minnesota v. Carter, 525 U.S. 83, 85 (1998); Florida v. Riley, 488 U.S. 445, 451–52 (1989); California v. Ciraolo, 476 U.S. 207, 215 (1986).

6. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 8 (2013).

7. United States v. Carloss, 818 F.3d 988, 995 (10th Cir.) ("As an initial matter, just the presence of a 'No Trespassing' sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock."), *cert. denied*, 137 S. Ct. 231 (2016).

8. *Senior Judge David M. Ebel*, U.S. CT. APPEALS FOR 10TH CIR., https://www.ca10.uscourts.gov/judges/senior-judge-david-m-ebel (last visited Nov. 9, 2017); *Chief Judge Timothy M. Tymkovich*, U.S. CT. APPEALS FOR 10TH CIR., https://www.ca10.uscourts.gov/judges/judge-timothy-m-tymkovich (last visited Nov. 9, 2017); *Judge Neil M. Gorsuch*, U.S. CT. APPEALS FOR 10TH CIR.,

whether the knock-and-talk constituted a search within the Fourth Amendment when "No Trespassing" signs were present.[9] Despite the differences in opinion, the majority did not stamp out the belief that law enforcement has an irrevocable right to conduct knock-and-talks. On October 3, 2016, any hopes to correct or clarify the court's holding faded when the United States Supreme Court denied the petition for writ of certiorari regarding the case.[10]

This Comment analyzes the Tenth Circuit Court of Appeals' most recent decision on knock-and-talks, *United States v. Carloss*,[11] specifically the appropriate concerns addressed by newly confirmed Supreme Court Justice Gorsuch in his dissent[12] and the consequences this decision may have on the Tenth Circuit. Section II of this Comment summarizes the Fourth Amendment protections for the home and curtilage and the current jurisprudence of knock-and-talks through prior court decisions. Section III summarizes the facts and holding of the court's decision in *Carloss*, which held that "No Trespassing" signs did not sufficiently revoke an implied license to approach the front door.[13] Section IV focuses on reasons why the court's decision is problematic by analyzing the court's disregard for the constitutional protections granted to the curtilage and the potential abuse the practice of knock-and-talks may now have under the vague and unworkable ruling. Section V offers a recommendation that knock-and-talks be conducted under the same standard as stop-and-frisks to protect the privacy interest of many innocent citizens. Section VI discusses how the recommendation may have applied in Carloss's case. Section VII concludes this Comment by explaining how the unfavorable ruling will erode Fourth Amendment protections.

I. BACKGROUND

A. Modern Theories of Fourth Amendment Protection

The current jurisprudence surrounding Fourth Amendment protections revolve around two theories: a property trespass theory and a reasonable expectation of privacy theory. The property trespass theory,

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https://web.archive.org/web/20170203174008/http://www.ca10.uscourts.gov:80/judges/judge-neil-m-gorsuch (last visited Nov. 9, 2017).

9. *Carloss*, 818 F.3d at 995–96 (stating in an opinion authored by Judge Ebel that the "No Trespassing" signs in the yard and side yards could not be considered because Carloss did not claim they were included in the home's curtilage and the "No Trespassing" sign on the door was ambiguous; therefore, the officers had a right to enter under the implied license and there was no constitutional intrusion); *id.* at 1001 (Tymkovich, C.J., concurring) (stating under the implied license the police may approach a door and knock as "any private citizen might do" and the subjective intent does not matter because knock-and-talks are characterized as investigations pursuant to the implicit license); *id.* at 1004 (Gorsuch, J., dissenting) ("[A] 'search' occurs when the government physically enters a constitutionally protected area like a home or its curtilage for investigative purposes.").

10. *Carloss*, 137 S. Ct. at 231.

11. 818 F.3d 988 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

12. *Id.* at 1003–15 (Gorsuch, J., dissenting).

13. *Id.* at 997 (majority opinion).

initially discussed by the Court in 1928, focuses on a narrow and literal text-based interpretation of "search."[14] This interpretation of the Fourth Amendment protection was overruled by *Katz v. United States*[15] in 1967, in favor of a broader definition and the idea that "the Fourth Amendment protects people, not places."[16]

In *Katz*, the Supreme Court held that Katz's Fourth Amendment rights were violated when officers recorded a conversation he had while inside a telephone booth.[17] The majority concluded that the police had committed an unreasonable search by evaluating if Katz had an expectation of privacy and if that expectation was reasonable.[18] This rule, also known as the *Katz* rule, has been applied to limit privacy protection for activities voluntarily exposed to the public's view[19] or conducted in open fields.[20] The rule has also been utilized to protect a citizen's reasonable expectation of privacy from sense-enhancing technology.[21] In 2012, the Court set the *Katz* rule aside and reintroduced the physical property trespass theory as another avenue to Fourth Amendment protections in *United States v. Jones*.[22] In *Jones*, the Court held that a search also occurs within the original meaning of the Fourth Amendment when the government obtains information by physically intruding on a person or their property.[23]

B. Current Fourth Amendment Jurisprudence Regarding the Home

Currently, the Fourth Amendment protects the home against unreasonable searches and seizures because the Supreme Court has interpreted the amendment to mean that probable cause alone is not enough to justify a warrantless entry into a home.[24] However, this protection has two exceptions: consent and exigent circumstances.

