

national lawyers guild

Volume 72
Number 3
Fall 2015

REVIEW

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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



editor's preface

In 1999 the *Washington Post* won the Pulitzer Prize for Public Service, perhaps the most coveted of journalistic prizes, for “Deadly Force,” a five-part series of articles that sought to explain the alarming frequency with which police officers in Washington D.C. killed residents of the city they were charged with protecting. The series identified a number of causes for the epidemic of police violence, including poor training, inadequate supervision, and minimal accountability. In “‘Deadly Force’ Revisited: Transparency and Accountability for the D.C. Police Force,” Karen Hopkins digs deep into the data to demonstrate that a decade and a half, later many of the same problems remain.

This article could hardly be more timely. Over the past two years there has been a great awakening to the fact that police violence is a national epidemic that can no longer be tolerated, particularly in cities like the District of Columbia where there are large concentrations of African Americans. There have been mass uprisings around the country. Protesters and activists, including the bold and tireless Black Lives Matter (BLM) movement, continue to demand reform. Even in the teeth of so much popular anger and resistance, police who kill, even under circumstances that, for any civilian, would constitute probable cause for arrest and prosecution, still tend to enjoy impunity. The framework of our criminal justice system is designed to exonerate them. Darren Wilson was not indicted after he shot and killed Michael Brown, an unarmed teenager, in Ferguson, Missouri. Daniel Pantaleo was not indicted after choking Eric Garner, also unarmed, to death on Staten Island. Prosecutors did all they could to insure that a grand jury would not indict Timothy Loehmann, who shot and killed 12-year-old Tamir Rice, armed only with a toy gun, in Cleveland. The list goes on interminably.

“‘Deadly Force’ Revisited,” exploring how the reforms that followed the *Post*’s landmark series have fallen short, helps demonstrate how frustratingly

Continued on inside back cover

NATIONAL LAWYERS GUILD REVIEW, formerly GUILD PRACTITIONER, is published quarterly by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are \$75/yr for libraries and institutions; \$25/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. NATIONAL LAWYERS GUILD REVIEW is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, the Alternative Press Index and in A MATTER OF FACT.

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Karen Hopkins

**“DEADLY FORCE” REVISITED:
TRANSPARENCY AND ACCOUNTABILITY
FOR D.C. POLICE USE OF FORCE**

Introduction

In 1999, a *Washington Post* investigative series entitled “Deadly Force” revealed that the Metropolitan Police Department (MPD) in the District of Columbia had “shot and killed more people per resident in the 1990s than any other large American city police force.”¹ The *Post* found that in some cases the police investigated themselves and failed to conduct a thorough investigation of shooting incidents. Media attention prompted police leadership to submit an unprecedented request that the Department of Justice (DOJ) conduct a “pattern or practice” investigation.

DOJ’s investigation did in fact reveal a pattern or practice of the use of excessive force by MPD officers. DOJ subsequently monitored the MPD from 2002 to 2008. Since 2008 however, there has been decreased oversight of the MPD. In March 2015, shortly after protests erupted in Baltimore following the death of Freddie Gray, the District of Columbia Auditor ordered a review of MPD’s use-of-force policies to determine whether MPD remains in compliance with DOJ’s recommendations.² While the audit will review MPD policies for compliance, this article examines whether the MPD has maintained its commitment to reform or has slid back into old habits. This article uses available data to analyze whether the MPD exhibits a pattern or practice of police misconduct sufficient for another DOJ investigation and further reforms to MPD policy and practice.

The first section details the problems MPD faced in the 1990s as identified by the *Washington Post* investigation and a Human Rights Watch (HRW) report on police brutality. The second section summarizes the DOJ’s investigation and MPD compliance with a Memorandum of Agreement (MOA) between 2002 and 2008. The third section relies on self-reported data from the MPD and the Office of Police Complaints (OPC), as well as external data from the FBI and other sources, to show that practices observed during the post-DOJ oversight era from 2009 to 2014 repeat the patterns from the 1990s. The final section argues that the warning signs of problems persist today along with new challenges and opportunities for reform. This article suggests that these warrant a thorough examination and transformation of present MPD practices relating to transparency and accountability, as steps toward a more just policing system.

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MPD Use of excessive force in the 1990s

By the mid-1990s it became apparent that the District of Columbia MPD civilian oversight system was not properly functioning. Activists and leadership both from within the MPD and outside it made attempts to create more effective civilian oversight during the '90s, but problems persisted. The *Washington Post* "Deadly Force" series highlighted mounting concerns over MPD abuses, focusing on factors that contributed to its alarming use of deadly force. The Human Rights Watch multi-city report targeted the roots of the MPD's police brutality as a system-wide lack of transparency and accountability.

***Washington Post* investigation: "Deadly Force"**

Washington Post investigative reporters were awarded a Pulitzer Prize in 1999 for their "Deadly Force" series of articles. The series revealed that MPD officers fired their weapons more than twice as often as other major metropolitan area police departments.³ Eighty-five people were shot and killed by DC police between 1990 and 1998.⁴ The *Post* series discussed six deficiencies including incomplete reporting and tracking of police use of force, failure to properly train new and continuing officers, off-duty shootings and shooting at cars, failure to discipline officers guilty of misconduct, ineffective complaint investigations, and costly litigation.⁵

Incomplete reporting and tracking hinders accountability for officers. The 1998 *Washington Post* investigation found that shooting incidents were under-reported or misreported by 33 percent.⁶ Investigative reporters at the *Post* found seven fatal shootings were missing from police shooting trend records from 1994 to 1997, and seven other fatal shootings were mislabeled as nonfatal.⁷ Poor and incomplete background checks of officers during the hiring period from 1989 to 1990 were cited as potential reasons for their increased use of force.⁸

Criminologists and police officials agree that training and supervision are often underlying factors impacting the likelihood of police use of excessive force, particularly for shootings.⁹ Failure to train officers on proper use of force and use of firearms puts officers and citizens at risk. As of March 1998, approximately half of DC police "had not been certified on their firearms, as required by department regulations."¹⁰ Experts consider a twice yearly retraining a bare minimum for firearm competence.¹¹ Department regulations require firearms training every six months, in line with expert recommendations. However, the requirement is not strictly enforced. The *Post* investigation found that "75 percent of all D.C. officers involved in shootings during 1996 failed to comply with the retraining regulation."¹² A high demand for street duty and poor management contributed to the training deficiencies, as well as lead contamination at the shooting range, which shut it down in the early 1990s.¹³

Geoffrey Alpert, a criminologist at the University of South Carolina and an expert on police violence, used data to compare lethal police shootings

involving vehicles in Miami and Washington D.C.¹⁴ Generally, police are instructed to resist shooting at cars due to the increased risk of harming passengers in the vehicle as well as bystanders in the vicinity. Miami had double the population of Washington, with approximately the same size police force and more crime. Yet the MPD had a disproportionately larger number of off-duty police shootings and shootings at cars.¹⁵ MPD officers fatally shot nine people in cars during a five-year period, compared with Miami’s four in ten years. MPD officers also “fired three times as many bullets per car shooting.”¹⁶ Off-duty shootings can be problematic because citizens may not realize they are interacting with a police officer and officers are more likely to feel vulnerable without backup.¹⁷

According to MPD regulations, every gunshot fired by an officer undergoes a rigorous, multilayered review. The *Post* found however that during the 1990s, the police shooting investigation process was ineffective.¹⁸ In some cases, “Bullet wounds were undercounted. Witness statements disappeared. Basic forensic tests were not conducted. Officers were allowed to shift their accounts or submit vague statements. And investigations of fatal shootings sometimes were conducted by direct supervisors instead of an independent unit.”¹⁹ Essentially, the police were allowed to investigate themselves, and in many cases failed to investigate thoroughly. The MPD review of shootings ruled nine of every ten shootings justified during hearings closed to the public.

In the mid-1990s, police investigators found three shootings to be unjustified.²⁰ Citizen complaints do not necessarily indicate an officer was in the wrong. However, even officers with multiple complaints and lawsuits faced little discipline from the MPD during the 1990s. Of the 422 police shootings reviewed, 87 percent were declared justified between 1994 and 1997.²¹ Only two of the shootings led to criminal charges against officers.²² Former deputy chief Claude Beheler explained that, “Disciplinary systems are often referred to as “the Bermuda Triangle,” where investigations into officer misconduct languish and even vanish.”²³ Individuals did not specifically protect officers; rather it was the system that protected them.

The city had a public interest in police misconduct cases because litigation cost the city millions of dollars each year. Over 750 civil lawsuits were filed between 1990 and 1998.²⁴ More than seventy of those lawsuits were related to police shootings.²⁵

As a result of the *Post* series, the MPD began implementing non-lethal-force technologies, such as pepper spray. The implementation of these strategies was credited with a 78 percent drop in death or injuries resulting from shootings in just two years.²⁶ The number of deaths dropped drastically from twelve to one, and the number of times officers fired their weapons declined by 48 percent.²⁷ Media coverage from the *Deadly Force* series raised awareness and public pressure on leaders, serving as a catalyst for several MPD reforms addressing use of excessive police force in D.C.

HRW Report “Shielded from Justice”

Human Rights Watch (HRW) published a report in 1998 entitled “Shielded from Justice: Police Brutality and Accountability in the United States.” The report surveyed police brutality in ten major U.S. cities and recommended policy changes to improve transparency, accountability, investigation and civilian review.²⁸ One of the cities cited in the HRW report was Washington, D.C.

HRW’s requests for information from the MPD and the District government sent in 1996 remained unanswered for two years. One explanation for the lack of public access to information was simply that information was not collected or tracked. For example, data and statistics were not publicly available “regarding prosecution efforts against police officers, reasons for prosecutorial decisions, or prosecutorial success rates in these cases.”²⁹ HRW observed that district attorney’s offices generally did not track or maintain data related to police officers who were prosecuted. Without this data, HRW warned, it was impossible to know whether local cases were being handled appropriately or if federal prosecutors should have conducted their own investigations.³⁰ Similarly, many citizen review boards did not track civil lawsuits, settlements, or the costs of abuse for cities.³¹ High profile cases, on the other hand, led to increased public scrutiny.

According to a 1999 Amnesty International report, the DOJ “filed criminal charges against 74 officers for excessive force in 1998, a 12-year high.”³² Prosecutors rarely pursue cases of police abuse because of the high legal threshold required to prevail. Prosecutors must prove an officer had specific intent to deprive a citizen of his or her civil rights. The scarcity of resources devoted to these types of cases may also be an indicator that prosecutions of law enforcement officers for civil rights violations are a low priority. According to HRW, twenty-nine D.C. officers were prosecuted “for assaultive behavior” between 1990 and 1998.³³ Civil lawsuits typically held a city financially responsible rather than the officer.

The HRW report added the additional dimension of race, which was overlooked in the *Post* articles. The report identified problems specific to D.C., which included cultural and linguistic barriers to interactions with the Latino population and inadequate firearms training.³⁴ D.C.’s Latino task force observed “a real or perceived pattern of widespread, endemic racism and physical and verbal abuse by the MPD against the Latino community, particularly in the Third District, which had the highest concentration of Latino residents.”³⁵

The HRW report recommended that police departments adhere to international human rights treaties ratified by the U.S., standards for police such as the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.³⁶ HRW also called for proportionality in the amount

of force used when required, the adoption of reporting requirements when force or firearms were used, and for governments to ensure that “arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under the law.”³⁷

DOJ Oversight and Monitoring: 2002–2008

According to 42 U.S.C.S. § 1983, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity.”³⁸ The DOJ’s Civil Rights Division Special Litigation Section is responsible for suing police departments that violate constitutional rights as a “pattern or practice.”³⁹ They receive thousands of complaints annually, but prosecute only a handful. Spurred in part by the *Post* media coverage and the HRW report, the DOJ initiated an investigation into the MPD complaints process.

The Special Litigation Section of the Civil Rights Division of the Justice Department is responsible for prosecuting cases of police abuse.⁴⁰ In the early 2000s, MPD Chief Charles Ramsey requested that the DOJ conduct an investigation of the MPD.⁴¹ The DOJ Civil Rights Division’s investigation of MPD’s use of force revealed “a pattern or practice of use of excessive force by MPD” and it recommended policy improvements.⁴² It identified deficiencies in critical MPD policies including use-of-force reporting, investigation, training, establishment of an early warning tracking system, and complaint system reforms.⁴³ A MOA between the DOJ, the Mayor, and the MPD outlined a course of action regarding deficiencies identified by the investigation.

From 2001 to 2008, between 811 and 976 incidents were reported involving use of force by MPD officers.⁴⁴ During the monitoring period, the MPD reported 29 fatal police shootings.⁴⁵ According to experts, police use of force should be limited to about 1 to 2 percent of all incidents in police departments.⁴⁶ Approximately 15 percent of use-of-force incidents involved use of excessive force by MPD officers.⁴⁷ The DOJ’s investigation found that MPD policy does not explicitly mandate officers to report the use of *all* physical force, which meant use-of-force incidents were likely to be under-reported.

The DOJ found that the MPD’s complaint system was ill equipped to conduct thorough, fair, and timely investigations or promote accountability. In some cases, the MPD investigators failed to record the location of physical evidence, perform ballistics comparisons, photograph the scene, or interview witnesses.⁴⁸ Despite the number of shootings and use-of-force incidents reported in the media, complaints related to fatal shootings were rare. One reason for this may have been that the complaint process discouraged individuals from filing complaints. The policy required employees to ask individuals to

appear in person at MPD in order to file the complaint, which had a deterrent effect. The Office of Police Complaints (OPC) records for use-of-force hearing outcomes do not include deadly force or shooting cases, perhaps because these cases are settled through civil suits or investigated by the Internal Affairs Bureau (IAB).⁴⁹ Police departments and citizen review units, as a rule, will not initiate an investigation into alleged police brutality without a formal complaint.

The MPD provided use-of-force training in an uncoordinated manner with insufficient oversight by policy makers or legal staff.⁵⁰ Use-of-force training was often in conflict with applicable law and MPD policy. For example, the MPD failed to review training needs after unintentional shootings.

At the time of the DOJ investigation, the MPD did not have a comprehensive risk management process such as an Early Warning Tracking System (EWTS) designed to identify and track officers previously engaged in excessive force or with multiple complaints of misconduct. In 2002, the EWTS database did not capture use-of-force, and only retained data for two years. The MPD unit responsible for the system was understaffed, with only one officer responsible for maintaining the entire database, tracking complaints, reviewing the quality of complaint investigations and conducting financial audits.

In many cases where the MPD ruled use of force “unjustified,” or a citizen complaint of excessive force was “sustained,” the DOJ did not receive evidence that the MPD issued a corresponding disciplinary action for the officer. Only two officers were prosecuted for excessive force during the monitoring period in 2007.⁵¹

In 2005 and 2006, the MPD refused to take disciplinary action against officers in a significant majority of OPC cases where “officers had not cooperated with OPC’s investigation or mediation of police misconduct complaints.”⁵² In response, the OPC aggressively publicized the failure to discipline as required by law via the MPD management and D.C. Council. The OPC warned the failure “hindered OPC’s ability to gather the facts in its investigations, jeopardized the agency’s independence, and had the effect of encouraging further non-cooperation by officers.”⁵³ In April 2007, MPD Chief Cathy Lanier issued directives instructing employees to cooperate fully with the OPC and that officers who did not cooperate would be disciplined. Within a month of the directive “the number of instances of non-cooperation fell dramatically and discipline has been imposed regularly.”⁵⁴

Overall, the DOJ investigation concluded that the MPD training, complaint, investigation, and disciplinary processes were inadequate and inefficient. To correct these policy deficiencies, the DOJ recommended that the MPD: (1) expand the definition of the “use of force” to include all physical force and use of an instrument on a civilian; require officers to report every use of force; create a reporting form that tracks the type of force, the particular circumstances, injuries, etc.; train officers on policies; and monitor compliance with policies;

(2) ensure the complaint system clearly delineated the respective roles of the OCCR and the MPD; conduct community outreach regarding complaints, track complaints in a database, and improve the investigation of complaints; (3) collect and track all data related to officer use of force, litigation pertaining to excessive force, and the results of all investigations; (4) revise and update disciplinary policies with regard to adequate and timely discipline for excessive force cases; and establish a centralized system for documenting and tracking all disciplinary actions; (5) require that investigations for all serious use of force be conducted by the MPD’s Force Investigation Team; that the MPD provide all use of force investigators with proper training investigation techniques, basic forensics, disciplinary and administrative procedures; supervisory reviews should assess whether the use of force was reasonable; whether misconduct occurred; and any need for additional training; and (6) reform its training program by increasing the quantity and quality of use of force training; enhance its written and applied firearm training; and ensure shooting investigations include a firearm safety perspective.⁵⁵

By 2007, the MPD had achieved substantial compliance with 61 percent of the provisions listed in the MOA.⁵⁶ This is an average of about 10 percent progress per year. In 2008 the MPD was able to bring compliance levels up to 80 percent,⁵⁷ an increase of 20 percent in just three months, at which point the DOJ agreed to release the MPD from monitoring.⁵⁸ Such a quick turnaround occurred in conjunction with a new police chief, Cathy Lanier, being appointed. There was hope that new leadership would summon renewed commitment to reform, but without adequate follow-up about the changes made during the course of those three months it would be difficult to assess whether the reforms were real or merely cosmetic.

Four broad provisions of the MOA were not implemented as of the June 2008 final report. These included community outreach, revising the complaint process, documenting complaint and disciplinary action, and field training related to use of force.⁵⁹ First, paragraph 91 of the MOA required the MPD to conduct quarterly community outreach programs in each district to inform citizens of the complaint process and to receive complaints.⁶⁰ In Fiscal Year 2013, the OPC continued this outreach work, conducting or participating in twenty-six outreach events, including at least one in each of the District’s eight wards.⁶¹ Second, paragraph 94 of the MOA required the MPD’s Office of Professional Responsibility (OPR) to receive and record all citizen complaints filed with the MPD within twenty-four hours.⁶² Third, paragraphs 107–117 of the MOA related to the database documentation of use of force incident complaints, investigation results, disciplinary actions and adjudication.⁶³ Fourth, paragraph 121 of the MOA required oversight of the Field Training program including curriculum, trainers, evaluation, and needs assessments related to use of force.⁶⁴ These components of the MOA, left unresolved despite six years of

oversight, were arguably the underlying cause of the MPD's problems. Following the final report, the MPD was required to submit bi-monthly progress reports for these specific MOA provisions.⁶⁵

Despite reforms, many of the issues identified by the *Post*, HRW and the DOJ investigations have resurfaced since 2008. Some previously instituted reforms have relaxed enforcement, and some were never implemented. If the MPD fails to implement the DOJ recommendations, the DOJ's Civil Rights Division lacks the authority to file a civil lawsuit against the police department.⁶⁵ However, community organizations or individuals are able to supply evidence necessary to initiate a DOJ investigation by monitoring and reporting incidents to the Civil Rights Division's Special Litigation Section.⁶⁶ Current facts demand such an investigation begin immediately.

