

REACTIONARY LEGISLATION: THE MARJORY STONEMAN DOUGLAS HIGH SCHOOL PUBLIC SAFETY ACT

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“Without reflection, we go blindly on our way, creating more unintended consequences, and failing to achieve anything useful.”

—Morgan J. Wheatley

I. INTRODUCTION

At 2:21 p.m. on February 14, 2018, a gunman, armed with an AR-15 and numerous magazines, entered Marjory Stoneman Douglas High School after an Uber driver dropped him off.¹ The gunman was “wearing a gas mask and equipped with smoke grenades, which he used to set off a fire alarm ‘so kids would come pouring out of classrooms and into the hall.’”² Shortly after the gunman entered the building, he opened fire at students fleeing from what they thought was a fire drill.³ He advanced through three floors, firing at students and faculty inside classrooms and across hallways.⁴ After committing this massacre, the gunman disarmed himself and fled along with other students, attempting to camouflage himself from investigators.⁵ After leaving the school, the gunman visited Walmart and purchased

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1. Marjory Stoneman Douglas High Sch. Pub. Safety Comm’n, *Initial Report Submitted to the Governor, Speaker of the House of Representatives and Senate President 24–25* (2019) [hereinafter *Commission Report*].

2. Lisa Marie Segarra, et al., *Sheriff’s Office Had Received About 20 Calls Regarding Suspect: The Latest on the Florida School Shooting*, TIME (Feb. 18, 2018, 1:51 ET), <https://time.com/5158678/what-to-know-about-the-active-shooter-situation-at-florida-high-school/>.

3. *Commission Report*, *supra* note 1, at 27.

4. *Id.* at 25–30. For a virtual animation of the shooting see *Marjory Douglas High School Public Safety Commission Timeline*, FLA. DEP’T OF LAW ENFORCEMENT, www.fdle.state.fl.us/MSDHS/Timeline.aspx (Florida Department of Law Enforcement virtual animation) (last visited Apr. 4, 2020).

5. *Commission Report*, *supra* note 1, at 34.

a drink at Subway inside the store and then went to McDonalds before deputies apprehended him a couple miles from campus.⁶

While school violence is not a new phenomenon,⁷ governmental bodies struggle to implement effective policies⁸ that balance punishing crimes against rendering students victim to the school-to-prison pipeline.⁹ And—with recent media focusing on school shootings—students and parents nationally are paranoid about imminent, violent attacks at school.¹⁰ On February 14, 2018, this nightmare became a reality at Marjory Stoneman Douglas High School in Parkland, Florida; the gunman fatally shot seventeen people, including fourteen students and three staff members, and severely wounded seventeen others.¹¹ The perpetrator, a nineteen-year-old former student, was “charged with [seventeen] counts of premeditated murder and [seventeen] counts of attempted murder.”¹² Although police and prosecutors have not yet solidified the gunman’s motive, they “are investigating a pattern of disciplinary issues and unnerving behavior.”¹³

After the Parkland shooting, people across the nation, including Marjory Stoneman Douglas High School students, adamantly pled for additional safety measures on school campuses, more mental health

6. *Id.* at 35–37.

7. See Stephen R. Band & Joseph A. Harpold, *School Violence: Lessons Learned*, 68 FBI L. ENFORCEMENT BULL. 9, 9 (1999) (discussing instances of school violence in 1999).

8. Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1513 (2014).

9. See Chauncey D. Smith, Comment, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1012, 1018–19 (2009) (“The phrase ‘school-to-prison pipeline’ conceptually categorizes an ambiguous, yet seemingly systematic, process through which a wide range of education and criminal justice policies and practices collectively result in students of color being disparately pushed out of school and into prison.”); Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009) (“The school-to-prison pipeline is the collection of education and public safety policies and practices that push our nation’s schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system.”). For a discussion on the relationship between zero-tolerance policies and the school-to-prison pipeline see S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271 (2014).

10. See Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen At Their School, and Most Parents Share Their Concern*, FACTTANK, <https://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/> (Apr. 18, 2018).

11. *Commission Report*, *supra* note 1, at 7.

12. *Id.* To view the police interrogation of the Defendant see *Full Video: Nikolas Cruz Interrogation After Parkland School Shooting* (YouTube Aug. 9, 2018) <https://www.youtube.com/watch?v=ob77T58HeLo>.

13. Lori Rozsa, Mark Berman & Renae Merle, *Accused South Florida School Shooter Confessed to Rampage that Killed 17 People, Police Say*, WASH. POST (Feb. 15, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/15/florida-school-shooting-suspect-booked-on-17-counts-of-murder-premeditated/>.

counselors for students, and heightened gun regulations.¹⁴ On February 21, 2018, one week after the shooting, Governor Rick Scott announced his major action plan to combat school violence.¹⁵ On March 9, 2018, he signed into law Senate Bill 7026—an omnibus bill also known as the Marjory Stoneman Douglas High School Public Safety Act.¹⁶ The Act comprehensively addresses gun violence—particularly gun violence in schools.¹⁷ The Act includes provisions enhancing school safety policies, implementing new procedures, and adding personnel on the state and local level.¹⁸ The Act also creates and revises operating and capital funding policies, allocating four hundred million dollars to implement its provisions.¹⁹

While this Act was undeniably passed with good intentions and may produce positive results, it targets an extremely rare problem and imposes expensive, drastic rules. Such reactionary legislation is not abnormal following tragic events; in fact, two scholars describe this phenomenon as part of “the shooting cycle.”²⁰ This Article will analyze reactionary, emotionally-driven legislation and explore several ways policymakers and constituents can combat this issue.

Laws are often motivated by societal values and preferences, making them easy to change with the culture.²¹ Unfortunately, this feature of laws can produce injustice, cause suffering,²² and produce economic and practical inefficiencies.²³ However, a positive

14. Mallery Shelbourne, *Gun Control Dominates Conversation as Congress Returns*, THE HILL (Feb. 25, 2018, 3:11 PM EST), <https://thehill.com/homenews/sunday-talk-shows/375526-gun-control-dominates-conversation-as-congress-returns>.

15. *Governor Scott Announces “Major Action Plan” to Keep FL Students Safe*, ABC ACTION NEWS WFTS TAMPA BAY (Feb. 22, 2018, 9:36 PM), <https://www.abcactionnews.com/news/state/governor-scott-announcing-major-action-plan-to-keep-fl-students-safe>.

16. S. Rules Comm., *Report on Senate Bill No. 7026*, 2d Reg. Sess., (Fla. 2018); S. 7026, 2d Reg. Sess. (Fla. 2018).

17. S. Rules Comm., *Report on Senate Bill No. 7026*, 2d Reg. Sess.

18. *Id.*

19. *Id.*

20. Blackman & Baird, *supra* note 8, at 1513 (describing the shooting cycle as a painfully familiar pattern, starting with a gunman shooting up “a public place, killing many innocent victims. After this tragedy, support for gun control surges. With a closing window for reform, politicians and activists quickly push for new gun laws. But as time elapses, support decreases. Soon enough, the passions fade, and society returns to the status quo.”).

21. Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54, 101 (2006).

22. See Matthew A. Viana, *Aaron’s Law: Reactionary Legislation in the Guise of Justice*, 10 U. MASS. L. REV. 214, 216 (2015) (explaining the unintended consequences of Aaron’s Law and its loose definition of hacking).

23. See generally DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH THE LAW AND WHY IT MATTERS* (2000) (discussing the interaction between economics and lawmaking).

consequence of this feature is that laws can be constantly redesigned to mitigate unintended consequences, reducing inefficiency and suffering.

This Article explores the provisions of the Marjory Stoneman Douglas High School Public Safety Act and its potential unintended consequences. Importantly, this Article does not argue that the Act is a terrible law or that school shootings should be ignored. Instead, this Article seeks to uncover the underlying assumptions, preferences, and values that motivated the Act and explain how such reactionary legislation may lead to inefficiency and increased costs. Part II of this Article discusses various cognitive biases and explains their relationship with the law. Part III explores reactionary legislation, explaining what it is and why it is a problem. Part IV exemplifies this phenomenon by discussing the Marjory Stoneman Douglas shooting and subsequent public safety act, including the flawed statistics behind its implementation. Part V proposes a pragmatic solution to this problem.

II. COGNITIVE BIASES AND THE LAW

People often use heuristics to simplify risk-magnitude assessment.²⁴ Heuristics are systematic techniques that aid human decision making.²⁵ In other words, heuristics are mental shortcuts that humans use to quickly address unique, complex problems.²⁶ Typically, heuristics “govern . . . intuitive judgments, but can also be used as deliberate mental strategies when working from limited information.”²⁷ While heuristics effectively speed up decision making, heuristics can also elicit systematic deviations from “tenets of logic, calculation, and probability in ways that are inadvisable, leading to suboptimal decisions in terms of invested time and effort.”²⁸ These systematic deviations are

24. E.g., Cass R. Sunstein, *The Availability Heuristic, Intuitive Cost-Benefit Analysis, and Climate Change*, 77 CLIMATIC CHANGE 195, 198 (2006); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 44, 46 (2002).

25. Guthrie, Rachlinski & Wistrich, *supra* note 24, at 44, 46; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) (explaining that “people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”).

26. Guthrie, Rachlinski & Wistrich, *supra* note 24, at 44, 46; Tversky & Kahneman, *supra* note 25, at 1124; *Heuristics*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/heuristics> (last visited Apr. 2, 2020).

27. CHRISTOPHER K. MERKER & SARAH W. PECK, *THE TRUSTEE GOVERNANCE GUIDE: THE FIVE IMPERATIVES OF 21ST CENTURY INVESTING* 40 (2019).

28. Johan E. Korteling, Anne-Marie Brouwer & Alexander Toet, *A Neural Network Framework for Cognitive Bias*, 9 FRONTIERS IN PSYCHOL., Sept. 3, 2018, <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.01561/full>; see also Tversky & Kahneman, *supra* note 25, at 1124.

called “cognitive biases.”²⁹ Cognitive biases affect judicial decision making, product valuation, premarital commitments, investment decisions, and much more.³⁰ Similarly, legislators and constituents often draw on cognitive biases, which can heavily influence lawmaking.³¹

A. Availability Bias

One common technique that aids human decision making is the availability heuristic, which implicitly influences our legal landscape.³² The availability heuristic is a timesaving approach to decision making where “people assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind.”³³ Under the availability heuristic, recent, salient events appear more frequent and probable than remote, dull memories.³⁴ Unfortunately, the availability heuristic often manifests as a cognitive bias because events that are recent or elicit a powerful emotional response are often salient and easily retrieved.³⁵ Accordingly, these recent or emotion-evoking events seem more frequent and probable than comparable events that are less recent or not as emotion evoking—even when this deduction is not objectively accurate.³⁶

Under the availability bias, individuals often diminish general information compared to salient information, give exaggerated weight to recent and emotionally evoking events, and overvalue actual

29. See, e.g., Attila Ambrus, Laszlo Sandor & Hye Young You, *Testing an Informational Theory of Legislation: Evidence from the US House of Representatives* (Econ. Research Initiatives at Duke, Working Paper No. 121, 2012), <http://public.econ.duke.edu/~aa231/legisemiricalnew4.pdf> (discussing sponsor bias and its effect on legislation); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 (2007) (discussing affective forecasting, the endowment effect, probability neglect, affect infusion, and risk perception); *The Illusion of Transparency: Why You Are Not as Obvious as You Think You Are*, EFFECTIVEOLOGY, <https://effectiviology.com/illusion-of-transparency/> (last visited Apr. 2, 2020) (discussing the illusion of transparency and egocentric bias).

30. Blumenthal, *supra* note 29, at 25–26, 34–35, 65.

31. Cass R. Sunstein, *Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75, 98–99 (2005) (part of *Meador Lecture Series 2004–2005: Risk and the Law*).

32. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1127–28 (2002) (book review).

33. Tversky & Kahneman, *supra* note 25, at 1127; Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 813 (2012) (defining “the availability heuristic [as] a tendency to assume that a highly salient event is more common or typical than it actually is”).