1. Consent Exception

Under the consent exception, police may enter a home without a warrant if there is consent from the homeowner or someone with common

14. *See* Olmstead v. United States, 277 U.S. 438, 464–66 (1928).
15. 389 U.S. 347 (1967).
16. *Id.* at 351–53.
17. *Id.* at 352, 359.
18. *Id.* at 351–52.
19. California v. Ciraolo, 476 U.S. 207, 211–13 (1986).
20. Oliver v. United States, 466 U.S. 170, 178–81 (1984).
21. Kyllo v. United States, 533 U.S. 27, 34–35 (2001).
22. 565 U.S. 400 (2012); *id.* at 404–07.
23. *Id.* at 406–07.
24. Payton v. New York, 445 U.S. 573, 584–85 (1980) ("[T]he Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause. . . . It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment.").

authority.[25] The idea of common authority was introduced in 1974 through *United States v. Matlock*.[26] In *Matlock*, the Supreme Court examined whether a person with common control of a residence could give consent to search the home against an opposing tenant who was legally removed.[27] The Supreme Court held that voluntary consent may be obtained from a third party who possesses common authority over or other sufficient relationship to the premises or effect sought to be inspected.[28] The Court defined common authority as follows:

> [M]utual use of the property by persons generally having joint access for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[29]

Some sixteen years later, in *Illinois v. Rodriguez*,[30] the Supreme Court was confronted with the question of whether a warrantless search violated the Fourth Amendment when officers did not actually receive consent from someone who legitimately possessed common authority.[31] In *Rodriguez*, when the police entered an apartment without a warrant under the mistaken belief that they had received consent from someone with common authority, the Supreme Court held that a warrantless entry into a home is valid when officers reasonably believe the person giving consent has authority to do so.[32] The Court reasoned that the test was not whether the party actually had any authority over the premises, but rather whether it was reasonable to believe that consent was granted from a party with authority.[33]

2. Exigent Circumstances Exception

Absent consent, the police may enter a home without a warrant in cases of exigent circumstances. The exigent circumstances exception was recognized by the Supreme Court in 1980 through *Payton v. New York*.[34] In *Payton*, the Court analyzed whether an illegal search and seizure took place when police entered Payton's home with probable cause but without a warrant or exigent circumstances.[35] The Court held that the Fourth Amendment prohibited warrantless entries into a home to search for weapons or contraband absent exigent circumstances, even when there is

25. *See, e.g.*, United States v. Matlock, 415 U.S. 164, 171 (1974).
26. *Id.*
27. *Id.* at 166–67, 171–72.
28. *Id.* at 171.
29. *Id.* at 171 n.7.
30. 497 U.S. 177 (1990).
31. *Id.* at 179.
32. *Id.* at 188–89.
33. *Id.*
34. 445 U.S. 573 (1980).
35. *Id.* at 574–76.

probable cause.[36] The Court reasoned that the entrance to a person's home was a critical point where constitutional safeguards are heightened even when probable cause exists or when there is statutory authority permitting the searches.[37]

Over time, the Supreme Court has identified several exigencies that may justify a warrantless search of a home. The first exception recognized by the Court is the emergency aid exception addressed in *Brigham City, Utah v. Stuart*.[38] The Court held that "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[39] The second exception recognized by the Court is the hot pursuit exception addressed in *United States v. Santana*.[40] In *Santana*, the Court held that police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect.[41] The third exception recognized by the Court was the imminent destruction of evidence exception in *Kentucky v. King*.[42] In *King*, the Court reaffirmed that officers may enter an apartment or home without a warrant when there is a reasonable belief that evidence is being destroyed.[43] The Court also concluded that officers may seize evidence in plain view so long as they did not arrive at the spot of the evidence through a violation of the Fourth Amendment.[44]

C. Current Fourth Amendment Jurisprudence Regarding the Curtilage

The current Fourth Amendment jurisprudence also outlines constitutional protections for the curtilage to protect the privacy interest of citizens from intrusions by government actors without warrants or probable cause.[45] However, Supreme Court decisions pertaining to the Fourth Amendment protections of the curtilage have outlined exceptions for the warrant and probable cause requirements.[46]

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36. *Id.* at 587–90.

37. *Id.* at 588–90.

38. 547 U.S. 398 (2006); *id.* at 400 (addressing "whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury").

39. *Id.* at 403.

40. 427 U.S. 38 (1976).

41. *Id.* at 42–43.

42. 563 U.S. 452 (2011).

43. *Id.* at 460, 462.

44. *Id.* at 462–63.

45. Oliver v. United States, 466 U.S. 170, 180 (1984) ("The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." (citation omitted)).

46. *See* Florida v. Jardines, 569 U.S. 1, 6–8 (2013) (citing Kentucky v. King, 563 U.S. 452, 469–70 (2011); Hester v. United States, 265 U.S. 57, 57 (1924)).