Hybrid complaint system: 2001–present

At the time of the DOJ investigation and up to the present, the MPD has had a dual complaint process whereby citizens can submit police misconduct complaints directly to the MPD or to the OPC. In 2001 the Office of Citizen Complaint Review (OCCR) with its governing Citizen Complaint Review Board (CCRB) and were inaugurated as an independent agency in charge of reviewing and resolving police misconduct complaints.⁶⁷ The CCRB consisted of five volunteer members, including a member of the MPD, and four private citizens with no current affiliation with law enforcement agencies.⁶⁸ Board members were appointed by the mayor with the approval of the D.C. Council and served staggered three-year terms.⁶⁹ In 2001, an OCCR staff of fourteen, including two senior investigators and five line investigators had the daunting task of addressing a backlog of hundreds of complaints left over from the previous CCRB.⁷⁰ The statute creating the CCRB and OCCR followed a hybrid model for citizen oversight in that the office was independent and could make policy recommendations to the MPD.⁷¹ However, the OCCR was still dependent on MPD cooperation for access to evidence and officer interviews.⁷²

Currently, complaints submitted to the MPD are investigated by the IAB. The IAB has the authority to investigate any type of complaint, including lethal and serious non-lethal use of police force.⁷³ Once a complaint is received, an MPD official contacts the complainant to inform him/her that the complaint is being investigated and to obtain any necessary information.⁷⁴ As part of the IAB investigation, the officer against whom the complaint is alleged is interviewed, along with any witnesses. Unless complainants request to remain anonymous, officers are entitled to know their names.⁷⁵ Once an investigation is completed, a finding of either Sustained, Insufficient Facts, Exonerated or Unfounded is made. If complainants are not satisfied with the outcome they may appeal to the Chief of Police in writing.⁷⁶

In 2004, D.C. passed a law changing the name of the CCRB and OCCR to the Police Complaints Board (PCB) and the Office of Police Complaints

(OPC), while leaving the structure intact.⁷⁷ The OPC and its investigative staff are independent of MPD and not under the direct control of the Mayor.⁷⁸ The OPC has authority to investigate complaints that allege abuse or misuse of police powers, including use of unnecessary or excessive force filed within forty-five days of the underlying incident.⁷⁹ Each complaint is assigned to an OPC staff investigator.⁸⁰ After conducting interviews and collecting evidence, an investigative report is drafted for each complaint. The Executive Director of OPC determines whether the complaint should be dismissed, referred to third party mediators for resolution, or where there is “reasonable cause to believe” that police misconduct occurred it is referred to an independent complaint examiner.⁸¹ With the approval of a PCB member, complaints can be dismissed if they are deemed to lack merit, if complainants refuse to cooperate with the investigation, or if they fail to participate in the mediation process.⁸² A survey and comparison of mediation programs used by different police departments cited OPC’s performance “at or near the top of all of the programs around the United States.”⁸³ If the complaint is sustained, the MPD uses a progressive discipline system whereby officers with multiple sustained complaints against them receive increasingly harsh penalties.

The OPC is required to refer complaints alleging criminal conduct by police officers to the U.S. Attorney’s Office, which determines whether to prosecute officers, including for all lethal shootings involving police.⁸⁴ Mediation through the Community Dispute Resolution Center is voluntary and provides an opportunity for the officer and complainant to reach a mutual understanding without the expense of formal litigation.⁸⁵

Officers have an opportunity to submit written objections to the OPC’s investigative report for review by complaint examiners.⁸⁶ As of 2007, OPC was utilizing a pool of fourteen complaint examiners. Officers and complainants may be represented by counsel during hearings.⁸⁷ The complaint examiner issues a written decision on the merits of the complaint based on the investigative report and/or an evidentiary hearing.⁸⁸ The Police Chief is bound by any complaint examiner decisions sustaining complaints and is required to discipline officers.⁸⁹ If the Police Chief believes the examiner “clearly misapprehends the record...and is not supported by substantial, reliable, and probative evidence in that record” the Chief can request a final review by a panel of three complaint examiners.⁹⁰

Methodology of this study

The findings in this report are based on MPD and the OPC annual reporting on use of force incidents. This study used the MPD annual reports posted on MPD’s website from 1998–2000 and 2006–2013.⁹¹ The MPD annual reports do not account for citizens killed by police with other weapons or bodily force, nor do they include details of whether police shootings were justified or unjustified.

The OPC annual reports fill some of these gaps and provide greater detail than the MPD annual reports.⁹² National data is drawn from the Center for Disease Control and FBI databases to draw comparisons between DC and other large metropolitan areas in the U.S.⁹³ The FBI and DOJ already collect some data, but could improve tracking and monitoring of police department use of force with additional data collection. The Uniform Crime Reporting (UCR) database and National Incident Based Reporting System (NIBRS) used by the FBI and DOJ were not designed to regulate police. They were designed to compile national crime data.⁹⁴ Police departments produce extensive data through “arrest reports, COMPSTAT, Early Intervention Systems, and other computer databases that might provide a basis for governing or regulating the police.”⁹⁵ Yet police departments are not required to report this or any other data to the DOJ or FBI. Submission of any data to the FBI database on officer-involved shootings, including “justifiable homicides” by law enforcement, is voluntary.⁹⁶ MPD does not report data on officer-involved shootings to the DOJ or FBI.⁹⁷

Therefore, publicly available data on MPD use of force is limited. Data used in section III of this article admittedly presents an incomplete picture of the MPD’s implementation of use of force policies. However, the available data does show striking similarities between patterns and practices implicated in the DOJ MOA from 2001, as well as current statistics indicative of problems of excessive use of force and failure to hold officers accountable for such use of force.

Post-monitoring police misconduct 2009–2014

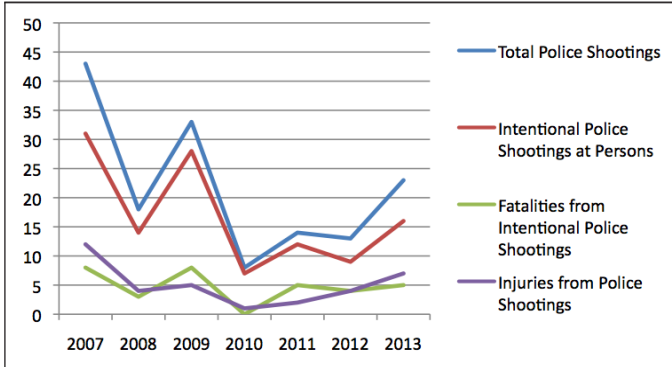
At first glance, D.C. police have made great strides in reforms to reduce police brutality. However, data presented in this section indicate the MPD’s reforms may be superficial. Since the cessation of the DOJ monitoring in 2008, the data show suspicious trends in citizen complaints and officer use of force. The MPD and the OPC self-reported data raise enough questions to warrant a DOJ investigation to determine the scope of problems in D.C. A DOJ investigation would provide for the collection of data sufficient to determine whether a “pattern or practice” of misconduct exists, would monitor police behavior and ensure accountability in cases of confirmed misconduct. A new investigation by the DOJ is required to summon the data required to adequately show a continuing pattern or practice of police misconduct in DC.

Lethal force

Twenty-two people have been killed and nineteen injured by police firearms discharge in DC since 2009.⁹⁸ Graph 1 shows the number of intentional shootings at persons, resulting fatalities and injuries between 2007 and 2013 as reported by the MPD.⁹⁹ The MPD annual reports do not indicate whether police shootings were justified or unjustified.

In addition, it is difficult to gauge whether there has been a decline or increase in fatal police shootings because annual reports for 2001–2006 are

Graph 1. Number of deaths and injuries from intentional police shootings in D.C.



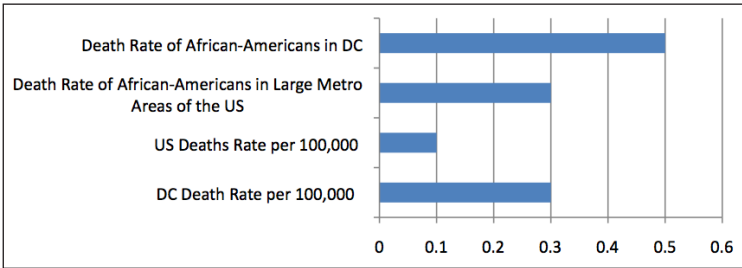
not posted on the MPD website. The author requested previous annual reports from the MPD and received no response. The OPC annual report data include information on the number of complaints of guns fired. In some cases the number of firearm discharges in the OPC reports does not correspond with the number of reported injuries and deaths from police shootings in the MPD reports. For example, an OPC annual report cited police firing a gun ten times in 2010, yet MPD cited thirteen intentional discharges of firearms at persons or animals plus another five accidental discharges for a total of eighteen.¹⁰⁰ Once again in 2009, a year after DOJ monitoring stopped, we see that the number of intentional firearm discharges at persons doubled from fourteen to twenty-eight incidents and fatalities increased from three to eight.¹⁰¹ Graph 1 also shows that the number of police shootings is creeping back up after a decline in 2010. Furthermore, the number of OPC complaints of firearm discharge is much lower than reported incidents, which may indicate that citizens are not filing complaints or are using other means such as civil lawsuits to resolve grievances. The MPD annual reports don't account for citizens killed by police with other weapons or bodily force. For this reason, deaths due to the MPD's use of force are likely underreported in Graph 1.

The CDC defines “death by legal intervention” as a person “killed by a police officer or other peace officer (a person with specified legal authority to use deadly force), including military police, acting in the line of duty.”¹⁰² Graph 2 shows legal intervention death rates reported by the CDC, which tracks causes of death.¹⁰³ The graph illustrates that African-Americans are much more likely to be killed by legal intervention in DC compared with other large metropolitan areas in the U.S. DC has a legal intervention with firearms death rate three times higher than the national average.¹⁰⁴

Use-of-force complaints

The MPD and OPC data show a steady increase in use-of-force complaints. Graph 3 shows that the number of complaints of force has increased signifi-

Graph 2. Legal Intervention by Firearm Discharge Death Rates 1999-2011

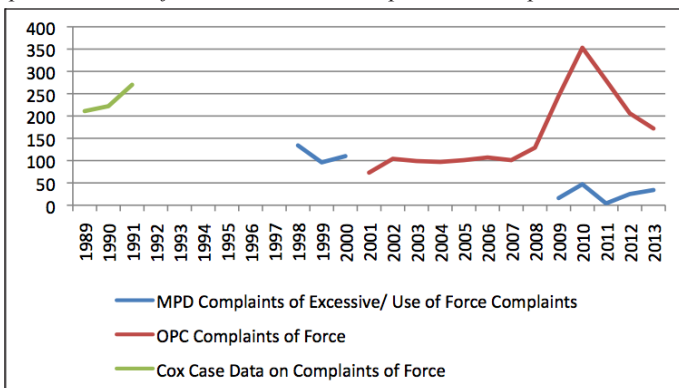


cantly since 2008 when the DOJ ceased monitoring, and remain higher than they were during the monitoring period.¹⁰⁵ This could be explained by reforms in the complaints process leading to more complaints being filed or that there has simply been an increase in instances of police misconduct, particularly when juxtaposed with a drop in violent crime levels in DC since 2009.¹⁰⁶

In the last five years, DC police officers have been arrested for a wide variety of on- and off-duty offences running the gamut from murder to money laundering.¹⁰⁷ According to the *Huffington Post*, “the latest instances have increased concerns about training, supervision and accountability,” prompting hearings before the DC Council.¹⁰⁸

A Pew Research Center study reveals that across the country, “the gun homicide rate has dropped 49 percent since 1993, with non-fatal gun crimes dropping 75 percent.”¹⁰⁹ However, complaints of police use of force in D.C. have increased. The average number of complaints during the five-year period between 2003 and 2008 was 400.5,¹¹⁰ compared with the average between 2009 and 2013 at 540.8 complaints.¹¹¹ Furthermore, the combined total number of complaints for the MPD and the OPC was 600 in 2008 and increased to 798 in 2013.¹¹²

Graph 3. Number of Excessive Force Complaints in DC per Year



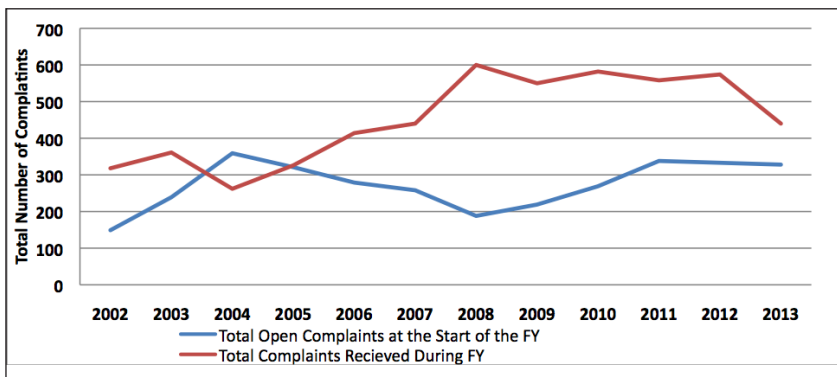
The dual complaint system in place is still struggling to meet the level of demand for investigations to resolve complaints. As shown in Graph 4, the OPC has had a consistent backlog of cases since 2005.¹¹³ As of 2013, the OPC still had a backlog of 312 complaints.¹¹⁴ The backlog of complaints significantly increases the likelihood that the complaint will remain unresolved, and makes it less likely that victims will receive justice or the officer held accountable. Over the last ten years, an average of 40 percent of complaints remained open from year to year despite a rule requiring that cases be investigated within 120 days.¹¹⁵ Unfortunately, access to information about the types of claims that are backlogged is not available to the public, so it is not possible to discern how many excessive force cases are part of the backlog.

Delays occur in part because OPC is understaffed for the volume of complaints compared with other large police departments. The ratio of investigators to police officers is more favorable in San Francisco (1/113) than in D.C. (1/324).¹¹⁶ San Francisco sets a legal requirement that there must be at least one investigator for every 150 officers.¹¹⁷ On average since 2008, OPC complaint examiners heard eleven cases per year¹¹⁸ compared with eighteen cases prior to 2008.¹¹⁹

DC police misconduct allegations went unresolved for most of 2011 because no acceptable bids were received for the contract to administer the independent examination program.¹²⁰ Johnny Barnes, Executive Director of D.C.’s chapter of the American Civil Liberties Union noted, “The police cannot and will not police themselves. If that board isn’t functioning and cannot function, then there is likely no way to seek and find justice when citizens have complaints.”¹²¹

The OPC recommended several programs to resolve less serious complaints more quickly in order to reduce the backlog. First, the OPC recommended legislation that would authorize a Rapid Response Program (RRP).¹²¹ In 2013, PCB reiterated its recommendation that legislation be enacted “that would cre-

Graph 4. Total Number of OPC Complaints by Year



ate a ‘rapid resolution’ process, to refer some relatively minor or service-oriented citizen complaints to MPD for resolution... [to] free up some OPC resources so that the agency could more efficiently resolve the most serious complaints filed with OPC, and allow MPD supervisors to address potential deficiencies in officers’ job performance more rapidly.¹²²

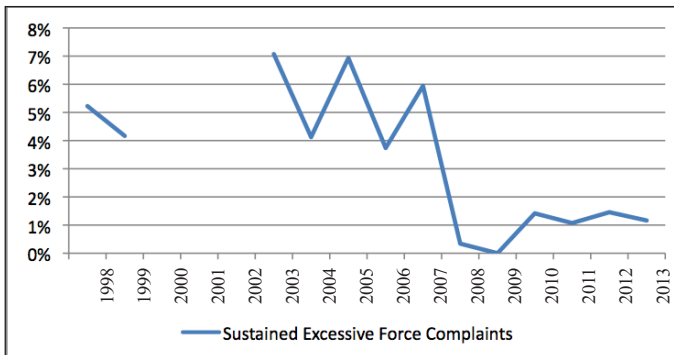
The RRP would enable supervisors to resolve minor complaints directly.¹²⁴ Second, OPC planned to pilot a conciliation program in 2014 for complaints that are less serious than those sent to mediation.¹²⁵ The conciliation program would be distinguished from mediation in that participation is voluntary, sessions are via telephone, and “the complaint will be closed after the conciliation session, regardless of whether any understanding or agreement is reached.”¹²⁶ Third, PCB formally adopted a written Open Meetings policy on September 30, 2010.¹²⁷ The policy established procedures for notifying the public of dates, times, and locations of PCB meetings. The policy also requires PCB to publish the minutes of board meetings.¹²⁸

The OPC faces persistent understaffing and lack of resources. To remedy these challenges, OPC needs to have an adequate ratio of investigators and perhaps legislation requiring a specific ratio as in San Francisco. In addition, it needs a parallel system such as RRP and/or conciliation programs for minor complaints so OPC can focus resources on the most serious complaints.

Discipline

MPD’s historical use of excessive force and failure to discipline officers continues, according to statistics from MPD’s and OPC annual reports. Graph 5 shows the percentage of sustained use of force complaints.¹²⁹ The OPC reported that zero use of force complaints were sustained in 2009 and only 1.1 percent of all use of force complaints were sustained in 2013.¹³⁰ The graph shows a significant drop in the number of sustained complaints after the end of the DOJ monitoring period. A general complaint has only a 4.7 percent chance of being sustained or mediated by the OPC.¹³¹ Of the 456 complaints

Graph 5. Percentage of Total Use-of-Force Complaints Sustained by Complaint Examiner



closed by OPC investigators in 2013, 259 were dismissed, representing 56.7 percent of the closed complaints.¹³²

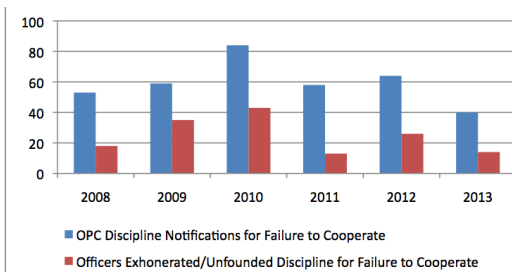
In 2009, the OPC reported a 42 percent increase in “requests to discipline officers who had failed to appear or cooperate with OPC’s processes” and cited “numerous instances where the MPD did not provide adequate justifications for exonerating uncooperative officers.”¹³³ Graph 6 compares the total number of discipline notifications for officers failing to cooperate with OPC investigations and the number of officers exonerated or whose disciplinary actions were determined to be unfounded.¹³⁴ Unfounded complaints occur when “the investigation determined no facts to support that the incident took place.”¹³⁵ Finding no facts in support of the complaint is unlikely to be the case where an OPC investigation sustained the accusation. Suspiciously, exonerations dropped by almost half in 2010, while the use of the “unfounded” category increased from four to twenty-seven.¹³⁶ According to the OPC, between forty and eighty-four discipline notifications were issued to officers each year between 2008 and 2013 for failure to cooperate with investigators.

