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# Addressing Workplace Violence: From Collective Bargaining to Constitutional Forfeitures

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## INTRODUCTION

Violence transforms work. Angry patients and families may shoot surgeons, punctuating hospitals with bullets.<sup>1</sup> Disgruntled airline passengers, once content with biting biscuits, may now bite the flight attendants themselves.<sup>2</sup> From judges with elevated benches and lifetime

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<sup>1</sup> See James P. Phillips, *Workplace Violence Against Health Care Workers in the United States*, 374 NEW ENG. J. MED. 1661, 1664-65 (2016) (describing violence in healthcare settings, data limitations, characteristics of offenders, and long-term effects).

<sup>2</sup> See JOYCE A. HUNTER, *ANGER IN THE AIR: COMBATING THE AIR RAGE PHENOMENON* 125 (2009).

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pensions, to dollar store employees toiling in the trenches, workplace violence looms.

This Essay has two aims. First, it describes the modern experience of third-party workplace violence in four varied contexts: dollar stores, education, social work, and courthouses.<sup>3</sup> The National Institute for Occupational Safety and Health divides incidents of workplace violence into four categories: criminal intent with no relationship, customer-client, worker-on-worker, and personal relationship.<sup>4</sup> For our purposes, third-party workplace violence includes the first two categories of incidents.

Second, we augment these descriptions by highlighting the web of relevant legal institutions and interventions, some of which are rarely discussed in connection to workplace violence. Dollar stores illustrate the role of the federal Occupational Safety and Health Administration (“OSHA”), namely its use of inspections, citations, and repeat offender programs. Recent litigation by teachers shows the interaction of tort law with workers compensation for injured employees; meanwhile, legislators consider prohibitions against, and privileges for, arming teachers. Social workers move beyond OSHA and seek to address violence through staffing ratios and de-escalation training, formalized in collective bargaining agreements. Finally, we discuss how courthouse violence by individuals already facing criminal charges has justified the deprivation of otherwise-constitutionally protected rights, namely the right to counsel.

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<sup>3</sup> Trends in workplace violence are challenging to estimate. The Department of Justice released a report finding that the rate of nonfatal workplace violence — including rape/sexual assault and robbery — had decreased by nearly 75% from the early 1990s to the late 2000s. ERIKA HARRELL, *WORKPLACE VIOLENCE, 1993–2009*, at 1 (2011). Data came from the National Crime Victimization Survey, which includes both crimes reported and not reported to the police. *Id.* at 11.

<sup>4</sup> See NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, *WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH NEEDS 14-19* (2006), <https://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf?id=10.26616/NIOSH PUB2006144> [<https://perma.cc/C5KV-A2QC>]; *Types of Workplace Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://wwwn.cdc.gov/WPVHC/Nurses/Course/Slide/Unit1\\_5](https://wwwn.cdc.gov/WPVHC/Nurses/Course/Slide/Unit1_5) (last updated Feb. 7, 2020) [<https://perma.cc/S6S4-UEAR>]; see also Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 728 (2008).

Through these four accounts, we move beyond conceptions of workplace violence that rely only on narrow, oft-cited authorities. Many scholars view workers' compensation and Occupational Safety and Health ("OSH") Act as the driving mechanisms for "achieving healthy and safe workplaces."<sup>5</sup> But that provides an incomplete picture of the levers at play.<sup>6</sup>

By looking beyond the Occupational Health and Safety Administration ("OSHA") and the workers' compensation system, we expose the multiple legal authorities influencing violence at work — and the multiple perspectives on how, and whose, safety matters. For example, even where corporate management seems indifferent to workplace violence, activist shareholders can change company culture, severing the relationship between capitalism and violence.<sup>7</sup> Additionally, while courthouse peace may be paramount, so are defendants' constitutional rights — how, then, do we respond if they have violent reactions in the courthouse? By looking in both familiar and new corners of the American workplace and governing law, our Essay modernizes our understanding of workplace violence.

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<sup>5</sup> See, e.g., Sherley E. Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 644 (2022) (characterizing "OSHA and workers' compensation (workers' comp) [as] the two main systems for workplace safety"); Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1227-28 (2015) (noting that workers' compensation and OSHA nonetheless have "categories of inclusion and exclusion"); Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 187 (2003) (specifying only workers compensation and OSHA laws as "cover[ing] issues involving occupational safety and health").

<sup>6</sup> In briefly canvassing contemporary interventions and debates, our short Essay is limited in its normative assessments. At points we explicitly acknowledge the dearth of empirical studies to assist such assessments. For other contexts, such as the deprivation of the right to counsel for criminal defendants' courthouse violence, the phenomenon is so niche and symbolic as to render such empirical studies challenging. See *infra* Part IV (discussing violence at the courthouse).

<sup>7</sup> In adjacent contexts, like the university, others might protest this characterization, arguing that donors as activist investors have hurt workers and students.

## I. DOLLAR STORES

Dollar stores have emerged as a feature of many communities — and an arena for occupational-safety disputes.<sup>8</sup> The omnipresent dollar store chains are Dollar Tree (which owns Family Dollar)<sup>9</sup> and Dollar General.<sup>10</sup> Surveys suggest both that ninety percent of Americans shop at dollar stores at least a few times per year and that people are more likely to live near a dollar store than a hospital.<sup>11</sup> In displacing traditional, full-service, grocery stores, dollar stores confront longstanding litigation from competitors.<sup>12</sup> Local governments seek to

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<sup>8</sup> Yue Cao, *The Welfare Impact of Dollar Stores 1* (Nov. 1 2022) (Working Paper) (on file with author) (noting that “the number of dollar stores operated by three major chains increased from 7,352 in 2000 to 31,164 in 2019” amidst the decline of other retail stores). The growth has attracted the attention and resistance of local business advocacy groups. See STACY MITCHELL, KENNEDY SMITH & SUSAN HOLMBERG, INSTITUTE FOR LOCAL SELF-RELIANCE, *THE DOLLAR STORE INVASION: COMMUNITIES ARE IN REVOLT, BUT THE CHAINS’ PREDATORY TACTICS ALSO CALL FOR FEDERAL ACTION* 13 (2023), <https://cdn.ilsr.org/wp-content/uploads/2023/01/ILSR-Report-The-Dollar-Store-Invasion-2023.pdf> [<https://perma.cc/R372-3H7W>] (arguing that private equity “set Dollar General on a path of aggressive expansion”).

<sup>9</sup> Dollar Tree traces its history to a 1953 variety store in Virginia, while Family Dollar’s roots lie in its first store opening in Charlotte in 1959. *Our Dollar Tree, Inc. Story*, DOLLAR TREE, INC., <https://corporate.dollartree.com/about/our-history> (last visited Feb. 6, 2024) [<https://perma.cc/VSZ4-VUJ2>]. In 2015, Dollar Tree acquired Family Dollar and soon after celebrated its 15,000th store opening. *Id.*

<sup>10</sup> Dollar General traces its history to a 1939 family dry goods store supplying retailers after the Great Depression. *Our History*, DOLLAR GEN., <https://www.dollargeneral.com/about-us/history> (last visited Feb. 8, 2024) [<https://perma.cc/9WA5-88L7>]. It became a public company in 1968. *Id.*

<sup>11</sup> Brian Vines, *The Truth About Those Dollar Stores*, CONSUMER REPS. (Oct. 6, 2021), <https://www.consumerreports.org/dollar-stores/the-truth-about-those-dollar-stores/> [<https://perma.cc/C496-2D4L>]. Dollar stores thrive during economic downturns, as consumers abandon Wal-Mart for more affordable if unhealthier pastures. See Jane Collins, *Wal-Mart, American Consumer Citizenship, and the 2008 Recession*, 61 *FOCAL J. GLOB. & HIST. ANTHROPOLOGY* 107, 113 (2011).

<sup>12</sup> Full-service grocery stores like Winn-Dixie see the encroachment of dollar stores as not only an existential threat but as a violation of their lease terms, resulting in longstanding litigation. See *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835 (11th Cir. 2018) (providing the last appellate opinion, and overview, in the long-running case); Tanya D. Marsh, *Because of Winn-Dixie: The Common Law of Exclusive Use Covenants*, 69 *U. MIA. L. REV.* 935, 948-65 (2015) (overviewing the underlying facts and

limit their proliferation and preserve retail diversity and access to fresh produce.<sup>13</sup> (Because of their ubiquity in communities with poor health metrics, some scholars have even suggested dollar stores as ideal locations for health interventions, including vaccine distribution.<sup>14</sup>) Southern sundry stores became all-consuming chains with an international future.<sup>15</sup>

Gun violence mars dollar stores, affecting their hundreds of thousands of employees.<sup>16</sup> In a recent three-year period, over two hundred violent incidents involving guns occurred at Family Dollar or Dollar General stores, fifty of which resulted in death.<sup>17</sup> Dollar Tree

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history of Winn-Dixie's litigation against owners of multiple national dollar store chains based on a violation of exclusive use covenants).