In 1984, the Court recognized the curtilage as an area protected under the Fourth Amendment through *Oliver v. United States*,[47] when upholding the actions of police officers searching an open field for evidence of a crime.[48] The Court concluded that only a home's curtilage, the area immediately surrounding or attached to the home, is protected by the Fourth Amendment because the curtilage protects intimate activities of the home.[49] In 1987, the Court clarified the extent of the curtilage protection through *United States v. Dunn*[50] by establishing four factors that should be evaluated when considering whether an area is a part of the curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure surrounding the home, (3) the nature and use of the area, and (4) the steps taken to protect the area from observation by a passerby.[51]

In 2013, through *Florida v. Jardines*,[52] the Court formally recognized that there was an implied license for others to enter into the curtilage to knock on the door and that license also extended to police officers.[53] However, the Court was careful to clarify that the implied license did not allow police officers to enter the curtilage to look for evidence without consent or a warrant, concluding that the implied license depended on an officer's purpose.[54]

D. Current Jurisprudence Regarding Knock-and-Talks

A knock-and-talk is a police procedure conducted for the purpose of obtaining consent to speak with a homeowner or to make a warrantless entry.[55] Current case law regarding knock-and-talks has done little to restrain this procedure because of a belief that the entire interaction is consensual and not subject to Fourth Amendment scrutiny.[56] Given the unrestrained nature of knock-and-talks, police departments throughout the nation have begun utilizing the tactic as a way around the Fourth Amendment because, once inside the home, they may gather any evidence that is in plain view.[57]

The Supreme Court has discussed knock-and-talks on two occasions—once directly and once indirectly. While the Court did not directly address knock-and-talks when reaching a conclusion in *King*, the Court recognized that when officers do not have a warrant, an occupant

47. 466 U.S. 170.
48. *Id.* at 176, 179.
49. *Id.* at 180.
50. 480 U.S. 294 (1987).
51. *Id.* at 301.
52. 569 U.S. 1 (2013).
53. *Id.* at 8.
54. *Id.* at 9.
55. Ian Dooley, *Fighting for Equal Protection Under the Fourth Amendment: Why "Knock-and-Talks" Should Be Reviewed Under the Same Constitutional Standard as "Stop-and-Frisks,"* 40 NOVA L. REV. 213, 218 (2016).
56. *Id.* at 214.
57. *See id.* at 220.

has no obligation to open the door or to speak, and even if the door is opened, the occupant need not let them in.[58] Knock-and-talks were directly addressed in *Jardines*, when the Court was asked whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog was a Fourth Amendment search requiring probable cause.[59] The Court found that the physical intrusion was not licensed by the implied consent of social norms because, unlike a knock-and-talk, the officer brought along a sense-enhancing animal to conduct a search under the pretense of a knock-and-talk.[60]

Through *King* and *Jardines*, the Supreme Court has outlined guidelines which should govern the use of knock-and-talks. While both *King* and *Jardines* held that a Fourth Amendment search occurs when an officer trespasses on a constitutionally protected area for the purposes of conducting a search, *Jardines* went a little further by explaining that under an implied license, an officer can do "no more than any private citizen might do" and whether an officer has an implied license to enter the curtilage depends on the purpose for entry.[61]

II. *UNITED STATES V. CARLOSS*

A. Facts

After receiving tips that Ralph Carloss, a convicted felon, unlawfully possessed firearms and sold drugs, law enforcement officials went to the home, where Carloss resided, to investigate.[62] The officers knocked on the front door to speak with Carloss, despite numerous professionally printed "No Trespassing" signs in the yard, along the sidewalk, and on the front door.[63] After the officers knocked for several minutes, Carloss emerged from the home and was questioned regarding the allegations.[64] Carloss informed the officers that he was not allowed to be around ammunition because of prior convictions and denied their subsequent request to search the home by stating that he was not the homeowner and could not give permission.[65] When Carloss entered the home to seek permission, the officers followed him in after asking if it was okay to enter and wait inside.[66] While in the home, the officers observed drug paraphernalia and what appeared to be methamphetamine in Carloss's room.[67] Earnest Dry, the homeowner, refused to allow the officers to search without a warrant

58. Kentucky v. King, 563 U.S. 452, 469–70 (2011).
59. *Jardines*, 569 U.S. at 3–5.
60. *Id.* at 9.
61. *Id.* at 8, 10 (quoting *King*, 563 U.S. at 469).
62. United States v. Carloss, 818 F.3d 988, 990 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).
63. *Id.*
64. *Id.* at 990–91.
65. *Id.* at 991.
66. *See id.*
67. *Id.*

and asked them to leave.[68] The officers later obtained a warrant based on their observations while in the home and returned.[69] During the search, officers found "'multiple methamphetamine labs' and lab components, a loaded shot gun, two blasting caps, ammunition, and . . . drug paraphernalia."[70]

B. Procedural History

After the search, Dry and Carloss were arrested and charged with multiple drug and weapon offenses.[71] Dry and Carloss moved to suppress the evidence found in the home by arguing that Carloss's consent was the product of a Fourth Amendment violation.[72] The motion was denied and Carloss accepted a conditional guilty plea which allowed him to appeal the court's ruling on his motion to suppress the evidence found in the home.[73]

C. Majority Opinion

The majority opinion, authored by Judge Ebel, held that the officers did not violate the Fourth Amendment, in light of the *Jardines* decision, by conducting a knock-and-talk in efforts to speak with Carloss and that Carloss voluntarily consented to the officers accompanying him into the home.[74] The majority found that, post-*Jardines*, the Tenth Circuit has upheld the constitutionality of knock-and-talks, holding that there is an implied license for members of the public, including police, to go onto the curtilage of a home to knock on the front door.[75] Additionally, whether the implied license has been revoked depends on the context in which "an officer seeking to conduct a knock-and-talk, encountered the signs and the message that those signs would have conveyed to an objective officer . . . under the circumstances."[76]

The Tenth Circuit Court of Appeals concluded that the "No Trespassing" signs placed around the home would not have conveyed to an objective officer that he could not go to the front door and knock to speak consensually with Carloss.[77] Moreover, the court refused to place a time limit on how long a person can knock before exceeding the scope of an implied license when there was no evidence that the officers knocked aggressively or demanded entry.[78] The court gave two reasons to support their finding that Carloss voluntarily consented to the officers accompanying him into the home. First, Carloss's consent was not the