The MPD also exhibits an increasing reliance on chain of command and IAB investigations. For instance, in 2009 only 2 percent of cases were investigated by the chain of command, compared with 65 percent in 2010.¹³⁷ A corresponding decrease in MPD complaint referrals to the OPC and USAO also occurred.¹³⁸ D.C.’s 2010 prosecution rate was the lowest rate in the country at just 5 percent.¹³⁹ The average prosecution rate for law enforcement officers in the U.S. was 32 percent in 2010.¹⁴⁰ This, along with under-reporting, may skew the data, making D.C. appear to have fewer cases of police misconduct. The fact that there have been no criminal convictions for excessive use of force since 2007 does not mean fewer officers are using force. Rather this is an indicator that there may be less criminal accountability for police. Such patterns of behavior are similar to those cited in 1993 in *Cox v. District of Columbia*.

The OPC notes that the “MPD’s discipline process is reasonably complex and can go on for quite some time through all of the appeals, and there are

subsequent reviews that occur even after the department has taken its final action.”¹⁴¹ In 2009, just one year after DOJ monitoring stopped, 59 percent of discipline notifications were exonerated or considered unfounded by the police chief, nearly double the number in 2008.¹⁴² Several OPC annual reports com-

Graph 6. OPC Discipline Notifications for Failure to Cooperate: Exonerations or Unfounded



plained of the increasing number of unexplained exonerations.¹⁴³ The 2008 and 2009 annual reports requested that OPC have an opportunity to present evidence to rebut MPD decisions to exonerate officers for failure to cooperate. As of 2010 MPD had not responded to the request.¹⁴⁴

In 2013 the “OPC asked the Department several times to provide its legal basis for the exonerations in these nine instances of non-cooperation Because OPC issued a ‘Reverse-Garrity’ warning in each of the nine matters, it appears that MPD inappropriately allowed officers to thwart OPC’s investigative process without consequence on nine occasions.”¹⁴⁵ The OPC’s 2013 report raised questions about the large number of exonerations granted by Chief Lanier and “whether MPD officials are aware that the failure to cooperate with OPC processes is a violation, in and of itself, of District law requiring the imposition of discipline. Absent clear evidence that the violation did not occur, some form of discipline must be imposed when OPC determines that an MPD officer has failed to cooperate with OPC.”¹⁴⁶

In a letter to MPD dated January 22, 2014, the Office of the Attorney General (OAG) wrote, “MPD’s chief of police cannot reject factual determinations made by OPC complaint examiners in their decisions.”¹⁴⁷ The OPC expressed concern that the OAG’s letter, “expressly leaves open the possibility that the police chief can refuse to discipline officers who have been found liable for police misconduct in OPC decisions.”¹⁴⁸ If the Police Chief can refuse to discipline officers, then the OPC’s role in deterring police misconduct is likely toothless.

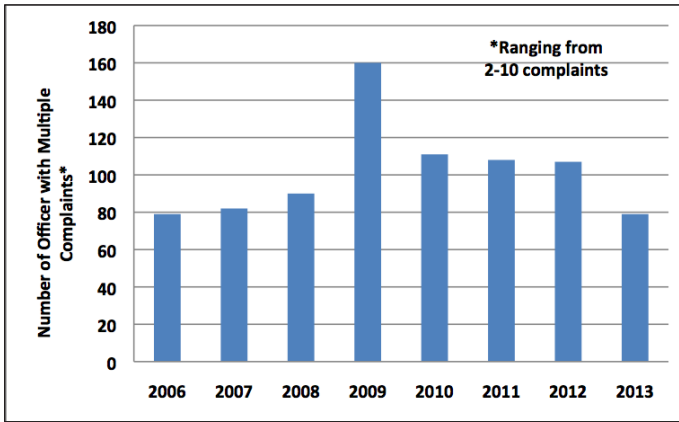
A consistent failure to discipline officers as mandated by statute “projects an assumption that failure to cooperate with OPC is not a serious infraction.”¹⁴⁹ An officer’s failure to cooperate violates D.C. law, hinders the OPC’s ability to investigate complaints, jeopardizes the OPC’s independence, and sets a precedent for non-cooperation by other officers.¹⁵⁰ The police chief has the authority to overrule the OPC’s decisions. Chief Lanier refused to implement the OPC decisions in at least three police misconduct cases since 2010.¹⁵¹

Officer training

The number of officers with multiple complaints may also be a warning sign. Graph 7 shows the number of officers with multiple OPC complaints each year.¹⁵² As shown in the graph, only one year after the DOJ ceased monitoring the MPD, the number of officers with multiple complaints nearly doubled from 90 in 2008 to 160 in 2009.¹⁵³ During the same period, an average of 113 officers per year were subject to two or more complaints.¹⁵⁴ In some cases, up to ten complaints were filed against the same officer.¹⁵⁵

Younger and less experienced MPD officers have a disproportionate number of complaints filed against them. For instance, officers with three to eight years of experience “were the subjects of 39 percent of complaints, while only comprising 23 percent of sworn officers at MPD.”¹⁵⁶ The number of

Graph 7. Number of Officers with Multiple Complaints by Year



unintentional or negligent shots fired by officers is also disconcerting, ranging up to six per year in the last five years.¹⁵⁷ These trends may indicate insufficient training for new officers similar to the inadequate hiring and training procedures in the early 1990s.

According to the National Institute of Justice, “an early warning system is more likely to shield an agency against liability for deliberate indifference regarding police use of force.”¹⁵⁸ When utilized to track police performance, EWTS can promote the implementation of interventions for officers with multiple complaints.¹⁵⁹ As of 2008, the MPD had pledged to input data into the early warning system that would enable the MPD to monitor and track police conduct that may increase likelihood for the use of excessive force.¹⁶⁰ It is unclear from the MPD and the OPC reports whether the early warning tracking system has been implemented. A DOJ investigation should verify whether the Performance Management System (PMS) was updated with historical data and has been maintained with current data.

Public Access to MPD Use-of-Force Data and Reporting

The structure of the MPD annual reports does not enable researchers to separate which types of complaints were sustained. Instead the MPD provides a general statistic for sustained complaints. The OPC decisions, on the other hand, clearly show whether excessive force complaints are sustained.¹⁶¹ Although publicly accessible, the statistics are not impressive. Only five excessive force complaints were heard in 2012 out of 206 force complaints received. Complaint examiners sustained four.¹⁶² Detailed results of mediation cases are unknown.

Some OPC annual reports have conflicting data. For example, OPC reported that it received 245 general allegations of force in 2009. Yet the same

2009 report shows a total of 351 complaints of force in 2009.¹⁶³ Similar data discrepancies occur for 2008 in the same report, representing a total of 271 complaints missing or misrepresented over a two-year period.¹⁶⁴ It's unlikely that the use of different calculations accounts for this discrepancy since all other years correspond exactly. Obtaining this information is difficult as the MPD has one of the worst transparency ratings in the country.¹⁶⁵

While the MPD annual reports provide a breakdown of how many complaints involve each of the twenty-one categories of excessive force, the resulting decisions in such complaints are not detailed. Data in MPD and OPC reports show how many shooting injuries and deaths occurred each year between 2009 and 2013, but do not include the results of these investigations or subsequent discipline for officers involved. Both the MPD and the OPC can improve public access to documentation regarding misconduct investigations and resulting disciplinary actions.

The MPD and the OPC should also improve information sharing between the two organizations. Prior to 2013 several OPC annual reports “cited long delays in receiving access to documents needed to investigate allegations of police misconduct thoroughly.”¹⁶⁶ As of 2010, the OPC was facing challenges in obtaining police reports and other documentation from the MPD that was required for OPC investigations. The MPD provided less than 48 percent of the documents requested in the first quarter of FY 2010.¹⁶⁷ The OPC recommended that electronic access to forms and reports would improve efficiency and cost-effective fulfillment of document requests, shorten the OPC’s investigatory process, and align the MPD with best practices in the field of independent police review.¹⁶⁸ Although the MPD may report that a document could not be located, many of the requested documents that “could not be located” must be completed according to MPD policies.¹⁶⁹

In 2013, the MPD significantly reduced the backlog of document requests and acceded the OPC’s request to obtain records directly from the Office of Unified Communications (OUC). Both the MPD and the OUC significantly reduced the turnaround time needed to process new document requests.¹⁷⁰ The OPC also reported that the MPD will soon provide “direct computerized access to certain basic police reports stored electronically.”¹⁷¹ To remedy the backlog problem, the OPC originally recommended the Police Monitoring Enhancement Act in 2009. According to OPC, “MPD opposed the legislation, especially the portions relating to access to underlying documents.”¹⁷² The bill was reintroduced before D.C. Council in 2013 and remains under Council review as of July 2014.¹⁷³

National trends support D.C. data

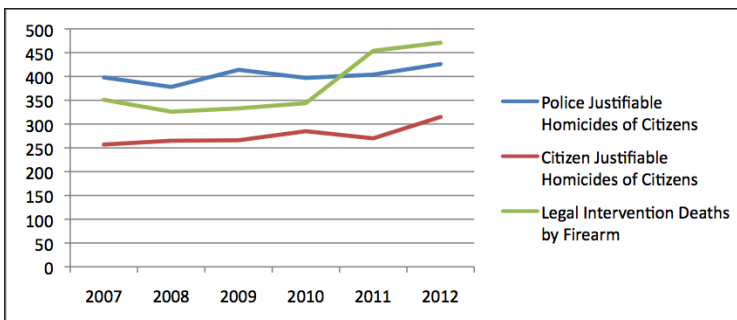
The FBI estimates that nationally there are about 400 “justifiable homicides” by police officers each year.¹⁷⁴ The FBI UCR database offers an incomplete picture since most agencies don’t report data.¹⁷⁵ The DOJ’s Bureau of Justice

Statistics also tracks “arrest-related deaths” but stopped releasing the data in 2009 due to concerns about reliability.¹⁷⁶ Graph 8 compares the number of citizen-justified homicides of felons to the number of citizens killed justifiably by police each year.¹⁷⁷ This data does not include unjustifiable homicides, off-duty police killings, or deaths from police that do not result from the use of a weapon. Some journalists and academics estimate the number of fatal police encounters is closer to 1,000 each year.¹⁷⁸

As shown in Graph 8, the CDC also tracks data due to legal intervention with a firearm, pegging the number of such deaths around 100 more than that reported by the FBI. Graph 8 raises questions as to whether DOJ monitoring can be effective where there is insufficient or underreported data. According to James O. Pasco, executive director of the Fraternal Order of Police, “an accurate database would require Congress to pass a law requiring police departments to report their shooting data to a federal agency, presumably the FBI.”¹⁷⁹ Graph 8 appears to confirm the suspicions that lethal force may be under-reported.

One explanation for the significant number of police shootings could be linked to the number of police officers killed yearly. The FBI tracks the number of officers killed each year for a special report entitled *Law Enforcement Officers Killed and Assaulted* that includes summaries of incidents by state, demographics, and circumstances such as type of weapon. Nationwide, 173 officers were killed in the line of duty in 2011.¹⁸⁰ The FBI reported that “in 2012, 48 law enforcement officers died from injuries incurred in the line of duty during felonious incidents.”¹⁸¹ The same data report shows that two D.C. officers were feloniously killed between 2003 and 2012.¹⁸² This could lead to a heightened perception of vulnerability when interacting with citizens and *vice versa*. In general, the public has the perception that they are at greater risk for violent crime despite the fact that violent crime rates have actually dropped across the U.S.

Graph 8. National Citizen and Police Justifiable Homicides 2007-2012



Back to the future: the need for a DOJ investigation and reforms

The primary purpose of this article is to set forth an argument for the DOJ to investigate the MPD for a pattern or practice of police misconduct and to spark reform. While all the data required to show patterns and trends in D.C. are not publicly available, the data that is available shows a disturbing trend since the cessation of monitoring in 2008. Current annual reporting fails to track officers with multiple complaints, unjustified use of deadly force, and resulting disciplinary action. Reforms must include mandatory reporting to the DOJ and FBI, improved transparency in the MPD and the OPC reports, the maximization of the use of new technologies, a shift in police culture, and mandatory independent investigations of police shootings.

Mandatory reporting to FBI and DOJ

Michael Planty, one of the chief statisticians for the DOJ said, “We do not have information at the national level for police shootings that result in non-fatal injury or no injury to a civilian.”¹⁸³ The FBI and DOJ surveys have been critiqued for failing “to identify many of the metrics that would be necessary to measure the existence of a pattern or practice of misconduct” even for those police departments that do submit surveys.¹⁸⁴ In short, the data needed for the DOJ to assess trends in police misconduct are not being collected as part of voluntary self-reporting. Experts have suggested that such data reporting be both mandatory and more comprehensive.¹⁸⁵ A standardized system of reporting and tracking misconduct may be required to enable police departments across the country to comply with the reporting requirements.¹⁸⁶ Congress recently reauthorized the “Death in Custody Act” which requires states “to report the number of people killed during an arrest or while in police custody.”¹⁸⁷ The bill has some teeth in that the DOJ is authorized under the bill to “withhold federal funds from states that don’t comply in sending the information to federal agencies.”¹⁸⁸ While the bill is a step in the right direction, it could take years to collect data required to show trends.¹⁸⁹

Academics have suggested that the database should also include information on nonfatal shootings and other forms of non-lethal excessive force.¹⁹⁰ Experts also note that simple access to data is not sufficient.¹⁹¹ Public access to data must be given in a workable format. For instance, the FBI track and analyze data to issue a special report on “Law Enforcement Officers Killed and Assaulted” that includes summaries of incidents by state, demographics, and circumstances such as type of weapon.¹⁹² A parallel report on “Civilians Killed and Assaulted by Law Enforcement,” tracking similar details and issued annually, could provide a starting point for improving transparency.

Improve transparency in MPD and OPC annual reports

In a 2008 article, Noah Kupferberg advocates the use of DOJ consent decrees as a “means of requiring the recording and public release of data, thus forcing openness and transparency in law enforcement.”¹⁹³ A simple improve-

ment could be for the MPD, the IAB and the OPC to consolidate summaries of serious use of force and deadly force investigations and hearing results, disciplinary actions, and any explanation for exonerations into their annual reports or a combined use of force report. Having the information from all three agencies accessible in a consolidated report would ensure that the breadth of information is more easily accessed and reviewed by the Mayor, the Police Chief, and the public. There are some areas where legislation could strengthen oversight and accountability. D.C. could imitate San Francisco by requiring that the OPC maintain a certain ratio of investigators to police officers to ensure timely investigation of complaints.

Furthermore, D.C. Council’s passage of the Police Monitoring Enhancement Amendment Act of 2013 Bill #20-0063, introduced in July 2014, would allow the PCB “to review and publicly report on the number, types, dispositions, and disciplinary outcomes of citizen complaints of police misconduct filed with the MPD and the D.C. Housing Authority Office of Public Safety (OPS).”¹⁹⁴ Incoming mayor Muriel Bowser is one of the bill’s co-sponsors.¹⁹⁵ Initially proposed and rejected in 2009, the bill would also enable OPC to compare “proposed discipline and the actual discipline imposed in any complaints sustained by MPD.”¹⁹⁶ The dual nature of the complaints system in D.C. makes it more difficult to analyze patterns and trends of misconduct and discipline. The proposed legislation would enable PCB to view MPD, OPC complaints and resulting discipline for a overview of the complaints process and trends. The current language of the bill provides OPC with “reasonable access” to information and supporting documentation.¹⁹⁷ The OPC is concerned that “reasonable access” may be too vague a phrase, thus limiting the effectiveness of the legislation.¹⁹⁸ Professor Samuel Walker, an expert in police oversight, believes the language should be changed to “unfettered access” to ensure PCB and OPC “remain in the forefront of carrying out the widest possible range of functions among independent police review agencies in the United States.”¹⁹⁹

Maximize the use of technology

The public has a right to know what happened in cases of police use of excessive and deadly force. In September 2014, Chief Lanier announced the use of body cameras as part of a pilot program beginning in October.²⁰⁰ Lanier predicts that the body cameras will reduce the number of complaints filed against police officers up to 80 percent.²⁰¹ The body cameras will provide unbiased evidence and help to make the MPD more transparent. Christian J. Klossner, acting Executive Director of the OPC, believes the cameras “will reduce the amount of time supervisors have to spend investigating allegations... increase accountability, improve training and promote respectful encounters between police and the public.”²⁰²

The D.C. Crime Policy Institute reviewed promising practices of the MPD in 2010.²⁰³ The MPD has a Research and Analysis Branch charged with using

technology and databases to compile crime statistics and identify patterns and trends that inform MPD decisions and initiatives. The MPD uses this technology to target potential criminals and reduce crime. Similarly, the MPD should be using technology to target officers at risk or those with multiple complaints to reduce the use of excessive force.²⁰⁴ Crime mapping software used to show trends in various types of crime by neighborhood could possibly be used to track complaints against officers and provide valuable visual representations of any emerging patterns of misconduct.²⁰⁵

Currently, citizens can report police misconduct via email. However individuals may not include all necessary information. Another suggestion would be to initiate an online complaint form that citizens could use to report police misconduct. The online form could have optional fields so citizens could submit as much of the necessary information as possible. This could reduce the workload for the OPC or the MPD who now input data by hand and reduce human error in transcribing from complaints submitted on paper or over the phone. It would also ensure that those complainants who are uncomfortable interacting with law enforcement could submit complaints from home.