<sup>13</sup> Julia McCarthy, Darya Minovi & Chelsea R. Singleton, *Local Measures to Curb Dollar Store Growth: A Policy Scan*, 14 NUTRIENTS 3092, 3097 (2022) (canvassing legal interventions to curb dollar store growth); see also CITY PLANNING COMM'N, CITY OF NEW ORLEANS, SMALL BOX RETAIL DIVERSITY STUDY 4 (2018), <https://nola.gov/nola/media/City-Planning/Major%20Projects/Small%20Box%20Retail%20Diversity%20Study/Small-Box-Retail-Diversity-Final-Report.pdf> [<https://perma.cc/U6B8-23YG>] (finding that among the 36 "small box discount stores" "such as Dollar General, Family Dollar, and Dollar Tree" in New Orleans, only one provided fresh fruits and vegetables); Kennedy Smith, *Dollar Store Restrictions*, INST. FOR LOCAL SELF-RELIANCE (Mar. 23, 2023), <https://ilsr.org/dollar-store-restrictions/> [<https://perma.cc/7UMR-EUPP>].

<sup>14</sup> Fernanda Bravo, Jingyuan Hu & Elisa F. Long, *Closer to Home: Partnering to Distribute Vaccinations Under Spatially Heterogeneous Demand* 5-6 (2023) (unpublished manuscript), [http://www.elisalong.com/uploads/1/0/9/7/109701801/bravo\\_hu\\_long\\_-\\_closer\\_to\\_home\\_2023.pdf](http://www.elisalong.com/uploads/1/0/9/7/109701801/bravo_hu_long_-_closer_to_home_2023.pdf) [<https://perma.cc/6JP5-8CB2>].

<sup>15</sup> See, e.g., Press Release, Dollar General, Inc., Dollar General Marks International Expansion into Mexico with First Mi Súper Dollar General Store Opening (Mar. 24, 2023), <https://newscenter.dollargeneral.com/news/dollar-general-marks-international-expansion-into-mexico-with-first-mi-super-dollar-general-store-opening/8a8adae8-8007-4842-9c48-fa549db440a7/#:~:text=Dollar%20General%20celebrated%20its%20international,Le%C3%B3n%20in%20early%20March%202023.> [<https://perma.cc/888G-9P3P>] (describing the growth of Dollar General into the Mexican market).

<sup>16</sup> Press Release, U.S. Dep't of Labor, Department of Labor Announces Corporate-Wide Settlement Agreement with Dollar Tree, Family Dollar to Address Hazards at Thousands of US Stores (Aug. 23, 2023), <https://www.dol.gov/newsroom/releases/osha/osha20230823#:~:text=The%20settlement%20agreement%20requires%20Dollar,within%20a%20two%20year%20period.> [<https://perma.cc/4PK3-7KVT>] (describing how Dollar Tree and Family Dollar alone employ nearly 200,000 people across the country).

<sup>17</sup> Alec MacGillis, *How Dollar Stores Became Magnets for Crime and Killing*, PROPUBLICA (June 29, 2020, 6:00 AM EDT), <https://www.propublica.org/article/how-dollar-stores-became-magnets-for-crime-and-killing> [<https://perma.cc/YB78-NG4Q>]

witnessed similar gun violence despite having a more suburban presence.<sup>18</sup> A midwestern reporter described Dollar Tree as the only local option (and therefore the only place from where individuals might steal cash).<sup>19</sup> Within a six month span, St. Louis dollar stores hosted three homicides — including one in which an armed individual entered, shot down the center aisle killing an employee in the security guard-less store, panicked, and left empty-handed.<sup>20</sup> Dollar stores' reputations build on both deep discounts and devastating deaths.

Workplace conditions at these stores — low pay and staffing levels — contribute to attrition, outcry, and violence.<sup>21</sup> A sociologist described Dollar General's labor management system of "flexible scheduling" and minimal staffing as central to its self-professed business model, even as the system perplexed store managers.<sup>22</sup> After being robbed at gunpoint while working alone, one Dollar General employee observed the

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(referring to deaths between 2017 and 2020). The article cites to the Gun Violence Archive, which contains disaggregated data searchable by location. GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org> (last visited Feb. 25, 2024) [<https://perma.cc/8MKX-99TF>].

<sup>18</sup> Press Release, Dollar Tree, Inc., Dollar Tree Completes Acquisition of Family Dollar (July 6, 2015, 12:38 PM EDT), <https://corporate.dollartree.com/news-media/press-releases/detail/120/dollar-tree-completes-acquisition-of-family-dollar> [<https://perma.cc/4Y6M-H94Y>] (describing how Dollar Tree targets Middle America "with stores located primarily in suburban areas").

<sup>19</sup> MacGillis, *supra* note 17 (quoting B.J. Bethel, who has reported on the chains for WDTN, the local NBC affiliate); *see also* Amended Complaint at 3, *Wilson v. Dollar Tree, Inc.*, No. 1:22-cv-01910 (N.D. Ohio Nov. 10, 2022) (arguing that there was demonstrated prevalence of "violent crime and robberies that target the Dollar Tree," both in Ohio and in Cuyahoga County specifically).

<sup>20</sup> MacGillis, *supra* note 17.

<sup>21</sup> *See, e.g.*, Tracy Vargas, *Employees Or Suspects? Surveillance And Scrutinization Of Low-wage Service Workers In U.S. Dollar Stores*, 20 J. LAB & SOC'Y 207, 210 (2017) (noting that the "dollar-store economy" "comes at a high cost to employees"); Michael Corkery, "Everything Going the Wrong Way": Dollar Stores Hit a Pandemic Downturn, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/business/dollar-stores-struggling-pandemic.html> [<https://perma.cc/MD5L-ESAX>] (describing a phenomenon where dollar store "employees had taped up signs in the front door announcing that they had walked off the job"). "Capitalism will destroy this country," read one sign in the window of a Dollar General in Eliot, Maine, this spring. "If you don't pay people enough to live their lives, why should they slave away for you?" *Id.*

<sup>22</sup> Tracy L. Vargas, *Consumer Redlining and the Reproduction of Inequality at Dollar General*, 44 QUALITATIVE SOCIO. 205, 207 (2021).

persistence of solo staffing and that “there is no safety at all.”<sup>23</sup> When pressed during the pandemic about the spate of violence, both companies declined to elaborate on safety measures.<sup>24</sup>

Investors have also expressed concern about the relationship between staffing and gun violence. In light of how “[u]nderstaffing and poor security measures” “contribute to increased risk of gun violence,” a shareholder proposal called on Dollar General to conduct a third-party audit on worker health and safety.<sup>25</sup> The proposal passed with more than two-thirds of the vote at the annual shareholder meeting, which included representatives from labor advocacy groups.<sup>26</sup>

These issues have also not escaped the Department of Labor’s attention. Dollar General has been subject to inspections by the OSHA.<sup>27</sup> The OSH Act’s General Duty clause requires employers to broadly provide a safe workplace and prevent “death or serious physical harm.”<sup>28</sup>

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<sup>23</sup> *Id.* at 223 (quoting Maya); *see also* Amended Complaint at 4, *Wilson v. Dollar Tree, Inc.*, No. 1:22-cv-01910 (N.D. Ohio Nov. 10, 2022) (characterizing the store that employed the now deceased Mr. Wilson “did not provide either armed or unarmed security guards” despite some employees having requested them). There was also allegedly “little, if any” employee training regarding security measures. *Id.* at 11.

<sup>24</sup> *See* MacGillis, *supra* note 17.

<sup>25</sup> Dollar General, Inc., 2023 Proxy Statement Summary 65 (2023), [https://investor.dollargeneral.com/download/companies/dollargeneral/Presentations/Dollar%20General\\_2023%20Proxy%20Statement.pdf](https://investor.dollargeneral.com/download/companies/dollargeneral/Presentations/Dollar%20General_2023%20Proxy%20Statement.pdf) [<https://perma.cc/KQE2-FJND>].

<sup>26</sup> Press Release, Domini’s Worker Safety Shareholder Proposal Is Approved, Prompting Progress at Dollar General (June 6, 2023), <https://domini.com/insights/dollar-general-worker-safety-proposal-approved/> [<https://perma.cc/QVM3-KDUF>] (describing the shareholder proposal co-filed by Domini Impact Investments, Adrian Dominican Sisters, Portico Benefit Services, Presbyterian Church U.S.A., Trinity Health, and United Church Funds); *cf.* Tao Chen, Hui Dong & Chen Lin, *Institutional Shareholders and Corporate Social Responsibility*, 135 J. FIN. ECON. 483, 501-02 (2020) (providing evidence that institutional investors, in particular, can affect corporate social responsibility spending through shareholder proposals).