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See id.*
73. *Id.*
74. *Id.* at 991, 994, 998.
75. *Id.* at 992.
76. *Id.* at 994.
77. *Id.* at 995.
78. *Id.* at 997–98.

product of a Fourth Amendment violation because there was no violation.[79] Second, it was unreasonable to believe that because Carloss declined to give the officers consent to search the home that he could not consent to their accompanying him into the home while he sought permission for the search.[80]

D. Concurring Opinion

The concurring opinion, authored by Chief Judge Tymkovich, held that the Fourth Amendment test asks "whether police intruded without license into a constitutionally-protected area, and . . . whether they obtained information via that intrusion."[81] The question of "whether the officers had an implied license to enter the porch . . . depends on the purpose for which they entered."[82] The concurrence reasoned that a "mere investigatory purpose will not invalidate an otherwise licensed police entry into the curtilage in every instance" and that intent was irrelevant under the implied license.[83] Moreover, a homeowner has the ability to revoke the implied license by opting out of social norms and making his revocation clear to a reasonable person.[84] The concurrence concluded by stating that the court must deploy an objective test and a general rule asking "whether a reasonable person would conclude that entry onto the curtilage . . . by police or others was categorically barred."[85]

E. Dissenting Opinion

The dissenting opinion, authored by Judge Gorsuch, addressed the implications of the court's holding and its departure from precedent and common law.[86] The dissent first analyzed the consensual theory behind knock-and-talks and the curtilage protection.[87] The dissent reasoned that the consensual theory behind knock-and-talks and the curtilage protection were at odds with each other because, while the curtilage is protected by the Fourth Amendment and requires police to have a warrant, exigent circumstances, or consent to enter a home or to reach the front door, the government has suggested that officers enjoy an irrevocable right to enter a home's curtilage to conduct knock-and-talks.[88] Second, the dissent examined historical evidence and the common law rule, which held that posted signs were sufficient to ward off unwanted visitors.[89] Third, the dissent concluded that the majority's holding was unclear and would invite

79. *Id.* at 998.
80. *Id.* at 998–99.
81. *Id.* at 1001 (Tymkovich, C.J., concurring).
82. *Id.* at 1002.
83. *Id.* at 1001–02.
84. *Id.* at 999.
85. *Id.* (emphasis omitted).
86. *Id.* at 1003 (Gorsuch, J., dissenting).
87. *Id.* at 1006–07.
88. *Id.* at 1004–06.
89. *Id.* at 1009–10.

more cases because of the specificity of the analysis concerning the placement and content of a sign.[90]

III. DISCUSSION

Police frequently utilize knock-and-talks to circumvent warrant requirements for purposes of obtaining information on behalf of the public good, obtaining consent to enter or search, or making a warrantless arrest.[91] The Tenth Circuit Court of Appeals has set a dangerous precedent through *Carloss* by holding that an implied license had not been revoked despite the presence of "No Trespassing" signs because the decision disregards current Fourth Amendment jurisprudence and will have dangerous consequences for communities most at risk police interactions. Judge Gorsuch's dissent addressed most of these concerns when he questioned why the majority ruled in favor of the government though they disagreed with all the reasons brought forth by the government.[92] While the majority might not have meant to approve the government's suggestion that it enjoys an irrevocable right to enter a home's curtilage to conduct a knock-and-talk,[93] its holding only complicated the matter by focusing on the content of the "No Trespassing" signs and the lack of a fence. Moreover, the court's failure to provide any real guidance or notice to police or citizens about when the implied license has been rescinded will ultimately lead to an abuse of the rule and police powers.

A. Disregard for Constitutional Protections and Precedent

Given the courts' belief that knock-and-talks are consensual procedures, the tactic is not subject to Fourth Amendment scrutiny.[94] Therefore, instead of addressing whether police have a justification to knock on a private door, the current rules analyze what happens after police intrude into a private area.[95] This practice is inconsistent with the Fourth Amendment jurisprudence set in *Jones* and *Jardines*, which held that a Fourth Amendment search occurs when an officer trespasses on a constitutionally protected area for the purposes of conducting a search.[96] Though the *Jardines* Court did not directly address the lawfulness of knock-and-talks, the Court limited the use of the implied license by holding that the existence of an implied license for officers to enter the porch "depends upon the purpose for which they entered."[97] Moreover, the Court concluded that an implied license is undermined when an officer's

90. *Id.* at 1014.
91. Dooley, *supra* note 55, at 218.
92. *Carloss*, 818 F.3d at 1004, 1008, 1015.
93. *Id.* at 1004.
94. *See* Dooley, *supra* note 55, at 214.
95. *Id.* at 223–24.
96. *See* Florida v. Jardines, 569 U.S. 1, 5, 10 (2013); United States v. Jones, 565 U.S. 400, 407 (2012).
97. *Jardines*, 569 U.S. at 10.

behavior goes beyond what property owners would ordinarily tolerate or expect from a visitor.[98] While the limitations established in *Jardines* are consistent with the curtilage doctrine and Fourth Amendment jurisprudence, the Tenth Circuit Court of Appeals' misinterpretation of *Jardines* and disregard for the curtilage doctrine is problematic and inconsistent for a number of reasons.