Police culture

University of Virginia School of Law Professor Barbara Armacost identifies as the primary defect in common solutions to police misconduct that they are based on assumptions putting individual behavior and judgments at the center of the controversy, “rather than as part of a distinctive and influential organizational culture.”²⁰⁶ Individual officers guilty of wrongdoing are seen as scapegoats to “satisfy society’s moral outrage while deflecting attention away from the institutional structures that lie at the root of the problem of police brutality.”²⁰⁷ Instead, when incidents occur, police departments should be “examining the organizational norms and policies that framed his [the officer’s] judgment”²⁰⁸ in situations where excessive or deadly force was used. Armacost goes on to assert that the vast majority of studies in the last thirty or forty years “have concluded that the patterns of repeated, wrongful incidents identified . . . were at least partly caused by systemic features of police culture.”²⁰⁹ One of the primary reasons civilian review boards may be less effective in changing the organizational culture of police departments is that civilian mechanisms have an adversarial and punitive orientation, not a reform orientation.²¹⁰ She suggests that professional peer review may promote “a change in the organizational values and systems” from the inside out.²¹¹ As part of a shift in police culture, the MPD should review the records all of the officers with multiple complaints of police misconduct and consistent use of unnecessary excessive force despite previous disciplinary action to determine whether termination is appropriate. While the police should certainly not be tasked with policing themselves, initiatives for police reform from within could be valuable in conjunction with civilian review systems.

Police culture can also be shifted through training for new officers and periodic retraining for veteran officers. Training should include not only firearms and use of force training, but also diversity training. The MPD should be internally and independently monitored to ensure officers are receiving initial and periodic firearms and use of force training. Local laws should require mandatory diversity training for all officers, including training on interacting with citizens of all racial backgrounds, non-English speakers, immigrant communities, persons with disabilities, and LGBTQ communities. The MPD should also be held accountable for failing to train officers as required.²¹²

Michael Bell, a retired lieutenant colonel in the U.S. Air Force whose son was killed by police, recommends that police departments should also establish a system for whistle-blowers to report ethical and safety concerns anonymously.²¹³ A strong example of such a non-punitive program is the Aviation Safety Reporting System (ASRS). The ASRS program collects and analyzes whistle-blower reports before forwarding findings to the Federal Aviation Administration (FAA).²¹⁴ This ensures no pilot or mechanic is identified by the FAA and subject to retribution by employers or colleagues.

The public should also be made aware of their rights when interacting with police through community outreach. The MPD’s community outreach program engages D.C. youth and educators in interactive trainings about an individual’s rights during encounters with police.²¹⁵ The training is also conducted for community-based organizations, which are then able to provide the information to their clients.²¹⁶ Organizations like Street Law and the ACLU also conduct “Know Your Rights” campaigns, hosting trainings and distributing information.

Independent investigations of police shootings

Currently, the IAB investigates use of deadly force.²¹⁷ Since IAB is part of the MPD it does not fulfill the independence test. Based on annual reports, it is unclear whether OPC investigates cases of deadly force. The OPC, which is an independent body, can only investigate complaints.²¹⁸ Most lethal force victims do not file complaints because they are advised police may use the investigation to prepare a defense, to intimidate witnesses or manipulate facts, and give police a head start in potential civil cases.²¹⁹

Michael Bell urges lawmakers to enact legislation that would require external professional investigations conducted by a trusted body and “reviewed by an independent board to determine cause and attribute responsibility.”²²⁰ Bell suggests that the National Transportation Safety Board (NTSB) could be used as a model for such independent investigations that protect against natural biases.²²¹ Wisconsin Act 348 is the first statewide mandate requiring independent investigations of deaths involving police.²²² The D.C. Council should consider enacting similar legislation that would enable elected officials who do not directly oversee MPD to appoint reviewers who do not have an

institutional or personal stake in the outcome.

As demonstrated above, problems highlighted in *Cox* during the 1990s and identified by the DOJ's investigation appear persist today. Similar warning signs are apparent, such as higher lethal use of force incidents compared to other cities, consistent failure to discipline officers, inadequate resources for OPC to conduct independent investigations and hold hearings, and perhaps inadequate training for new officers as well as periodic retaining. There is a need for DOJ oversight of the MPD again. The fact that there have been investigations in fifty major cities is a sign of deep-rooted problems with the justice system. As the police force of the nation's capital, the MPD should be leading the way in progressive police accountability mechanisms. Instead it lags behind similarly situated police departments.

Conclusion

As part of the Police Executive Research Forum, Jonathan Smith, Chief of the DOJ Civil Rights Division Special Litigation Section writes "our goals are the same as those of police chiefs across the country: to protect the civil rights of all people, while ensuring that communities have confidence in their police departments. The proper question really is, 'How do we deliver police services in an effective manner that complies with the Constitution and builds public confidence?'"²²³ Two answers to this question are improved transparency and accountability at the local and national levels. Media playing its role as watchdog combined with stricter self-reporting requirements for police departments are key aspects of this strategy.

Citizens in D.C. are more likely to be shot by a police officer than citizens in many other cities.²²⁴ Those killed by police officers are less likely to get justice. According to HRW, most police departments continue with "'business as usual' until scandals emerge...[and] human rights violations persist in large part because the accountability systems are so defective."²²⁵ Leadership should not wait for D.C. families to experience what Ferguson families are going through to ensure that comprehensive policies are in place for transparent and accountable reporting and investigation of use of force by police. The Police Chief, D.C. Council and Mayor receive OPC annual reports containing the data cited in this paper each year.²²⁶ Yet politics may be the most promising tool for mitigating police misconduct, because generally the laws in place are sufficient—provided they are enforced. As Rachel Harmon suggests, "The difficulty is that it is either not enforced or is deliberately disobeyed—and by the very persons charged with its enforcement."²²⁷

While there is not enough publicly available data to definitively determine whether pattern or practice of police misconduct exists, the MPD and the OPC self-reported data raise enough questions to warrant a DOJ investigation to determine the scope of problems. A DOJ investigation would provide for the collection of data sufficient to determine whether a pattern or practice

of misconduct exists, would monitor police behavior and ensure accountability in cases of confirmed misconduct. D.C.’s leadership should not wait for another shooting incident in D.C. to occur before taking action to ensure comprehensive policies are enforced for transparent and accountable reporting, investigation of use of force by police.

NOTES

1. Jeff Leen, Jo Craven, David Jackson & Sari Horwitz, *D.C. Police Lead Nation in Shootings Lack of Training, Supervision Implicated as Key Factors*, WASH. POST, Nov. 15, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police1page1.htm>.
2. Peter Herman, *Auditor to Review District Police Use-of-Force Policies*, WASH. POST, May 7, 2015, available at http://www.washingtonpost.com/local/crime/auditor-to-review-district-police-use-of-force-policies/2015/05/07/c6272de6-f4e6-11e4-bcc4-e8141e5eb0c9_story.html
3. Leen, et al., *supra* note 1 at A1.
4. *Id.*
5. *Id.* The series focused on the department’s poor training, supervision and investigation, rather than race, unlike other cities with similar police brutality issues. See also *Q&A With Jeff Leen and Sari Horwitz*, WASH. POST, Apr. 13, 1999, <http://www.washingtonpost.com/wp-srv/zforum/99/metro/pulizertalk0413.htm>.
6. *Washington Post* researchers found 14 additional fatal police shootings for a total of 43, compared with MPD report of 29 fatal shootings.
7. Leen, et al., *supra* note 1 at A1.
8. *Id.*
9. Cheryl W. Thompson, *Half of Officers Lack Firearm Certification*, WASH. POST, Mar. 28, 1998, at B1.
10. *Id.*
11. *Id.*
12. Jeff Leen & Sari Horwitz, *Armed and Unready: City Pays for Failure to Train Officers With Sophisticated Weapon*, WASH. POST, Nov. 18, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police4page1.htm>
13. *Id.*
14. Jeff Leen, *Moving Targets: Despite Department Rules, Officers Often Have Used Gunfire to Stop Drivers*, WASH. POST, Nov. 16, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police2page3.htm>
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David Loudon

**COULD OR MUST? APPRENDI'S
APPLICATION TO INDETERMINATE
SENTENCING SYSTEMS AFTER ALLEYNE**

Introduction

In a series of cases starting with *Apprendi v. New Jersey*,¹ the United States Supreme Court has held that the Sixth Amendment requires that any fact that increases the minimum or maximum sentence that a judge can impose on an offender² must be found by the jury beyond a reasonable doubt, rather than by the sentencing judge, unless the fact is a prior conviction, an element of the offense for which the offender was convicted, or a fact admitted by the offender.³ While early cases such as *Harris v. United States*⁴ limited *Apprendi* to judicial fact-finding that increased the maximum sentence, and rejected any constitutional challenge to the judge's reliance on facts that the jury had not found in raising the minimum sentence that an offender must serve, the Court extended *Apprendi* to cover minimum as well as maximum sentences in *Alleyne v. United States*.⁵

There are, however, important unresolved issues concerning the reach of *Apprendi*. *Apprendi*, *Harris* and *Alleyne* all involved determinate sentencing systems under which the offender, once sentenced, would serve his entire sentence, no more, no less.⁶ The Court has yet to deal directly with how the *Apprendi* line of cases applies in an indeterminate sentencing system,⁷ in which a judge imposes two sentences on an offender: a minimum amount of time the offender *must* serve before he is eligible for parole and a maximum amount he *could* serve before he must be released.⁸

In its 2015 decision in *People v. Lockridge*, the Michigan Supreme Court held that Michigan's indeterminate sentencing system violated the Sixth Amendment.⁹ Specifically, the Michigan Supreme Court reasoned that the Sixth Amendment, as interpreted by the United States Supreme Court in *Alleyne v. United States*, made increasing the *minimum* sentence that a judge can impose, *i.e.*, the amount of time that an offender *must* serve before being considered for parole, based on judicial fact-finding unconstitutional.¹⁰

This was the proper holding. An indeterminate system has only one minimum sentence.¹¹ As a result, when judicial fact-finding increases the minimum

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sentence a judge must impose, *i.e.*, the amount of time that an offender *must* serve in prison in an indeterminate sentencing system, it is raising the statutory minimum in violation of *Alleyne*.¹²

The Michigan Supreme Court in *Lockridge* did not, however, address its pre-*Alleyne* holding that judicial fact-finding that increases the *maximum* sentence that an offender must serve before being considered for parole does not violate the Sixth Amendment.¹³ This article argues, using the Michigan indeterminate sentencing system as a case study, that *Apprendi* should apply to judicial fact-finding that may raise either the maximum or minimum sentences that an offender *must* serve before being considered for parole in an indeterminate sentencing system.¹⁴ More particularly, the Supreme Court's 2013 decision in *Alleyne* has clarified that the proper inquiry in Sixth Amendment cases is whether a fact found aggravates the legally prescribed range of punishment available for a judge to impose on an offender.¹⁵ Since judicial fact-finding that increases the maximum or minimum sentences within which an offender *must* serve in prison aggravates the legally prescribed punishment for his crime, the reasoning of *Apprendi* should apply.

The first part of this article defines the language of sentencing and the distinct concepts of judicial sentencing and parole availability. The second explores the Court's Sixth Amendment jurisprudence before *Alleyne* beginning with *Apprendi*. The Court in these cases only dealt directly with determinate sentencing systems, leaving open the question of how these principles would apply in an indeterminate system. The third part describes the Michigan sentencing system, and why constitutional challenges to that system failed prior to the Court's decision in *Alleyne*. The fourth discusses the United States Supreme Court's decision in *Alleyne*, and the Michigan Supreme Court's subsequent decision in *Lockridge* declaring its indeterminate sentencing system unconstitutional. The fifth argues that *Alleyne* renders judicial fact-finding that increases either the minimum or maximum sentence that an offender *must* serve in an indeterminate sentencing system unconstitutional. Finally, the last part of the article summarizes its contents and briefly explores what implications its conclusions would have on indeterminate sentencing systems in other states.

The language of sentencing

A major issue that plagues court opinions and scholarly works in this area is the lack of clarity in the use of particular sentencing terms. Courts and commentators frequently contrast "determinate" and "indeterminate" sentencing.¹⁶ But "indeterminate" sentencing may refer to either certain forms of judicial sentencing or to sentencing that also sets minimum and maximum sentences that an offender either must or could serve before being considered for parole. Thus it is vital to clarify the definitions of these terms to avoid conflating these two concepts.

Judicial sentencing

The first important concept, which the Court has discussed extensively in its *Apprendi* line of cases, is judicial sentencing of an offender and the amount of discretion the judge has in imposing a sentence.¹⁷ There are two basic systems that a state can enact for allowing judges to determine the sentence of an offender.¹⁸ The first is a system in which the statutory scheme allows the judge to sentence an offender to any length of time within the range proscribed for that crime.¹⁹ For example, a statute might permit a judge to sentence an offender convicted of armed robbery to *any* sentence between five and ten years. The judge has complete discretion to determine where within this range to sentence an offender. This article will refer to such a system, sometimes referred to as an “indeterminate” system,²⁰ as a “discretionary judicial sentencing system,” or a “discretionary system.”²¹ This system is discretionary because the judge has complete discretion to sentence an offender within the range prescribed by statute for the crime, possibly subject to advisory guidelines that the court is not bound to follow.²²

On the other hand, there are other sentencing systems that limit a judge’s sentencing discretion based upon additional facts found about that particular offender, either by the judge or the jury.²³ For example, such a system will set the general sentencing range for an offender convicted of larceny at one to five years. However, if the judge or jury finds that the particular offender being sentenced committed larceny with a firearm, then the range within which the judge must sentence that offender shifts from one to five years to three to five years, or from one to five years to one to seven years. Once the factfinder finds that the offender committed larceny with a firearm, the judge’s binding sentencing range is altered, and he must sentence the offender to a sentence within that new range.²⁴

This article will refer to such a system, frequently referred to as a “determinate sentencing system,” as a “binding judicial sentencing range” or a “binding system.” Such a system is binding because facts found by the judge or jury alter the range within which a judge *must* sentence the offender.²⁵

Parole availability

The second important concept in sentencing is whether an offender can obtain early release on parole.²⁶ A majority of states offer offenders the opportunity to obtain release prior to serving their entire term of imprisonment.²⁷ In these states, an offender receives two sentences, the first sentence constituting the amount of time he *must* serve in prison before being considered for parole, and the second constituting the amount of time he *could* serve if his parole request is not granted.²⁸ For example, an offender may be sentenced to five to ten years in prison; five years being the amount of time the offender *must* serve before he may be considered for parole, and ten years being the longest amount of time the offender *could* serve in prison if not released early on pa-

role. This article will refer to such a system as an “indeterminate sentencing system” or “indeterminate system.”²⁹

On the other hand, some states (and the federal system), do not offer offenders a chance to obtain early release by applying to a parole board.³⁰ In such a system, the offender must serve the entire sentence that the judge imposes upon him, nothing more, nothing less.³¹ If a judge sentences an offender to seven years in prison, he will serve exactly seven years in prison. This article will refer to such a system as a “determinate sentencing system” or a “determinate system.”

The interaction between the two

These two concepts—judicial sentencing and parole availability—define the sort of sentencing system the State has chosen as part of an indeterminate sentencing system.³² Once a state decides that it is going to adopt an indeterminate system, it must decide how to determine how long an offender *must* serve in prison before he may be considered for parole and how long he *could* serve if denied parole.³³ Similar to sentencing in a determinate system, a state enacting an indeterminate system may enact a binding or discretionary system for determining the amount of time an offender *must* and *could* serve in prison. Thus, an indeterminate sentencing system may give the judge complete discretion to choose the sentences an offender must and could serve (a discretionary indeterminate sentencing system), or it could limit the judge’s discretion based upon additional fact finding (a binding indeterminate sentencing system).

Pre-*Alleyne* and indeterminate sentencing

These two distinct concepts, judicial sentencing and parole availability, create separate considerations when determining how the Sixth Amendment should be applied.³⁴ The Court, starting with *Apprendi*, has dealt extensively with the concept of judicial sentencing, ultimately concluding that, in a binding determinate sentencing system, any fact that increases the minimum or maximum sentence to which a judge may sentence an offender must be found by a jury beyond a reasonable doubt.³⁵ However, the Supreme Court has not squarely dealt with whether any fact that increases the sentence an offender *must* serve before being considered for parole in an indeterminate system must also be found by a jury beyond a reasonable doubt.³⁶

The *Apprendi* line

In *Apprendi v. New Jersey*, the Court held that “other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.”³⁷ In *Apprendi*, the offender pled guilty to one count of “possession of a firearm for an unlawful purpose,” for which the judge must sentence the offender to a term of imprisonment between five and ten years.³⁸ At sentencing, the judge found by a preponderance of the evidence “that the

crime was motivated by racial bias,” increasing the range of sentences within which the judge must imprison the offender to ten to twenty years in prison.³⁹ The Court ultimately concluded that increasing the *maximum* sentence that the judge could impose upon the offender based upon judicial fact-finding violated the offender’s Sixth and Fourteenth Amendment rights to a jury trial.⁴⁰

Two years later, the Court held in *Harris* that a judge could find facts that increased the *minimum* sentence the judge could impose on an offender.⁴¹ *Harris* was found guilty of selling illegal narcotics while in possession of a weapon, for which the statutory minimum sentence that the judge could impose was five years imprisonment.⁴² However, the sentencing judge, pursuant to 18 U.S.C. § 924(c)(1)(A), found by a preponderance of the evidence that the offender had “brandished” the firearm, increasing the minimum sentence the judge could impose to seven years in prison.⁴³ A majority of the Court ultimately concluded that this did not violate the offender’s Sixth Amendment rights.⁴⁴

The plurality opinion distinguished *Apprendi* on the ground that increasing the mandatory minimum sentence a judge can impose on an offender does not “extend the offender’s sentence beyond that authorized by the jury’s verdict.”⁴⁵ Instead, once a jury finds the offender guilty, it has “already found all the facts necessary to authorize the Government to impose the sentence.”⁴⁶ Since the jury has authorized a sentence anywhere within that statutory range, an offender’s Sixth Amendment rights are not violated.⁴⁷ Justice Breyer, while admitting that he could “not easily distinguish *Apprendi* from this case in terms of logic,” nevertheless concurred in the Court’s judgment based upon his belief that *Apprendi* had been wrongly decided.⁴⁸

In *Blakely v. Washington*, the Court expanded on the doctrine announced in *Apprendi*. *Blakely* had pled guilty to kidnapping his wife, a class B felony.⁴⁹ While the maximum sentence for a class B felony in Washington was ten years, Washington law provided a sentencing range of 49 to 53 months for the specific facts to which *Blakely* had pled guilty, but also allowed judges who found that an offender in a domestic violence case committed the crime with deliberate cruelty to enhance the offender’s sentence beyond the general statutory range.⁵⁰ The judge found by a preponderance of the evidence that the offender committed the act with “deliberate cruelty,” and based upon this finding sentenced the offender to 90 months in prison.⁵¹

The Supreme Court held that the judge’s sentence violated the offender’s Sixth Amendment right to a trial by jury.⁵² The Court determined that the relevant statutory maximum in this case for *Apprendi* purposes was not the ten-year maximum sentence for class B felonies, but the 53-month maximum for the offender’s crime.⁵³ The Court held that the statutory maximum for purposes of the Sixth Amendment, is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admit-*

ted by the offender.”⁵⁴ Since the maximum possible sentence the judge could impose on that offender without making any additional findings of fact was 53 months, that was the relevant statutory maximum, and any finding that increased the offender’s sentence above 53 months must be found beyond a reasonable doubt by the jury.⁵⁵

In two subsequent cases, the Court applied *Apprendi* and *Blakely* to strike down other sentencing systems in which judges found facts that increased the maximum sentence an offender could receive for his crime.⁵⁶ In *United States v. Booker*, the Court struck down the federal sentencing guidelines, which imposed a binding judicial sentencing range based upon judicial fact-finding that was constitutionally indistinguishable from the Washington system struck down in *Blakely*.⁵⁷ Similarly, in *Cunningham v. California*, the Court held that California’s Determinate Sentencing law (DSL), which allowed a judge to increase an offender’s sentence above the sentence authorized by the jury’s verdict based upon a judicial finding of “aggravating factors,” also violated the offender’s Sixth Amendment rights.⁵⁸

All of these cases involved binding judicial sentencing systems.⁵⁹ The Court repeatedly stated, on the other hand, that a discretionary sentencing system does not violate the Sixth Amendment, as judges historically have had broad discretion to sentence an offender within the range proscribed by statute.⁶⁰ Furthermore, none of these cases addressed the issue of parole availability.⁶¹ Thus, it still remains to be seen what effect, if any, the availability of parole has on an offender’s Sixth Amendment rights under *Apprendi*.