<sup>27</sup> *See Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/oshstats/commonstats.html> (last visited Feb. 21, 2024) [<https://perma.cc/7275-QY8T>] (describing federal OSHA and state analogs’ resource limitations). “[W]ith our state partners we have approximately 1,850 inspectors responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation — which translates to about one compliance officer for every 70,000 workers.” *Id.*

<sup>28</sup> 29 U.S.C. § 654 (a)(1).

Although the agency can adopt more specific standards to clarify this general duty, it has not promulgated a standard governing workplace violence in the years since it publicly recognized the issue's significance in the 1990s.<sup>29</sup>

In lieu of a standard, OSHA has put out nonbinding guidelines and recommendations for particular industries.<sup>30</sup> These guidance documents provide notice for potential workplace inspections, which happen on a programmed basis, or may arise from a complaint, referral, fatality, or catastrophic event.<sup>31</sup> For the latter type, the agency's guidance also details the role of an incident's foreseeability and perpetrator in determining whether an inspection is appropriate.<sup>32</sup> Ultimately, a citation issued under the General Duty Clause should

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<sup>29</sup> OFF. OF INSPECTOR GEN., U.S. DEP'T OF LAB., EVALUATION OF OSHA'S HANDLING OF WORKPLACE VIOLENCE ISSUES, at iii (2001), <https://www.oig.dol.gov/public/reports/oa/2001/2E-10-105-0002.pdf> [<https://perma.cc/8HGD-T2AP>] (noting that "there is no regulatory standard pertaining to workplace violence" and emphasizing how OSHA's approach centers the "issuance of voluntary guidelines and other materials"); Davis, *supra* note 5, at 1229.

<sup>30</sup> See, e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3148-06R, GUIDELINES FOR PREVENTING WORKPLACE VIOLENCE FOR HEALTHCARE AND SOCIAL SERVICE WORKERS, at iv (2016) [hereinafter OSHA GUIDELINES] (asserting that "[t]his guidance document is advisory in nature" and "not a standard or regulation"); OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., DIRECTIVE No. CPL 02-01-058, ENFORCEMENT PROCEDURES AND SCHEDULING FOR OCCUPATIONAL EXPOSURE TO WORKPLACE VIOLENCE 15 (Jan. 1, 2017), [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-01-058.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-058.pdf) [<https://perma.cc/UU4S-FMCY>] [hereinafter OSHA DIRECTIVE ON WORKPLACE VIOLENCE] (explaining how a compliance and safety health officer ("CSHO") "may pursue an investigation for workplace violence hazards during programmed inspections where there is recognition of the potential for workplace violence in that industry or where a hazard exists . . . and meets the criteria above").

However, some workforces, like nannies and maids employed by private residences, remain excluded from OSHA. E.g., Shayak Sarkar, *Intimate Employment*, 39 HARV. J.L. & GENDER 429, 465 n.186 (2016).

<sup>31</sup> OSHA DIRECTIVE ON WORKPLACE VIOLENCE, *supra* note 30, at 5.

<sup>32</sup> *Id.* at 7 (noting that while "OSHA should generally not initiate an inspection in cases of co-worker or personal threats of violence," an inspection may be appropriate based on "(1) whether the incident was foreseeable, that is whether the incidents of co-worker violence are ongoing and/or escalating and whether the employer has taken steps to address the hazard; and (2) if foreseeable, the severity of the incidents").



“identify the specific hazardous condition and/or practice that expose employees to death or serious physical harm.”<sup>33</sup>

Egregious inspection results and repeat workplace safety citations led to Dollar General’s inclusion in OSHA’s Severe Violator Enforcement Program (“SVEP”).<sup>34</sup> Hundreds of inspections produced nearly \$25 million in fines over recent years, reflecting unsafe store conditions nationwide.<sup>35</sup> A subsequent corporate-wide settlement agreement covering nearly all Dollar Tree and Family Dollar stores resulted in significant commitments.<sup>36</sup> That legal settlement formalized a number of abatement measures: a 24/7 hotline for receiving associate safety complaints as well as a safety advisory group comprised of employees.<sup>37</sup> While these measures focused on non-human safety threats — clean and unobstructed exit routes, exit doors, and safe stacking — they also emphasized means of egress for employees confronting human threats.<sup>38</sup>

Adjacent to OSHA’s sensible settlements and citations lie OSHA’s more unwieldy exhortations “to establish a zero-tolerance policy toward workplace violence.”<sup>39</sup> Although it may sound idealistic, zero tolerance is challenging to implement, especially with respect to threats from employees themselves. Such a policy potentially exposes

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<sup>33</sup> *Id.* at 19.

<sup>34</sup> *Severe Violator Enforcement Program*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/enforcement/svep#v-nav-2> (last visited Feb. 13, 2024) [<https://perma.cc/WS4X-9SBK>].

<sup>35</sup> Press Release, U.S. Dep’t of Lab., *Nine Inspections in Four States Find Dollar General Exposed Workers to Obstructed Exits, Fire, Electrical Hazards; Carry \$3.4M in New Penalties* (May 23, 2023), <https://www.dol.gov/newsroom/releases/osha/osha20230523-2> [<https://perma.cc/K6A2-7Q7F>] (aggregating fines from 2017-2023).

<sup>36</sup> U.S. Dep’t of Labor, *supra* note 16 (covering stores within federal OSHA jurisdiction).

<sup>37</sup> *Corporate-Wide Settlement Agreement* app. B, at 1-2, *Su v. Family Dollar Store* (Aug. 17, 2023), <https://www.osha.gov/sites/default/files/2023-08/Appendix-B-Enhanced-Abatement-Measures.pdf> [<https://perma.cc/WPU9-AEHW>].

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Healthcare, Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/healthcare/workplace-violence/> (last visited Feb. 15, 2024) [<https://perma.cc/7EQP-8KEX>] (“The policy should cover all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with workers of the facility.”).

employers to liability for marginalizing employees with disabilities like autism or bipolar disorder, to the extent these employees' mood regulation may be unfairly perceived as "risky."<sup>40</sup> Courts have expressly grappled with how to accommodate and prevent discrimination against employees with psychiatric disabilities while still addressing workplace threats.<sup>41</sup> In confronting "two competing but equally valid public policy interests — the need for a safe workplace, as weighed against the need to accommodate and treat mental illness," one judge carefully parsed the facts to allow a plaintiff who was fired after experiencing homicidal ideations at work to proceed to discovery on a disability-discrimination claim.<sup>42</sup>

Dollar stores attract both the American public and workplace violence. OSHA's lack of workplace violence regulation has shifted focus to inspections and citations, culminating in the Severe Violator Enforcement Program and attendant abatement measures. Their impact and the future of dollar stores remains to be seen, though zero-tolerance is unlikely to be a realistic or legally viable option.

## II. SCHOOLS

As jarring as violence at a store may be, violence at school can uniquely unsettle a community. School shootings severely injure students and

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<sup>40</sup> Ryan H. Nelson & Michael Ashley Stein, *Ability Apartheid and Paid Leave*, 120 MICH. L. REV. 1247, 1254 (2022) (reviewing PAUL DAVID HARPUR, *ABLEISM AT WORK: DISABLEMENT AND HIERARCHIES OF IMPAIRMENT* (2020)).

<sup>41</sup> See generally *Walton v. Spherion Staffing LLC*, 152 F. Supp. 3d 403, 408 (E.D. Pa. 2015) (summarizing caselaw describing how individuals who are threats to themselves or others may not be entitled to protection under the Americans with Disabilities Act and state analogs); *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1219 (S.D. Ohio 1988) (dismissing an employment discrimination claim by a plaintiff with paranoid schizophrenia). "The forbearance of the Postal Service is remarkable to say the least. In two of the incidents that involved violence the Plaintiff was dismissed and later reinstated. . . . How many times must violence be overlooked before a 'reasonable accommodation' has been achieved." *Id.* at 1218-19.

<sup>42</sup> *Walton*, 152 F. Supp. 3d at 404. In allowing the plaintiff's case to proceed to discovery, the *Walton* court explained that a "credible argument can be made that *failing* to provide treatment to someone such as the Plaintiff, who has to some degree identified his need for treatment and sought help, would create a greater risk of violence." *Id.* at 410.

teachers alike.<sup>43</sup> At the beginning of 2024, before the new year's classes had begun, an Iowa student killed his principal, Dan Marburger, and a peer and injured four other students before turning the gun on himself.<sup>44</sup> The principal's daughter, Claire Marburger, quickly urged the community to "show grace to the [deceased perpetrator's] family, as we are not our kids' mistakes and actions or our parents' mistakes and actions. Remember this is something [that] family has to live with, too, as well as losing their child."<sup>45</sup> These important invocations, echoing other victims' calls for peace, nonetheless cannot repair the damage done.