First, the majority's opinion ignores historical precedent and fails to set out a clear and concise rule of when an individual has revoked the implied license.[99] Traditionally, the implied license could be revoked by express words or an act indicating an intention to revoke; there was no requirement that one show notice by word and deed.[100] In 1951, through *Beard v. Alexandria*,[101] the Supreme Court recognized that a homeowner may bar visitors from entering private property to knock at the front door by "notice or order."[102] Moreover, several courts have specifically held that "No Trespassing" signs can revoke the implied license to enter regardless of whether the person seeking entry is a lay person or a police officer.[103] Despite the established common law principles and case precedent regarding revocation of the implied license, the majority in *Carloss* held that signs did not revoke the license given the circumstances, while the concurrence reasoned that a "No Trespassing" sign absent a fence or obstacle does not adequately revoke the implied license.[104]

Second, the majority's opinion strays from the current Fourth Amendment jurisprudence by failing to establish that police do not have an irrevocable right to approach a home for the purposes of conducting a knock-and-talk[105] and finding that Carloss voluntarily consented to the officers accompanying him into the home.[106] In 2013, the Supreme Court reaffirmed that the implied license to knock allowed an officer to do "no more than any private citizen might do."[107] Moreover, the Court recognized that a search occurs whenever the government physically enters a constitutionally protected area, like a home or its curtilage, to conduct a search.[108] Therefore, while an officer returning a lost dog or soliciting for a charity is not conducting a search within the Fourth Amendment, an officer called to investigate a crime is conducting a search

98. *Id.* at 8–9.

99. United States v. Carloss, 818 F.3d 988, 1008–13 (10th Cir.) (Gorsuch, J., dissenting), *cert. denied*, 137 S. Ct. 231 (2016).

100. *Id.* at 1009.

101. 341 U.S. 622 (1951).

102. *Id.* at 626, 626 n.2 (citing collected cases).

103. *Carloss*, 818 F.3d at 1010, 1010 n.10 (citing collected cases).

104. *Id.* at 990 (majority opinion); *see id.* at 1000–01 (Tymkovich, C.J., concurring).

105. *Id.* at 1004 (Gorsuch, J., dissenting) ("A homeowner may post as many 'No Trespassing' signs as she wishes. She might add a wall or a medieval-style moat, too. Maybe razor wire and battlements and mantraps besides. Even *that* isn't enough to revoke the state's right to enter.").

106. *Id.* at 998–99 (majority opinion).

107. Florida v. Jardines, 569 U.S. 1, 8 (2013).

108. *See id.* at 11.

within the Fourth Amendment.[109] However, *Carloss* threatens the guidance of this clear and concise distinction in three ways: the decision implies police have the ability to approach any home without restraint under knock-and-talks, it does not provide any guidance to citizens on how to sufficiently revoke the implied license, and it fails to provide any guidance to government officials on when they possess an implied license.[110]

Third, instead of ensuring that citizens retain the constitutional protections granted under the Fourth Amendment, *Carloss* ultimately gives government officials a way to circumvent Fourth Amendment requirements by holding that Carloss, a third party in Dry's home, had the authority to consent to officers accompanying him into the home.[111] The court failed to evaluate whether a reasonable officer would have believed that Carloss had authority to consent to the entry of another person's home. Moreover, the court failed to require the government to satisfy its burden of proving that Carloss had actual or apparent authority to consent to a search or warrantless entry of the home.[112] To show actual authority, the government must show that the person who consented had either mutual use of the home by virtue of joint access or control for most purposes over the home.[113] To show apparent authority, the government must show the officer had a reasonable belief that the person who consented had actual authority to do so.[114] If the court had asked for this burden to be fulfilled in *Carloss*, the government would have had great difficulty proving Carloss had actual or apparent authority to consent to entry of the home because Carloss acknowledged and notified the officers of his limited authority in the home when they initially asked to search the home.

Fourth, the majority opinion does not provide any real guidance on the structure or use of knock-and-talks because the court engaged in a nuanced and ambiguous analysis of specific factual circumstances that only brings more questions than answers.[115] Instead of suggesting that "No Trespassing" signs are categorically insufficient to revoke the implied license, the majority accepted the view that signs could revoke the license and argued that Carloss's signs did not revoke the license because the terms were ambiguous.[116] The result of a holding based on a fact-specific analysis leads to a patchwork of jurisprudence, where courts focus on

109. *Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting).

110. *See id.* at 1005, 1014.

111. *Id.* at 998 (majority opinion) (finding that "the district court did not clearly err in finding that Carloss voluntarily consented to the officers following him into the house").

112. *See* United States v. Cos, 498 F.3d 1115, 1124 (10th Cir. 2007) (stating the government has the burden of proving that the party who consented to a search had either actual or apparent authority to consent to the search).

113. United States v. Rith, 164 F.3d 1323, 1329–30 (10th Cir. 1999) (stating the mutual use analysis is very fact oriented while the control for most purposes could be satisfied by a presumption).

114. *Cos*, 498 F.3d at 1128.

115. *Carloss*, 818 F.3d at 1012–15 (Gorsuch, J., dissenting).