Justice Scalia’s *dicta*

While none of these decisions have addressed the issue of parole eligibility, individual Justices have given us glimpses of their views on this issue.⁶² Particularly, Justice Scalia has made statements, all *dicta*,⁶³ in his concurring opinion in *Apprendi* and the majority opinion in *Blakely* that would seem to argue against applying *Apprendi* to an indeterminate sentencing system. Nevertheless, following *Blakely*, several lower courts followed Justice Scalia’s lead in determining the constitutionality of judicial sentencing in an indeterminate sentencing system.

In his concurrence in *Apprendi*, Justice Scalia indicated that he believes that the Sixth Amendment does not apply to the lesser sentence in indeterminate sentencing systems.⁶⁴ In response to Justice Breyer’s assertions that a system in which a judge finds facts that affect an offender’s sentence is the only fair way to determine sentences, Justice Scalia argued:

I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a prison sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted

governor if his sentence is commuted)... [T]he criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*.⁶⁵

This is strikingly similar to the language Justice Scalia used two years later in his majority opinion in *Blakely*.⁶⁶ In response to Justice O'Connor's dissent, Justice Scalia explained why an indeterminate sentencing system does not implicate the Sixth Amendment:

Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the offender has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in prison. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.⁶⁷

This language was clearly *dictum*, as the Court did not base its opinion upon whether the Washington sentencing system was determinate or indeterminate.⁶⁸ Nevertheless, it provides persuasive authority for the Court's view on the subject.

Justice Scalia's *dicta* provide two main arguments against applying *Apprendi* to the sentence an offender must serve before being considered for parole in an indeterminate sentencing system. First, he argues that an offender has no legal right to a sentence less than the maximum sentence authorized by the jury, and therefore the Sixth Amendment does not apply to fact-finding that results in a sentence that is less than or equal to that maximum.⁶⁹ This position was supported by the Court's holding in *Harris*, overruled by *Alleyne*, that a judge may find facts that increase the mandatory minimum sentence a judge can impose on an offender.⁷⁰ If an offender has no Sixth Amendment right to a sentence below the maximum sentence authorized by a jury's verdict, then presumably fact-finding that increases the minimum sentence, i.e., the amount of time the offender *must* serve, would not be subject to *Apprendi* because the jury's sentence authorizes any sentence up to the maximum the offender *could* serve for that crime.

Secondly, Justice Scalia argues that in an indeterminate system an offender has no enforceable expectation of receiving a sentence below the statutory maximum for that crime, since he knows, at least in the realm of constitutional jurisprudence, that he is risking a sentence up to the statutory maximum.⁷¹ Therefore, so the argument goes, since "the criminal will never get *more*

punishment than he bargained for when he did the crime,” the Sixth Amendment does not apply.⁷²

The Michigan Supreme Court relied heavily on Justice Scalia’s arguments when it rejected a constitutional challenge to Michigan’s indeterminate sentencing system after *Blakely*.⁷³ However, any persuasive authority that Justice Scalia’s arguments concerning application of *Apprendi* to an indeterminate system might have had has been undermined by the Court’s 2013 decision in *Alleyne*.⁷⁴ Courts will need to reconsider *Apprendi*’s application to indeterminate sentencing systems post-*Alleyne*.

Challenges to Michigan’s sentencing system pre-*Alleyne*

Michigan has an indeterminate sentencing system, meaning that prisoners are eligible for early release on parole prior to serving their full sentence, in which the judge has discretion, within a binding sentencing range, to impose the sentence that an offender must serve before being considered for parole.⁷⁵ Thus, an offender in Michigan receives two sentences, one for the length of time he *must* serve before being considered for parole, and one for the maximum amount of time he *could* serve if parole is not granted.⁷⁶ The sentencing judge has no discretion in determining the amount of time a prisoner *could* serve, as that sentence is fixed by statute based upon the felony class of the conviction.⁷⁷ However, a sentencing judge does have discretion, within a particular guideline range, to choose the sentence a prisoner *must* serve before he will be considered for parole.⁷⁸ The binding sentencing range within which the judge must impose a sentence is determined by judicial fact-finding.⁷⁹

The Michigan Supreme Court held in *People v. Drohan* that *Apprendi* does not apply to the maximum sentence a judge can impose that an offender *must* serve before being considered for parole.⁸⁰ The Michigan Supreme Court based its decision primarily upon the assumption that the Sixth Amendment only protects an offender’s right to a sentence *within* the range authorized by the jury’s verdict.⁸¹ Therefore, the Michigan Supreme Court concluded that the Sixth Amendment does not protect an offender’s sentence that he *must* serve before being considered for parole because the jury’s verdict authorizes a sentence up to the statutory maximum that the offender *could* serve.⁸²

Michigan’s indeterminate binding sentencing system

In order to determine the range of possible sentences within which an offender *must* serve in prison, the court assigns the offender a Prior Record Variable (PRV) score, and an Offense Variable (OV) score.⁸³ The judge calculates an offender’s PRV score by examining the nature and number of the offender’s prior convictions and comparing them to the requirements of multiple PRVs.⁸⁴

In order to determine an offender’s OV score, a judge must find, by a preponderance of the evidence,⁸⁵ that the offender committed his crime in a particular way or that the crime caused a particular result.⁸⁶ For example, a judge determines an offender’s OV 1 score based upon what kind of weapon

the offender used when committing the crime and how he used it.⁸⁷ If the judge finds that “[a] weapon was displayed or implied” during the commission of the felony, he scores the offender five points.⁸⁸ However, if the judge finds that “[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon,” he scores the offender 25 points.⁸⁹ Other OVs that judges find to determine an offender’s OV score include whether the offense caused psychological injury to a member of the victim’s family (OV 5),⁹⁰ the number of victims to the crime (OV 9),⁹¹ and whether or not “the offender was a leader in a multiple offender situation” (OV 14).⁹²

Once the court has scored all the individual PRVs and OVs, those individual scores are added to make one total PRV score and one total OV score, which the court then applies to the sentencing grid that correlates with the grade of felony for the crime.⁹³ The court then locates the offender’s PRV score on the horizontal axis of the grid, and his OV score on the vertical axis.⁹⁴ At the intersection of the offender’s OV and PRV score is the sentencing range within which the court must sentence the offender.⁹⁵

For example, for a class A felony, a judge must sentence an offender with a PRV score of 30 and an OV score of 25 to a mandatory term of imprisonment between 81 and 135 months.⁹⁶ The longest amount of time the judge can sentence an offender that he *must* serve in prison, in this example 135 months, is sometimes referred to as the offender’s “maximum-minimum” sentence.⁹⁷

Because the United States Supreme Court has held that the fact of an offender’s prior convictions need not be found by a jury beyond a reasonable doubt, judicial fact-finding concerning an offender’s PRV score does not implicate *Apprendi*.⁹⁸ However, Michigan’s OV scoring system is similar to Washington’s sentencing system that was struck down in *Blakely*. The only constitutionally significant difference between the two sentencing systems is that the Michigan sentencing system is indeterminate.⁹⁹ Thus, considering the similarities, Michigan’s sentencing system was ripe for a legal challenge in the years following *Blakely*.

The challenge to Michigan’s indeterminate sentencing system after *Blakely*

The Michigan Supreme Court addressed the constitutionality of Michigan’s sentencing system after *Blakely* in the 2006 case *People v. Drohan*.¹⁰⁰ In *Drohan*, the offender was convicted of third-degree criminal sexual conduct (CSC) and two counts of fourth degree sexual conduct.¹⁰¹ During sentencing, the judge scored the offender ten points for OV 4 (psychological injury to a victim) and 15 points for OV 10 (exploitation of a vulnerable victim).¹⁰² This judicial fact-finding increased the offender’s mandatory minimum sentencing range from 36 to 90 months in prison,¹⁰³ to 51 to 127 months in prison.¹⁰⁴ The judge ultimately sentenced the offender to a mandatory sentence of 127 months in prison, with 360 months serving as the fixed statutory maximum

sentence.¹⁰⁵ The offender challenged the sentence, arguing that the judicial fact-finding that increased the maximum sentence that the judge could impose that he *must* serve before being considered for parole (his “maximum-minimum” sentence) violated his Sixth Amendment rights.¹⁰⁶

The Michigan Supreme Court held that, because Michigan’s sentencing system was an indeterminate system, judicial fact-finding that increased an offender’s “maximum-minimum” sentence was not unconstitutional under *Blakely*.¹⁰⁷ The Court, echoing the “reasonable expectation” argument raised by Justice Scalia in *Apprendi* and *Blakely*,¹⁰⁸ argued that because the offender knew, when he committed his crime, that he could face up to 30 years in prison, the Sixth Amendment does not entitle him to a jury determination of his “maximum-minimum.”¹⁰⁹

The Court also argued that a jury need not find facts that determine the offender’s “maximum-minimum” sentence because an offender may not be released immediately after serving his mandatory sentence.¹¹⁰ After an offender serves his mandatory sentence, the parole board has the discretion to keep him in prison until he has served the entire statutory maximum.¹¹¹ Since the offender is not entitled to release at any point prior to serving the full statutory maximum, a jury finding is not required to increase the sentence at which the offender is eligible for parole.¹¹²

Finally, the Court reasoned that, unlike the sentences overturned in the *Apprendi* line of cases, the “maximum-minimum” sentence imposed in the Michigan sentencing system “will always fall within the range authorized by the jury’s verdict.”¹¹³ Since a conviction authorizes a sentence up to the fixed statutory maximum, any sentence below that is “derived from the jury’s verdict,”¹¹⁴ and the Sixth Amendment does not entitle an offender to a sentence below that statutory maximum.¹¹⁵ Therefore, judges have the discretion to sentence an offender anywhere below that set statutory maximum for the offender’s crime.¹¹⁶

While stated a number of different ways, the Michigan Supreme Court’s opinion was based upon one main assumption, that the Sixth Amendment only protects an offender from an increase in the amount of time he *could* serve in prison. Since a Michigan offender *could* always serve the full statutory maximum, imposition of a lesser sentence for the time he *must* serve is not protected by the Sixth Amendment. The Court drew support for this conclusion from Justice Scalia’s concurring opinion in *Apprendi* and *dictum* in *Blakely*.¹¹⁷

Two statutory maximums?

It is helpful to compare Michigan’s indeterminate system with the Washington determinate system that was invalidated in *Blakely*. Both constitute a binding judicial sentencing system, *i.e.*, one in which the range of sentences that a judge may impose can be increased through judicial fact-finding.¹¹⁸ The

only relevant difference between the two sentencing systems is that one is determinate and the other is indeterminate.¹¹⁹

The United States Supreme Court has repeatedly held that a judge in a binding judicial sentencing system may not increase the statutory maximum based upon judicial fact-finding.¹²⁰ The first issue we must confront is what constitutes a statutory maximum in an indeterminate system.

In a determinate sentencing system, like the one in *Blakely*, there is only one statutory maximum for *Apprendi* purposes: “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the offender.*”¹²¹ In an indeterminate system, by contrast, there are two statutory maximums for *Apprendi* purposes: the amount of time the offender *must* serve in prison and the amount of time the offender *could* serve in prison if not released on parole.¹²²

Once we determine that there are two statutory maximums in an indeterminate system, the next issue is whether both statutory maximums are subject to *Apprendi*. If *Apprendi* applies to the maximum sentence a judge can impose that an offender *must* serve, Michigan’s sentencing system violates the Sixth Amendment because judicial fact finding increases the maximum sentence the judge may impose on the offender.¹²³ However, if *Apprendi* applies only to the maximum amount of time an offender *could* serve if not released on parole, then Michigan’s sentencing system would not violate the Sixth Amendment because that maximum is fixed by statute and may not be increased by judicial fact-finding.¹²⁴

The Michigan Supreme Court in *Drohan* concluded that the maximum amount of time an offender *could* spend in prison was the only statutory maximum protected by *Apprendi*.¹²⁵ However, it is not clear why this should be the case. In *Blakely*, the Court determined that the sentencing range for the particular offender was the statutory maximum under *Apprendi*, not the maximum the judge could impose for that crime under statute.¹²⁶ Of the three main reasons provided by the Michigan Supreme Court for its conclusion, only one of them logically flows from Supreme Court precedent from the *Apprendi* line of cases.

First, the Michigan Supreme Court posited that, because an offender who commits a crime can “expect” to receive a sentence as high as the maximum sentence he or she could serve under statute, the Sixth Amendment does not apply to his or her “maximum-minimum.”¹²⁷ This argument, as noted above, echoes Justice Scalia’s concurring opinion in *Apprendi* and *dictum* in *Blakely*.¹²⁸ However, *Apprendi* and its progeny have never indicated that a prisoner’s “reasonable expectations” were relevant to the application of the Sixth Amendment.¹²⁹

In addition, even if an offender’s expectation were a relevant consideration in determining an offender’s Sixth Amendment rights, the Michigan Supreme

Court's "expectation" argument ignores an offender's equally reasonable expectation in the possibility of parole. Just like the offender in *Apprendi*, who could expect that he would serve the statutory maximum for his crime if convicted by a jury, but not additional time that the judge, rather than jury, found was called for, an offender in the Michigan system should expect that he *could* spend up to the fixed statutory maximum in prison, but not that he *must* serve additional time before being considered for parole based upon judicial fact-finding.¹³⁰ The Michigan Supreme Court's "expectation" argument presumes what it purports to prove.

Furthermore, the Michigan Supreme Court contended that because an offender has no guarantee that he will be released before he serves the fixed statutory maximum for that crime, the judicial determination of the amount of time the offender must serve in prison is not subject to *Apprendi*.¹³¹ This is a variation on Justice Scalia's "expectations" argument: since a prisoner has no right to parole at any point, he cannot expect to be given less than the maximum. As a result, the minimum sentence that he *must* serve may not ultimately affect the total time he actually spends in prison; therefore, so the argument goes, a judge may increase the lower end of that range based on factual findings that the jury never made.¹³² However, this argument is contrary to the Court's *Apprendi* jurisprudence, as increasing the range of sentences an offender is subject to in a determinate system does not "guarantee" that he will receive a greater sentence either.¹³³

For example, when the range of sentences that a judge may impose on an offender is increased from five to ten years to five to fifteen years, the judge is not obligated to sentence the offender to a term of imprisonment longer than the original maximum; he could still impose a sentence that is ten years or less. Even so, the Court would still find that this increase violated the offender's Sixth Amendment rights.¹³⁴ Similarly, while increasing the time an offender *must* spend in prison does not "guarantee" that an offender will spend more time in prison than he would have without the increase, doing so still increases the maximum sentence that a judge could impose on an offender.¹³⁵ The Michigan Supreme Court's argument does not give us any legitimate basis to differentiate a determinate from an indeterminate system for *Alleyne* purposes.

The Michigan Supreme Court's final argument, however, did provide an adequate justification, at least prior to *Alleyne*, as to why an offender's "maximum-minimum" should not be subject to *Apprendi*. According to that Court a jury's verdict authorizes any sentence for the offender up to the fixed statutory maximum.¹³⁶ Therefore, any sentence below that fixed maximum is derived from the jury's verdict.¹³⁷

The Court cited Justice Scalia's *dicta* in *Apprendi* and *Blakely* to support its argument;¹³⁸ it could have also cited *Harris* as support for that position.¹³⁹

If the Sixth Amendment only ensures that the sentence an offender receives is within the range authorized by the jury's verdict, then *Drohan* was correctly decided. And, given the United States Supreme Court's plurality opinion in *Harris*, the Michigan Supreme Court's decision in *Drohan* was on solid legal ground prior to *Alleynes*.

Alleynes v. United States and People v. Lockridge

However, the United States Supreme Court's opinion in *Alleynes*, overruling *Harris* and extending the protections from *Apprendi* to statutory minimum sentences, has changed all that, rendering unconstitutional any system that allows an offender's mandatory minimum sentence to be increased based on facts that the jury has not found beyond a reasonable doubt.¹⁴⁰ Furthermore, the Court's reasoning in *Alleynes* effectively wiped away any foundation to differentiate the statutory maximum the offender *must* serve from the statutory maximum the offender *could* serve.¹⁴¹ As such, the reasoning of the Michigan Supreme Court's opinion in *Drohan* is no longer persuasive, and judicial fact-finding that increases either the minimum *or* maximum sentence a judge can impose that an offender *must* serve in prison is unconstitutional.