34. Sunstein, *supra* note 31, at 88–89; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208–09 (1973).

35. See Govind Persad, *When, and How, Should Cognitive Bias Matter to Law*, 32 LAW & INEQ. 31, 52 (2014); Sunstein, *supra* note 31, at 88–89; Tversky & Kahneman, *supra* note 34, at 208–09; Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law* 4 (Univ. Chi. Law & Econ., Online Working Paper No. 138, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=292149.

36. See Tversky & Kahneman, *supra* note 34, at 208–09; Persad, *supra* note 35, at 52; Sunstein, *supra* note 35, at 13.

experience versus speculative scenarios.³⁷ For example, salient events, like witnessing a plane crash, magnify the subjective probability of a plane crash more than reading about a plane crash on Twitter.³⁸

Further, the availability of information can be exaggerated by risk familiarity.³⁹ Specifically, “a risk that is familiar, like that associated with terrorism, will be seen as more serious than a risk that is less familiar, like that associated with sun-bathing.”⁴⁰ Imagery also plays an important role in the availability bias, as easily imagined risks appear more probable and are more readily retrievable than unfathomable risks.⁴¹

Similarly, people often analyze recent experiences when deciding whether to purchase natural disaster insurance.⁴² In fact, when there is no recent history of a natural disaster, people that may be affected by such disasters will often forgo purchasing disaster insurance.⁴³ However, immediately following a natural disaster, many more people purchase natural disaster insurance for the corresponding catastrophe, although the number of purchasers “declines steadily from that point, as vivid memories recede.”⁴⁴

B. Social Amplification

Because human cognition is complex and multifaceted, the availability heuristic often works in conjunction with other external phenomena, including social amplification.⁴⁵ Social amplification is a heuristic that occurs when individuals with imperfect knowledge of a topic rely on popular opinions to devise their own opinions.⁴⁶ In conjunction with other heuristics, “[s]ocial amplification further economizes on information-collection costs—and further reduces the reliability of the information—by using popular opinion as a proxy for the most informed opinion.”⁴⁷ However, unlike the availability bias,

37. Sunstein, *supra* note 31, at 77; Tversky & Kahneman, *supra* note 25, at 1127–28; *see also* W. Kip Viscusi, *Alarmist Decisions with Divergent Risk Information*, 107 *ECON. J.* 1657, 1669 (1997) (discussing biases leading to “alarmist responses”).

38. *See* Sunstein, *supra* note 31, at 88.

39. *Id.*

40. *Id.*

41. *See id.* at 88–89.

42. *See id.* at 88.

43. *See id.*

44. *See id.*

45. Sunstein, *supra* note 24, at 203; *see also* Roger E. Kasperson et al., *The Social Amplification of Risk: A Conceptual Framework*, 8 *RISK ANALYSIS* 177 (1988) (discussing the social amplification of risk).

46. Kasperson et al., *supra* note 45, at 181–82.

47. Aviram, *supra* note 21, at 75.

which centers around internal individual perception, social amplification focuses on how social forces impact risk perception.⁴⁸ The availability bias is often fueled by social amplification because availability of high-visibility, low-risk dangers is often formed from outside, social forces, such as media attention.⁴⁹ Accordingly, social amplification is often a product of the availability bias operating alongside social forces.⁵⁰

The social amplification cycle occurs as follows: first, the mass media disseminates exaggerated information about a high-visibility, low-probability risk to the public who then discusses their fears about this previously ignored risk with one another; this corresponding discussion, in turn, promotes even more media attention, which eventually causes widespread panic, continuing until the next inevitable disaster.⁵¹ For example, in 1996, a huge scandal broke out in the UK about mad cow disease, which garnered significant media attention.⁵² When the scandal was at its pinnacle, “a guest on Oprah Winfrey’s talk show claimed that meat produced in the USA could cause [mad cow disease].”⁵³ Oprah responded: “that just stopped me cold from eating another burger,” which—despite there being no cases of mad cow disease reported in the United States—instigated a “steep decline in beef prices in the USA during the following months.”⁵⁴ This example illustrates the influential role the media has on the public and how easily public fear can be instilled without valid corroboration.⁵⁵

Accordingly, extensive media coverage on and ensuing discussion of abnormal events boosts availability and salience, sponsoring an inaccurate, exaggerated risk-probability assessment.⁵⁶ Then, because humans intuitively use mental heuristics, people tend to respond to such information by forming biased opinions of these highly dramatic, low probability events—this process significantly heightens public

48. *Id.* at 72–76.

49. *Id.* at 74–76.

50. *Id.* at 76.

51. *See id.* at 74–76; *see, e.g.*, Kasperson et al., *supra* note 45, at 181–85; Sunstein, *supra* note 24, at 11–12.

52. Jill McCluskey & Johan Swinnen, *The Media and Food-Risk Perceptions*, 12 *SCI. & SOC.* 624, 624 (2011).

53. *Id.*

54. *Id.*

55. *Id.*

56. Aviram, *supra* note 21, at 72.

concern.⁵⁷ Thus, perceived catastrophes are sometimes not genuine problems but are instead low-risk events with exaggerated media attention.⁵⁸

C. Cultural Cognition Theory

Many heuristics combine to make certain events particularly salient.⁵⁹ While the availability bias centers around internal influences on risk perception and social amplification focuses on how social forces influence risk perception, the cultural cognition theory targets cultural effects on risk perception.⁶⁰ Specifically, the cultural cognition theory focuses on “the cultural congeniality of seeing instances of harm that gratify one’s cultural predisposition’ [and] helps explain ‘what accounts for the selective salience of various risks.’”⁶¹ Under this theory, availability and salience are also impacted by preexisting cultural ideologies, both personal and societal.⁶²

In other words, the cultural cognition theory explains that people assess risk magnitude based on their cultural values and predispositions.⁶³ For example, gun control advocates are more likely to maximize shooting consequences and request stricter legislation, while pro-gun individuals are inclined to minimize shootings and support relaxed gun laws.⁶⁴ Similarly, “a free-market advocate who opposes President Obama’s economic agenda is more likely to view a downturn in the stock market as a reflection of the President’s regulatory policies and lobby for deregulation.”⁶⁵

57. Sunstein, *supra* note 31, at 93; *see also* Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1, 3 (2002).

By contrast, other risks are so familiar that “social attenuation of risk” takes place. Because a danger is taken for granted, the risk is systematically underestimated and insufficient measures are taken to prevent it. Relying on Slovic, Sunstein cites smoking, indoor radon, and driving without a seat belt as examples [of this phenomenon].

Id.

58. *See* Sunstein, *supra* note 57, at 91–93.

59. *See* Sunstein *supra* note 24, at 198–99.

60. *See* Aviram, *supra* note 21, at 71, 74; Dan M. Kahn & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150 (2006); Blackman & Baird, *supra* note 8, at 1529 (discussing the cultural cognition theory).

61. Blackman & Baird, *supra* note 8, at 1529 (quoting Dan Kahn, *Who Sees Accidental Shootings of Children as Evidence in Support of Gun Control & Why? The “Cultural Availability” Effect*, CULTURAL COGNITION PROJECT (May 3, 2013), <http://www.culturalcognition.net/blog /2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

Yale Law School, through its Cultural Cognition Project, tested the cultural cognition theory during several studies targeting people's perceptions of the risks and benefits of nanotechnology.⁶⁶ In one study, the project assessed almost 1,800 Americans and found that people "assimilate balanced information in a way biased by their cultural predispositions toward environmental risks generally."⁶⁷ In other words, the project discovered that one's preexisting values largely influence their initial reaction to unknown topics and whether they credit or discredit additional information.⁶⁸

Specifically, people with "values that predispose them to credit claims of environmental risk" will typically credit additional risk information and panic, while "those who hold values that predispose them to dismiss claims of environmental risk" will often discredit additional risk information and "become reassured, as they are exposed to balanced information about nanotechnology's risks and benefits."⁶⁹ Further, the study found that lawmakers' reactions to certain activities largely "depends . . . on the cultural and political makeup of those communities."⁷⁰ Although this project targeted nanotechnology, its conclusions help understand the cultural cognition theory generally by affirming many of the theory's central hypotheses.⁷¹

D. Probability Neglect

Although cognitive biases often skew risk-probability assessments, people sometimes completely disregard probability.⁷² This phenomenon—called probability neglect—often arises with powerful emotions.⁷³ For example, people who purchase lottery tickets often disregard the extremely low probability of winning by imagining

66. See, e.g., Dan M. Kahan et al., *Affect, Values, and Nanotechnology Risk Perceptions: An Experimental Investigation 1* (Yale Law Sch., Public Law Working Paper No. 155, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=968652; *What is Nanotechnology?*, NAT'L NANOTECHNOLOGY INITIATIVE, <https://www.nano.gov/nanotech-101/what/definition> (last visited Mar. 19, 2020) ("Nanoscience and nanotechnology are the stud[ies] and application of extremely small things and can be used across all the other science fields, such as chemistry, biology, physics, materials science, and engineering.").

67. Kahan et al., *supra* note 66, at 2, 24.

68. *Id.* at 31.

69. *Id.* ("[I]ndividuals who are relatively hierarchical and individualistic, on the one hand, and those who are relatively egalitarian and communitarian, on the other, are likely to process information in a biased way that polarizes them. [Similarly], . . . liberals are likely to diverge from . . . conservatives.").

70. *Id.* at 33.

71. See *id.* at 1, 35.

72. See Sunstein, *supra* note 35, at 9.

73. *Id.*

everything they can buy if they win.⁷⁴ And, while hope contributes to probability neglect, so does fear.⁷⁵ In fact, probability neglect often emerges when “people focus on the worst possible case, which triggers strong emotions.”⁷⁶ Further, with risks of harm or personal injury, vivid imagery tends to influence probability assessment—often causing probability neglect.⁷⁷ And, when the worst possible case induces fear and is aided with vivid imagery—like watching a videotape of a school shooting on the news—people often completely disregard probability.⁷⁸

For example, Professor Sunstein recalls that, in the aftermath of the September 11, 2001, terrorist attacks—which the media vividly displayed—many Americans refused to fly due, in part, to a heightened sense of fear, although, statistically, most of them “were not at significantly more risk after the attacks than they were before.”⁷⁹ In fact, “any substitution of driving for flying is likely to cause [more] deaths, because driving is a less safe method of transportation.”⁸⁰

Professor Sunstein also brings attention to how people are willing to pay more for flight insurance if the losses are from terrorism than if the losses are from other causes.⁸¹ This strange result occurs because the mere use of the word “terrorism” triggers vivid imagery of such brutal attacks, leading to probability neglect.⁸²

Further, merely discussing a low-probability risk with others heightens a person’s concern, even when the discussion affirms that the risk probability is significantly low.⁸³ Apparently, this happens because “the discussion makes it easier to visualize the risk and hence to fear it.”⁸⁴ In these situations, strong emotions, like fear, increase risk salience, causing people to neglect statistical probabilities and focus on these highly speculative risks.⁸⁵

74. *Id.* at 4, 9, 14.

75. *Id.* at 9.

76. *Id.* at 4; *see also id.* at 9, 24.

77. *Id.* at 13 (“My point here is not that visualization makes an event seem more probable (though this is also often true), but that visualization makes the issue of probability less relevant or even irrelevant.”); *see also id.* at 14, 24.

78. *See id.* at 6, 13, 14, 24.

79. *Id.* at 2.

80. *Id.* For a more optimistic view, see Aviram, *supra* note 21, at 91.