When school employees sue to address such damage, courts must resolve a complicated threshold issue of whether their claims are precluded by state's workers' compensation exclusivity.<sup>46</sup> Consider Abigail Zwerner, a former first-grade teacher who was shot by a six-year-

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<sup>43</sup> They can also affect entire communities and neighboring children in stark and measurable ways. Economists used decades of Texas data to estimate how school shootings result in short-run increases in absenteeism and likelihood of grade repetition, as well as long-term declines in graduation, college matriculation, and college completion. Marika Cabral, Bokyoung Kim, Maya Rossin-Slater, Molly Schnell & Hannes Schwandt, *Trauma at School: The Impacts of Shootings on Students' Human Capital and Economics Outcomes 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28311, 2022), [https://www.nber.org/system/files/working\\_papers/w28311/w28311.pdf](https://www.nber.org/system/files/working_papers/w28311/w28311.pdf).

For the short-term effects, the authors utilize students' academic trajectories before and after in-school shootings with students' trajectories at control schools; for the long-term outcomes, the authors layer on differences between cohorts who attended before the school shooting with later cohorts. *Id.* at 4.

<sup>44</sup> Julie Bosman & Ann Hinga Klein, *A Day Later, the Iowa School Shooting Strikes an Intimate, Painful Chord*, N.Y. TIMES (Jan. 5, 2024), <https://www.nytimes.com/2024/01/05/us/school-shooting-perry-iowa.html>. Principal Marburger eventually succumbed to his injuries. Livia Albeck-Ripka, *Iowa High School Principal Injured in Perry Shooting Has Died*, N.Y. TIMES, (Jan. 14, 2024), <https://www.nytimes.com/2024/01/14/us/school-shooting-perry-iowa-principal-dead.html>.

<sup>45</sup> Bosman & Klein, *supra* note 44.

<sup>46</sup> Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641-43 (1983) (describing the early twentieth-century "transition from a common law [tort] remedy to an exclusive [statutory] remedy"). A century ago, this may have not been "a great sacrifice for workers [as] the common law would have left most of their injuries uncompensated." *Id.* at 1641.

old student.<sup>47</sup> Zwerner sought \$40 million for compensatory damages in a lawsuit against the School Board (“Defendants”), but Defendants argued that any remedy fell exclusively under the workers’ compensation statute. Under workers’ compensation, Zwerner would have received a comparative pittance.<sup>48</sup> The question before the court was whether Zwerner’s injury arose out of her employment as “a first-grade teacher in a general classroom,”<sup>49</sup> as to be governed by worker’s compensation — that is whether the six-year-old’s shooting resulted from “an actual risk arising out of [Zwerner’s] employment.”<sup>50</sup>

The Virginia court answered the question negatively and allowed Zwerner’s tort lawsuit to proceed. The court believed that a “job as a first-grade teacher in a general [as opposed to special education] classroom setting does not increase the risk of an injury like the one inflicted by the Student.”<sup>51</sup> The court also described the shooting as “personal,” recognizing the student’s past disagreements with Zwerner and the absence of threats to other teachers or administrators.<sup>52</sup> The court thus rejected the idea that the child’s intentional shooting resulted from an actual risk of general elementary school employment.

On appeal, the school board argues, and data suggest, that Zwerner’s experience reflects an actual job-related risk that should force her into the workers’ compensation system. Per the school board, the risk “of a teacher being injured at the hands of a student” — is a “common

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<sup>47</sup> *Zwerner v. Newport News Sch. Bd.*, No. CL2301446H-OO, 2023 Va. Cir. LEXIS 219, at \*1 (Va. Cir. Ct. Nov. 3, 2023).

<sup>48</sup> See VA. CODE ANN. § 65.2-500(A) (2023) (tying workers’ compensation income benefits to average weekly wages).

<sup>49</sup> *Zwerner*, 2023 Va. Cir. LEXIS 219, at \*15-16.

<sup>50</sup> *Id.* at \*6-7 (citing *Reamer v. Nat’l Serv. Indus.*, 237 Va. 466, 470 (1989)). See generally *Cruz*, *supra* note 5, at 680 (arguing that “[w]hether the injury arises out of and occurs from the employment is a key factor in obtaining a workers’ comp award”).

<sup>51</sup> *Zwerner*, 2023 Va. Cir. LEXIS 219, at \*15.

<sup>52</sup> *Id.* at \*16. In contrast, consider a recent California tort lawsuit successfully brought by a student plaintiff shot by a teenage peer and alleging negligence in the District’s “threat assessment” process and reporting. *Cleveland v. Taft Union High Sch. Dist.*, 76 Cal. App. 5th 776, 782 (2022). In that case, a “hit list” containing many people beyond the plaintiff helped the plaintiff’s case, as did the communication failures surrounding various threats. *Id.* at 785-89.

occurrence . . . only increasing in frequency this day and age.”<sup>53</sup> To that end, the K-12 School Shooting Database has documented an exponential increase in school shootings beginning in 2018.<sup>54</sup>

The court must determine the appropriate frame of reference for the risk. It focused on shootings in *general* classrooms in Virginia’s *elementary* schools. In contrast, the K-12 School Shooting Database is national in scope and covers non-elementary classroom spaces — shootings in California’s high school parking lots may reflect different risk assessments than those in *Zwerner*.

Regardless of the court’s analysis (of which we are skeptical), this case highlights an important feature of school violence.<sup>55</sup> This injured teacher’s effort to avoid an administrative resolution and pursue damages through litigation raises significant questions of how (un)remarkable, or personalized, a student’s shooting rampage may be.

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<sup>53</sup> Amanda Holpuch, *Teacher Shot by 6-Year-Old Student Can Sue School District, Judge Rules*, N.Y. TIMES (Nov. 4, 2023), <https://www.nytimes.com/2023/11/04/us/virginia-teacher-shooting-lawsuit.html>.

<sup>54</sup> According to the database’s methodology, a shooting incident reflects “when a gun is fired, brandished (pointed at a person with intent), or bullet hits school property, regardless of the number of victims, time, day, or reason.” *Research Question*, K-12 SCHOOL SHOOTING DATABASE, <https://k12ssdb.org/methodology-1> (last visited Feb. 21, 2024) [<https://perma.cc/3Z85-GYQG>]. While before 2018, there had never been more than 60 incidents per year, beginning in 2018, there haven’t been less than 116, with 2023’s incident count currently at 350. *Id.* The annual victim-fatality counts, however, are less monotonic due to single-incident mass casualties like the 26 people killed at Sandy Hook Elementary in 2012.

<sup>55</sup> For example, the court somewhat breezily implies that the risk of shooting is more appreciable in a “special needs” classroom. *Zwerner*, 2023 Va. Cir. LEXIS 219, at \*14-15. While employers can be held liable for negligence, courts and workers compensation statutes often exclude third party’s criminal acts from coverage because of these crimes’ purported unforeseeability. *See, e.g.*, Michael D. Moberly, *The Workplace Injunction: An Emerging but Imperfect Weapon in the Fight Against Domestic Violence*, 26 AM. U. J. GENDER, SOC. POL’Y & L. 831, 842-44 (2018) (arguing that employers’ obligation to provide a safe work environment to their employees “logically encompasses a duty to protect employees from workplace domestic violence”); Widiss, *supra* note 4, at 683 n.39 (describing how employers faced tort liability when they failed to take reasonable precautions to protect domestic violence victims).

And those chilling sociological questions bear on institutional liability and deterrence.<sup>56</sup>

As opposed to shock and horror, focusing on thorny tort liability questions for injured school employees regularizes teachers injured by firearms, like firefighters facing burn wounds. Alongside a rise in school shootings<sup>57</sup> came recommendations to increase human and physical security by relying on school resource officers as well as metal detectors, despite the latter's effect on morale.<sup>58</sup> Since then, threat assessments have also taken hold, and poor protocols or deviations can result in negligence liability in tort law.<sup>59</sup>

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<sup>56</sup> Steven Shavell, *Economic Analysis of Accident Law* 69-70 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9694, 2003), [https://www.nber.org/system/files/working\\_papers/w9694/w9694.pdf](https://www.nber.org/system/files/working_papers/w9694/w9694.pdf) [<https://perma.cc/PFQ3-FGAW>] (describing the dual motives of individual compensation and deterrence in tort liability).