116. *Id.* at 1012.

issues like the size of shrubs, fences, or the placement of signs, instead of whether police were justified in knocking on the door.[117] Moreover, such analysis causes the court to rarely engage in a detailed discussion of whether the government met its burden to prove if consent was given or whether the government was justified in approaching the door.[118]

B. Unclear Ruling Will Lead to Abuse of Power

While a police officer's knock on the door may not be troubling on its face, the prevalent use of the procedure can be seen as problematic if the courts and the public focused on how a lack of judicial guidance affects the coercive nature of knock-and-talks and deteriorates police and community relations. Police often utilize the knock-and-talk technique because it allows them to act without a warrant or probable cause, it is a simple and effective way of obtaining information, and it allows police to seize any evidence of a crime in the officer's plain view.[119] Moreover, under the *Schneckloth* doctrine, a waiver for searches and seizures does not require informed consent.[120] Therefore, an individual's knowledge of the right is not taken into account when examining whether consent was voluntary, and officers have no duty to inform individuals of their right to refuse consent.[121] Since the *Schneckloth* doctrine's original application, critics have complained that it creates two diverging perspectives regarding the nature of consent to search: as an honest appeal between equal consensual parties or a demand where choice is illusory given the unbalance power structure between the parties involved.[122] Despite the differing perspectives, the Supreme Court has been hesitant to recognize the inherently coercive nature of knock-and-talks in constitutionally protected areas.[123] However, a number of lower courts have expressed an uneasiness with the tactic and have attempted to curb how knock-and-talks are utilized by embracing a realistic view of what happens during the encounter to protect the rights of citizens and prevent further erosion of Fourth Amendment protections.[124]

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117. Dooley, *supra* note 55, at 226.

118. Andrew Eppich, *Wolf at the Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C. J.L. & SOC. JUST. 119, 138 (2012).

119. *Id.* at 124–25.

120. *Id.* at 137.

121. *Id.* at 136.

122. *Id.* at 139.

123. *Id.* at 139–40.

124. State v. Huddy, 799 S.E.2d 650, 653 (N.C. Ct. App. 2017) (holding that "the State cannot rely on the knock and talk doctrine because the officer did more than merely knock and talk. The officer ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door (without knocking) and then to a rear door not visible from the street and located behind a closed gate"); Dana Chicklas, *Michigan Supreme Court Hears Oral Arguments in "Knock and Talk" Marijuana Butter Case*, FOX 17 W. MICH. (Mar. 9, 2017, 7:11 PM), http://fox17online.com/2017/03/09/michigan-supreme-court-hears-oral-arguments-in-knock-and-talk-marijuana-butter-case (hearing oral arguments on whether the timing of knock and talks play into their constitutionality and coercion of consent).

The former chief justice of the Arkansas Supreme Court, Jim Hannah, painted a vivid picture of what knock-and-talks truly entail by stating the following:

> [A]sking questions is often no longer necessarily the primary purpose of a knock and talk. Often it is not one officer, but two or more who approach the door. Many times, the intent in going to a citizen's door is not to talk but to obtain consent to search. Common practice is illustrated by the testimony of one law enforcement officer who, when asked about action taken on an anonymous tip, stated, "People call in and tell us, and we go and check. And if they wanna let us in we do. Eighty percent of 'em just let us come in and look." Law enforcement utilizes the knock and talk in lieu of a warrant when they recognize that they do not have probable or reasonable cause to obtain a search warrant. This misuse of a knock and talk causes concern that the protections against warrantless searches are being eroded. The United States Court of Appeals for the Sixth Circuit stated that "when the police go to a home with the intention of searching for evidence, they may not forgo a warrant." Yet, that is the very purpose of many knock and talk encounters today.[125]

Former Chief Justice Hannah's description of the reality of knock-and-talks, coupled with the lack of initiative police officers have to notify individuals of their rights under the *Schneckloth* doctrine, displays how the Supreme Court's skewed view of the tactic potentially endangers communities most at risk of facing police interaction and those who lack knowledge of their rights.

Statistics show that poor and minority communities are most at risk of facing law enforcement, less likely to have confidence in the police, and less likely to believe that the police will treat them equally with their white counterparts.[126] Those fears, beliefs, and concerns are not unfounded. American studies have found that police officers typically stereotype residents of minority communities as uncooperative, estranged, or hostile based on a belief of ecological contamination; use coercion more often in minority communities than in white communities; and engage in more misconduct in disadvantaged minority neighborhoods.[127] Despite statistics showing that police officers treat and perceive minorities differently because of their race, ethnicity, and place of residence, the Supreme Court has been unwilling to address the realities that minority communities face during interactions with the police. Rather, the Court has established standards that appear on their face to be colorblind and class blind but

125. Jim Hannah, *Forgotten Law and Judicial Duty*, 70 ALB. L. REV. 829, 837 (2007).

126. Bruce Drake, *Divide Between Blacks and Whites on Police Runs Deep*, PEW RES. CTR. (Apr. 28, 2015), http://www.pewresearch.org/fact-tank/2015/04/28/blacks-whites-police.

127. Ronald Weitzer & Rod K. Brunson, *Policing Different Racial Groups in the United States*, 35 CASHIERS POLITIESTUDIES 129, 135–36 (2015), https://sociology.columbian.gwu.edu/sites/sociology.columbian.gwu.edu/files/downloads/Weitzer%20%26%20Brunson%202015%20.pdf.

which have exceptions that solely apply to minority and poor communities.[128]

By allowing police officers to circumvent the warrant requirement through knock-and-talks, the level of trust between citizens and law enforcement is reduced,[129] the chance of incidental fatality is increased,[130] and citizens are left feeling helpless and unprotected by the law and courts.[131] Knock-and-talks rely heavily on the discretion of the police with little direction to guide or check their actions.[132] Though the technique may be convenient for police to use, the technique significantly reduces the special protection of the home for minorities and the poor because of their proximity to areas that police perceive to be high crime.[133] Moreover, frequent use of the technique "can create the perception that one's home . . . is constantly under siege by the police."[134] While knock-and-talks may be successful in obtaining criminal evidence, the Court should question whether the governmental interest in the intrusion outweighs society's right to privacy within the home and curtilage and whether guidance in the utilization of the tactic would actually result in the practice being applied equally and fairly among white and minority communities.