81. Sunstein, *supra* note 35, at 13.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 6, 13–15.

E. End Result

Often, events are produced from a complicated interplay of factors.⁸⁶ This combination of factors leaves individuals confused as to which factor actually caused the event, which may shift blame to factors that are only minimally at fault.⁸⁷ While individuals often correct inaccurate risk assessments through familiarity, some risks are not common enough to self-correct.⁸⁸ When events are too infrequent, individuals often fail to reassess low-probability risks because they are unfamiliar.⁸⁹ Thus, the interaction of heuristics and biases with highly-publicized, unfamiliar events that evoke fear—like a recent school shooting—cause an exaggerated risk magnitude assessment.⁹⁰

Specifically, the availability of a school shooting due to widespread media coverage triggers the availability bias, increasing risk perception.⁹¹ This increased risk perception is exacerbated through social amplification because one person expressing heightened concern for school shootings may increase risk salience for others.⁹² Finally, this emotionally-driven fear causes probability neglect and poor judgment; when these individuals join together to discuss and validate their unsubstantiated judgments, risk assessment about such events becomes increasingly biased.⁹³

III. REACTIONARY LEGISLATION

Legislators probably try to create laws that actually decrease the probability of harmful behavior.⁹⁴ Unfortunately, legislators are governed by constituents who focus more on subjective risk perceptions rather than objective criteria.⁹⁵ Using the heuristics previously described, constituents often exaggerate risk magnitude.⁹⁶ And, because politicians must be attentive to constituent demands to get elected or reelected, politicians may placate constituents' biases by responding to statistically rare—yet highly publicized—subjects.⁹⁷ Accordingly, major

86. Aviram, *supra* note 21, at 70.

87. *Id.*

88. *Id.*; Blackman & Baird, *supra* note 8, at 1524.

89. Aviram, *supra* note 21, at 70–72; Blackman & Baird, *supra* note 8, at 1526–28.

90. *See* Aviram, *supra* note 21, at 76; Blackman & Baird, *supra* note 8, at 1524.

91. *See* Aviram, *supra* note 21, at 71–72; Blackman & Baird, *supra* note 8, at 1524.

92. Aviram, *supra* note 21, at 75–76.

93. *See id.*; Blackman & Baird, *supra* note 8, at 1524; Sunstein, *supra* note 35, at 13–15.

94. Aviram, *supra* note 21, at 68, 101.

95. *Id.* at 77, 90–92, 101.

96. *See id.* at 77–79.

97. *Id.* at 77–79, 90–92.

problems that are not popular may be ignored, which may gradually amplify these issues.⁹⁸

Thus, reactionary legislation occurs because constituent pressure is a fundamental characteristic of a representative democracy, which causes legislators to depend on opinions from their constituents to develop laws.⁹⁹ In other words, legislators must succumb to voters' policy preferences to secure reelection.¹⁰⁰ Practically speaking, ignoring a risk is sometimes more cost effective than mitigating it. However, when constituents overestimate a risk, they expect legislators to implement costly remedial measures to combat the exaggerated risk.¹⁰¹ If lawmakers ignore the risk, constituents may elect new officials or abstain from risk-exposing activities.¹⁰² This attentiveness to public concern often results in highly publicized programs that falsely promise immediate risk mitigation, even when long-term measures are more effective at combatting such risk.¹⁰³

Further, reputational pressure may discourage legislators and experts from voicing legitimate concerns about a popular issue.¹⁰⁴ This is because those who voice seemingly negative opinions about certain issues are often seen as difficult.¹⁰⁵ Specifically, when there is a widely accepted view, anyone who does not agree, including experts, risks reputational harm for voicing their concerns.¹⁰⁶

In lawmaking, this might occur when a politician passes "an ineffective but persuasive policy."¹⁰⁷ The "reputational pressure"

98. *Id.* at 77–79.

99. *Id.* at 77–79, 90–92, 101.

100. *Id.*; see, e.g., Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1622–24 (2014) (describing the Connecticut General Assembly's response to the Sandy Hook tragedy).

101. Aviram, *supra* note 21, at 82–83.

102. *Id.*; see, e.g., Arthur Seldon, *Economists and the Politician*, 9 MANAGERIAL & DECISION ECON. 89, 89 (1988) ("Politicians exhibit the occupational failing of wanting policies that are easy to sell to the electorate more than policies that are generally desirable. . . . [P]roposals are resisted or rejected not because they are unacceptable by the public but because politicians fail in the power they claim to persuade the public of their advantages.").

103. Aviram, *supra* note 21, at 81–83; ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 171 (2003) ("Politicians are regularly tempted to sacrifice the long-term public interest for their own short-run private political gain."); Mark V. Tushnet, "Sir, Yes, Sir!": *The Courts, Congress and Structural Injunctions*, 20 CONST. COMMENT 189, 193–94 (2003) ("[V]oters no less than politicians overlook long-term costs in pursuit of apparent short-run benefits. . . . This suggests that politicians who pursue short-run goals while disregarding long-run costs may well be faithful servants of a shortsighted public.").

104. Aviram, *supra* note 21, at 81.

105. *Id.*

106. *Id.*

107. *Id.*

resulting from this cascade¹⁰⁸ may stop experts or politicians from discrediting an issue.¹⁰⁹ Incumbent politicians may placate public concern to remain in office and implement slightly effective, well-known policies over highly effective, unpopular policies.¹¹⁰ This result is further exacerbated by the fact that even a completely ineffective policy will seem effective because the public tends to overestimate risk magnitude.¹¹¹

An illustration would be:

A state governor [calling] out the state National Guard to police a disaster-devastated area, not because she believes that looting and violence are likely to occur, but because she believes her constituents are concerned about those risks and will criticize her for failing to take action to counter those risks. Similarly, a state legislator might propose passing or strengthening a state looting law after a serious disaster in his state, not because he believes the law is necessary to deal with disaster looting, but because he believes he can score political points with his constituents who worry about looting of their homes.¹¹²

Such laws are primarily, if not completely, symbolic and often lead to unintended consequences.¹¹³

A. The Problem with Reactionary Legislation

1. Unintended Consequences

While many reactionary policies produce minimal positive effects, they often yield unintended consequences that are difficult or expensive to reverse.¹¹⁴ Unfortunately, the formulation of public policy through legislation is a difficult process. The connection between issues and

108. *Cascade*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cascade> (last visited Apr. 12, 2020) (defining a cascade as “something arranged or occurring in a series or in a succession of stages so that each stage derives from or acts upon the product of the preceding”).

109. Cass R. Sunstein & Reid Hastie, *Making Dumb Groups Smarter*, HARV. BUS. REV., Dec. 2014.

110. Amos Tversky & Eldar Shafir, *Choice Under Conflict: The Dynamics of Deferred Decision*, 3 PSYCHOL. SCI. 358, 359 (1992).

111. Aviram, *supra* note 21, at 59.

112. Lisa Grow Sun, *Disaster Mythology and Availability Cascades*, 23 DUKE ENVTL. L. & POL’Y F. 73, 80 (2006).

113. Aviram, *supra* note 21, at 59, 90–92.

114. See Aviram, *supra* note 21, at 81. Pam Ferderbar, *The Law of Unintended Consequences*, HUFFPOST (Dec. 30, 2016), https://www.huffpost.com/entry/the-law-of-unintended-con_4_b_13897396 (“In the social sciences . . . unintended consequences are outcomes that are not foreseen or intended by a purposeful action.”).

markets is extremely complicated, and legislation focusing on one issue will often produce unintended consequences in another market.¹¹⁵ Often, unintended consequences are effects that were not contemplated during drafting.¹¹⁶ Accordingly, a thorough cost-benefit analysis of any policy is imperative.¹¹⁷

For example, zero-tolerance policies,¹¹⁸ while intended to combat violence, actually caused irreparable harm to minority students.¹¹⁹ The United States Department of Education defines zero tolerance in a school or district, as a “policy that mandates predetermined [and severe] consequence[s] or punishment for specific offenses.”¹²⁰ Strict zero-tolerance policies were designed, in part, “to calm parental concerns fed by media reports of violence in public schools.”¹²¹ Zero tolerance originated in the Gun-Free Schools Act of 1994, which was a federal mandate that required state schools to expel—at a one year minimum—any students that bring drugs or weapons to campus.¹²² And, following the Columbine High School massacre, many states implemented more zero-tolerance policies for bringing weapons to school.¹²³

Unfortunately, these policies produced disproportionate responses to minor offenses, which garnered media attention.¹²⁴ For example, one school suspended a student for carrying legal, over-the-counter medicine to school.¹²⁵ “Another example occurred in 2010 when twelve-

115. See generally Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) (discussing the unintended consequences that result from campaign finance legislation).

116. Rob Norton, *Unintended Consequences*, LIBRARY ECON. & LIBERTY, <https://www.econlib.org/library/Enc/UnintendedConsequences.html> (last visited Apr. 13, 2020).

117. Andrew P. Cortell & Susan Peterson, *Limiting the Unintended Consequences of Institutional Change*, 34 COMP. POL. STUDIES 768, 772 (2001).

118. Nancy Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, 2 F. ON PUB. POL’Y ONLINE 1, 8 (2009).

119. Sarah Gonzalez, *How Zero Tolerance Rules Turn Bad Behavior into a Crime*, NPR REP. (Feb. 25, 2013), <https://stateimpact.npr.org/florida/2013/02/25/map-florida-students-arrested-for-bad-behavior-not-criminal-behavior/>.

120. *Violence and Discipline Problems in U.S. Public Schools*, No. 98-030 NCES (U.S. Dep’t. of Educ. Mar. 1998).

121. J. Kevin Jenkins & John Dayton, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, 171 EDUC. L. REP. 13, 18 (2003).

122. Gun-Free Schools Act of 1994, 20 U.S.C. § 7961 (2020); Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 36 J.L. & EDUC. 211, 212 (2007).

123. Aaron J. Curtis, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1253 (2014).

124. *Id.* at 1259.

125. *Student Suspended for Carrying Advil*, WASH. POST (Oct. 10, 1996), <https://www.washingtonpost.com/archive/politics/1996/10/10/student-suspended-for-carrying-advil/11b42924-bc6e-4af7-ba64-6643f4895fcf/>.

year-old Alexa Gonzalez was “handcuffed, arrested, and detained at a New York City Police Department” for doodling “‘Lex was here 2/1/10’ on her desk.”¹²⁶ In 2013, a young student was arrested and charged with brandishing a weapon after bringing a toy gun to school, despite law enforcement’s awareness that the “gun did not actually shoot or propel anything.”¹²⁷ Further, in 2013, a fourteen-year-old student was charged with “disrupting [the] educational process” and “obstructing an officer” for wearing a National Rifle Association (NRA) t-shirt to school and refusing to take it off.¹²⁸

Surprisingly, the “kids for cash scandal” also derived from these zero-tolerance policies. During the kids for cash scandal, Judge Mark Ciavarella, a juvenile court judge, was flagged for delivering particularly harsh sentences to petty offenders.¹²⁹ An investigation showed that Judge Ciavarella formed his own private juvenile prison and earned kickbacks from sentencing kids to his prison.¹³⁰ During his reign, he used his position to issue harsh sentences for misusing Myspace, trespassing, and shoplifting.¹³¹

The PROMISE program was a prime example of reactionary legislation.¹³² In 2013, the public ridiculed lawmakers for the unintended consequences of zero-tolerance policies, including many students being thrown in prison for minor offenses.¹³³ In response, the Florida legislature implemented the PROMISE program.¹³⁴ The PROMISE program was intended to offset zero-tolerance policies by advising and encouraging schools to handle minor offenses on their own,

126. Farnel Maxime, *Zero-Tolerance Policies and the School to Prison Pipeline*, SHARED JUSTICE, Jan. 18, 2018, <http://www.sharedjustice.org/domestic-justice/2017/12/21/zero-tolerance-policies-and-the-school-to-prison-pipeline>.

127. Curtis, *supra* note 123, at 1259.

128. *Id.*

129. Ian Urbina, *Despite Red Flags About Judges, Kickback Scheme Flourished*, N.Y. TIMES, March 27, 2009, <https://www.nytimes.com/2009/03/28/us/28judges.html>.

130. *Fed. Officials Announce the Filing of Fed. Fraud and Tax Charges against Two Luzerne Cty. Common Pleas Ct. Jj. in an On-going Pub. Corruption Probe*, U.S. DEP’T OF JUSTICE (Jan. 26, 2009), https://web.archive.org/web/20090901151339/http://www.usdoj.gov/usao/pam/press_releases/Ciavarella_Conahan_01_26_09.htm (last visited Mar. 31, 2020).

131. Stephanie Chen, *Pennsylvania Rocked by ‘Jailing Kids for Cash’ Scandal*, CNN (Feb. 24, 2009), <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges/>.