The Court's change of position in *Alleynes* was brought about by Justice Breyer's decision to join four other justices in overruling *Harris v. United States*.¹⁴² In *Harris*, the Court had held that a finding that increased the minimum sentence that a judge could impose on an offender need not be found by a jury beyond a reasonable doubt.¹⁴³ The majority in *Alleynes* concluded that *Harris* was contrary to the Court's holding in *Apprendi* and held that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum."¹⁴⁴

The Court, citing to Justice Breyer's concurrence in *Harris*, stated, "It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime."¹⁴⁵ Similar to increasing the statutory maximum, increasing the prescribed floor for a sentence "aggravate[s] the punishment,"¹⁴⁶ because it narrows the offender's sentencing range and "require[s] the judge to impose a higher punishment than he might wish."¹⁴⁷ It is irrelevant that a judge could still impose a sentence above the new statutory minimum without the additional finding,¹⁴⁸ because raising the mandatory minimum "alters the legally prescribed punishment so as to aggravate it."¹⁴⁹ Thus, the Court overruled *Harris* and held that any fact that increased the maximum *or* minimum possible sentence that a judge may impose must be found by a jury beyond a reasonable doubt.¹⁵⁰

Justice Breyer, despite his continued disagreement with the Court's holding in *Apprendi*, agreed that it was "highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that permit a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence."¹⁵¹ Acknowledging that *Apprendi* has be-

come well established in the Court's jurisprudence, Justice Breyer concluded that the inconsistency between *Harris* and *Apprendi* should be resolved in *Apprendi*'s favor.¹⁵²

In 2014, the Michigan Supreme Court granted leave to appeal in *People v. Lockridge* to consider a challenge to Michigan's indeterminate sentencing system after *Alleyne*.¹⁵³ The Michigan Supreme Court ultimately held that Michigan's sentencing system violates the Sixth Amendment as interpreted in *Alleyne* to the extent that judicial fact-finding increases the *minimum* sentence that an offender must serve in prison before being considered for parole that a judge must impose.¹⁵⁴ It is irrelevant that the increased sentence in the Michigan scheme, unlike the other schemes rendered invalid in the *Apprendi* line, only delays parole availability because it still aggravates the legally prescribed minimum sentence that the offender must serve.¹⁵⁵

However, the Michigan Supreme Court did not directly address its prior holding in *Drohan* that judicial fact-finding that increases the *maximum* sentence that a judge can impose that an offender must serve in prison is not subject to *Apprendi*, limiting its holding to an offender's "mandatory minimum" sentence.¹⁵⁶ We address that issue in Section V below.

In *Lockridge*, the Michigan Supreme Court held that allowing a judge to increase the minimum sentence that a prisoner must serve in order to be considered for parole under Michigan's indeterminate sentencing system based on factual findings that the jury had not made violated the Sixth Amendment under *Alleyne*.¹⁵⁷ The Court ultimately concluded that the fact that Michigan's sentencing system was "indeterminate" was irrelevant because Michigan's sentencing system, like the sentencing system in *Alleyne*, used judicial fact-finding to alter the "minimum" sentence that a judge could impose on an offender.¹⁵⁸ Thus, Michigan's sentencing system violated the Sixth Amendment to the extent that this "mandatory minimum" sentence was increased.

The State of Michigan argued, as others had before it, that because judicial fact-finding was used only to determine parole availability, to which an offender has no constitutional right, an offender's rights are not violated when that sentence is increased.¹⁵⁹ The Court responded that the constitutional violation identified in *Alleyne* is completely separate from the issue of parole eligibility.¹⁶⁰ The Sixth Amendment right to a jury trial is triggered during sentencing, and forbids judicial fact-finding that "increases the prescribed range of penalties, including both the minimum and the maximum sentences," because increasing that prescribed range establishes a "distinct and aggravated crime."¹⁶¹ Once judicial fact-finding aggravates the "range" of permissible sentences, an offender's Sixth Amendment right is violated, regardless of the sentence an offender actually receives.¹⁶² Thus, since the violation of an offender's Sixth Amendment right is complete once judicial fact-finding aggravates the minimum or maximum sentence that serves as the

legally prescribed range for the crime, the offender's Sixth Amendment right has been violated, and it is irrelevant whether that legally prescribed range involves parole availability or not.¹⁶³

While the Court held that judicial fact-finding that increased the *minimum* sentence that an offender must serve before being considered for parole violated the Sixth Amendment, the Court did not address whether its prior holding in *Drohan*, that increasing the *maximum* sentence that a judge can impose that an offender must serve before being considered for parole, was still correct after *Alleyne*.¹⁶⁴ Rather, once that Court held that increasing the minimum sentence violated the Sixth Amendment, it determined that the proper remedy was to make Michigan's sentencing guidelines advisory.¹⁶⁵ As a result, the Court did not need to address the continuing validity of *Drohan* because a discretionary sentencing system poses no Sixth Amendment issue under *Apprendi* and its progeny.¹⁶⁶

The Michigan Supreme Court was able to avoid dealing with its holding in *Drohan* because of its decision to render the Michigan sentencing guidelines advisory.¹⁶⁷ Furthermore, the nature of "minimum sentences" in an indeterminate sentencing scheme provides a potential basis to distinguish *Drohan* from *Lockridge*.

As argued above, there are two potential statutory maximums in an indeterminate sentencing system, the maximum sentence a judge can impose that he *must* serve, and the maximum sentence a judge can impose that he *could* serve.¹⁶⁸ However, in an indeterminate system, like a determinate system, there is only one statutory *minimum*. The minimum sentence a judge can impose that an offender *must* serve and the minimum sentence a judge can impose that the offender *could* serve are identical in an indeterminate sentencing system. For example, in an indeterminate system, if the sentencing guidelines prescribe a range of 25 to 40 months in prison, the minimum sentence that a judge can impose that the offender *must* serve is 25 months, and the minimum sentence the offender *could* serve in prison is also 25 months. Thus, the offender's minimum sentence, like that in a determinate system, is the sentence that the offender *must* serve in prison.

Therefore, while the existence of two maximums in an indeterminate sentencing system arguably distinguishes it from a determinate system,¹⁶⁹ that same distinction does not exist when we look at the statutory minimum. When a judge finds facts that increase the minimum sentence he can impose in an indeterminate system, he is increasing the amount of time an offender must serve in exactly that same way that a judge in a determinate sentencing system does when he increases an offender's mandatory minimum.¹⁷⁰ Therefore, if it is unconstitutional for a judge in a determinate system to increase the mandatory minimum sentence for offender based upon judicial fact finding, it is also unconstitutional for a judge to do so in an indeterminate sentencing system.

Thus, the Michigan Supreme Court correctly concluded, independently of the issue of the statutory maximum, that judicial fact-finding that increases the minimum sentence that an offender *must* serve in an indeterminate sentencing system is unconstitutional after *Alleyne*. The Court did not explicitly differentiate between statutory maximums and the statutory minimum in an indeterminate sentencing scheme in its holding, but rather presumed that Michigan's sentencing system had only one statutory maximum and one statutory minimum.¹⁷¹ Because it is true that an indeterminate sentencing system has only one statutory minimum, *i.e.*, that the minimum sentence that an offender *must* and *could* serve are the same, the Court reached the proper result.

However, the fact that an indeterminate sentencing system has two potential statutory maximums leaves the issue in *Drohan* arguably distinguishable from *Lockridge*. This is because neither *Lockridge* nor *Alleyne* discussed what constitutes a *maximum* sentence for the purposes of *Apprendi* in an indeterminate sentencing system. Thus, the question still remains after *Alleyne* and *Lockridge* whether judicial fact-finding that increases the *maximum* sentence that a judge can impose that an offender must serve before being considered for parole in an indeterminate sentencing system is constitutional.

Aggravating the legally prescribed punishment

A proper reading of *Alleyne* invalidates judicial fact-finding that increases the minimum *or* maximum sentence a judge can impose on an offender that he must serve in an indeterminate sentencing system. *Alleyne* does not merely undermine the Michigan Supreme Court's reasoning in *People v. Drohan*, it rejects it.¹⁷² Increasing an offender's "maximum-minimum" in an indeterminate system implicates the Sixth Amendment in the same way that increasing the *minimum* sentence that a judge can impose does.¹⁷³

Alleyne, in addition to extending *Apprendi* to raising the statutory minimum a judge can impose in a determinate sentencing system, altered the fundamental inquiry when determining an offender's Sixth Amendment rights.¹⁷⁴ Prior to *Alleyne*, the Court had held that only increasing the statutory maximum sentence a judge can impose implicated *Apprendi*.¹⁷⁵ A plurality of the Court reasoned that the Sixth Amendment ensured that an offender's sentence would not be longer than the maximum sentence authorized by the jury's verdict.¹⁷⁶ As a result, the minimum sentence a judge could impose on an offender could be increased based upon judicial fact-finding because that sentence was still within the range authorized by the jury's verdict.¹⁷⁷ If the Sixth Amendment only protects an offender's right to receive a sentence no longer than the maximum sentence authorized by the facts found by the jury, then the sentence that an offender must serve before being considered for parole in an indeterminate system would not be subject to the Sixth Amendment. This is true because any term of imprisonment the offender ultimately receives does not extend past the maximum sentence authorized by the jury.¹⁷⁸

However, the Court in *Alleyne* rejected this narrow view of the Sixth Amendment.¹⁷⁹ The Court held that it is irrelevant to the Sixth Amendment inquiry that increasing the statutory minimum sentence a judge can impose does not subject an offender to a sentence higher than that authorized by the jury's verdict.¹⁸⁰ Instead, the relevant inquiry is "whether a fact is an element of a crime,"¹⁸¹ and "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."¹⁸² The proper inquiry under *Alleyne* when determining an offender's Sixth Amendment rights is not whether the sentence is authorized by the jury's verdict, but rather whether a finding of fact "alters the legally prescribed punishment so as to aggravate it."¹⁸³

Under this new framework, it is clear that increasing an offender's "maximum-minimum" is unconstitutional. In the same way that increasing the "mandatory minimum" a judge may impose in a determine system "alters the legally prescribed punishment so as to aggravate it,"¹⁸⁴ so does increasing the maximum sentence an offender must serve.¹⁸⁵ Judicial fact-finding "produce[s] a higher range"¹⁸⁶ of sentences that an offender *must* serve, thereby aggravating the punishment.¹⁸⁷

It is irrelevant that increasing an offender's "mandatory minimum" may not actually result in a longer sentence served, in the same way that it is irrelevant in a determinate system that an offender's actual sentence received when the statutory minimum is increased may be the same sentence he would have received without the increase.¹⁸⁸ All that matters is that the legally prescribed range for the crime is aggravated based upon judicial fact-finding.¹⁸⁹ When the maximum sentence a judge can impose that an offender *must* serve in prison is increased, the legally prescribed range for the crime has increased and, therefore, any fact that does so must be found by the jury.

Conclusion

The United States Supreme Court should ultimately conclude that it is unconstitutional to increase the minimum or maximum sentence that a judge must impose on an offender that the offender *must* serve in prison before being considered for parole based upon judicial fact-finding. Such a holding is consistent with the Sixth Amendment and would allow the jury to perform its role as a check on government power¹⁹⁷ by ensuring that the government cannot aggravate the legally proscribed punishment for an offender without the authorization of a jury of his peers.

NOTES

1. 530 U.S. 466 (2000).
2. The Sixth Amendment protections of *Apprendi* and its progeny are implicated only during sentencing of a defendant. This article uses the term "offender" to refer to any defendant who has pled guilty to a crime or who has been found guilty of a crime after a trial.

3. See *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Alleyne v. United States*, 133 S.Ct. 2151, 2160 (2013).
4. 536 U.S. 545, 557-68 (2002).
5. *Alleyne*, 133 S.Ct. at 2161-62.
6. Nancy J. King, *Alleyne on the Ground: Factfinding that limits Eligibility for Probation or Parole Release*, 26 FED. SENT'G REP. 287, 289 (2014) (defining a determinate sentence as a sentence in which “defendants receive a single sentence and serve that sentence; they are not sentenced to a range within which they might or might not be released depending on decisions by paroling authorities at a later time”). Some determinate sentencing systems give prisoners the opportunity to get out of prison early by earning “good time credits.” James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 222-24 (1982) (defining the term “good time credits” and explaining how they work in different sentencing systems). While the Supreme Court has not directly addressed whether *Apprendi* applies to the awarding or revocation of “good time credits,” most courts and commentators have concluded that *Apprendi* does not apply. See e.g., Nicholas J. Xenakis, *A Good Time with the Sixth Amendment: The Application of Apprendi to the Denial of Good Time Credit*, 47 CRIM. LAW BULL. art. 3 (“There are several state courts and one federal court that have already addressed whether *Apprendi* applies to the denial of good time credit. None of them, however, have ruled that *Apprendi* does in fact apply”); King, *supra* note 6 (“Corrections officials’ decisions . . . delaying release eligibility by refusing to grant or revoking good time credit . . . fall[s] outside of the *Apprendi* principle”). However, at least one article has argued that “the due process and the Sixth Amendment guarantees as articulated in *Apprendi v. New Jersey* [should] apply to some factual determinations related to the denial of good time credit.” Xenakis, *supra* note 6. Because good time credits are generally awarded or revoked by correction officials, not judges, whether *Apprendi* should apply to good-time credits is outside the scope of this article. This article instead focuses on when *Apprendi* applies to judicial sentencing of an offender.
7. Gary L. Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 89-90 (1990) (“Under an indeterminate sentencing system, the trial judge applies a minimum and a maximum sentence range to the convicted defendant’s prison term. Any time after the completion of the minimum term, the prisoner becomes eligible for parole; however, he must be released from prison upon the expiration of the maximum term”). This article will sometimes refer to this lower sentence in an indeterminate system as an offender’s “mandatory sentence.” This sentence is “mandatory” in the sense that an offender *must* serve that much time in prison before being released. *Id.*
8. Bradley R. Hall, *Mandatory Sentencing Guidelines by Any Other Name: When “Indeterminate Structured Sentencing” Violates Blakely v. Washington*, 57 DRAKE L. REV. 643, 680-81 (2009) (noting that “the presence or absence of a parole mechanism has never been a determinative or even relevant factor in the constitutional equation” of an offender’s Sixth Amendment Rights in the Court’s *Apprendi* line of cases).
9. *People v. Lockridge*, No. 149073, 2015 WL 4562293, *1 (Mich. July 29, 2015), available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/Clerks/Recent%20Opinions/14-15-Term-Opinions/149073-Opinion.pdf>.
10. *Id.* at *1-2.
11. See *infra* Subsection IV.B.2.
12. See *infra* Subsection IV.B.2.
13. Since the Court decided that increasing the *mandatory minimum* in Michigan’s sentencing system violated the Sixth Amendment, and that the proper remedy was to make Michigan’s guidelines advisory, the Court did not need to decide whether increasing the maximum sentence a judge can impose that an offender must serve before being considered for parole also violated the Sixth Amendment. *Lockridge*, 2015 WL 4562293 at *28-29.
14. See *infra* Part V.
15. *Alleyne*, 133 S.Ct. at 2161-62.
16. W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 906 (2009) (defining the “commonly used (and commonly confused) sentencing terms ‘determinate’ and ‘indeterminate.’”); Jon Wool,

Beyond Blakely: Implications of the Booker Decision for State Sentencing Systems, 17 FED. SENT'G REP. 285, 286-87 (2005) (defining the sentencing terms and describing the confusion in the case law concerning the definitions of “determinate” and “indeterminate” sentences).

17. Ball, *supra* note 16.
18. Ball, *supra* note 16, at 906-07; Wool, *supra* note 16. There are also some instances in which a judge has absolutely no discretion and must sentence an offender to a specific term in prison. This is the case in Michigan for the maximum sentence that an offender could serve if not released early on parole. See MCL § 769.8(1). For that sentence, a judge has absolutely no discretion and must sentence the offender to the term of years enumerated by statute for that crime. *Id.*; *People v. Drohan*, 475 Mich. 140, 161 (2006) (an offender’s “maximum sentence is not determined by the trial court, but rather is set by law”).
19. Ball, *supra* note 16; Wool, *supra* note 16.
20. Ball, *supra* note 16, at 907 (noting that “the Supreme Court has often conflated [the two concepts], using “indeterminate” to mean “advisory” and “determinate” to mean “binding”); Wool, *supra* note 16, at 286 (noting that in *Blakely*, the Court used the phrase “indeterminate sentencing” to “refer[] to systems . . . where judges are free to sentence anywhere within the statutory limits”).
21. This is similar to the terminology employed by Professor W. David Ball in his article on this topic. See Ball, *supra* note 16, at 907.
22. Ball, *supra* note 16; Wool, *supra* note 16. Of course, a judge does not have the discretion to impose a sentence outside of the statutory range for the crime. Some sentencing systems permit a judge to impose a sentence outside of the statutory range in some circumstances. However, a judge does not have the complete discretion to do so, as “departure” is generally limited to unique circumstances, and is unavailable in most cases.
23. Ball, *supra* note 16, at 907; Wool, *supra* note 16.
24. When a sentencing range is shifted from one to five years to three to five years, a judge’s sentencing discretion is limited, as the minimum sentence he must impose on an offender is three years. On the other hand, when the sentencing range is shifted from one to five years to one to seven years, the judge has greater discretion to impose a sentence, as he may now impose a sentence up to seven years in jail. Regardless of whether a judge has more or less discretion, both increasing the floor and the ceiling of the judicial sentencing range “aggravate” an offender’s punishment because both alter the legally prescribed range of sentences a judge can impose to the detriment of the offender. See *infra* Section V.
25. Ball, *supra* note 16, at 907; Wool, *supra* note 16. Some binding sentencing systems allow a judge to depart from the guidelines in unique circumstances. However, the United States Supreme Court has held that the ability for a judge to depart from the guidelines if certain additional requirements are met does not immunize a sentencing system from scrutiny under *Apprendi*. See *infra* note 57.
26. Ball, *supra* note 16; Wool, *supra* note 16, at 286
27. King, *supra* note 6.
28. Mason, *supra* note 7.
29. This is similar terminology to that employed by Professor W. David Ball in his article on this topic. See Ball, *supra* note 16, at 906-07.
30. King, *supra* note 6.
31. King, *supra* note 6. Some determinate sentencing systems will grant prisoners early release if they earn “good time credits.” For a discussion on whether *Apprendi* applies to the awarding and revocation of “good time credits,” see *supra* note 6.
32. For example, in Michigan’s indeterminate sentencing system, a judge has no discretion to set the amount of time an offender *could* serve if he is not released early in parole. See e.g., MCL § 769.8(1); *Drohan*, 475 Mich. at 161 (an offender’s “maximum sentence is not determined by the trial court, but rather is set by law”). However, a Michigan judge does have the discretion, within a binding sentencing range, to impose the sentence an offender *must* serve before being considered for parole. See MCL § 769.8(1); MCL § 769.34(2)(b).
33. See *supra* note 32.