IV. RECOMMENDATION

Presently, Justices of the Supreme Court have adopted a false narrative surrounding knock-and-talks which views the tactic as consensual because social visitors have an implied license to approach a door and the conversational aspect of the situation discredits the possibility of coercion.[135] While *Jardines* attempted to establish guidelines for knock-

128. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (utilizing a neighborhood's crime level and the sole act of running away unprovoked in a high crime neighborhood as major justifications for reasonable suspicion).

129. Eppich, *supra* note 118, at 146–47; Kirk Mitchell, *Denver Jury Awards $1.8 Million to Family in Wrongful Prosecution Case*, DENV. POST (Apr. 27, 2016, 1:21 AM), http://www.denverpost.com/2014/09/26/denver-jury-awards-1-8-million-to-family-in-wrongful-prosecution-case (discussing how officers made false charges against a family to divert attention from their own misconduct stemming from a knock-and-talk).

130. *See, e.g.*, Henry Pierson Curtis, *Lawsuit Filed in Police "Knock-and-Talk" Killing of Orlando Teen*, ORLANDO SENTINEL (Jan. 16, 2015, 4:39 PM), http://www.orlandosentinel.com/news/breaking-news/os-knock-and-talk-orlando-lawsuit-20150116-story.html (discussing the wrongful-death lawsuit filed against the Orlando police for killing a teenager during a controversial knock-and-talk).

131. Mark Joseph Stern, *Appeals Court: Officer Who Shot and Killed Innocent Man in His Own Home Cannot Be Sued*, SLATE (Mar. 17, 2017, 4:31 PM), http://www.slate.com/blogs/the_slatest/2017/03/17/appeals_court_rules_officer_who_killed_man_in_his_own_home_cannot_be_sued.html (discussing the Eleventh Circuit's holding that an officer who shot and killed innocent man in his own home during knock-and-talk could not be sued).

132. Eppich, *supra* note 118, at 148.

133. *See id.* at 147, 150.

134. *Id.* at 147.

135. Kentucky v. King, 563 U.S. 452, 469–70 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak."); *see also* Florida v. Jardines, 569 U.S. 1, 8 (2013) ("This implicit license typically permits the visitor to approach the home

and-talks, the confusing, circular nature of the reasoning behind the holding[136] has resulted in various conflicting decisions across the country.[137] However, one consistent factor that has progressed, despite the various results, is the false narrative surrounding knock-and-talks. Contrary to the Supreme Court's belief that knock-and-talks are not being used to solely conduct searches, some police forces have assembled knock-and-talk task forces whose sole duty is to approach a home and ask for entry.[138] Because knock-and-talks are being used as an investigatory tool by police departments across the country, courts should apply reasonable time constraints and the reasonable suspicion standard, first established in *Terry v. Ohio*,[139] to knock-and-talks when evaluating their constitutionality.

Jardines established that the implied license gave a customary invitation for visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[140] However, the Court did not clarify the time of day that knock-and-talks could be conducted under the implied license or discuss whether the timing of a knock-and-talk could make it coercive. This issue is currently being discussed in the Michigan Supreme Court regarding a case in which police conducted knock-and-talks at four o' clock in the morning and five thirty in the morning.[141] When the prosecution in that case attempted to assert that, though unusual, the public may customarily expect officers at that time of morning, Michigan Supreme Court Justice Young interjected that it is never customarily expected for armed and vested officers to arrive at a person's home in the early hours except in an emergency.[142] Given the flawed belief that police are able to approach the home at any time of the day or night[143] and the fatalities involved in those decisions,[144] it would be best for the Court to establish a reasonable time

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by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.").

136. *See Jardines*, 569 U.S. at 10 ("[W]hether the officer's conduct was an objectively reasonable search . . . depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they have entered.").

137. *See, e.g.*, United States v. Hernandez, 392 F. App'x 350, 353 (5th Cir. 2010) (holding that the officers' conduct during their knock-and-talk, which included banging on doors and windows and breaking the glass on Hernandez's door, then relying on her admission that an illegal alien was present as probable cause to enter, violated the Fourth Amendment); *see also, e.g.*, United States v. Perea-Rey, 680 F.3d 1179, 1189 (9th Cir. 2012) (holding that the warrantless intrusion by border patrol agents violated the defendant's Fourth Amendment rights because to do otherwise would swallow the curtilage protection); People v. Nelson, 296 P.3d 177, 184 (Colo. App. 2012) (holding that officers may use a ruse to get a person to open the door so they can conduct a knock-and-talk).

138. Jamesa J. Drake, *Knock and Talk No More*, 67 ME. L. REV. 25, 35 (2014) (discussing how the Dallas Police Department has a "46-member knock-and-talk task force" and the Orange County Florida Sheriff's Office has an entire division dedicated to the tactic).

139. 392 U.S. 1 (1968); *id.* at 30.

140. *Jardines*, 569 U.S. at 8.

141. Chicklas, *supra* note 124.

142. *Id.*

143. *See id.*

144. *See, e.g.*, Curtis, *supra* note 130; Stern, *supra* note 131.

period for police officers conducting knock-and-talks to approach the home. The time period in which police are allowed to conduct knock-and-talks should be similar to that of an unexpected private citizen, such as eight o' clock in the morning and six o' clock in the evening, to protect civilian rights and increase officer safety.