<sup>57</sup> See, e.g., Leila Nadya Sadat, *Torture in Our Schools?*, 135 HARV. L. REV. F. 512, 515-16 (2022) (describing the rise in school shootings over the last 50 years).

<sup>58</sup> Traci L. Wike & Mark W. Fraser, *School Shootings: Making Sense of the Senseless*, 14 AGGRESSION & VIOLENT BEHAV. 162, 166, 168 (2009). In theory, school resource officers are not only armed police officers patrolling the school but also adult figures engaging in preventative programs. Antonis Katsiyannis, Denise K. Whitford & Robin Parks Ennis, *Historical Examination of United States Intentional Mass School Shootings in the 20th and 21st Centuries: Implications for Students, Schools, and Society*, 27 J. CHILD & FAM. STUD. 2562, 2570 (2018).

Metal detectors are, to some, part and parcel of a troubling transformation of educational institutions. See, e.g., JOHN DEVINE, MAXIMUM SECURITY: THE CULTURE OF VIOLENCE IN INNER-CITY SCHOOLS 76 (1996) ("Although violent students acts . . . are perceived as abnormal and rare, . . . the techno-response is seen as normal . . . Funds are appropriated for more and better trained guards, metal detectors, X-ray scanning machines, electromagnetic door locks, alarm systems, emergency telephones, and other security equipment."). Scholars are also finding empirical evidence of the efficacy of restorative justice practices. See, e.g., Anjali Adukia, Benjamin Feigenberg & Fatemeh Momeni, *From Retributive to Restorative: An Alternative Approach to Justice* 25 (Becker Friedman Inst. for Rsch. in Econ., Working Paper No. 2023-117, 2023), [https://econ.uic.edu/wp-content/uploads/sites/283/2023/10/BFI\\_WP\\_2023-117.pdf](https://econ.uic.edu/wp-content/uploads/sites/283/2023/10/BFI_WP_2023-117.pdf) [<https://perma.cc/2FQ7-WWH2>] (estimating that restorative practices reduce the number of out-of-school suspensions, especially among Black male and female students, with their increased instructional time producing academic gains).

<sup>59</sup> See, e.g., *Cleveland v. Taft Union High Sch. Dist.*, 76 Cal. App. 5th 776, 782 (2022) (concluding that "substantial evidence supports the jury's finding that the campus supervisor's failure to report information, like the threat assessment teams' many other failures to communicate information, was a substantial factor in causing plaintiff's injuries").

Beyond common law tort, which can result in multimillion dollar verdicts against negligent districts, lie other legal authorities aimed at curbing school violence. Congress passed notable federal laws at the end of the 20th century like the Gun Free School Zones Act of 1990<sup>60</sup> and Gun Free Schools Act of 1994,<sup>61</sup> which required expulsion for firearm possession at school.<sup>62</sup> While many connect the availability of guns to school shootings,<sup>63</sup> modest gun control measures in affected states have faced uphill battles.<sup>64</sup> Even Republican mothers at a private, Christian school in one of Nashville's wealthiest neighborhoods faced challenges, if not outright dismissiveness, in lobbying Tennessee state legislators after experiencing a school shooting.<sup>65</sup>

Rather than restricting guns at school, newer state self-help laws promote the arming of teachers, though firearm federalism has divided the country. After the school shootings in Parkland, Florida, the state convened the Marjory Stoneman Douglas High School Public Safety

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<sup>60</sup> 18 U.S.C. § 922(q)(2)-(3) (restricting gun possession in school zones).

<sup>61</sup> 20 U.S.C. § 7961(b)(1) ("Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school.").

<sup>62</sup> *Id.* Another example is the Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322, 108 Stat. 1796. This omnibus bill included grants to the states "for the purpose of developing alternative methods of punishment for young offenders to traditional forms of incarceration" as well as restrictions on the manufacture and possession of so-called "assault weapons." §§ 20201, 110101-03; *see also* James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 *CARDOZO L. REV.* 681, 683 (2015) (discussing the expiration of the 1994 assault weapons ban in 2004, and the subsequent failed efforts to revive it after the 2012 Sandy Hook Elementary School massacre in Newtown, Connecticut). State weapons prohibitions beyond assault weapons bans continue to percolate, often in response to school shootings. *Id.*; *see also* Emily Cochrane, *The Covenant Parents Aren't Going to Keep Quiet on Guns*, *N.Y. TIMES* (Dec. 26, 2023), <https://www.nytimes.com/2023/12/26/us/politics/nashville-school-shooting-covenant-parents.html> [<https://perma.cc/37NP-H8SM>] (describing "one of the parents' highest priorities — a law that would allow judges to temporarily remove weapons from people deemed to be a threat to themselves or others").

<sup>63</sup> *See, e.g.*, Sadat, *supra* note 57, at 516 (emphasizing the role of "unregulated gun ownership").

<sup>64</sup> *Id.* at 515-16 (describing the difficulties faced by Florida citizens fighting for more stringent gun control post-Parkland); Cochrane, *supra* note 62.

<sup>65</sup> Cochrane, *supra* note 62.

Commission, which recommended that schools permit teachers to volunteer to become armed “guardians,”<sup>66</sup> ensuring that Florida schools will have “enough armed personnel . . . who are willing to volunteer for the responsibility to stop an active shooter as soon as possible.”<sup>67</sup> In contrast, the state of New York barred districts from arming teachers, with scholars noting how the “guns in schools” issue, including power struggles between firearm “sanctuary” districts and states, raise constitutional questions.<sup>68</sup> Beyond the lofty legal questions lies the absence of evidence on how laws allowing armed staff in K-12 schools affect school safety.<sup>69</sup>

Educators appear to support fewer, not more, guns. Becky Pringle, President of the National Education Association, testified before Congress that “we cannot ask educators . . . to carry weapons and wear body armor while teaching addition or the Pythagorean Theorem.”<sup>70</sup> This comports with surveys showing that the majority of teachers feel that their being armed would make students less safe, a finding robust

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<sup>66</sup> FLA. STAT. § 1006.12(3) (2023).

<sup>67</sup> MARJORY STONEMAN DOUGLAS HIGH SCH. PUB. SAFETY COMM’N, SECOND REPORT 87 (Nov. 2019), <https://www.fdle.state.fl.us/MSDHS/MSD-Report-2-Public-Version.pdf> [<https://perma.cc/V3S6-4XQ6>].

<sup>68</sup> Dave Fagundes & Darrell A.H. Miller, *The City’s Second Amendment*, 106 CORNELL L. REV. 677, 738 (2021).

<sup>69</sup> *The Effects of Laws Allowing Armed Staff in K-12 Schools*, RAND CORP., <https://www.rand.org/research/gun-policy/analysis/laws-allowing-armed-staff-in-K12-schools.html> (last updated Jan. 10, 2023) [<https://perma.cc/77B4-6BCU>] (finding “no qualifying studies showing that laws allowing armed staff in K-12 schools increased [or decreased] any of the eight outcomes”: defensive gun use, gun industry outcomes, hunting and recreation, mass shootings, police shootings, suicide, unintentional injuries and deaths, and violent crime).

<sup>70</sup> Press Release, Staci Maiers, Nat’l Educ. Ass’n, NEA President Becky Pringle Testifies at House Committee on Oversight and Reform, Urges Congress to Act to End Gun Violence (June 8, 2022), <https://www.nea.org/about-nea/media-center/press-releases/nea-president-becky-pringle-testifies-house-committee-oversight-and-reform-urges-congress-act-end> [<https://perma.cc/T3G5-YZUT>].



to teacher gender and race.<sup>71</sup> Public school parents, and adults generally, feel similarly.<sup>72</sup>

In sum, tort lawsuits brought by injured teachers wrestle with the exclusivity of workers' compensation. Their lawsuits raise important questions as to whether school shootings are now simply hazards of educational employment. Federal gun law and state laws that either prohibit teachers from arming themselves on campus, or afford them the right to do so, reflect conflicting ways aimed at protecting school communities.

### III. FOSTER CARE SOCIAL WORKERS

Youth in the foster care system may refract their poor treatment on those closest to them: social workers. Consider the practice of “hoteling”—youth in foster care (including nonminor dependents in their twenties) are placed in hotels (or even offices) rather than the traditional placements required by state statute.<sup>73</sup> In Washington, a

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<sup>71</sup> BRIAN A. JACKSON, MELISSA KAY DILIBERTI, PAULINE MOORE & HEATHER L. SCHWARTZ, RAND CORP., TEACHERS' VIEWS ON SCHOOL SAFETY: CONSENSUS ON MANY SECURITY MEASURES, BUT STARK DIVISION ABOUT ARMING TEACHERS 4 fig.1 (2023), [https://www.rand.org/pubs/research\\_reports/RRA2641-1.html](https://www.rand.org/pubs/research_reports/RRA2641-1.html) [<https://perma.cc/V4DS-TW34>].