34. Wool, *supra* note 16 (“It is critical to distinguish between these definitions because indeterminate systems under the Court’s definition— that is, systems that impose no constraint on a judge’s sentencing discretion—are not affected by the *Blakely* rule, whereas indeterminate systems under the second definition may well be.”).
35. See *Blakely*, 542 U.S. at 301 (citing *Apprendi*, 530 U.S. at 490); *Booker*, 543 U.S. at 244; *Allelyne*, 133 S.Ct. at 2160.
36. Hall, *supra* note 6; Wool, *supra* note 16, at 287.
37. *Apprendi*, 530 U.S. at 490.
38. *Id.* at 468-70 (citing N.J. STAT. ANN. § 2C:39-4(a) (West 1995); § 2C:43-6(a)(2)).
39. *Id.* at 470-71 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).
40. See *id.* at 491-97.
41. 536 U.S. 545 (2002).
42. *Id.* at 550 (citing 18 U.S.C. § 924(c)(1)(A)).
43. *Id.* at 550-51.
44. *Id.* at 568.
45. *Id.* at 557.
46. *Id.* at 565.
47. *Id.* at 557. The plurality also noted that *Apprendi* did not limit the judge’s ability to exercise his broad discretion to sentence an offender within the statutory range. *Id.* at 560. Since “the judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from” a jury, it makes no difference constitutionally that the state requires that judge to do sentence the offender to a lengthier sentence within that range. *Id.* at 565. Therefore, since increasing the minimum sentence to which a judge can sentence the offender does not “swell the penalty above what the law has provided for the acts charged,” it is distinguishable from increasing the maximum sentence a judge can impose and therefore does not violate the offender’s Sixth Amendment Rights. *Id.* at 562 (citing Bishop, CRIMINAL PROCEDURE § 85, at 54).
48. *Id.* at 569-72 (Breyer, J., concurring in part and concurring in the judgment).
49. *Id.* at 298-99.
50. *Id.* at 299.
51. *Id.* at 300.
52. *Id.* at 314.
53. *Id.* at 303-04.
54. *Id.* at 303 (emphasis in original).
55. *Id.* at 304-05.
56. See *infra* text accompanying notes 57-58.
57. 543 U.S. 220, 233 (“As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case”). The federal sentencing system allowed a judge to depart from the binding sentencing range if he or she found “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” *Id.* at 234. The Court held that this did not immunize the federal sentencing guidelines from an *Apprendi* problem, explaining that: Importantly . . . departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for “substantial and compelling reasons,” that exception was not available for *Blakely* himself. *Id.* at 234 (citing *Blakely*, 542 U.S. at 299).
58. 549 U.S. 270, 277, 293 (2007). California’s sentencing system prescribed three possible terms of imprisonment for a crime, “a lower, middle, and upper term sentence.” *Id.* at 277.

The judge was forced by statute to sentence the offender to the middle term unless it found “circumstances in aggravation or mitigation” that justified the lower and upper sentence. *Id.* The Court held that for *Apprendi* purposes, the middle sentence constitutes the statutory maximum because the “aggravating circumstances [necessary to sentence an offender to the upper term] depend on facts found discretely and solely by the judge.” *Id.* at 288. Therefore, the Court held that allowing the judge to find an aggravating factor that was not part of the jury’s verdict or the offender’s plea to increase the offender’s sentence violated his Sixth Amendment rights. *Id.* at 288-89, 293.

59. See Hall, *supra* note 6, at 675 (concluding that the Court has held that any sentencing system that allows a judge to impose a harsher sentence based upon judicial fact-finding must be advisory).
60. See *Booker*, 543 U.S. at 233 (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range”) (citing *Apprendi*, 530 U.S. at 481).
61. Hall, *supra* note 6.
62. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Blakely*, 542 U.S. at 309.
63. Justice Scalia’s arguments were not binding authority, as they constituted dictum in *Blakely*, and were part of a concurring opinion in *Apprendi* that was not joined by a majority of the Court.
64. *Id.*
65. *Id.* at 498 (emphasis in original).
66. *Blakely*, 542 U.S. at 309.
67. *Id.*
68. In fact, that Court never stated in its opinion whether Washington’s system was indeterminate or not. *Id.*
69. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (“I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a prison sentence of 30 years . . . the criminal will never get *more* punishment than he bargained for when he did the crime.”) (emphasis in original); *Blakely*, 542 U.S. at 309 (“Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the offender has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.”) (emphasis in original).
70. See *supra* text and accompanying notes 45-47.
71. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (“[T]he criminal will never get *more* punishment than he bargained for when he did the crime.”); *Blakely*, 542 U.S. at 309 (“In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in prison.”).
72. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)
73. See *infra* text and accompanying notes 107-10, 113-16, 127-30, 136-39.
74. See *infra* Section V.
75. MICH. COMP. LAWS ANN. (hereinafter “MCL”) § 769.8(1); MCL § 769.34(2)(b); *People v. Drohan*, 475 Mich. 140, 161 (2006) (“[I]n all but a few cases, a sentence imposed in Michigan is an indeterminate sentence.”).
76. Mason, *supra* note 7.
77. MCL § 769.8(1); *Drohan*, 475 Mich. at 161 (an offender’s “maximum sentence is not determined by the trial court, but rather is set by law”).
78. MCL § 769.8(1); MCL § 769.34(2)(b).
79. *Drohan*, 475 Mich. at 142-43 (stating that Michigan’s sentencing system “allows a trial court to set an offender’s minimum sentence on the basis of factors determined by a preponderance of the evidence”).
80. 474 Mich. at 164.

81. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Blakely*, 542 U.S. at 309 (2004); *Harris*, 536 U.S. at 557-68 (2002).
82. *Drohan*, 475 Mich. at 162-63.
83. MCL § 777.21.
84. A judge determines an offender's PRV 1 score based upon the number of "high severity" felony convictions he has on his record. If the offender has one prior "high severity" felony conviction, the court assesses him 25 points; if he has two prior "high severity" felony convictions, the court assesses him 50 points; and if he has three or more prior high severity felony convictions, the court assesses him 75 points. MCL § 777.51. Other Michigan PRVs that the court must score against an offender include: the number of prior low severity convictions (PRV 2), MCL § 777.52, the number of prior high severity adjudications (PRV 3), MCL § 777.53, and the number of prior misdemeanor convictions (PRV 5). MCL § 777.55.
85. *Drohan*, 475 Mich. at 142-43 (stating that Michigan's sentencing system "allows a trial court to set an offender's minimum sentence on the basis of factors determined by a preponderance of the evidence").
86. MCL § 777.22.
87. MCL § 777.31.
88. MCL § 777.31(1)(e).
89. MCL § 777.31(1)(a).
90. MCL § 777.35.
91. MCL § 777.39.
92. MCL § 777.44.
93. MCL § 777.21(1)(c).
94. *See e.g.*, MCL § 777.62 (the minimum sentencing grid for class A felonies).
95. *Id.* Both axes on the grid are subdivided into smaller categories. *Id.* For example, for a class A felony, an offender with 15 PRV points is placed in the C category of PRV scores, which is the category for any offender with a PRV score between 10 and 24 points. *Id.* Additionally, an offender with an OV score of 25 points is placed in category II, which is the category for any offender with an OV score between 20 and 39 points. *Id.* These subcategories determine where on the x-axis and y-axis an offender's scores are, which ultimately determines his minimum sentencing range. *Id.*
96. MCL § 777.62; MCL § 769.34(2). "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL § 769.34(3). However, as the United States Supreme Court explained in *Booker*, the ability of a judge to depart from the guidelines does not immunize a sentencing system from an *Apprendi* challenge. *See supra* note 57.
97. *See Drohan*, 475 Mich. at 162, 163.
98. *See Blakely*, 542 U.S. at 301 (citing *Apprendi*, 530 U.S. at 490); *Booker*, 543 U.S. at 244.
99. *See infra* text accompanying notes 118-120.
100. *Drohan*, 475 Mich. at 142-43. The Michigan Supreme Court had briefly addressed the issue two years earlier in a footnote. *See People v. Claypool*, 470 Mich. 715, 730 n.14 (2004). However, this language was *dictum*, and therefore was not binding precedent. *Drohan*, 475 Mich. at 167 (2006) (Kelly, J., concurring in part and dissenting in part); Christopher M. Thompson, *Redefining "Statutory Maximum": The Demise of Michigan's Presumptive Indeterminate Sentencing Guidelines at the Hands of Blakely v. Washington*, 83 U. DET. MERCY L. REV. 137, 150 (2006).
101. 475 Mich. at 144.
102. *Id.* at 145.
103. *Id.* at 167.
104. *Id.* at 145 n.3
105. *Id.* at 145.
106. *Id.*

107. *Id.* at 159-65
108. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Blakely*, 542 U.S. at 309; see *supra* text accompanying notes 70-72.
109. *Drohan*, 475 Mich. at 163.
110. *Id.*
111. *Id.*
112. *Id.* at 163-64.
113. *Id.* at 162.
114. *Id.* at 162 (2006).
115. *Id.* at 163 (“In short, the Sixth Amendment ensures that an offender will not be incarcerated for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt. However, the Sixth Amendment does not entitle an offender to a sentence *below* that statutory maximum”) (emphasis in original) (citing *Apprendi*, 530 U.S. at 498 (2000) (Scalia, J., concurring)).
116. *Id.*
117. See *id.* at 159-64. The Michigan Supreme Court relied heavily on Justice Scalia’s views on the Sixth Amendment, citing Justice Scalia’s concurrence in *Apprendi* twice and once to his *dictum* in *Blakely*. See *id.* In contrast, the Michigan Supreme Court cites to other United States Supreme Court decisions in its analysis section five times, twice in support of a quote from Justice Scalia’s concurrence in *Apprendi*, once simply citing the holding of *Blakely*, and two other times citing the history of the Sixth Amendment. *Id.*
118. Compare *Blakely*, 542 U.S. at 299-300, with MCL § 769.34(2)(b), and MCL § 777.21.
119. Compare *Blakely*, 542 U.S. at 298-300, with MCL § 769.8(1), and *Drohan*, 475 Mich. at 161.
120. See *Blakely*, 542 U.S. at 301 (citing *Apprendi*, 530 U.S. at 490); *Booker*, 543 U.S. at 244.
121. *Blakely*, 542 U.S. at 302 (emphasis in original).
122. Mason, *supra* note 7; Thompson, *supra* note 100.
123. Thompson, *supra* note 100.
124. *Id.*
125. *Drohan*, 475 Mich. at 164 (2006); Thompson, *supra* note 100, at 151 (“The Michigan Supreme Court has adopted one possible, reasonable definition of the term: that a ‘statutory maximum’ is simply the period a defendant *may* serve”) (emphasis added).
126. *Blakely*, 542 U.S. at 303-04; Hall, *supra* note 7, at 685 (arguing that the Michigan Supreme Court’s definition of statutory maximum in *Drohan* “mirrors the argument that the Supreme Court rejected in *Blakely*”).
127. *Drohan*, 475 Mich. at 163.
128. *Apprendi*, 530 U.S. at 466, 498 (Scalia, J., concurring); *Blakely*, 542 U.S. at 309; see *supra* text accompanying notes 71-72.
129. In fact, this “expectation” argument, if applied broadly, could undo the entire line of *Apprendi* jurisprudence. Is it not true that when the offender in *Apprendi* committed his crime due to racial bias he did so knowing that he was risking 20 years in prison? After all, New Jersey statute clearly stated that an offender who committed an offense that was “motivated by racial bias” would receive a heightened sentence. *Apprendi*, 530 U.S. at 468-70 (citing N.J. STAT. ANN. § 2C:39-4(a) (West 1995); § 2C:43-6(a)(2)). Nevertheless, the Court held that the offender’s Sixth Amendment rights were violated because a fact that enhanced the maximum sentence that the judge could impose was not found by a jury. *Id.* at 491-97. Thus, the relevant issue under *Apprendi* is not whether an offender can “expect” to receive up to a particular sentence when he commits a crime, but rather whether a jury must find a fact that increases the maximum sentence that a judge can impose on an offender.
130. *Drohan*, 475 Mich. at 163.
131. *Id.* at 164.
132. *Id.*
133. *Alleyne*, 133 S.Ct. at 2162 & n.3 (“[I]f a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant

ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact.”) (citing *Apprendi*, 530 U.S. at 474).

134. *Id.*
135. See King, *supra* note 6 (“That a paroling authority may ultimately decide not to release the defendant when he first becomes eligible is irrelevant. What is crucial is that the legislature has narrowed the penalty range available to the trial judge once the specified fact is determined”).
136. *Drohan*, 475 Mich. at 162-63.
137. *Id.*
138. *Id.* at 159, 163.
139. See *id.* at 159-64. In *Harris*, the United States Supreme Court held that a finding a fact that increases the minimum sentence a judge may impose on an offender does not need to be found by a jury. 536 U.S. at 568. The plurality opinion reasoned that increasing the mandatory minimum sentence a judge must impose does not “extend the offender’s sentence beyond that authorized by the jury’s verdict,” *id.* at 557, because the jury has “already found all the facts necessary to authorize the Government to impose” any sentence within the sentencing range. *Id.* at 565. This is also true in Michigan’s indeterminate sentencing system: once a jury finds an offender guilty, it has authorized a term of imprisonment up to the fixed statutory maximum. *Drohan*, 475 Mich. at 161-62. Thus, when the judge sets an offender’s “maximum-minimum,” he is not increasing the offender’s punishment beyond that authorized by the jury.
140. See generally *Lockridge*, 2015 WL 4562293.
141. *Alleynes*, 133 S.Ct. at 2161-63.
142. Compare *Harris*, 536 U.S. at 569-72 (Breyer, J., concurring in part and concurring in the judgment), with *Alleynes*, 133 S.Ct. at 2166 (Breyer, J., concurring in part and concurring in the judgment).
143. *Harris*, 536 U.S. at 550-51.
144. *Alleynes*, 133 S.Ct. at 2160.
145. *Id.* at 2160 (citing *Harris*, 536 U.S. at 569-72 (Breyer, J., concurring in part and concurring in the judgment)).
146. *Id.* at 2161 (emphasis removed).
147. *Id.* (quoting *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring)).
148. *Id.* at 2161-62.
149. *Id.* at 2161.
150. *Id.*, 133 S.Ct. at 2161.
151. *Id.* at 2167 (Breyer, J., concurring in part).
152. *Id.*
153. See *People v. Lockridge*, 496 Mich. 852 (2014) (granting leave to appeal to consider “whether a judge’s determination of the appropriate sentencing guidelines range, MCL 777.1, *et seq.*, establishes a ‘mandatory minimum sentence,’ such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact”).
154. *Lockridge*, 2015 WL 4562293, *1 (the “deficiency [of Michigan’s sentencing system] is the extent to which the guidelines require judicial fact-finding . . . that *mandatorily* increase the floor of the guidelines minimum sentence range, *i.e.* the “mandatory minimum” sentence under *Alleynes*) (emphasis in original).
155. *Id.* at *22-23.
156. Since the Court decided that increasing the *mandatory minimum* in Michigan’s sentencing system violated the Sixth Amendment, and that the proper remedy was to make Michigan’s guidelines advisory, the Court did not need to decide whether *Drohan* was still good law after *Alleynes*. See *id.* at *28-29.
157. *Id.* at *1-2.
158. *Id.* at *21-23.
159. *Lockridge*, 2015 WL 4562293, *16, 21-23. When responding to the State’s argument, adopted by the dissent, that *Alleynes* does not apply to Michigan’s sentencing system, the majority

separated this argument into three separate sub-arguments, 1) that *Alleyne* does not apply because Michigan's sentencing system is "indeterminate," 2) that there is no constitutional right to parole eligibility, and 3) that Michigan's minimum sentence is not a "mandatory minimum" as defined in *Alleyne*. *Id.* at *16. However, the essential premise of the second and third arguments is that *Alleyne* does not apply because Michigan's sentencing system is indeterminate and judicial fact-finding in Michigan only affects parole eligibility. *See id.* at *17-26. For the sake of clarity and space, this article focuses on that core issue, rather than separately analyzing the majority's response to each sub-argument.

160. *Id.* at *21 ("We have no quarrel with the general proposition that a defendant has no constitutional entitlement to be paroled . . . but we do not see its relevance here. The right at issue includes the Sixth Amendment right to a jury trial, not just the due-process right to be free deprivation of one's liberty.").
161. *Id.* at *22 (citing *Alleyne*, 133 S.Ct. at 2163).
162. *Id.* (citing *Alleyne*, 133 S.Ct. at 2163) ("The failure to have the jury find an element establishing "a distinct and aggravated crime," not the resulting sentencing, is the constitutional deficiency.") (internal citations omitted).
163. *Lockridge*, 2015 WL 4562293 at *22-23.
164. Since the Court decided that increasing the *mandatory minimum* in Michigan's sentencing system violated the Sixth Amendment, and that the proper remedy was to make Michigan's guidelines advisory, the Court did not need to decide whether *Drohan* was still good law after *Alleyne*. *Id.* at *28-29.
165. *Id.* at *28-29.
166. *See Booker*, 543 U.S. at 223 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range.") (citing *Apprendi*, 530 U.S. at 481).
167. *Lockridge*, 2015 WL 4562293 at *28-29.
168. *See supra* Section III.C.
169. *See id.*
170. King, *supra* note 6.
171. *See e.g.*, *Lockridge*, 2015 WL 4562293 at *13 ("*Alleyne* now prohibits increasing the *minimum* as well as the maximum sentence in this manner) (emphasis in original); *id.* (stating that in Michigan, an offender's "*maximum* [sentence] is set by statute and authorized by the jury's verdict.) (emphasis in original); *id.* at *16 ("the Legislature may not require judicial fact-finding that results in a mandatory increase in *either* the minimum or maximum sentence beyond the range set by the jury verdict") (emphasis in original); *id.* at *21 ("And [the Sixth Amendment] includes the right to have a 'jury determination' of all the pertinent facts used in *increasing the prescribed range of penalties, including both the minimum and the maximum sentences.*") (emphasis in original).
172. *See infra* text accompanying notes 174-184.
173. *See infra* text accompanying notes 185-190.
174. *See Alleyne*, 133 S.Ct. at 2161-63 (rejecting the Court's approach to the Sixth Amendment in *Harris*).
175. *See Harris*, 536 U.S. at 557-68.
176. *Id.* at 557, 565.
177. *Id.* at 557.
178. *Drohan*, 475 Mich. at 161-62.
179. *Alleyne*, 133 S.Ct. at 2161-62.
180. *Id.*
181. *Id.* at 2161.
182. *Id.*
183. *Id.*
184. *Alleyne*, 133 S.Ct. at 2158.