In addition to introducing a time constraint, the Court should evaluate knock-and-talks under *Terry*'s reasonable suspicion standard. In *Terry*, a case in which an officer stopped and searched three men after observing them walking in repeated cycles and staring into a store, the Court held that a warrantless search for weapons is reasonable when officers have a reasonable suspicion that a crime has been committed or is about to be committed.[145] The Court reasoned that when assessing the reasonableness of a stop, the focus should be on the governmental interest that allegedly justifies the official intrusion on constitutionally protected interests and whether the officer is able to point to a specific or articulable fact that reasonably warrants that intrusion.[146] The Court's reasoning showed its concern for the social implications of giving police broad discretion and the legal implications of unwarranted searches and seizures. The Supreme Court's decision in *Terry* alluded to some of the legal and social concerns that have arisen from the prevalent use of knock-and-talks across the country.[147] Like a stop-and-frisk, a knock-and-talk is a tactic used by police when there is not enough evidence to obtain a warrant; it involves a level of intrusion where the officer should have at least reasonable suspicion before asking about details of citizens' lives or for consent to search.[148] Knock-and-talks should be reviewed under *Terry*'s reasonable suspicion standard to limit the broad discretion police officers currently have and to avoid violating a person's constitutional right to be free from unreasonable police intrusion.

Similar to a stop-and-frisk, to conduct a knock-and-talk the police should be required to show reasonable suspicion under the totality of the circumstances and be able to point to specific and articulable facts to demonstrate that criminal activity was occurring.[149] The search should also be reasonable in its inception and as conducted.[150] This means that an anonymous tip should not be enough to satisfy the reasonable suspicion requirement without specific indicia of reliability[151] because the police would have the intention to intrude on a person's privacy at the home, and

145. Terry v. Ohio, 392 U.S. 1, 6, 28, 30 (1968).
146. *Id.* at 20–21.
147. *Id.* at 10–12 (discussing "substantial interference with liberty and personal security by police officers whose judgment is necessarily colored," and "exacerbat[ing] police-community tensions").
148. Dooley, *supra* note 55, at 241.
149. *See Terry*, 392 U.S. at 21.
150. *See id.* at 19–20.
151. Florida v. J.L., 529 U.S. 266, 270–71 (2000).

the home has significant constitutional protections.[152] However, numerous tips from named informants or a tip from a previously used informant in the past[153] should be enough to justify the police's warrantless entry into a home's curtilage for purposes of a search or to ask questions pertaining to an individual's involvement in criminal activity. Hence, this standard would allow police to efficiently conduct knock-and-talks under a clear guideline, while protecting the fundamental civil liberties of society.

V. APPLYING THE RECOMMENDATION TO THE FACTS OF *CARLOSS*

Under the recommended standards, a knock-and-talk would be unconstitutional unless police could show that the tactic was utilized at a reasonable time and point to specific and articulable facts to show that reasonable suspicion existed under the totality of the circumstances. Thus, if the knock-and-talk is unconstitutional at inception, then any nonattenuated evidence resulting from that tactic, including consent to enter or search the home, are inadmissible against the defendant in court.

In Carloss's case, the police intrusion onto his curtilage may have been constitutional despite the presence of "No Trespassing" signs because police had reasonable suspicion to conduct the knock-and-talk. The police in this case were alerted to the potential criminal activity of Carloss through numerous tips from neighbors. Based on that information alone, the police may have had reasonable suspicion to approach Carloss's home to speak with him regarding the allegations if the informing neighbors were readily identifiable, could face criminal penalty for giving a false tip, or had a sufficient explanation for how they gained access to that knowledge. The only remaining questions the court would have had to address were whether Carloss had the authority to give consent and whether the police conducted the knock-and-talk within the established reasonable time constraint. If the court determined that Carloss had the authority, though limited, to consent to officers entering the home and that the knock-and-talk was conducted between 8:00 a.m. and 6:00 p.m., the results of *Carloss* would remain the same.

CONCLUSION

Through *Carloss*, the Tenth Circuit Court of Appeals set an unfavorable precedent, which fails to coincide with the special protections the Fourth Amendment grants to the home and curtilage. Both *King* and *Jardines* work together to address how police should handle knock-and-talks in a way that is consistent with the Constitution under the present jurisprudence.[154] Despite the guidelines laid out in *King* and *Jardines*, which attempt to control how police conduct activities in relation to

152. *See* discussion *supra* Section II.B.

153. *See* Adams v. Williams, 407 U.S. 143, 146–47 (1972).

154. Florida v. Jardines, 569 U.S. 1, 7–9 (2013); Kentucky v. King, 563 U.S. 452, 469–72 (2011).

searches, the ruling of *Carloss* gives police officers unrestricted access to physically intrude onto one's property in hopes of conducting a search.[155] This unrestricted power is not only a threat to those who have more contact with police but also a threat to the Fourth Amendment's protection of the home and curtilage. Therefore, when evaluating whether police permissibly intruded onto the curtilage without a warrant and with intention to commit a search, courts should consider whether the tactic took place at a reasonable time and whether *Terry*'s reasonable suspicion standard was satisfied to protect the civil liberties and rights of society.

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155. *King*, 563 U.S. at 469–70; *see also Jardines*, 569 U.S. at 8. *But see* United States v. Carloss, 818 F.3d 988, 994–95 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

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