132. Scott Travis, *A Wary Broward School Board Considers Changes to Promise Program*, SOUTH FLORIDA SUN-SENTINEL, Apr. 30, 2019, <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-broward-school-board-4-30-workshop-20190430-story.html>.

PROMISE stands for “Preventing Recidivism through Opportunities, Mentoring, Interventions, Supports and Education.” Charles Trainor, Jr., *As School Year Starts, Miami-Dade Rolls Out a New Approach to Student Discipline*, MIAMI HERALD, Aug. 24, 2015, <https://www.miamiherald.com/news/local/education/article31934748.html>.

133. Travis, *supra* note 132.

134. *Commission Report*, *supra* note 1, at 276.

rather than through the judicial system;¹³⁵ the Obama administration praised the PROMISE program.¹³⁶ Further, the Broward County school district—where Marjory Stoneman Douglas High School is—was commended under President Obama’s “Race to the Top” initiative and awarded fifty-four million dollars.¹³⁷

However, on February 28, 2018, “Sunshine State News reported possible ways the school system’s PROMISE Program, and the aims behind it, may have stopped confessed shooter Nikolas Cruz from being arrested well before he killed 14 students and three teachers at Marjory Stoneman Douglas High School—despite numerous allegations of criminal behavior.”¹³⁸ Essentially, the PROMISE program was meant to reduce the number of students arrested for minor infractions.¹³⁹ Unfortunately, pursuing that goal led to the unintended consequence of aiding students, like the Parkland shooter, in avoiding detection on federal background checks conducted for gun purchases.¹⁴⁰

135. *Id.* at 276–77.

136. Ryan Nicol, *Progressive PROMISE Program Still at Issue in the Making of Parkland Tragedy*, SUNSHINE STATE NEWS, Mar. 10, 2018, <https://web.archive.org/web/20190928040308/http://sunshinestatenews.com/story/progressive-promise-program-still-issue-making-parkland-tragedy>.

137. *Id.*

138. Ryan Nicol, *Does Broward Schools’ Program Coddle Troubled Students and Excuse Dangerous Behavior?*, SUNSHINE STATE NEWS, Feb. 28, 2018, <https://web.archive.org/web/20190908163230/http://sunshinestatenews.com/story/does-broward-schools-program-coddle-troubled-students-and-excuse-dangerous-misbehavior>. Further, the Commission Report indicated that:

PROMISE data and a student’s participation are not integrated with the Florida Department of Juvenile Justice (DJJ) Prevention Web tracking of civil citation juvenile pre-arrest diversion. Therefore, in Broward County, a juvenile could have multiple in-school PROMISE diversions and multiple out-of-school civil citation diversions, without either system being aware of the multiple diversions.

Commission Report, *supra* note 1, at 278.

139. Broward County Collaborative Agreement on School Discipline, 1, 3 (Oct. 5, 2016), <https://www.browardschools.com/cms/lib/FL01803656/Centricity/Domain/12430/Fully-Executed-Collaborative-Agreement.pdf> (last visited Apr. 13, 2020).

140. Paul Sperry, *Behind Cruz’s Florida Rampage, Obama’s School-Leniency Policy*, REALCLEAR INVESTIGATIONS, Mar. 1, 2018, at 1, https://www.realclearinvestigations.com/articles/2018/02/28/obama_administration_school_discipline_policy_and_the_parkland_shooting.html. However, many also argue that the program is not the problem but rather the source is the school administration for a lack of response to the incidents. David Fleshler, *Stoneman Douglas Shooting Commission: PROMISE Program Flawed but Not Relevant to Massacre*, SOUTH FLORIDA SUN-SENTINEL, July 10, 2018, <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-commission-threat-assessment-20180710-story.html>.

2. Overspending and Poor Priority-Setting

Ignoring cognitive biases in lawmaking and placating public concern can have severe consequences.¹⁴¹ Economically speaking, resources are finite and must be allocated sensibly.¹⁴² Popular perceptions of risk are often very different than expert calculations, and public officials often placate popular perceptions of risk, ignoring statistically imminent problems.¹⁴³ Thus, these opinion-based misconceptions cause poor priority-setting.¹⁴⁴

For example, the Love Canal story.¹⁴⁵ Love Canal was located in a neighborhood and turned into a chemical dumpsite that poisoned hundreds of residents.¹⁴⁶ On December 11, 1980, Congress allocated billions of dollars to enact the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁴⁷ Although CERCLA has yielded positive effects, reallocating the billions of dollars spent on this program would have saved many more lives and mitigated much more probable risks.¹⁴⁸

For example, smoking kills nearly 480,000 Americans annually.¹⁴⁹ Similarly, people regularly die from eating unhealthy foods and failing to exercise; plus, many more die each year from other preventable issues.¹⁵⁰ And, in reality, poor diet actually “produces far more cancers than abandoned hazardous waste sites.”¹⁵¹ Thus, at a much lower price than CERCLA,¹⁵² politicians could save thousands of lives annually fixing these other preventable issues.¹⁵³ Regardless, to sustain CERCLA,

141. THOMAS C. FISCHER, *LEGAL GRIDLOCK: A CRITIQUE OF THE AMERICAN LEGAL SYSTEM* 15–16 (2012).

142. See generally HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* (1983).

143. Cass. R. Sunstein & Timur Kuran, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683, 742 (1999).

144. *Id.* at 737.

145. Eckardt Beck, *The Love Canal Tragedy*, 5 *EPA J.* 16, 17 (1979).

146. Anthony Depalma, *Love Canal Declared Clean, Ending Toxic Horror*, *N.Y. TIMES*, Mar. 2004, at A1.

147. Kuran & Sunstein, *supra* note 143, at 696.

148. *Id.* at 697.

149. *Smoking & Tobacco Use: Fast Facts*, CDC, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (last visited Feb. 22, 2020) (explaining that “[c]igarette smoking is responsible for more than 480,000 deaths per year in the United States, including more than 41,000 deaths resulting from secondhand smoke exposure. This is about one in five deaths annually, or 1,300 deaths every day”).

150. *Obesity and Cancer: The Scientific Links and the Future of Prevention*, *NAT. DIALOGUE ON CANCER*, U.S. Surgeon General (Sep. 29, 2003), <https://web.archive.org/web/20031108070248/http://www.surgeongeneral.gov/news/speeches/obesitycancer09292003.htm>; Kuran & Sunstein, *supra* note 67, at 697.

151. Kuran & Sunstein, *supra* note 143, at 697.

152. *Id.* at 698.

153. *Id.*

Congress ignored the risks associated with unhealthy eating and lack of exercise, and addressed cigarette smoking with discrete public health warnings.¹⁵⁴ Only recently did governments start allocating resources to stop smoking campaigns; these resources are finite and often undercut by the government's openhanded subsidies for tobacco farmers.¹⁵⁵

However, prioritizing is never black and white, and I do not mean to imply that rigid, number-based assessments always produce informed democratic judgments. Instead, legislators should consider both quantitative and qualitative principles for priority setting, and unbiased, informed judgment is imperative during decision making.¹⁵⁶

IV. THE MARJORY STONEMAN DOUGLAS HIGH SCHOOL PUBLIC SAFETY ACT

A. Public Response

Following the Parkland shooting in Florida, Marjory Stoneman students and others mobilized, demanding gun control legislation that may have protected the seventeen victims.¹⁵⁷ Further, students led a rally in Fort Lauderdale where they protested gun violence; requested gun reform; and attempted to discredit politicians, like Senator Marco Rubio, for taking campaign money from the National Rifle Association (NRA).¹⁵⁸ These students also organized two national school walkouts, the first one being one month after the anniversary of the Parkland shooting, and the other one year after the Columbine shooting.¹⁵⁹ Lastly, the Parkland students organized the successful "March for Our Lives" rally in Washington, D.C., and hundreds of corresponding events throughout the U.S. where advocates prowled the streets requesting stricter gun controls among other policy objectives.¹⁶⁰

154. *Id.* at 697–98.

155. *Id.* at 698.

156. *Id.*

157. *Florida School Shooting Survivor: "We Want Our Voices Heard,"* 1:40–2:04 (MSNBC Broadcast Feb. 20, 2018), <https://www.nbcnews.com/feature/debunker/video/parkland-school-shooting-survivor-speaks-out-about-gun-violence-1165794371884> [hereinafter *Voices Heard*].

158. *Survivor to Rubio: Will You Reject NRA Money?* (CNN Broadcast Feb. 21, 2018), <https://www.cnn.com/2018/02/21/politics/rubio-nra-money-cameron-kasky/index.html>.

159. Kaitlyn Schallhorn, *National School Walkout Planned by Students Worldwide After Parkland Shooting*, FOX NEWS (March 14, 2018), <https://www.foxnews.com/us/national-school-walkout-planned-by-students-worldwide-after-parkland-shooting>.

160. Audrey Carlsen & Jugal K. Patel, *March for Our Lives: Maps of the More Than 800 Protests Around the World*, N.Y. TIMES (Mar 22, 2018), <https://www.nytimes.com/interactive/2018/03/22/us/politics/march-for-lives-demonstrations.html?mtrref=www.google.com&assetType=REGIWALL>.

B. Legislative Action¹⁶¹

1. Main Provisions

Responding to widespread movements—and possibly a personal desire to hold a United States Senate seat in a few short months¹⁶²—Governor Rick Scott quickly signed The Marjory Stoneman Douglas Public Safety Act into law.¹⁶³ This Act comprehensively “address[es] the issues presented by the tragedy at Marjory Stoneman Douglas High School in Parkland, Florida, including firearm and school safety, and community mental health resources.”¹⁶⁴ Specifically, the Act prohibits a person “who has been adjudicated mentally defective or who has been committed to a mental institution” from owning or possessing a firearm without certain relief.¹⁶⁵ The Act also bans anyone under twenty-one years old from purchasing a firearm and prohibits bump-fire stock possession.¹⁶⁶

Moreover, the Act develops several new agencies, programs, and networks. These agencies include: a commission on school safety and security within the Florida Department of Law Enforcement,¹⁶⁷ an Office of Safe Schools within the Department of Education,¹⁶⁸ and a Multiagency Service Network for Students with Severe Emotional Disturbance (SEDNET).¹⁶⁹ Further, the Act creates the Guardian Program, named after Coach Aaron Feis, who selflessly sacrificed his life to save students at Marjory Stoneman Douglas during the massacre.¹⁷⁰

161. S. 7026, 2d Reg. Sess. (Fla. 2018). This Article focuses solely on the legislation adopted in the State of Florida. However, there is also a federal school safety law called the School Violence Act Funds Security Systems (STOP). To read more about the federal school safety law see Zach Winn, *School Security Bolstered with Omnibus Funding Bill, STOP School Violence Act*, CAMPUS SAFETY (March 26, 2018), <https://www.campusafety.com/safety/stop-school-violence-act-security/> (explaining The STOP School Violence Act).

162. Gary Fineout, *Florida Gov. Rick Scott Says He's Running for Senate in 2018*, PBS (Apr. 9, 2018, 6:36 PM EST), <https://www.pbs.org/newshour/politics/florida-gov-rick-scott-says-hes-running-for-senate-in-2018>.

163. *CS/SB 7026: Public Safety*, THE FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2018/7026/?Tab=BillHistory> (last visited Feb. 22, 2020). To reference the bill signed by the Governor see S. 7026, 2d Reg. Sess. (Fla. 2018).

164. *Florida Senate Passes Marjory Stoneman Douglas High School Public Safety Act*, FLA. TREND (Mar. 6, 2018), <https://www.floridatrend.com/article/24092/florida-senate-passes-marjory-stoneman-douglas-high-school-public-safety-act>.

165. FLA. STAT. § 790.064(1) (2019).

166. FLA. STAT. § 790.065(13) (2019); FLA. STAT. § 790.222 (2019).

167. FLA. STAT. § 943.687 (2019).

168. FLA. STAT. § 20.15 (2019).

169. FLA. STAT. § 1006.04(1)(a) (2019).

170. Read more about Coach Aaron Feis at Andrea Adelson, *Assistant Football Coach Aaron Feis Died as He Had Lived—Helping Students*, ESPN (Feb. 21, 2018), <https://www.espn.com/espn/print?id=22530711&type=Story&imagesPrint=off>.