185. King, *supra* note 6.
 186. *Alleyne*, 133 S.Ct. at 2162-63.
 187. King, *supra* note 6.
 188. See *Alleyne*, 133 S.Ct. at 2162.
 189. King, *supra* note 6 (“That a paroling authority may ultimately decide not to release the defendant when he first becomes eligible is irrelevant. What is crucial is that the legislature has narrowed the penalty range available to the trial judge once the specified fact is determined.”)
 190. See *e.g.*, *United States v. Cotton*, 535 U.S. 625, 626 (2002) (noting that the Sixth Amendment right to a jury “serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power”); Randolph N. Jonakait, *Confrontation Clause Curiosities: When Logic and Proportion Have Fallen Sloppy Dead*, 20 J.L. & POL’Y 485, 492 (2012) (“The Sixth Amendment jury trial right acts as a check on . . . judges and prosecutors.”).



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BOOK REVIEW: *GUANTANAMO DIARY*

By Mohamedou Ould Slahi, Larry Siems ed., Little, Brown & Company, 2015. \$29. 379 pp. Out in paperback December 2015

Imagine you receive a knock on the door one day as you return home from work. It's the police requesting you visit the local police station to answer some routine questions. You take your own car and leave your house for the station to find the course of your life forever altered. Suddenly you're being held in a secret security prison without any contact with the outside world, not even those you hold dear, let alone legal counsel. Soon enough you are flown off from one country to another on a world tour of torture, indefinite detention, and interrogation. Eventually you land at your final destination: a military prison. It's a torture complex that violates all forms of international law and basic human rights. For years you are held in detention and solitary confinement. You're tortured and sexually abused. You're told that you have been designated a dangerous terrorist, Enemy #1, and if you do not cooperate your entire existence will be erased, your family raped, tortured, and killed. You learn your predicament is due to the commands of the most powerful world governments and intelligence agencies, yet you never learn of the charges against you. Eventually you are able to record your story in a diary for the entire world to read. After years of a government crusade to silence your story, the world is finally granted the opportunity to be exposed to the darkest reaches of power and state tyranny.

All the architects and perpetrators of your abuse and torture return triumphantly to their lives: one becomes a renowned law professor; another a federal judge; the other awarded a distinguished medal of honor; another granted a job with the Department of Aviation. Yet you remain detained for over a decade waiting for a breakthrough, for the truth to matter. Such a setting is not a dystopian Hollywood film plot, nor a contemporary attempt to emulate

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Kafka, but rather the account of the life and experiences of Guantanamo prisoner #760 Mohamedou Ould Slahi.

The book describes the ordeal of the Mauritanian national, first imprisoned in his home country in fall 2001, renditioned to an intelligence detention facility in Jordan for six months, then to Bagram in Afghanistan, finally reaching the Guantanamo military base in the summer of 2002, where he remains today. The supposed basis of his imprisonment and interrogation has been described by the ACLU as “guilty by long ago association.”¹ In 1990 Slahi went to Afghanistan with the intention of fighting the Soviet-supported government. This was at a time when the United States’ military was actively supporting the Mujahideen of Afghanistan. By 1992 Slahi severed his ties with Al-Qaeda, and has never returned to Afghanistan. According to Slahi, this is where his relationship with Afghanistan and Al-Qaeda ended. The United States, however, despite never having filed anything resembling charges against Slahi, initially maintained he was an architect of the foiled Millennium terror plot, as well as a top recruiter for Al-Qaeda with links to Osama Bin Laden. Five years into his ordeal in Guantanamo, Slahi began to record his experiences producing a 466 page handwritten transcript in English, a language he acquired while imprisoned there. After an extended government-led legal assault attempting to prohibit the publication of the manuscript, *Guantanamo Diary* was finally published in January 2015.

The persistent crusade the United States government launched against the publication of *Guantanamo Diary* itself merits discussion. The basis of the attempted prohibition is the policy that any communication expressed by a Guantanamo detainee, whether orally or written, is presumptively classified, regardless of the sensitivity of the nature of the communication.² The litigation battle to get the diary published was initiated by the ACLU through a FOIA request, and lasted over five years, with the details of the lawsuit still under seal. Initially the transcript was only accessible to Slahi’s legal team, stored in an office in Washington D.C., and classified as highly confidential. Those beyond the legal team who were allowed access possessed security clearances. In order for them to be published, Slahi’s legal team was required to send the manuscript to a government team who assessed the sensitivity of the manuscript, with every page requiring analysis as to whether it should be declassified. Seven years later, the end result is 2,500 bars of redaction within the 466-page manuscript.³

These black bars of redaction at one point censor seven consecutive pages, serving “as fingerprints of [the] longstanding censorship regime” as Larry Siems, the editor of the book, states

Some of the redactions transcend any form of logic, such as the absurd censoring of the name of the 1950’s ex-Egyptian president Gamal Abdul-Nasser, in addition to the systematic redaction of any female pronoun referring to

Slahi's interrogators. Perhaps the latter alludes to the government's wish to keep secret the active participation of female military officers in the sexual assault of detained men at the military camp.⁴

In a particularly emotional entry, Slahi relates an experience in which a Puerto Rican prisoner escort attempts to provide solace, telling him that he would indeed return to his family:

"No worry, you gonna back to your family" he said.

When he said that I couldn't help breaking in [redacted].

Lately I'd become so vulnerable. What was wrong with me? Just one soothing word in this ocean of agony was enough to make me cry.

Disturbingly, we witness the censoring of the word "tears" by the clearance team, perhaps in a cynical—and vain—attempt to dehumanize an especially humanizing moment in the story. Despite the rampant appearance of black boxes across the book, Siems, who has never been allowed communication privileges with Slahi, took on the daunting task of rendering educated guesses on the words and phrases that the redactions were meant to conceal. Siems successfully utilized publicly accessible records such as Slahi's 2005 administrative review board hearing testimony transcript, Slahi's 2008 habeas corpus brief, as well as government and media reports in order to contextualize much of the redacted material for the reader.

Even though such censorship is a clear attempt to cover up the deplorable injustices committed by the U.S. government and their proxies against Slahi and prisoners of the "War on Terror," it fails to disguise some of the darkest points of the book that clearly depict the subversive nature of the empire. Such descriptions include the interrogation, brutal torture, and rendition of Slahi. He depicts his interrogators as well as the interrogation techniques used on him in the different secret facilities he had been to with emotional and sensory precision. Such varied settings in the diary serve as an international comparative analysis on torture and interrogation tactics, with Slahi tactfully assessing each.

Slahi's torture and particularly that which he experienced at Guantanamo has been a frequently cited subject, and brought to much attention by previous reports and books on Guantanamo such as Jess Bravin's *The Terror Courts* or the Senate Armed Service Committee's report on the status of detainees in U.S. custody. As cited in *Guantanamo Diary* and thoroughly documented in the Senate Committee Report, Donald Rumsfeld personally authorized a "special interrogation plan" to extract information from Slahi. The tactics included sensory and sleep deprivation, sexual abuse, denial of adequate and edible food, threats of harm to his family members, as well as beatings, and were based upon the John Yoo "Counter Resistance Techniques" memos of 2003.⁵

The documentation of such abusive practices is conveyed in a nuanced manner in *Guantanamo Diary*. Slahi is not the detached voice or passive

victim cited in a government report or a media exposé on enhanced interrogation techniques, but rather the active storyteller, embodying a voice of the voiceless still languishing in Guantanamo and black sites around the world.

One of the most disturbing descriptions in the book is that of a late night boat ride in which Slahi is blindfolded, beaten, and threatened with murder while a bag is put on his head and his jacket is filled with ice. The leader of what the interrogators describe as Slahi's "Birthday Party" is labeled by the author, throughout his narrative, as "Mr. X." His actual name is Richard Zuley, a former detective with the Chicago Police Department, implicated in torture and abuse. Zuley was transferred to Guantanamo to participate in the interrogation of detainees and on his arrival he was delegated by Guantanamo Task Force Commander Geoffrey Miller to carry out the Rumsfeld-authorized interrogation plan on Slahi.⁶ Miller would eventually go on to devise interrogations at Abu Ghraib. Upon retirement in 2008, he was awarded a Distinguished Medal of Honor.⁷ Zuley would eventually return to Chicago and is currently employed in the aviation sector.⁸ Recalling one of his final interrogation sessions with Zuley, Slahi states:

[The] special team realized that I was not going to cooperate with them as they wished, and so the next level of torture was approved.

[Redacted] and another guy with a German shepherd pried open the door of the interrogation room where [redacted] and I were sitting. It was in [redacted] Building.

[Redacted] and his colleague kept hitting me, mostly on my ribs and face, and made me drink salt water for about three hours before giving me over to an Arabic team with an Egyptian and a Jordanian interrogator. Those interrogators continued to beat me while covering me in ice cubes, one, to torture me, and two, to make the new, fresh bruises disappear.

Then after about three hours Mr. X and his friends took me back and threw me in my present cell.

"I told you not to fuck with me, Motherfucker!" was the last thing I heard from [redacted].

The story of Richard Zuley, apart from being one of the darkest and most abusive characters in Slahi's narrative, sheds some light on a deep relationship between the American police state and the military complex. Zuley accumulated considerable experience using inhumane and degrading tactics of interrogation and torture in the Chicago Police Department. Four months prior to the publication of *Guantanamo Diary*, a wrongful conviction lawsuit was filed in federal court against Zuley by a Chicago man who was imprisoned for 23 years for murder before his exoneration. Lathierial Boyd stated that he was set up for his wrongful conviction by the techniques of Lieutenant Zuley, who subjected him to prolonged detention while shackled, and planted

evidence against him. Another three victims of Zuley's techniques during his time at the CPD have recently stepped forward, describing similar patterns of abuse.⁹ Perhaps it should come as no surprise that the military wished to export these homegrown interrogation techniques, used for years to terrorize low-income communities of color in the United States, and channel them into the torture of prisoners of the "War on Terror" abroad.

In light of the degrading and inhumane experiences Slahi endured, one of the most remarkable elements of the story is his resilience, as well as his capability to rationalize and empathize, even with those who categorized him as the enemy. As Siems states in the introduction,

[He] recognizes the larger context of fear and confusion in which all these characters interact, and the much more local institutional and social forces that shape those interaction . . . he tries to understand people , regardless of stations or uniforms or conditions In doing so he transforms even the most dehumanizing situations into a series of individual, and at times harrowingly intimate human exchanges.

Slahi's grappling with the darkest forms and complexities of the human condition is an approach that manifests elements of a literary classic. That Slahi fails to lose sense of his humanity in the face of subhuman conditions forcing him to the edges of his sanity is truly one of the most significant components of the narrative. On speculating why an individual would choose to become involved in the commission of war crimes, doing a job which "surely is going to haunt him for the rest of his life," Slahi states:

Maybe he had few choices, because many people in the Army come from poor families, and that's why the army sometimes gives them the dirtiest job. I mean theoretically [redacted] could have refused to commit crimes of war, and he might even get away with it. Later on I discussed with some of the guards why they executed the order to stop me from praying, since it's an unlawful order.

"I could have refused, but my boss would have given me a shitty job or transferred me to a bad place. I know I can go to hell for what I have done to you" one of them told me. History repeats itself: during World War II, German soldiers were not executed when they argued that they received orders."

Despite Slahi's persistence in evoking truth throughout his ordeal, and his resilience and dedication to being set free and reunited with his family in his homeland, three months after the publication of *Guantanamo Diary*, Slahi was once again internally relocated within the camp and had all his possessions of the past thirteen years, except his Quran, taken from him.

Currently 122 detainees remain at Guantanamo. The Obama administration claims that it is attempting to transfer some of them out, while others cleared for release by several federal agencies are allegedly to be set free in the coming months. However, such efforts are likely to be thwarted by Congressional

action seeking to ban future transfers of imprisoned men outside Guantanamo. Mohammedou Ould Slahi continues to wait for his freedom.

NOTES

1. Janie Williams, *Guantánamo Diary*, HUMAN RIGHTS BRIEF: CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW (Feb. 12, 2015), <http://hrbrief.org/2015/02/guantanamo-diary/>.
2. Cora Currier, *How Guantánamo Diary Escaped the Black Hole and Got Past the Censors*, THE INTERCEPT (Jan. 31, 2015, 9:26 AM), <https://firstlook.org/theintercept/2015/01/31/guantanamo-diary-escaped-black-hole-got-past-censors-mostly/>.
3. *Id.*
4. *Id.*
5. STAFF OF S. COMM ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, (Comm. Print November 20,th 2008), *available at* http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.
6. Spencer Ackerman, *Bad Lieutenant: American Police Brutality Exported from Chicago To Guantánamo*, THE GUARDIAN (Feb. 18, 2015, 11:03 AM), <http://www.theguardian.com/us-news/2015/feb/18/american-police-brutality-chicago-guantanamo>.
7. Josh White, *General Who Ran Guantánamo Bay Retires*, WASH. POST (Aug. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073101183.html>.
8. Spencer Ackerman, *Guantánamo Torturer Led Brutal Chicago Regime of Shackling and Confession*, THE GUARDIAN (Feb. 18, 2015, 11:01 AM), <http://www.theguardian.com/us-news/2015/feb/18/guantanamo-torture-chicago-police-brutality>.
9. *Id.*
10. Linda Moreno, *The Best-Selling Prisoner of Guantánamo*, SLATE (Mar. 19, 2015, 10:15 AM), http://www.slate.com/articles/news_and_politics/foreigners/2015/03/guantanamo_detainee_mohamedou_ould_slahi_can_t_have_a_copy_of_his_best_selling.html.



difficult reform in this area can be. Activists around the country, including BLM, deserve credit for continuing to force a national discussion of this issue even as months and years go by. Some of their efforts have led to more concrete gains, such as the recent indictment of the officers accused of killing Freddie Gray in Baltimore. And, clearly, it was only through ongoing efforts by activists and lawyers in Chicago that the public learned what authorities knew for a year, that Officer Jason Van Dyke murdered Laquan McDonald in cold blood, lied about it, and joined in an attempt to erase surveillance camera footage that could have belied the cover-up. *NLGR's* recently published "Race and Criminal Justice" theme issue (Volume 71, Issue 4) was our attempt to promote this effort and advance the discussion.

"'Deadly Force' Revisited" utilizes social science and legal research methods to shine a light on how resilient the problem of police violence continues to be in D.C. It also recommends solutions that, if used as a model, might lead to widescale reforms to ensure respect for civil liberties and human life.

David Loudon's "Could or Must? *Apprendi's* Application to Indeterminate Sentencing Systems after *Alleyne*" makes a particular, narrowly focused legal argument—that after *Alleyne v. United States* the Sixth Amendment requires that facts that postpone an inmate's eligibility for parole in an indeterminate sentencing system should be treated like elements of the crime which must be proven to a jury beyond a reasonable doubt. If implemented, that simple change would be an important step toward mitigating some of the devastating harms of our current gargantuan carceral state, in which more citizens are being locked up for longer periods of time than ever before. If courts interpret *Alleyne* as Loudon thinks they should two consequences will result, both of which could contribute to the end of this longstanding and shameful era of mass incarceration: the opportunity for parole will come sooner to many deserving inmates and, by increasing the role of the jury while decreasing that of the judge, sentencing will become more democratic and reflective of the judgment of the people to whom the agents of the criminal justice system should be accountable.

Guantánamo Diary by Mohamedu Ould Slahi chronicles the author's saga as a detainee trapped in a constitution-free Twilight Zone as part of the U.S.'s Global War on Terror. It is a revelatory work in the history of prison literature and essential reading for anyone who seeks to understand, as we all should, the yawning divide that crisis and fear can open up between the constitutional values a nation preaches and its actual practices. In their review of Slahi's memoir, Leila Sayed-Taha and Azadeh Shahshahani summarize and explain the significance of this extraordinary work by a man who after 13 years is still held captive in the world's most notorious prison, without ever having been charged and, so far as anyone can tell, despite a complete lack of evidence. What is particularly remarkable about his story is that Slahi has kept his humanity in a system that has lost its own.

—Nathan Goetting & David Gespass

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1. Title of Publication: NATIONAL LAWYERS GUILD REVIEW. 2 Publication number: 231 560. 3. Date of filing: October 1, 2015. 4. Issue frequency: quarterly. 5. Number of issues published annually: Four. 6. Annual subscription price: \$25. 7. Complete mailing address of known office of publication: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. 8. Complete mailing address of the general business offices of the publisher: 132 Nassau Street, # 922, New York NY 10038. 9. Full names and complete mailing address of publisher, editor and managing editor: Publisher: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. Editor: Nathan Goetting, 132 Nassau Street, # 922, New York NY 10038. Managing editor: Deborah Willis. 10. Owner: National Lawyers Guild Foundation. 11. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities: none. 12. For completion by nonprofit organizations authorized to mail at special rates (Section 423.12DMM only): Status has not changed during the preceding 12 months. 13. Publication name: NATIONAL LAWYERS GUILD REVIEW. 14. Issue date for circulation data below: Summer 2015. 15. Extent and nature of circulation. Average number of copies of each issue during preceding 12 months. A. Total number of copies (net press run): 550. B. Paid and/or requested circulation (1) Outside county: 511. (2) Paid in-county subscriptions: 3. (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 514. D. Free distribution by mail (samples, complimentary and other free): 0 (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 0. G. Total distribution: 514. H. Copies not distributed: 36. I. Total:550. Percent paid and/or requested circulation: 100%. Actual number of copies of single issue published nearest to filing date. A. Total number of copies (net press run): 492. B. Paid and/or requested circulation (1) Outside county: 489. (2) Paid in-county subscriptions: 3 (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 492. D. Free distribution by mail (samples, complimentary and other free): (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 0. G. Total distribution: 492. H. Copies not distributed: 83. I. Total: 575. Percent paid and/or requested circulation: 100% 16. This statement of ownership will be printed in the Fall 2015 issue of this publication. 17. I certify that the statements made by me above are correct and complete. Signature and title of editor, publisher, business manager or owner: National Lawyers Guild Foundation, owner, October 1, 2015.

NATIONAL LAWYERS GUILD REVIEW
132 NASSAU STREET, SUITE 922
NEW YORK, NY 10038

Periodicals
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