<sup>72</sup> See PHI DELTA KAPPA INT'L, PUBLIC BROADLY SUPPORTS SCHOOL SECURITY — BUT NOT ARMED TEACHERS AND STAFF 1 (2022), [https://pdkpoll.org/wp-content/uploads/2022/08/2022\\_PDK\\_Poll\\_School\\_Security.pdf](https://pdkpoll.org/wp-content/uploads/2022/08/2022_PDK_Poll_School_Security.pdf) [<https://perma.cc/3A5J-SG8K>] (reporting that while 80% of adults strongly or somewhat support mental health screenings as a school security measure, only 45% felt similarly about armed teachers). Among public school parents, 79% of adults strongly or somewhat support mental health screenings as a school security measure, while only 43% felt similarly about armed teachers. *Id.*

<sup>73</sup> See Complaint, A.R. & B.C. v. Oregon, No. 3:16-cv-01895 (D. Or. Sept. 27, 2016) (alleging constitutional and statutory violations based on the practice of “hoteling”). The case specifies how hotels are used rather than placing children with relatives, “certified non-relative foster home or, if necessary, congregate or group care or a residential treatment facility.” *Id.* at 5-6, 10; see also Taylor Mirfendereski & Chris Ingalls, *Foster Teen's Violent Attack of Washington Social Worker Highlights Lack of Safety Solutions*, KING 5 (Mar. 6, 2023, 3:54 PM PST), <https://www.king5.com/article/news/investigations/foster-violent-attack-washington-social-safety-solutions/281-c8c47fa6-a392-4483-9d13-8592094e5c8c> [<https://perma.cc/3TJA-W56X>]; OFF. OF THE FAM. & CHILDREN'S OMBUDS, STATE OF WASH., ANNUAL REPORT 19-20 (2023), [https://ofco.wa.gov/sites/default/files/2023-11/2023\\_OFCO\\_Annual\\_Report.pdf](https://ofco.wa.gov/sites/default/files/2023-11/2023_OFCO_Annual_Report.pdf) [<https://perma.cc/6L8E-EMUM>] (discussing staff safety and trauma-informed support for Washington social workers).

report by the Office of Family and Children's ("OFC") ombuds reported that the majority of assault and other serious conduct by youth in the foster system against workers occurred in hotels or other temporary placement facilities.<sup>74</sup> South Carolina confronted a similar situation.<sup>75</sup>

Because these youth are injuring the very adults assigned to ensure their thriving, social workers' reliance on police can further client deterioration, if not entry into the so-called foster care-to-prison pipeline.<sup>76</sup> As the Washington OFC report indicated, the thirty-three youth implicated in these incidents "frequently have special needs and are some of the most challenging children for DCYF to appropriately [legally] place."<sup>77</sup> Rather than relying solely on police, the primary

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<sup>74</sup> Federally highlighted risk factors include working with people in social service settings as well as in community settings such as group homes. OSHA DIRECTIVE ON WORKPLACE VIOLENCE, *supra* note 30, at 9 (citing NIOSH Current Intelligence Bulletin #57: Violence in the Workplace: Risk Factors and Prevention Strategies (1996)) (documenting ten known risk factors for workplace violence including contact with the public or with people in healthcare, social service, or criminal justice settings; working in small numbers, late at night, or in high-crime areas; and working in community settings such as drug rehabilitation centers and group homes).

<sup>75</sup> T. Michael Boddie, "Aggravated Assault by Mob" Added to Charges for 7 Foster Teens at Columbia DSS Building, *POST & COURIER* (Aug. 24, 2023), [https://www.postandcourier.com/columbia/sc-foster-teens-charged-with-aggravated-assault-by-mob-at-dss-building/article\\_912b1730-42a1-11ee-993d-37477c321c20.html](https://www.postandcourier.com/columbia/sc-foster-teens-charged-with-aggravated-assault-by-mob-at-dss-building/article_912b1730-42a1-11ee-993d-37477c321c20.html) [<https://perma.cc/TX9P-9UJD>] (describing how seven teenagers of various genders forced to sleep at Department of Social Services offices faced criminal charges for a collective attack on a social worker). "[T]he incident's occurrence at a DSS office at night caught the attention of Columbia-area residents who have noticed an overflow of kids in foster care without foster homes." *Id.*

<sup>76</sup> Dorothy E. Roberts, *Digitizing the Carceral State*, 132 *HARV. L. REV.* 1695, 1704-05 (2019) (reviewing VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018)) (arguing that "[t]he carceral state also runs a foster-care-to-prison pipeline" as "welfare authorities frequently have foster children arrested"). *But see* E. Jason Baron & Max Gross, *Is There a Foster Care-to-Prison Pipeline? Evidence from Quasi-Randomly Assigned Investigators 1-2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29922, 2022), [https://www.nber.org/system/files/working\\_papers/w29922/w29922.pdf](https://www.nber.org/system/files/working_papers/w29922/w29922.pdf) [<https://perma.cc/6YAC-KGDH>] (exploiting plausibly exogenous variation in foster care assignments based on child welfare investigator assignment and using Michigan administrative data to show that "foster care placement substantially reduces the chances of later-in-life criminal involvement for children at the margin").

<sup>77</sup> OFF. OF THE FAM. & CHILDREN'S OMBUDS, *supra* note 73, at 19.

recommendations to mitigate violent acts were to increase “staff ratios when supervising placement at a hotel or leased facility and when transporting a child” and to ensure “sufficient training and supervision, including in de-escalation techniques.”<sup>78</sup> The recommendations internalized safety, through both increased staffing and de-escalation training, rather than focusing on external parties. Yet as non-binding recommendations, they lacked legal force.

Unions allow social workers to formalize workplace standards, but the history of unions and social workers has vacillated between antagonism and cooperation. Into the early twentieth century, tensions divided social workers — both upper class volunteers and middle class paid professionals — from organized labor: union members opposed social workers who might suggest to an unemployed client that he “go out and apply for a position as a strike breaker.”<sup>79</sup> Eventually, the Great Depression’s transformation of American society nudged social workers away from a focus on individual dynamics to an appreciation of potential structural reforms, and an alliance with organized labor.<sup>80</sup> Social worker unions eventually focused on conditions arguably incidental to their professional lives but fundamental to their clients’ lives.<sup>81</sup>

The union representing Los Angeles County social workers raised concerns about injured staff and won contractual concessions echoing the Washington OFC recommendations — increased staffing and de-

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<sup>78</sup> *Id.* at 20.

<sup>79</sup> Shulamith Lala Ashenberg Straussner & Norma Kolko Phillips, *The Relationship Between Social Work and Labor Unions: A History of Strife and Cooperation*, 15 J. SOCIO. & SOC. WELFARE 105, 110 (1988). “Likewise, union members were enraged when, after a bitter struggle of the unions to gain a six-day work week, a staff member of a family casework agency was found actually writing to an employer, asking him to give the employee seven days’ work a week because his large family and other complications made an increased income desirable.” *Id.* at 110 (internal alterations, citations, and quotations omitted).

<sup>80</sup> *Id.* at 112-15.

<sup>81</sup> See Randi Weingarten, *Bargaining for the Common Good: How Unions and Labor Contracts Create a Better Life for All*, 43 BERKELEY J. EMP. & LAB. L. 241, 245 (2021) (describing “things like lower caseloads for social workers” as part of bargaining for the common good); Note, *Collective Bargaining and the Professional Employee*, 69 COLUM. L. REV. 277, 289-91 (1969).

escalation training.<sup>82</sup> Admittedly, the most recent collective bargaining agreement for LA county social workers avoids detailing standards to avoid workplace violence. It broadly discusses “safety and health” by cross-referencing OSHA.<sup>83</sup> Yet for employees of the Department of Mental Health, which provides services for youth struggling with severe mental illness,<sup>84</sup> the collective bargaining agreement (“CBA”) specifies a few measures to prevent workplace violence, including assault prevention training, handheld alarms, and facility panic buttons.<sup>85</sup>

Significantly, the CBA expressly defines both workloads<sup>86</sup> and caseloads.<sup>87</sup> The agreement creates a facilitated committee, with the opportunity to invite experts, to ensure “effective caseloads and manageable workloads to provide the necessary services to children and their families.”<sup>88</sup> This includes meeting particular quantitative staffing targets across program categories, including for those focused on high-risk populations.<sup>89</sup>

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<sup>82</sup> See Rebecca Ellis & Kathryn Hurd, “We Have No Placement for Them”: L.A. County Still Keeping Troubled Youths in Hotel Rooms, L.A. TIMES (June 25, 2023, 5:00 AM PST), <https://www.latimes.com/california/story/2023-06-25/los-angeles-county-foster-care-hotels> [<https://perma.cc/4PKM-QXJE>]. See generally Lucy D. Rey, *What Social Workers Need to Know About Client Violence*, 77 FAMILIES IN SOC. 33, 33-35 (1996) (reporting results of workplace violence survey of 175 licensed social workers). Rey’s concluding recommendations included learning techniques to deescalate violent situations. *Id.* at 33.