The Guardian Program permits trained faculty members to be armed on school campus during school hours.¹⁷¹

Further, the Act establishes Prevention, Intervention, and Emergency Preparedness Planning administered by the Office of Safe Schools.¹⁷² Additionally, the Act creates the Florida Safe Schools Assessment Tool, requiring the Department of Education to contract with a security consulting firm that specializes in developing risk assessment software solutions and has experience conducting security assessments of public facilities to develop, update, and implement a risk assessment tool.¹⁷³ Finally, Florida has allocated \$400 million to implement the Act.¹⁷⁴

2. Mass Shooting Statistics

Several high-profile school shootings, including the Parkland shooting, have understandably heightened parental concern for their children's safety at school.¹⁷⁵ However, despite public outcry and mass media coverage,¹⁷⁶ mass school shootings do not happen often.¹⁷⁷ In fact, "the statistical likelihood of any given public school student being killed by a gun, in school, on any given day since 1999 [is] roughly one in 614,000,000."¹⁷⁸ And, since the 1990s, school shootings have actually declined.¹⁷⁹

Indeed, the probability that a fatal school shooting will occur is much lower "than almost any other mortality risk a kid faces, including

171. FLA. STAT. § 30.15(k) (2019).

172. FLA. STAT. § 1006.07(4)(a) (2019); *Office of Safe Schools*, FLA. DEP'T OF EDUC., www.fldoe.org/safe-schools/ (last visited Feb. 22, 2020).

173. FLA. STAT. § 1006.1493(1) (2019).

174. *CS/SB 7026: Public Safety*, THE FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2018/7026/?Tab=BillHistory> (last visited Feb. 22, 2020). To reference the full text and provisions of the bill see S. 7026, 2d Reg. Sess. (Fla. 2018).

175. The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in The United States, U.S. SECRET SERVICE & U.S. DEP'T OF EDUC. 7 (July 2004).

176. See, e.g., Scott Simon, *School Shootings Are Sad, but No Longer Surprising*, NPR (Jan. 27, 2018, 8:07 AM ET), <https://www.npr.org/2018/01/27/581216851/school-shootings-are-sad-but-no-longer-surprising> (noting that mass shootings have become commonplace).

177. See James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUD. 125, 128-30 (2014) (suggesting that there has not been an increase in mass shootings).

178. David Ropeik, *School Shootings Are Extraordinarily Rare. Why Is Fear of Them Driving Policy?*, WASH. POST (Mar. 8, 2018, 3:27 PM EST), https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c_story.html.

179. Allie Nicodemo & Lia Petronio, *Schools Are Safer Than They Were in the 90s, and School Shootings are Not More Common Than They Used to Be, Researchers Say*, NE. NEWS (Feb. 26, 2018), <https://news.northeastern.edu/2018/02/26/schools-are-still-one-of-the-safest-places-for-children-researcher-says/>.

traveling to and from school, catching a potentially deadly disease while in school or suffering a life-threatening injury playing interscholastic sports.”¹⁸⁰ In fact, the risk “of a child being shot and killed in a public school is extraordinarily low. Not zero—no risk is. But it’s far lower than many people assume, especially in the glare of heart-wrenching news coverage after an event like Parkland.”¹⁸¹

Further, school is much safer for students than it once was. For example, “[b]etween 1992 and 2016, total victimization rates for students ages [twelve to eighteen] declined both at school and away from school.”¹⁸² Between 1992 and 2016, theft and serious violent victimizations declined.¹⁸³ Additionally, “[t]he rate of serious violent victimization against students ages 12–18 was lower at school than away from school in most survey years between 1992 and 2008 and in 2016.”¹⁸⁴ Specifically, “[t]he 2016 serious violent victimization rates were 3 per 1,000 students at school and 5 per 1,000 students away from school.”¹⁸⁵

Overall, school crime has decreased since the early 1990s.¹⁸⁶ However, the amount of crime has varied by crime type over time based on the school district.¹⁸⁷ Moreover, for many crimes, public schools reported less crimes in 2015–2016 than in 2009–2010.¹⁸⁸ For example, “65[%] of public schools recorded incidents of physical attack or fight without a weapon in 2015–16 compared to 71[%] in 2009–10, and 25[%] reported such incidents to the police in 2015–16 compared with 34[%] in 2009–10.”¹⁸⁹ In 2015, only around three percent of teenagers reported that they were afraid of being attacked at school.¹⁹⁰

180. Ropeik, *supra* note 178.

181. *Id.*

182. Louis Jacobson, “*This Week*” Report Says Hundreds Have Died in Multiple-Victim Shootings, POLITIFACT (Jan. 11, 2011), <https://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>; IES, *Fast Facts*, NAT’L. CTR. FOR EDUC. STATS., 2018 (June 29, 2018), <https://web.archive.org/web/20180629084337/https://nces.ed.gov/fastfacts/display.asp?id=49>; *see also* Mark B. Melter, *The Kids Are Alright; It’s the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZ. J. INT’L L. 33, 37 n.35 (2012) (“There were on average 22.25 incidents and 108.75 victims from 2006–2009. By contrast, there were on average 18.46 incidents and 84.46 victims between 1976–2010.”).

183. Jacobson, *supra* note 182; *Fast Facts*, *supra* note 182; *see also* Melter, *supra* note 182, at 37 n.35 (“There were on average 22.25 incidents and 108.75 victims from 2006–2009. By contrast, there were on average 18.46 incidents and 84.46 victims between 1976–2010.”).

184. *Fast Facts*, *supra* note 182.

185. *Id.*

186. *Indicators of School Crime and Safety: 2017*, NAT’L. CTR. FOR EDUC. STATS., 2017, at 54.

187. *Id.* at 54–56.

188. *Id.* at 54.

189. *Id.*

190. *Id.* at viii.

Further, even among mass killings, the “indiscriminate slaughter of strangers,” which the media commonly indicates as a mass shooting, “is the exception to the rule.”¹⁹¹ In other words, an even smaller number of the already small percentage of mass shootings includes opening fire at random people in public places like schools.¹⁹² Thus, “[a]s a total percentage of unfortunate bloodshed, mass shootings are a small sliver that nonetheless captures a huge percentage of the public fascination” and media attention.¹⁹³ In fact, these events are extremely rare; “on average, mass murders occur between 20 and 30 times per year, and about one of those incidents on average takes place at a school.”¹⁹⁴

Thus, legislators must mitigate biases by placing concerns in context. Specifically, legislators should have mechanisms in place for uncovering and debunking common misperceptions about school safety and violence. While just improving understanding will not fix the entire problem, instilling skepticism will facilitate informed discussions regarding school safety. Thus, legislators should use federal data from the Department of Education, the Department of Justice, and the Center for Disease Control, and other research by school safety experts, to dispel common school safety myth.

Unfortunately, legislators passed the Act to succumb to constituent demand, which was driven by their cognitive biases—leading to probability neglect and poor priority setting.¹⁹⁵ After the Parkland shooting, several cognitive biases were at play.¹⁹⁶ First, mass shootings were readily available in the public’s mind as the ones that occurred in Las Vegas¹⁹⁷ and Orlando¹⁹⁸ were highly publicized; likely resulting in availability bias. And the graphic nature of the Parkland shooting videos, mixed with the victims being innocent children, probably caused emotions to peak—causing probability neglect.

While the Act was passed, these individual biases were intensified by various institutional biases. First, the House of Representatives’ and Senate’s Final Bill Analysis (the Report) demonstrated the informational

191. James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 CRIME & JUST. REV. RES. 407, 438 (1998).

192. Blackman & Baird, *supra* note 8, at 1520.

193. *Id.*

194. Nicodemo & Petronio, *supra* note 179.

195. Aviram, *supra* note 21, at 77.

196. *Voices Heard*, *supra* note 157.

197. LMVPD Preliminary Investigative Report, Las Vegas Metropolitan Police Dept. 1, 3 (Jan. 31, 2018).

198. Jack Healy & John Eligon, *Orlando Survivors Recall Night of Terror: “Then He Shoots Me Again,”* N.Y. TIMES, June 17, 2017, <https://www.nytimes.com/2016/06/18/us/pulse-nightclub-orlando-mass-shooting.html>.

theory.¹⁹⁹ Specifically, rather than investigating the Parkland shooting or, at least, waiting until Broward County Police uncovered the gunman's motive, the bill committee relied on questionable data from Everytown for Gun Safety.²⁰⁰

Everytown for Gun Safety is an organization that opposes gun violence and advocates for stricter gun control laws.²⁰¹ After the Parkland shooting, Everytown stated that the shooting was the eighteenth school shooting of the year, a statistic the *Washington Post* called "flat wrong."²⁰² Everytown defined school shooting as "any time a firearm discharges a live round inside a school building or on a school campus or grounds."²⁰³

During its calculations, Everytown labeled a random suicide in an abandoned school parking lot as a school shooting.²⁰⁴ Further, Everytown considered an elementary school student accidentally discharging an officer's holstered weapon as a school shooting.²⁰⁵ USA Today reported that the actual number of school shootings since January 1, 2018, was six,²⁰⁶ and according to TIME, the number was only four.²⁰⁷ Everytown's school shooting definition was challenged in 2014; it reported that seventy-four school shootings occurred since Sandy Hook.²⁰⁸ Without authenticating Everytown's statistics, committee analysts relied on data from the questionable, politically motivated

199. S. RULES COMM., 94TH CONG., REPORT ON SENATE BILL NO. 7026 (Comm. Report 2018).

200. *Id.*

201. *Everytown for Gun Safety Action Fund Inc.*, GUIDESTAR (2007), <https://www.guidestar.org/profile/20-8802884>. According to its website, Everytown was founded in 2014, combining Mayors Against Illegal Guns and Moms Demand Action for Gun Sense in America. Visit Everytown for Gun Safety's website at <https://everytown.org/>. The organization's mission is to both produce research on gun violence and "support efforts to educate policy makers, as well as the press and the public, about the consequences of gun violence and promote efforts to keep guns out of the hands of criminals." *Id.*

202. John Cox & Steven Rich, *No, There Haven't Been 18 School Shootings in 2018. That Number is Flat Wrong*, WASH. POST, Feb. 15, 2018.

203. Chloe Aiello, *A Gun Control Group Counted 18 School Shootings in 2018. That's Now Disputed—Here's Why*, CNBC (Feb. 15, 2018), <https://www.cnbc.com/2018/02/15/heres-how-everytowns-disputed-report-of-18-school-shootings-breaks-down.html>.

204. *Id.*

205. *Id.*

206. Davis Mastio, *No, There Have Not Been 18 School Shootings Already This Year*, USA TODAY (Feb. 16, 2018, 8:09 AM ET), <https://www.usatoday.com/story/opinion/2018/02/16/parkland-school-shooting-no-there-have-not-been-18-school-shootings-already-year-column/343100002/> (last updated Feb. 18, 2018, 3:11 PM ET).

207. Chris Wilson, *This Chart Shows the Number of School Shooting Victims Since Sandy Hook*, TIME (Feb. 22, 2018), <https://time.com/5168272/how-many-school-shootings/>.

208. Lauren Carroll, *Have There Been 74 School Shootings Since Sandy Hook? A Closer Look at a Tricky Statistic*, POLITIFACT (June 13, 2014), <https://www.politifact.com/truth-o-meter/statements/2014/jun/13/everytown-gun-safety/have-there-been-74-school-shootings-sandy-hook-clo/>.

source to support the Act,²⁰⁹ without compiling contradictory data. This is a typical example of cultural cognition theory.

With the Parkland shooting, the availability of other recent shootings was accompanied by social amplification when this false information was widely disseminated. Further, the misinformation became publicly corroborated by political representatives. For example, Senator Bernie Sanders claimed, “[A]fter eighteen school shootings in America in just forty-three days of 2018 . . . Congress might want to consider common-sense gun safety legislation and save innocent lives.”²¹⁰ However, due to flawed analytics, *PolitiFact* rated Senator Sanders’ comment “[m]ostly [f]alse”.²¹¹ The *New York Times* explained that, of the incidents, “[i]t would not be fair to call them all shootings.”²¹² Specifically, Senator Sanders’ statistics are based on the same over-inclusive list created by Everytown for Gun Safety.²¹³

Florida Representative Ted Deutch also participated in social amplification of school shootings by stating that “mass shootings went up [two hundred] percent in the decade after the assault weapons ban expired.”²¹⁴ Experts questioned the causation between the two, explaining that Deutch’s claim ignored population changes and used improper data for comparison.²¹⁵ *PolitiFact* further commented, “Deutch’s claim contains an element of truth but ignores critical facts that would give a different impression,” labeling the statement as “[m]ostly [f]alse.”²¹⁶ Proliferating these false statistics clouds existing data and exacerbates already prevalent biases by evoking fear. This confusion also makes it more difficult to uncover and resolve the actual concerns of parents and protect rights.

209. S. RULES COMM., SB 7026 BILL ANALYSIS AND FISCAL IMPACT STATEMENT, 2018 Reg. Sess. 19 n.1001 (Fla. 2018).

210. Bernie Sanders, TWITTER, (Feb. 14, 2018, 4:58 PM), <https://twitter.com/sensanders/status/963895154607296512?lang=en>.

211. Tom Kertscher, *Mostly False: 18 U.S. School Shootings So Far in 2018 and 18 in Rest of the World over Past 20 Years*, POLITIFACT (Feb. 15, 2018), <https://www.politifact.com/wisconsin/statements/2018/feb/15/jeff-greenfield/mostly-false-18-us-school-shootings-so-far-2018-an/>.

212. Linda Qiu & Justin Bank, *Checking Facts and Falsehoods About Gun Violence and Mental Illness After Parkland Shooting*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/fact-check-parkland-gun-violence-mental-illness.html>.

213. Tom Kertscher, *18 School Shootings Already in 18? Not So Fast*, POLITIFACT (Feb. 16, 2018), <https://www.politifact.com/article/2018/feb/16/18-school-shootings-already-18-not-really-stat-kee/>.

214. Miriam Valverde, *Did Mass Shootings Increase 200 Percent Since Assault Weapons Ban Expired?*, POLITIFACT (Feb. 23, 2018), <https://www.politifact.com/florida/statements/2018/feb/23/ted-deutch/did-mass-shootings-increase-200-percent-assault-we/>.

215. *Id.*

216. *Id.*

3. Mental Health Statistics

In addition to placating public concern for school shootings, the Act also contributes to the exaggeration of the relationship between mental health problems and mass shootings. The Act explicitly attempts to keep guns out of the hands of those suffering from mental illness,²¹⁷ allocating over sixty-nine million dollars to the Department of Education for funding mental health assistance.²¹⁸ Specifically, the Act prohibits “[a] person who has been adjudicated mentally defective or who has been committed to a mental institution”²¹⁹ from owning or possessing firearms until a court orders otherwise.²²⁰

However, identifying mental illness as a particularly important risk factor for gun violence is misleading and stigmatizing.²²¹ For one, the law might actually reduce students’ willingness to seek necessary mental health treatment by deepening the stigma and reducing students’ privacy.²²² This legislation is seemingly inspired by the common belief that “mental health is often a big problem underlying these tragedies.”²²³

217. See Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241 (2009) (noting the research literature supporting the finding that individuals with mental illness who are in regular treatment are much less likely to commit violent acts); Olav Nielssen et al., *Homicide of Strangers by People with a Psychotic Illness*, 37 SCHIZOPHRENIA BULL. 572, 577 (2011) (finding that stranger homicide by psychotic persons is extremely rare and is even rarer among patients receiving pharmacological treatment); Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 764–65 (1990) (finding that only ten to thirteen percent of respondents suffering from mental disorders reported violence in the previous year, compared with two percent of respondents that do not have a disorder).

218. FLA. H.R. APPROPRIATIONS COMM., PUBLIC SCHOOL FUNDING THE FLORIDA EDUCATION FINANCE PROGRAM (FEFP) FISCAL YEAR 2018–2019, FINAL CONF. REP. 1 (Fla. 2018).

219. FLA. STAT. § 790.064(1) (2018).

220. *Id.* § 790.064(1), (3).

“[C]ommitted to a mental institution” means: [i]nvoluntary commitment, commitment for mental defectiveness or mental illness, and commitment for substance abuse. The phrase includes involuntary inpatient placement... involuntary outpatient placement... involuntary assessment and stabilization... and involuntary substance abuse treatment... but does not include a person in a mental institution for observation or discharged from a mental institution based upon the initial review by the physician or a voluntary admission to a mental institution.

Id. § 790.065(2)(a)(4)(b)(I). The term also includes when a person has been involuntarily examined under the Baker Act statute but then consents to voluntary inpatient or outpatient treatment if certain conditions are met. *Id.* § 790.065(2)(a)(4)(b)(II).

221. James Knoll & George Annas, *Mass Shootings and Mental Illness*, in LIZA H. GOLD & ROBERT I. SIMON, GUN VIOLENCE AND MENTAL ILLNESS 81, 94–95 (2016).

222. See *id.*

223. Jennifer De Pinto et al., *Speaker Ryan Wants to Fix Possible Legal Gaps on Guns and Mental Health*, REUTERS (Feb. 15, 2018, 12:11 PM), <https://www.reuters.com/article/us-florida-shooting->

However, implementing gun restriction policies targeting the mentally ill may not prevent acts of violence as there is little evidence to back up this claim.²²⁴ While “some mass shooters are found to have a history of psychiatric illness,” it is not commonly accepted that this is the cause of their offense.²²⁵ Further, “no reliable research has suggested that a majority of perpetrators are primarily influenced by serious mental illness as opposed to, for example, psychological turmoil flowing from other sources.”²²⁶

Nonetheless, following the Sandy Hook tragedy in 2012, a senator immediately publicly advocated to keep guns “out of the hands of criminals and the mentally ill.”²²⁷ Subsequently, a National Rifle Association official announced in a press conference:

[O]ur society is populated by an unknown number of genuine monsters. People that are so deranged, so evil, so possessed by voices and driven by demons, that no sane person can even possibly comprehend them. . . . How can we possibly even guess how many, given our nation’s refusal to create an active national database of the mentally ill? ²²⁸

The media excessively circulates such statements, reinforcing cognitive associations between evil criminals and the mentally ill, which unfortunately are easily believed without any further corroboration.²²⁹ Instead, studies show that the general public is predisposed to associate mental illness with depravity and perversion; meaning people are easily persuaded by underwhelming evidence of a mentally ill person’s criminality.²³⁰ This is because negative attitudes toward persons with mental illness permeate society.²³¹ Often, people relate any abnormal

mentalhealth/speaker-ryan-wants-to-fix-possible-legal-gaps-on-guns-and-mental-health-idUSKCN1FZZB6?feedType=RSS&feedName=domesticNews; Jennifer De Pinto et al., *Americans Attitudes to Gun Violence: Sandy Hook & Newtown Anniversary*, CBS NEWS (Dec. 11, 2017, 9:00 AM), <https://www.cbsnews.com/news/cbs-news-poll-americans-attitudes-to-gun-violence-sandy-hook-newtown-anniversary/>.

224. Liza H. Gold, *Gun Violence: Psychiatry, Risk Assessment, and Social Policy*, 41 J. AM. ACAD. PSYCHIATRY & L. 337, 340 (2013).

225. Knoll & Annas, *supra* note 221, at 82.

226. *Id.*

227. Caroline Horn, *Potential 2016 Presidential Candidates Talk Gun Control*, CBS NEWS (Mar. 29, 2013, 6:00 AM), <https://www.cbsnews.com/news/potential-2016-presidential-candidates-talk-gun-control/>.

228. Abby Rapoport, *Guns—Not the Mentally Ill—Kill People*, THE AM. PROSPECT (Feb. 7, 2013), <https://prospect.org/power/guns-not-mentally-ill-kill-people/>.

229. *Id.*

230. *Id.*

231. *Id.*

mental diagnosis with shame, disgrace, and humiliation.²³² Further, widespread fear, anxiety, and the desperation to find immediate solutions instigates mistaken common beliefs that continue to stigmatize those with mental illness.²³³ These mistaken beliefs include ones that personally blame people for their mental illness and those that paint mentally ill people as more dangerous and uncontrollable than individuals without mental illnesses.²³⁴

Today, many Americans still believe the common misconception that people with mental illness are easily triggered to violently act out.²³⁵ In fact, this belief remains deeply engrained—even though studies have demonstrated that “about 5% of all violence is attributable to persons with mental illness, most of which is not committed with guns.”²³⁶ The NRA does continuously support gun control efforts for those living with mental illness; however, “there is little evidence to support the effectiveness of such prohibitions.”²³⁷ Instead, the available data actually indicates “the impossibility of differentiating between individuals with mental illness who might become perpetrators of gun violence and the vast majority of such individuals who will not be violent.”²³⁸

Further, an analysis of gun seizure data in Connecticut indicated that the people who were diagnosed as mentally ill “were not the ones who presented risks with firearms.”²³⁹ Instead, this study found that public safety risks often “come from ordinary people in problem circumstances.”²⁴⁰ The study demonstrated that “[w]ith or without a diagnosis, the presence of mental distress, social isolation, pain, suffering, and decreased function and problem solving ability is evidence that people need help.”²⁴¹ And by focusing on mentally ill people in general, legislation diverts attention from dangerous persons who are not mentally ill but are instead encompassed in tragic situations that alter their perception of reality, often leading to violent outbreaks.²⁴² Moreover, the Marjory Stoneman Douglas Commission

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Norko & Baranoski, *supra* note 100, at 1628.

237. *Id.*

238. *Id.*

239. *Id.* at 1630.

240. *Id.*

241. *Id.*

242. *Id.* at 1631.

reported “that most acts of violence are not committed by those with serious mental illness and that most of the individuals with serious mental illness are not violent.”²⁴³

Accordingly, explicitly including a mental health provision in this Act was not necessary and does not seem to be supported by any research. One of the most problematic results of these kinds of laws is they perpetuate the myth that mental illness is linked to gun violence. “Such reinforcement adds to the considerable stigma associated with mental illness, while having no appreciable effects on the incidence of mass killings that often drive the policy interventions.”²⁴⁴ Further, this enactment could compound the mistreatment of those with psychiatric diagnoses or misdirect peoples’ attention to and appreciation for the Act’s actual risk.

4. More School Resource Officers

School resource officers have also been a major point of contention for the Act. Under the Act, at least one “safe-school officer” is now required in each school.²⁴⁵ The Act allocated public schools an additional \$97.5 million to hire these resource officers.²⁴⁶ However, it seems as if this budget was not well thought out because it seems to be likely that “[t]here will not be enough funding... to actually fund a law enforcement officer in every school.”²⁴⁷ A spokesperson for Bay County

Laws intended to reduce gun violence that focus on a population representing less than 3% of all gun violence will be extremely low yield, ineffective, and wasteful of scarce resources. Perpetrators of mass shootings are unlikely to have a history of involuntary psychiatric hospitalization. Thus, databases intended to restrict access to guns and established by guns laws that broadly target people with mental illness will not capture this group of individuals.

Knoll & Annas, *supra* note 221, at 82.

243. *Commission Report*, *supra* note 1, at 15.

244. Knoll & Annas, *supra* note 221, at 95.

245. FLA. STAT. § 1006.12 (2018) (“For the protection and safety of school personnel, property, students, and visitors, each district school board and school district superintendent shall partner with law enforcement agencies or security agencies to establish or assign one or more safe-school officers at each school facility within the district, including charter schools.”). This requirement can be met with: (1) School Resource Officers, who are employed by law enforcement agencies; or (2) School Safety Officers, who may be employed by the district school board; and/or (3) School Guardians, armed school employees who are authorized to act in active assailant incidents at school; or (4) Security Guards, contracted for by the school district or charter school. *Id.*

246. Emily L. Mahoney, *Florida Now Requires Schools to Have Armed Protection. Districts and Counties Must Make That a Reality*, TAMPA BAY TIMES (Apr. 30, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/04/30/headline-suggestions/>.