<sup>83</sup> Memorandum from Authorized Mgmt. Reps. of the Cnty. of L.A. & SEIU Local 721, to Bd. of Supervisors, Regarding the Children’s Social Workers Employee Representation Unit 100 (Dec. 6, 2022), [https://file.lacounty.gov/SDSInter/lac/1031030\\_723.pdf](https://file.lacounty.gov/SDSInter/lac/1031030_723.pdf) [<https://perma.cc/9PAS-67DB>] [hereinafter Memorandum].

<sup>84</sup> *Transition Age Youth*, L.A. CNTY. DEP’T OF MENTAL HEALTH, <https://dmh.lacounty.gov/our-services/transition-age-youth/> (last visited Feb. 10, 2024) [<https://perma.cc/9V97-EWYW>] (“Transition Age Youth (TAY) programs provide an array of mental health and supportive services for Seriously Emotionally Disturbed (SED) and Severe and Persistently Mentally Ill (SPMI) youth ages 16-25.”).

<sup>85</sup> Memorandum, *supra* note 83, art. 42, at 110-11.

<sup>86</sup> *Id.* art. 46, § 1, at 119 (defining workload as “the number of employee hours which represents the work effort required to successfully complete a given quantity of tasks”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* art. 46, § 3, at 121.

<sup>89</sup> *Id.* art. 46, § 4, at 123. Nonetheless, increased staffing manifested through institutional care faced challenges. After California’s 2015 legislative reforms moved away from congregate care, building intensive treatment foster care homes and non-carceral but secure congregate care facilities remain fraught. A.B. 403, ch. 773, § 1(a),

These agreements formalize concerns expressed, if not enforced, by federal agencies. Staffing levels, types of staffing, and training preoccupy OSHA's guidelines addressing high-risk social service settings. In the advisory Workplace Violence Program Checklists, key employee risk factors are "Do they work alone?" and "Is the workplace often understaffed?"<sup>90</sup> Additional risk factors that address the type of staffing include the adequacy of trained staff available "to protect workers who are in potentially dangerous situations" and whether "trained security personnel" are accessible to workers in a "timely manner."<sup>91</sup> For training, OSHA asks whether workers can "defuse potentially violent situations" and are trained in personal safety, including self-defense.<sup>92</sup>

While these OSHA factors are advisory, collective bargaining agreements can legally ratify the underlying concerns.<sup>93</sup> These agreements can protect publicly employed children's social workers from clients' violent acts as well as protect clients themselves.<sup>94</sup>

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2015 Leg., Reg. Sess. (Cal. 2015), [http://leginfo.ca.gov/pub/15-16/bill/asm/ab\\_0401-0450/ab\\_403\\_bill\\_20151011\\_chaptered.pdf](http://leginfo.ca.gov/pub/15-16/bill/asm/ab_0401-0450/ab_403_bill_20151011_chaptered.pdf) [<https://perma.cc/JAJ4-7NFZ>] (articulating legislative intent of "using comprehensive initial child assessments, increasing the use of home-based family care and the provision of services and supports to home-based family care, [and] reducing the use of congregate care placement settings"); see also Paul Lanier, Gerard Chung & Roderick Rose, *A Quasi-Experimental Study of Intensive Alternative Family Treatment to Prevent Entry of Youth to Psychiatric Residential Treatment*, 39 CHILD & ADOLESCENT SOC. WORK J. 303, 304, 310 (2022) (arguing that Intensive Alternative Family Treatment, an intensive therapeutic foster care model, while expensive, should be considered an alternative to residential, or congregate, care).

<sup>90</sup> OSHA GUIDELINES, *supra* note 30, at 30-31.

<sup>91</sup> *Id.* at 35.

<sup>92</sup> *Id.* at 36.

<sup>93</sup> Cf. Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 519 (2009) (describing how OSHA standards can help "gain bargaining strength during organizing campaigns, and also after a collective bargaining agreement is in place" as "[m]any collective bargaining agreements call for the creation of joint committees on occupational safety and health").

<sup>94</sup> Rey, *supra* note 82, at 33 (advocating for "high professional self-esteem" and "refusal to accept violence as a condition of life for our clients or ourselves" (emphasis added)).

Some workforces, like nannies and maids in private residences, lack access to collective bargaining, and therefore must address workplace violence through other means. See, e.g., Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. &

## IV. COUNSEL AT COURT

The courthouse, whether for civil matters like child welfare or for criminal proceedings, is more than a workplace. It is also a hallowed if imperfect site of American law and justice. In striking down a general practice of shackling defendants in front of juries, the Supreme Court explained how “[t]he courtroom’s formal dignity” “reflects a seriousness of purpose” as well as “the judicial system’s power to inspire the confidence and . . . behavior of a general public.”<sup>95</sup>

The courthouse’s decorum and physical architecture have long been extolled, perhaps too reflexively. Nineteenth century courthouses were characterized as “Temples of Justice.”<sup>96</sup> Yet even beautiful renderings and sophisticated words can mask ugly realities — courthouse depictions of Justice itself, sword in hand, “reiterate[] law’s power and its violence”<sup>97</sup> and “decorum” has been historically used as a euphemistic way to justify racial segregation in courtrooms.<sup>98</sup>

Courthouse violence includes acts committed by defendants against their lawyers, particularly public defenders.<sup>99</sup> Courthouse shootings

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FEMINISM 1, 3-19 (2020) (noting both domestic workers’ exclusion from collective bargaining in the United States as well as the inclusion of collective bargaining rights in the International Labour Organization’s Domestic Workers Convention).

<sup>95</sup> *Deck v. Missouri*, 544 U.S. 622, 631 (2005); *see also Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding “that a defendant can lose his right to be present at trial” if, after the judge’s warning of removal for continued disruption, defendant’s conduct is “so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom”). The *Allen* court emphasized that the right could “be reclaimed” upon the defendant comporting “with the decorum and respect inherent in the concept of courts and judicial proceedings.” *Id.*

<sup>96</sup> JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 137 (2011).

<sup>97</sup> *Id.* at 292; *see also* Richard Delgado, *Law’s Violence: Derrick Bell’s Next Article*, 75 U. PITT. L. REV. 435, 441-42 (2014) (arguing that “those societies with the most law, like South Africa under apartheid, with its elaborate rules, passes, ethnic categories, and checklists, or the American South under the Black Codes, have been . . . among the worst, with high levels of crime, imprisonment, income inequality, and other measures of social distress”).

<sup>98</sup> *See, e.g.,* RESNIK & CURTIS, *supra* note 96, at 138 (“The City Attorney for Richmond, Virginia defended the ‘long established practice’ of segregated seating on the grounds that it avoided friction and preserved ‘order and decorum in the courtroom.’”).

<sup>99</sup> *See, e.g., State v. Lehman*, 749 N.W.2d 76, 79 (Minn. Ct. App. 2008) (“Appellant attacked and beat his attorney in open court while on trial for felony assault after the

have sometimes ended lives and elicited numerous safety recommendations.<sup>100</sup> We focus, however, on less violent but more frequent batteries and assaults. Such courthouse violence, rather than reflecting premeditation, may reflect an individual “simply overwhelmed by the gestalt of the proceeding” that now jeopardizes their life and liberty.<sup>101</sup>

The consequences are not so simple, as criminal defendants’ courthouse violence has been found to be the basis of forfeiture of the Sixth Amendment’s right to counsel. Where a defendant repeatedly struck his public defender in the face, a Minnesota court wrote that “[v]iolence in the courtroom cannot be tolerated and . . . it is appropriate to deprive the defendant of [the] right” to counsel, even as the court acknowledged such a deprivation as an “extreme sanction.”<sup>102</sup> A New York court reached a similar conclusion where “a brutal assault” occurred outside the courtroom — at a presentencing meeting with defendant’s legal aid attorney in a courthouse holding cell.<sup>103</sup>

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district court denied his requests to discharge his public defender and declare a mistrial.”).