247. Steve Bousquet, *Gov. Rick Scott Signs Gun, School Security Legislation Over NRA Opposition*, TAMPA BAY TIMES (Mar. 9, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/03/09/gov-rick-scott-signs-gun-school-security-legislation-over-nra-opposition/>.

Schools, Sharon Michalik, views the legislation as a “huge step forward” for improving school safety.²⁴⁸ But she added that it is already apparent “that there’s not enough funding provided to accomplish all of the tasks and responsibilities outlined in the law.”²⁴⁹ Later, the *Commission Report* also recommended an increase in funding for school resource officers (SROs).²⁵⁰

Another challenge is finding officers to employ. According to Miami-Dade Superintendent Alberto Carvalho, “The biggest hurdle is not lack of willingness, it’s not even issue of funding’ ‘It’s that everyone across the state . . . is going to be hiring law enforcement at the same time.”²⁵¹ Both the *Miami Herald* and *Tampa Bay Times* reached out to all sixty-seven school districts in the state with a survey and found, “[n]early every county that responded has a shortfall of funding compared to what it will cost to properly secure the schools compared to how much the state provided—just as sheriffs and superintendents warned before the bill was passed.”²⁵² Additionally, increasing the number of armed personnel in schools, as the Act has done, can have its own unintended consequences, such as the previously mentioned school-to-prison pipeline, as well as severe displacement of officers.²⁵³ Displacement occurs when schools subtract from an already scarce amount of officers—essentially taking law enforcement off of the streets where crime is happening daily—and putting them in schools where shootings and other acts of violence are uncertain.²⁵⁴ And this displacement may not even solve the problem considering many schools that experienced shootings were in fact “prepared” for such an event.²⁵⁵

248. Mahoney, *supra* note 246.

249. *Id.*

250. *Commission Report*, *supra* note 1, at 105.

251. Mahoney, *supra* note 246.

252. *Id.*

253. FLA. STAT. § 1006.12 (2018); Archer, *supra* note 9, at 868.

254. Sarah Hollenbeck, *St. Pete Is Taking Officers Off the Streets to Put Them in Schools Following the Parkland Shooting*, ABC ACTION NEWS (Mar. 30, 2018), <https://www.abcactionnews.com/news/region-south-pinellas/st-petersburg/st-pete-is-taking-officers-off-the-streets-to-put-them-in-schools-following-parkland-shooting>.

255. Todd C. Frankel et al., *Texas School Had a Shooting Plan, Armed Officers, and Practice. And Still 10 People Died.*, WASH. POST (May 19, 2018), https://www.washingtonpost.com/national/santa-fe-school-had-a-shooting-plan-armed-officers-and-practice-and-still-10-people-died/2018/05/19/58b1b55e-5b8d-11e8-8b92-45fdd7aaef3c_story.html.

5. Coach Aaron Feis Guardian Program

The Coach Aaron Feis Guardian Program was very controversial and may fail due to the unexpected costs for school boards.²⁵⁶ The Guardian Program was named after a courageous football coach, Aaron Feis, who died saving students from the Parkland shooter.²⁵⁷ Attempting to safeguard schools, the Coach Aaron Feis Guardian Program allows qualified, trained (132 hours) administrators to carry guns on school campuses.²⁵⁸ If the county has the option, school boards must decide whether to participate in the program.²⁵⁹

To qualify, the training must include:

1. Eighty hours of firearms instruction based on the Criminal Justice Standards and Training Commission's Law Enforcement Academy training model, which must include at least 10 percent but no more than 20 percent more rounds fired than associated with academy training. Program participants must achieve an 85 percent pass rate on the firearms training.
2. Sixteen hours of instruction in precision pistol.
3. Eight hours of discretionary shooting instruction using simulator exercises.
4. Eight hours of instruction in active shooter or assailant scenarios.
5. Eight hours of instruction in defensive tactics.
6. Twelve hours of instruction in legal issues.
7. Twelve hours of a certified nationally recognized diversity training program.²⁶⁰

256. Danny McAuliffe, *Superintendents Want Rick Scott to Veto School Marshal Funding*, FLA. POLITICS (Mar. 9, 2018), <https://floridapolitics.com/archives/258569-superintendents-want-rick-scott-veto-school-marshal-funding>.

257. Amir Vera, *A Football Coach Who Shielded Students from the Florida Shooter Died as He Lived—by Putting Himself Second*, CNN (Feb. 15, 2018), <https://www.cnn.com/2018/02/15/us/football-coach-florida-school-shooting-trnd/index.html>.

258. S. 7026, 2d Reg. Sess. (Fla. 2018); FLA. STAT. § 30.15(1)(k)(2) (2018).

259. John Kennedy, *State's New School Safety Law Hits Roadblocks*, FLA. TIMES-UNION, Mar. 24, 2018, <https://www.jacksonville.com/news/20180324/states-new-school-safety-law-hits-roadblocks>.

260. FLA. STAT. § 30.15(1)(k)(2)-(6).

Administrators, support staff, and professionals not working exclusively in classrooms may become guardians.²⁶¹ Classroom teachers who exclusively perform classroom duties cannot participate.²⁶² The exceptions are Junior Reserve Officers' Training Corps (JROTC) teachers, current members of armed services, and former law enforcement officers.²⁶³

Sixty-seven million dollars were allocated to implement the Coach Aaron Feis Guardian Program.²⁶⁴ However, “[i]n a letter signed by Broward County superintendent Robert Runcie, whose district suffered the mass shooting that prompted the legislation, the superintendents organization suggested that the \$67 million set aside for the school ‘guardian’ program is too much money.”²⁶⁵ Armed personnel under the Guardian Program can be substituted for the Student Resource Officers, which can help funding, but only schools who implement the program can receive these benefits. Thus, superintendents are “faced with the untenable decision to implement the [Guardian] Program even if the superintendent, school board, local sheriff, and teachers oppose it.”²⁶⁶

Shortly after the Act was passed, superintendents realized that the cost of implementing the Guardian Program may outweigh its long-term benefits.²⁶⁷ Ron Meyer, attorney for the Florida Education Association (FEA), said that “insurance usually covering teachers on the job does not extend to incidents involving guns.”²⁶⁸ Accordingly, guardians will likely “be considered personally responsible for the financial risk of any mishap stemming from having a weapon.”²⁶⁹ While the guardians would take on sworn law enforcement positions, “their minimized training also could be an [expensive] insurance problem for [s]heriff’s [o]ffices, raising more questions about the liability of guardians who actually use their weapons to [combat] an attack,” and creating more school safety laws.²⁷⁰ But this unfunded mandate left schools pressured to use

261. *Id.* § 30.15(1)(k).

262. *Id.*

263. *Id.*

264. S. 7026 § 40, 2d Reg. Sess. (Fla. 2018).

265. Jeffrey S. Solochek, *Florida Superintendents Join Call for Veto of School ‘Guardian’ Funding*, TAMPA BAY TIMES (Mar. 9, 2018), <https://www.tampabay.com/blogs/gradebook/2018/03/09/florida-superintendents-join-call-for-veto-of-school-guardian-funding/>.

266. McAuliffe, *supra* note 256.

267. Solochek, *supra* note 265.

268. John Kennedy, *State’s New School Safety Law Hits Roadblocks*, THE GAINESVILLE SUN (Mar. 24, 2018), <https://www.gainesville.com/news/20180324/states-new-school-safety-law-hits-roadblocks>.

269. *Id.*

270. *Id.*

guardians and/or pull financial resources from other educational programs that may assist school safety.²⁷¹

6. End Result

Flawed analytics and emotionally distraught constituents—paired with the fact that the Act was signed into law less than one month after the Parkland Shooting—indicates that either: (1) the legislature did not exercise due diligence to uncover enough empirical evidence for the Act; or (2) ulterior, but not shady, motives were at play. If the former is true, this demonstrates bad judgment and the Act's benefits will likely be coincidental. If the latter is true, this deception by the legislature does not fulfil its role as representatives of the people's will. Either way, long-term, unintended consequences should be expected.

V. THE SOLUTION

A. Informational Theory

One seemingly rational approach to keeping cognitive biases out of the legislative process is the informational theory. The informational theory maintains that because legislators often ignore key variables affecting policy outcomes, the legislature should create committees and agencies to collect and disseminate certain issues.²⁷² While committees and agencies can help, “underlying [positive political theory] dynamic of political bargaining by ideologically motivated officials and materially motivated interest groups” remains.²⁷³ Here, the main fallacy is that committee members are not ideologically motivated and somehow are not incentivized to generate or transmit information that confirms their individual beliefs.²⁷⁴

In other words, the informational theory assumes that participants in the political process are not self-interested, employing an optimistic assumption that groups of public-minded individuals can work together

271. *What Does the “Marjory Stoneman Douglas High School Public Safety Act” Mean for Students?*, ACLU FLA., <https://www.aclufl.org/en/what-does-marjory-stoneman-douglas-high-school-public-safety-act-mean-students> (last visited Feb. 22, 2020).

272. Marco Battaglini et al., *The Informational Theory of Legislative Committees: An Experimental Analysis* (Dec. 31, 2017), http://homepage.ntu.edu.tw/~josephw/BLLW_Legislative_Committees_Experiment_revision_with_appendix.pdf.

273. William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 620 (2002).

274. *Id.*

and solve public problems.²⁷⁵ Unfortunately, this optimistic assumption is quite unrealistic since individual and institutional biases often sidetrack the deliberative process.²⁷⁶

In fact, committees are often influenced by cognitive biases.²⁷⁷ First, individual committee members demonstrate the biases previously described, including: overgeneralizing vivid events; seeking answers that confirm cultural predispositions; and supplanting their own beliefs with public opinion.²⁷⁸ Based on these individual biases, a committee might start its investigation from an “arbitrary starting point and filter factual evidence through the lens of that bias.”²⁷⁹

Further, in a committee composed of like-minded individuals, more extreme conclusions emerge.²⁸⁰ Conversely, a committee of members with vastly different views may avoid extreme, but potentially optimal, solutions.²⁸¹ Some committee members accept a proposal only because they feel like everyone else agrees.²⁸² And, if a situation becomes too complex for the committee, it might defer to overconfident experts²⁸³ whose research is sponsored by interested groups.²⁸⁴ Because of these biases, “[c]ognitive psychology raises red flags about informational theories even if all participants are public-regarding.”²⁸⁵

For example, when Americans’ attitudes towards cannabis dramatically changed at the turn of the twentieth century, the legislature implemented an outright ban.²⁸⁶ This shift in attitudes was partly motivated by the recent influx of Mexican immigration to the U.S.²⁸⁷ These new Americans introduced new things, including marijuana.²⁸⁸ Many Americans thought the new Americans were “distributing this

275. *Id.*

276. *Id.* at 621. This Article discusses only a select amount of biases; for a more expansive list and discussion of other individual and institutional biases see Eskridge & Ferejohn, *supra* note 273.

277. Eskridge & Ferejohn, *supra* note 273, at 621.

278. *See, e.g.*, Sunstein, *supra* note 32, at 1127 (discussing errors in normative judgment and the implications thereof for law and policy); Tversky & Kahneman, *supra* note 25, at 1124 (discussing common errors in the assessment of probabilities and the prediction of values).

279. Eskridge & Ferejohn, *supra* note 273, at 622.

280. *Id.* (explaining that this is known as the polarization effect).

281. *Id.* (explaining that this is known as extremeness aversion).

282. *Id.* (explaining that this is known as the cascade effect).

283. *Id.* (explaining that this is known as the expert-deference bias, also known as hypervigilance bias).

284. *Id.* at 622-23 (explaining that this is known as overconfidence bias).

285. *Id.* at 623.

286. John Hadak, *How Racism and Bias Criminalized Marijuana*, WASH. POST (Apr. 28, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana/>.

287. ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 19 (2004).

288. *Id.*

'killer weed' to unsuspecting American school children."²⁸⁹ Police officers in Texas placated this perception, claiming that marijuana incited violent crimes, "aroused a 'lust for blood,' and gave its users 'superhuman strength,'" without considering alternative explanations for criminality like alcohol use or recent trauma.²⁹⁰

These myths have been debunked by science—in fact, alcohol is more addictive than marijuana.²⁹¹ Scientific evidence was not the basis for this prohibition; instead, these public perceptions were based on cognitive biases fueled by propaganda, such as the movie *Reefer Madness*.²⁹² Despite a lack of evidence supporting these claims, twenty-nine states outlawed marijuana between 1916–1931.²⁹³ And, in 1937, the Marijuana Tax Act of 1937 was enacted, which, despite the American Medical Association's objections, banned marijuana nationwide.²⁹⁴ Congress ignoring facts contrary to its position, such as the medical benefits of marijuana,²⁹⁵ demonstrates how cognitive biases are still pervasive within supposedly neutral committees.

B. Common Sense Approach²⁹⁶

Simply gaining a personal understanding and appreciation of cognitive theory may help reduce bias.²⁹⁷ This perspective may cause lawmakers to reflect on and be more aware of their cognitive biases. Optimistically, once lawmakers become cognizant of bias and probability neglect, they will behave more efficiently. Unfortunately, this

289. *Id.*

290. *Id.*; MITCH EARLYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 217 (2007).

291. Dirk Lachenmeier & Jurgen Rehm, *Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach*, 5 SCI. REP. 8126, 8216 (2015) (explaining how experiment results confirm that the risk of cannabis has been overestimated in the past).

292. *Id.*; Becky Little, *Why the U.S. Made Marijuana Illegal*, HISTORY (Aug. 4, 2017), <https://www.history.com/news/why-the-u-s-made-marijuana-illegal>.

293. Little, *supra* note 292 ("This act came just a year after the film *Reefer Madness* warned parents that drug dealers would invite their teenagers to jazz parties and get them hooked on 'reefer.'").

294. *Id.*

295. *Why Isn't There More Research on Medical Marijuana?*, WEBMD (Dec. 15, 2018), <https://www.webmd.com/a-to-z-guides/qa/why-isnt-there-more-research-on-medical-marijuana> (explaining that "the U.S. Drug Enforcement Administration (DEA) considers marijuana a Schedule I drug, the same as heroin, LSD, and likely to be abused and lacking in medical value. Because of that, researchers need a special license to study [marijuana].").

296. For a discussion of a "common sense" approach see PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 187 (1994).

297. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1368 (2003).

education is not always a proper solution.²⁹⁸ Sometimes, biases will be unresponsive to education if they are occurring subconsciously, as these biases are more difficult to overcome.²⁹⁹

Regardless, these mental processes sometimes occur consciously and are open to manipulation.³⁰⁰ Lawmakers are usually aware of legislation they introduce and accept, and “could easily enough be made sensible of other, more subtle, choices that lawmakers and constituents have (presumably) been making intuitively, as well as of the saliency phenomena that can cause them to discriminate between cognitive tasks.”³⁰¹ Some scholars optimistically suggest that “[b]y act of will, surely, persons are capable of redirecting their attention.”³⁰² In other words, lawmakers may, at least partially, solve this problem by becoming aware of biases and making an effort to minimize them.³⁰³

C. Cost-Benefit Analysis

Another potential solution is performing a cost-benefit analysis on legislative enactments to ensure effective risk prioritization.³⁰⁴ While some laws are extremely efficient, others are quite costly and have minimal effects on improving public health or safety.³⁰⁵ Both the federal and legislative branches already require federal agencies to justify their costs by providing equal or greater short-term and long-term benefits when promulgating rules.³⁰⁶ However, the current legal system wastes billions on combatting non-existent risks, often leaving the public vulnerable to other, legitimate risks.³⁰⁷ Sometimes this oversight increases social costs like high unemployment rates, poor health, and low standards of living.³⁰⁸

298. *Id.*

299. *Id.*

300. *Id.*; JOHN W. PAYNE, JAMES R. BETTMAN & ERIC J. JOHNSON, *THE ADAPTIVE DECISION MAKER* 107 (1993) (suggesting that “people sometimes explicitly control their mode of cognition,” although “conscious decisions on how to decide are not made that often”).

301. Hirsch, *supra* note 297, at 1368.

302. *Id.*

303. *Id.*

304. See Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1818–20 (2017).

305. See, e.g., Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INST. 9, 15–17 (2016).

306. Posner & Sunstein, *supra* note 304, at 1819–20.

307. Diane Katz, *Cleaning Up Environmental Regulation*, DAILY SIGNAL (June 15, 2016), <https://www.dailysignal.com/2016/06/15/cleaning-up-environmental-regulation/>.

308. See generally FISCHER, *supra* note 141 (discussing how oversight of laws can lead to inefficient costs).

Assuming this is true, the system must devote more resources to combatting only necessary risks to ensure that laws do not reduce the resources available for socially important needs.³⁰⁹ Although states often enact cost-benefit analysis measures, such measures include creating discretionary agencies or legislation that is passed before their reports are concluded.³¹⁰ While reports may help solve problems down the road, it is more cost effective to consider the ramifications of each bill before it goes into effect rather than after.³¹¹ For example, instead of allocating billions of dollars to create new programs that may not work, had Florida lawmakers waited until the Commission released their Report, they may have saved money through its recommendation that

districts implement a tiered approach to campus hardening that begins with basic harm mitigation concepts that are of little or no cost and those that may be implemented quickly. After basic concepts have been implemented, districts should then consider more advanced security measures, specifically those focusing on prevention and those that involve technology and/or law changes.³¹²

309. See Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection*, 5 KAN. J.L. & PUB. POL'Y 9, 24–25 (1996).

310. For example, S.B. 7026 established a commission to determine what went wrong at Marjory Stoneman Douglas in order to pass more informed preventative legislation, FLA. STAT. § 943.687 (2018), however the legislature passed specific provisions on mental illness and school safety before the commission report was released. FLA. STAT. §§ 1006.1493, 1012.584 (2018).

311. 2009 Fla. Laws 2009–124 (codifying FLA. STAT. § 627.638 (2009)); see also *About OPPAGA*, OFFICE OF PROGRAM POLICY ANALYSIS AND GOV'T ACCOUNTABILITY, <http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/about.htm> (last visited Feb. 22, 2020) (noting the Florida OPPAGA is a staff unit of the Legislature responsible for examining agencies and programs to improve services and cut costs when directed by state law, the presiding officers, or the Joint Legislative Auditing Committee. OPPAGA supports the Florida Legislature by “provid[ing] data, evaluative research, and objective analyses to assist legislative budget and policy deliberations”). But see also FLA. STAT. § 11.1465 (2019):

The House of Representatives and the Senate shall be independently responsible for providing the following services to their respective members and committees: (1) Legal research and drafting of legislation for individual members and committees. (2) Review of legislation and drafting of amendments. (3) The preparation of bill summaries. (4) Providing staff facilities comparable in quality and adequacy to those which the Legislature provides for other departments of state government, and, to the extent that funds are available, providing such other adequate expert assistance as may be necessary to assist each house in performing its required functions. (5) To the extent that funds are available, furnishing each standing committee such professional assistance as may be required in order to provide comprehensive research capabilities for each such committee.

312. *Commission Report*, *supra* note 1, at 83.

Instead, the Florida Legislature compiled the most readily available, potentially biased, information and fashioned an omnibus, 105-page bill³¹³—just one week after the Parkland shooting.

D. Red Teams

Another potential solution is using contrary evidence to refute and test majority theories. According to the informational theory, the legislator's problem is often that, given the factual and causal complexities of public policy, he does not know how to vote in order to best pursue his interests.³¹⁴ The solution is often "to appoint a set of expert agents—the congressional committees—who will subdivide the space of public policies and each specialize in mastering a small slice of policy questions."³¹⁵ However, developing even a primitive conception of complex policies often requires a significant investment of time that politicians would rather spend on other activities, such as fundraising or servicing constituents, that are more likely to secure their reelection.³¹⁶ Bills that do not garner public attention may be neglected, even when they could have a substantial impact on the community.

Moreover, the committee members' opinions may be different than the legislator's. Specifically, committee members tend to show individual bias either for or against policies. However, experts may feel obligated to placate the legislator's decisions no matter what, preventing useful advice on proposals.³¹⁷ Creating "red teams" or "devil's advocates" may resolve this issue.³¹⁸ Devil's advocates are designated, institutionally created enemies.³¹⁹ Red teams come in two forms: (1) attack and attempt to conquer the primary team during a simulated mission; and (2) find the strongest possible case against a certain proposal or a plan.³²⁰ Red teams have proven effective in several

313. See S. 7026, 2d Reg. Sess. (Fla. 2018).

314. Battaglini et al., *supra* note 272, at 1.

315. Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2216 (2012).

316. *Id.*

317. See Ambrus, Sandor & You, *supra* note 29, at 22 (discussing sponsorship bias).

318. Brendan Mulvaney, *Red Teams Strengthening Through the Challenge*, MARINE CORPS GAZETTE, July 2012, at 63.

319. Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 580 (2015).

320. See DEF. SCI. BD., THE ROLE AND STATUS OF DOD RED TEAMING ACTIVITIES 3–4 (2003); Sitaraman & Zions, *supra* note 319, at 579–80.

contexts, especially when the red team genuinely looks for mistakes, exploits vulnerabilities, and has clear incentives.³²¹

E. Reducing Expectations

Another simple solution to reactionary legislation is reducing unrealistic expectations through transparency. Often, “our expectations of the law far outflank its ability to deliver,”³²² and sometimes people need to simply accept the fact that the law has its limits³²³ and mistakes are inevitable.³²⁴ Reducing expectations can provide flexibility for government funding.

For example, public schools are often funded by a combination of local, state, and federal sources.³²⁵ Each distribution comes with regulations dictating how schools and districts can use the funds; “[o]ften such regulations can be highly restrictive, limiting the ability of schools to align their budgets with their instructional programs.”³²⁶ However, state and local school leaders arguably have greater contextual knowledge, allowing them to effectively find school safety solutions that are fitting for the need of their communities. By putting things in a realistic context and providing more flexibility for local boards to adapt their solutions, more problems may be resolved more efficiently. Thus, Congress should incentivize states to implement independent policies, which may enable states and local governments to cater their policies to the needs of individual communities.

VI. CONCLUSION

This Article provided an interdisciplinary review of cognitive biases and legislative decision-making and, in doing so, provided evidence to support the relevance of these theories to the legislative proposal recently adopted to address school shootings. Using several theories as a foundation, this Article proposed that legislators likely relied on public perception rather than accurate statistical data when debating the

321. Steve Ragan, *Thinking Like an Attacker: How Red Teams Hack Your Site to Save It*, DICE (Nov. 12, 2012), <https://insights.dice.com/2012/11/12/thinking-like-an-attacker-how-red-teams-hack-your-site-to-save-it/>.

322. FISCHER, *supra* note 141, at 10.

323. *Id.*

324. *Id.* at 9.

325. See REBECCA R. SKINNER & CONG. RESEARCH SERV., STATE AND LOCAL FINANCING OF PUBLIC SCHOOLS, at 1–2 (Aug. 26, 2019).

326. MASS INSIGHT EDUC. & RESEARCH INST., FEDERAL AND STATE FUNDING FLEXIBILITY: TARGETING FEDERAL REGULATORY AND FUNDING FLEXIBILITIES FOR SCHOOLS WITHIN A PARTNERSHIP ZONE 1 (2009).

adoption of the Marjory Stoneman Douglas High School Public Safety Act. Specifically, in adopting the Act, legislators may have acted to ensure reelection rather than in the best interest of the public.

Aside from the effects of the Act, this Article demonstrates that legislators are generally incentivized to define policy problems and solutions based on public concern. Accordingly, this Article attempted to demonstrate that legislators, with other actors, construct policy problems and solutions that align with public opinion and pressure group preferences to secure reelection. This acknowledgement at least provides advocates with tools with which to affect the policy process and convince legislators to adopt certain policy solutions over others. Specifically, as applied to the case of school shootings, understanding the factors that convinced Florida legislators to pass the Act allows advocates the resources to stop legislators from immediately resorting to ineffective school safety solutions when faced with school shootings in the future.