There has also been documented instances of *judges* attacking public defenders. W. Kearse McGill, *A Personal Perspective (and Journey) on Judicial Civility*, 62 JUDGES’ J. 17, 18 (2023) (summarizing a judge’s obscenity-laden attack and physical altercation simply because “the public defender refused to waive a client’s Sixth Amendment right to a speedy trial”). The state supreme court ultimately removed the judge from the bench “for violations of the Code of Judicial Conduct and Rules of Professional Conduct.” *In re Murphy*, 181 So. 3d 1169, 1171 (Fla. 2015).

<sup>100</sup> NAT’L CTR. FOR STATE CTS., COURTHOUSE VIOLENCE IN 2010–2012: LESSONS LEARNED 1, 7–13 (2013), <https://nsc.contentdm.oclc.org/digital/collection/facilities/id/182> [<https://perma.cc/8VFN-YL7U>]. The report notes that, while judges can often be disinterested in trainings and drills, “the leadership of judges in promoting security measures is imperative.” *Id.* at 7.

<sup>101</sup> Fred Geiger, *Courthouse Violence: The View from the Bench*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 103 (2001).

<sup>102</sup> *Lehman*, 749 N.W.2d at 79, 82.

<sup>103</sup> *Gilchrist v. O’Keefe*, 260 F.3d 87, 90 (2d Cir. 2001) (describing how Gilchrist “had punched hi[s fourth attorney] in the ear and ruptured his eardrum” leading the judge to grant the Legal Aid Society’s motion to withdraw as counsel); *People v. Gilchrist*, 239 A.D.2d 306, 307 (N.Y. App. Div. 1997) (“The court properly found that, by brutally assaulting his attorney, the fourth one appointed by the court, on the original sentencing date, defendant forfeited his right to counsel.”).

Even courts upholding forfeiture of the right to counsel seek limits on such serious constitutional deprivations. The Second Circuit, in a decision written by then-Judge Sotomayor, rejected petitioner's claim of being unconstitutionally deprived of counsel during sentencing "when the state trial court refused to appoint a new attorney for him after he had punched his appointed trial counsel in the head, causing that attorney to withdraw from representing him."<sup>104</sup> Yet because the Second Circuit was reviewing the New York court's decision in habeas review, it leaned on the deferential review standard.<sup>105</sup>

The Second Circuit, however, elaborated safeguards on the forfeiture of the right to counsel, even in the face of violence. The court explained similar circumstances where the right might not be forfeited despite a defendant's violence: had this been a direct appeal, the court said it

might well have agreed with petitioner that the constitutional interests protected by the right to counsel prohibit [forfeiture] based on a [i] single incident, [ii] where there were no warnings that a loss of counsel could result from such misbehavior, [iii] where there was no evidence that such action was taken to manipulate the court or delay proceedings, *and* [iv] where it was possible that other measures short of outright denial of counsel could have been taken to protect the safety of counsel.<sup>106</sup>

For the Second Circuit, these collective issues — a single violent act (without a dangerous implement) vs. a series, the lack of direct warning to the defendant about the consequences of his behavior, the absence of a judicial manipulation motive, and the possibility of alternative and lesser sanctions — could help an individual retain their Sixth Amendment right to counsel.<sup>107</sup> State courts have cited to *Gilchrist's*

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<sup>104</sup> *Gilchrist v. O'Keefe*, 260 F.3d at 89.

<sup>105</sup> *Id.* at 100 ("[B]ecause [28 U.S.C.] § 2254 severely restricts our scope of review, we have no occasion to pass on the question of whether the denial of counsel in this case violates the Sixth Amendment *simpliciter*. Our ruling is only that the state courts' decision to deny counsel was not 'contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'").

<sup>106</sup> *Id.* at 89 (emphasis added).

<sup>107</sup> It may have also been persuasive that the public defender, while no longer the defendant's attorney, attended the sentencing and spoke on the defendant's behalf,



dicta to protect defendants' constitutional right to counsel and reverse lower courts that have overreacted to a client's physical assault.<sup>108</sup> In contrast, the Third Circuit has more expressly found, on a direct appeal, that "an unprovoked physical battery" is the "sort of 'extremely serious misconduct' that amounts to the forfeiture of the right to counsel."<sup>109</sup>

Whatever the imperfections of justice and "decorum," they doctrinally remain pertinent for understanding constitutional limits. The Sixth Amendment "insure[s] fundamental human rights of life and liberty ... [and] stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done."<sup>110</sup> The Supreme Court has also acknowledged the potential "need to restrain dangerous defendants to prevent courtroom attacks" and remained "mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms."<sup>111</sup> The very practices meant to protect the courthouse's sanctity and workplace safety can also erode its openness and values.<sup>112</sup>

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suggesting that the violence should not adversely affect the sentencing as it was stress-induced, and the injuries healed themselves. *Id.* at 91.

<sup>108</sup> See, e.g., *State v. Holmes*, 302 S.W.3d 831, 833-35, 843, 848 (Tenn. 2010) (reversing after finding that the lower courts "erred in determining that Defendant forfeited his fundamental constitutional right to counsel at trial as a result of his verbal threat and physical assault upon counsel," where the defendant's physical assault involved "striking the lawyer's eyeglasses with his finger" and a threat that "I know how to get rid of you").

<sup>109</sup> *United States v. Leggett*, 162 F.3d 237, 250 (3d Cir. 1998) (quoting *United States v. Goldberg*, 67 F.3d 1092, 1102 (3d Cir. 1995)); see also *Commonwealth v. Babb*, 625 N.E.2d 544, 545-47 (Mass. 1994) (affirming forfeiture where the defendant "struck [his public defender], bruising his cheek, and knocking off his glasses" before "[t]he correctional officers came to [the public defender]'s rescue").

<sup>110</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (internal quotations omitted).

<sup>111</sup> *Deck v. Missouri*, 544 U.S. 622, 632 (2005).

<sup>112</sup> That protection may also need to extend beyond the courtroom, as even judges and their families, not only lawyers, have been targeted and killed at their homes. See, e.g., John Yoon & Mike Ives, *Police Search for Gunman in Killing of Maryland Judge*, N.Y. TIMES (Oct. 23, 2023), <https://www.nytimes.com/2023/10/20/us/maryland-judge-killed.html> [<https://perma.cc/T26Q-JN9J>] (describing death of Judge Andrew F. Wilkinson of Maryland Circuit Courts by aggrieved party to a child custody case); Press Release, Wis. Dep't of Just., Critical Incident Investigation in Mauston, Wis. (June 4, 2022), <https://www.doj.state.wi.us/news-releases/update-critical-incident-investigation-mauston-wis> [<https://perma.cc/RJW7-9QVY>] (describing the death of retired Judge John Roemer in Wisconsin); Robin L. Rosenberg & Esther Salas, *In Daniel's Name*, 107

Such constitutional deprivations divide courts as they evaluate the severity of a client's violence.<sup>113</sup> The courthouse, as distinct from the dollar store, demands unique protection in its administration of public justice rather than private bargains. But so might the individual tried within those courthouses, perhaps even when their violent conduct spills into the courthouse itself. Recognizing how some people's constitutional rights are forfeited in order to preserve the sanctity of constitutionally mentioned spaces expands our understanding of, and tensions within, the law of workplace violence.

#### CONCLUSION

Employees injured by customers, clients, and students raise questions about how the law addresses violence at work. While OSHA and workers' compensation reflect central forces in workplace safety, our Essay uncovers other levers that respond to contemporary workplace violence. These include state laws prohibiting or permitting the arming of teachers on campus; collective bargaining agreements under labor law; and the forfeiture of constitutional rights like the Sixth Amendment right to counsel. These mechanisms compel us to unmoor ourselves from traditional administrative approaches to workplace violence and acknowledge other legal forces.

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JUDICATURE 8, 9 (2023) (describing the passage of the Daniel Anderl Judicial Security and Privacy Act ("DAJSPA"), S. 2340 11th Congress, after the targeted shooting of U.S. District Court Judge Esther Salas's son, Daniel, at their home). Daniel's murder came after targeted attacks and killings of at least five other federal judges. Statement of Judge Roslynn Mauskopf, Dir., Admin. Off. of the U.S. Cts., S. 2340: The Daniel Anderl Judicial Security and Privacy Act of 2021 (Dec. 2, 2021) (supporting DAJSPA and noting the murders of "Judge John Wood (1979), Judge Richard Daronco (1988), Judge Robert Vance (1989), the husband and mother of Judge Joan Lefkow (2005), [and] Judge John Roll (2011)").

<sup>113</sup> See, e.g., *State v. Holmes*, 302 S.W.3d 831, 833 (Tenn. 2010) (conceding that "the defendant's physical attack on his lawyer was serious misconduct" but finding that "it did not rise to the level of 'extremely serious misconduct' sufficient to warrant an immediate forfeiture").